A/CN.4/SER.A/2016/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2016

Volume II
Part One

Documents of the sixty-eighth session

UNITED NATIONS

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NOTE

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References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook …*, followed by the year (for example, *Yearbook … 2016*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its sixty-eighth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
ICRC	International Committee of the Red Cross
CAHDI	Committee of Legal Advisers on Public International Law
ECOWAS	Economic Community of West African States
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
ICRC	International Committee of the Red Cross
IFRC	International Federation of Red Cross and Red Crescent Societies
ILO	International Labour Organization
IMO	International Maritime Organization
IOM	International Organization for Migration
MCDA Guidelines	Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Cooperation and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDP	United Nations Development Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
WFP	World Food Programme
WMO	World Meteorological Organization
WTO	World Trade Organization

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AFDI	*Annuaire français de droit international* (Paris)
AJIL	*American Journal of International Law* (Washington, D.C.)
BYBIL	*The British Year Book of International Law* (London)
DSR	World Trade Organization, *Dispute Settlement Reports*
ECHR	European Court of Human Rights, *Reports of Judgments and Decisions*. All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int).
ECR	*European Court Reports*
EJIL	*European Journal of International Law*
GYBIL	*German Yearbook of International Law*
I.C.J. Reports	International Court of Justice, *Pleadings, Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
ILR	*International Legal Reports* (Cambridge)
ITLOS Reports	*Reports of the International Tribunal for the Law of the Sea*
LGDJ	*Librairie générale de droit et de jurisprudence*
P.C.I.J., Series A	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
RGDIP	*Revue générale de droit international public* (Paris)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, the "International Tribunal for Rwanda" refers to 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; and the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 2]

DOCUMENT A/CN.4/697

Eighth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur*

[*Original: English*]
[*17 March 2016*]

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* The Special Rapporteur expresses his deep appreciation for assistance in the preparation of the present report to the coordinators of the International Disaster Law Project, in particular Professor Giulio Bartolini (University Roma Tre, Italy), with the support of Professor Federico Casolari (University of Bologna, Italy) and Assistant Professors Emanuele Sommario (Sant'Anna School of Advanced Studies, Pisa, Italy) and Flavia Zorzi Giustiniani (International Telematic University (UNINETTUNO University), Italy); to Julian S. Kramer (B.Sc., L.L.B., L.L.M. candidate, Leiden University, the Netherlands); and to Paul R. Walegur, The Hague, the Netherlands.

Multilateral instruments cited in the present report

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, No. 17513, p. 609.
Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991)	OAS, *Official Documents*, OEA/Ser.A/49 (SEPF).
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363.
Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005)	*Ibid.*, vol. 2689, No. 35457, p. 59.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)	*Ibid.*, vol. 2296, No. 40906, p. 5.
Framework Convention on Civil Defence Assistance (Geneva, 22 May 2000)	*Ibid.*, vol. 2172, No. 38131, p. 213.
ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)	ASEAN, *Documents Series 2005*, p. 157.
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Kampala, 22 October 2009)	Available from http://au.int.
SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters (Malé, 26 May 2011)	Available from www.ifrc.org/docs/idrl/N840EN.pdf.

Works cited in the present report

Bartolini, Giulio, Tommaso Natoli, and Alice Riccardi
"Report of the expert meeting on the ILC's draft articles on the protection of persons in the event of disasters", International Law and Disasters Working Papers, No. 3 (2015), p. 96.

Breau, Susan C., and Katja L. H. Samuel (eds.),
Research Handbook on Disasters and International Law. Edward Elgar, Cheltenham, 2016.

Caron, David D., Michael J. Kelly and Anastasia Telesetsky, eds.
International Law of Disaster Relief. Cambridge, Cambridge University Press, 2014.

Connolly, Róise, Eloïse Flaux and Angela Wu
"Working paper on the ILC draft articles on the protection of persons in the event of disasters" (Human Rights Centre, Queen's University, Belfast, 2016).

González Napolitano, Silvina Sandra *et al*.
Respuestas del Derecho Internacional a Desastres y otras Consecuencias de Fenómenos Naturales. University of Buenos Aires, Avellaneda, SGN Editora, 2015.

International Strategy for Disaster Reduction
2009 UNISDR Terminology on Disaster Risk Reduction. Geneva, 2009. Available from www.undrr.org/publication/2009-unisdr-terminology-disaster-risk-reduction.

Nansen Initiative Global Consultation
Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, 2 vols. Geneva, 2015. Available from https://nanseninitiative.org.

Sphere Project
Humanitarian Charter and Minimum Standards in Disaster Response. Geneva, The Sphere Project, 2000, revised in 2011.

Introduction

1. The draft articles on the protection of persons in the event of disasters, which were developed by the International Law Commission from 2008 to 2014, were adopted on first reading in 2014. Upon their adoption, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit them, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs of the Secretariat and the Secretariat of the International Strategy for Disaster Reduction, by the same date.[1]

2. During the course of the elaboration of the draft articles, comments and observations were made during the successive annual debates in the Sixth Committee, held from the sixty-third to the sixty-ninth sessions of the General Assembly, by the delegations of 61 States (Algeria, Argentina, Australia, Austria, Belarus, Brazil, Chile, China, Colombia, Cuba, Cyprus, the Czech Republic, Denmark, on behalf of the Nordic States (Denmark, Finland, Iceland, Norway and Sweden), Egypt, El Salvador, Estonia, Finland, on behalf of the Nordic States, France, Germany, Ghana, Greece, Hungary, India, Indonesia, the Islamic Republic of Iran, Ireland, Israel, Italy, Jamaica, Japan, Malaysia, Mexico, Monaco, Mongolia, Myanmar, the Netherlands, New Zealand, the Niger, Pakistan, Peru, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, the Sudan, Switzerland, Thailand, Tonga (on behalf of the 12 Pacific small island developing States of Fiji, Kiribati, the Marshall Islands, Micronesia, Nauru, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu), Trinidad and Tobago, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Bolivarian Republic of Venezuela and Zambia. Statements were also made by the observer delegations of the European Union, also on behalf of its member States, and IFRC. Further comments and observations, on file with the Codification Division of the Office of Legal Affairs, were received in writing prior to 2014 from six States: Belgium (8 May 2012), Cuba (5 January 2011 and 1 October 2012), El Salvador (17 January 2011), Germany (26 February 2009), Malaysia (26 August 2009) and Mexico (5 November 2008).

3. Conscious of the Commission's past experience regarding the submission of comments and observations on other of its first reading drafts, the Special Rapporteur imposed upon himself a two-and-a-half month extended time limit, until 15 March 2016, to enable him to reflect in the present report those responses that might be received well after the original deadline. At the time of writing, comments and observations on the draft articles, as adopted on first reading, were received, in response to the request of the Commission, from the following States: Australia (8 January 2016), Austria (12 January 2016), Cuba (2 February 2016), the Czech Republic (1 January 2016), Ecuador (11 February 2015), Finland, on behalf of the Nordic States (18 December 2015), Germany (29 May 2015), the Netherlands (30 December 2015), Qatar (12 March 2015) and Switzerland (12 January 2016). Responses were likewise received from the Association of Caribbean States (28 January 2016), the Council of Europe (25 November 2014) and the European Union (17 December 2015), and from the Food and Agriculture Organization of the United Nations (FAO) (14 January 2016), the International Organization for Migration (IOM) (18 January 2016) and the World Bank (3 November 2014), as well as ICRC (19 January 2016) and IFRC (21 January 2016). Comments and observations were also received from the Office for the Coordination of Humanitarian Affairs (23 December 2015), the Secretariat of the International Strategy for Disaster Reduction (8 December 2015) and the World Food Programme (WFP) (21 January 2016). The comments and observations received in response to the request of the Commission are reproduced, as submitted, in a separate report of the Secretary-General, prepared by the Secretariat.[2]

[1] *Yearbook … 2014*, vol. II (Part Two), p. 61, para. 53.

[2] Document A/CN.4/696 and Add.1 of the present volume. The full text of the various comments and observations is also available (in the

4. In order to facilitate the Commission's second reading of the draft articles, the present report contains, organized by issue and article by article, summaries of all the comments and observations made since 2008, orally or in writing. Under each issue and article dealt with, preceded by the first reading text of the article concerned, the summaries of the relevant comments and observations made prior to the General Assembly resolution inviting written submissions are presented separately from those received in response to that request. While the former are grouped whenever possible, the latter are each presented in a separate paragraph for ease of reading. Most of them suggest further clarification of the first reading draft articles in the explanations given in their respective commentaries, which were also adopted by the Commission. The Special Rapporteur sees merit in a good number of such suggestions. In that connection, it must be recalled that, in accordance with the Commission's practice, the drafting of commentaries can only take place once the provisional, and *a fortiori*, final text of the draft articles is adopted. Consequently, and for maximum efficiency, the Special Rapporteur will not address in the present report suggestions that relate to the drafting of commentaries. Rather, he will await the Commission's adoption on second reading of the draft articles before incorporating, as appropriate, into the draft of the accompanying commentaries (for which he is initially responsible) suggestions that may still be made within the Commission and those already advanced by States and international organizations and other entities.

5. The present report, therefore, will concentrate on concrete suggestions intended to modify the text of draft articles as adopted on first reading. The full text of the preamble and draft articles on the protection of persons in the event of disasters, as proposed by the Special Rapporteur on the basis of such suggestions, is contained in the annex to the present report.

6. Given the fact that written comments and observations were requested for submission early in 2016, the Commission at its 2015 session did not consider the topic that is the subject of the present report. However, disasters, in particular those following the adoption on first reading of the Commission's draft articles on the protection of persons in the event thereof, were given considerable attention, especially in 2015, at a number of important intergovernmental and non-governmental international conferences and meetings as well as in academic circles, such as the Third United Nations World Conference on Disaster Risk Reduction held in Sendai, Japan, from 14 to 18 March 2015, which adopted the Sendai Framework for Disaster Risk Reduction 2015–2030 (Sendai Framework);[3] the meeting convened in Sendai on 13 March 2015 by the Inter-Parliamentary Union on the occasion of the World Conference, which adopted an outcome statement on governance and legislation on disaster risk reduction;[4] the twenty-first session of the Conference of the Parties and the eleventh session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at the conference on climate change held in Paris from 30 November to 12 December 2015, which adopted the Paris Agreement;[5] the thirty-second International Conference of the Red Cross and Red Crescent held in Geneva from 8 to 10 December 2015, which adopted in particular resolution 6;[6] the United Nations Sustainable Development Summit for the adoption of the post-2015 development agenda held at United Nations Headquarters in New York from 25 to 27 September 2015, which adopted the 2030 Agenda for Sustainable Development;[7] the seventieth session of the General Assembly, which adopted more than 25 resolutions[8] directly or indirectly concerned with disasters and related issues dealt with in the Commission's draft articles, in particular resolutions 70/106 of 10 December 2015 on the strengthening of the coordination of emergency humanitarian assistance of the United Nations, 70/107 of 10 December 2015 on international cooperation on humanitarian assistance in the field of natural disasters, from relief to development and 70/204 of 22 December 2015 on the International Strategy for Disaster Reduction; the Nansen Initiative Global Consultation held in Geneva on 12 and 13 October 2015, which endorsed the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change;[9] the regional consultative meetings on law and disasters convened by IFRC in, among other places, Toluca, Mexico, on 13 and 14 November 2014, and Addis Ababa on 30 June and 1 July 2015; the expert consultation on accelerating progress in improving the facilitation and regulation of international disaster assistance organized in Geneva on 15 June 2015 by IFRC and the Government of Switzerland; a panel on disasters and the law organized in Geneva in August 2015 by the World Health Organization; the establishment of the International Disaster Law Project of the Italian universities Roma Tre University, Bologna, Sant'Anna School of Advanced Studies and UNINETTUNO University; the research project of the law school of the University of Buenos Aires that concluded with the book *Respuestas del Derecho Internacional a Desastres y otras Consecuencias de Fenómenos Naturales*;[10] the expert consultations convened by the Office for the Coordination of Humanitarian Affairs together with the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations on 10 and 11 July 2014, which led to the adoption of the Oxford Guidance on the Law relating

language of submission) from the website of the Commission, at http://legal.un.org/ilc/guide/6_3.shtml.

[3] *Sendai Framework for Disaster Risk Reduction 2015–2030*, Third World Conference on Disaster Risk Reduction, 14 to 18 March 2015, Sendai, Miyagi, Japan, General Assembly resolution 69/283, annex II.

[4] Inter-Parliamentary Union and the Secretariat of the International Strategy for Disaster Reduction, "Governance and legislation for disaster risk reduction", outcome statement of the Parliamentary meeting on the occasion of the Third World Conference on Disaster Risk Reduction, 13 March 2015, Sendai, Japan.

[5] Paris Agreement, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum—Part Two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2015/10/Add.1), Decision 1/CP.21.

[6] Thirty-second International Conference of the Red Cross and Red Crescent, resolution 6 on strengthening legal frameworks for disaster response, risk reduction and first aid, document 32IC/15/R6.

[7] General Assembly resolution 70/1 of 25 September 2015.

[8] For example, General Assembly resolutions 70/104, 70/105, 70/106, 70/107, 70/110, 70/114, 70/134, 70/135, 70/147, 70/150, 70/153, 70/154, 70/165, 70/169, 70/194, 70/195, 70/197, 70/202, 70/203, 70/204, 70/205, 70/206, 70/208, 70/222, 70/224 and 70/235.

[9] Nansen Initiative Global Consultation, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*.

[10] González Napolitano *et al.*, *Respuestas del Derecho Internacional a Desastres y otras Consecuencias de Fenómenos Naturales*.

to Humanitarian Relief Operations in Situations of Armed Conflict;[11] the thought leadership forum on disaster relief "Advancing the International Programme for Disaster Relief—Challenges for Lawyers and Policy Makers" held at the Dickson Poon School of Law of King's College in London on 30 October 2014, followed by the launching of the book *International Law of Disaster Relief*;[12] the Conference on Disasters and Fundamental Rights, convened by the Association française pour la prévention des catastrophes naturelles and the United Nations Educational, Scientific and Cultural Organization (UNESCO) at UNESCO headquarters in Paris on 24 June 2014, on the basis of the final report with conclusions of the research project "Disasters and Human Rights" of the University of Limoges;[13] the International Disaster and Risk Conference organized by the Global Risk Forum at Davos, Switzerland, from 24 to 28 August 2014; the First Northern European Conference on Emergency and Disaster Studies, organized by the Changing Disaster Project of the University of Copenhagen, held in Copenhagen from 9 to 11 December 2015; the Summer School on European Disaster Response Law in an International Context of the Università degli Studi of Milan held from 7 to 11 September 2015; the research resulting in the *Research Handbook on Disasters and International Law*[14] at the School of Law of the University of Reading; the annual course on international disaster law at the International Institute of Humanitarian Law in San Remo, Italy; the Workshop on Disasters and International Law in the Asia-Pacific Region held at the University of New South Wales on 24 July 2015;[15] and the establishment of an interest group on disaster law of the American Society of International Law in 2015. More recently, in February of 2016, the research project of the Human Rights Centre of Queen's University in Belfast concluded with the "Working paper on the ILC draft articles on the protection of persons in the event of disasters";[16] and an international conference on the topic "Protection of persons in times of disasters—international and European legal perspectives" was held in Rome on 3 and 4 March 2016 under the auspices of the Italian International Disaster Law Project. The Special Rapporteur is particularly grateful for the convening of the following expert-level meetings focused on the draft articles on the protection of persons in the event of disasters, as adopted on first reading: the symposium "This is not a drill: confronting legal issues in the wake of international disasters" held at the law school of Vanderbilt University in Nashville, United States, on 13 February 2015; the expert meeting on the International Law Commission's draft articles on the protection of persons in the event of disasters convened by the Department of Law of Roma Tre University, Italy, on 8 and 9 June 2015;[17] and a symposium on the Commission's draft articles on protection of persons in the event of disasters organized by the Geneva Academy of International Humanitarian Law and Human Rights and held in Geneva on 11 July 2014.

[11] OCHA, Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, available from www.unocha.org/sites/unocha/files/dms/Documents/Oxford%20Guidance%20Conclusions%20pdf.pdf.

[12] Caron, Kelly and Telesetsky, eds., *International Law of Disaster Relief*.

[13] Available from https://cidce.org/en/catastrophes-et-droits-de-lhomme-disasters-human-rights/.

[14] Breau and Samuel, *Research Handbook on Disasters and International Law*.

[15] Australian Human Rights Centre, "Report of the Workshop held 24 July 2015 Faculty of Law UNSW Australia—Disasters and International Law in the Asia-Pacific Workshop", 24 July 2015.

[16] Róise Connolly, Eloïse Flaux and Angela Wu, "Working paper on the ILC draft articles on the protection of persons in the event of disasters".

[17] See Bartolini, Natoli and Riccardi, "Report of the expert meeting on the ILC's draft articles on the protection of persons in the event of disasters", p. 96.

Chapter I

Comments and observations on the draft articles on the protection of persons in the event of disasters, as adopted on first reading

A. General comments and observations

1. Comments and observations made prior to the adoption of the first reading draft

7. General comments and observations on the draft articles were made during their consideration, as proposed by the Commission, in the Sixth Committee at the sixty-fourth to sixty-ninth sessions of the General Assembly.

8. Greece,[18] Ireland,[19] Japan,[20] New Zealand,[21] Portugal,[22] Slovenia,[23] Spain,[24] Slovakia,[25] the United Kingdom[26] and the European Union[27] expressed general support for the balance achieved in the draft articles as adopted on first reading. Slovenia cautioned against reopening contentious issues, which could lead to upsetting the balance in the text as adopted on first reading.[28] Conversely, China was of the view that a salient characteristic of the draft articles was that it was short on *lex lata* but long on *lex ferenda*, in the sense that some of the articles lacked the support of general State practice, while the commentaries included predominantly quotations from non-binding instruments.[29]

9. Chile,[30] Cuba[31] and Myanmar[32] recalled the importance of full observance and respect for the principle

[18] A/C.6/69/SR.21, para. 19.

[19] A/C.6/69/SR.19, para. 172.

[20] A/C.6/69/SR.20, para. 53.

[21] A/C.6/69/SR.21, para. 31.

[22] A/C.6/69/SR.19, para. 156.

[23] A/C.6/69/SR.20, para. 40.

[24] A/C.6/67/SR.18, para. 117.

[25] A/C.6/69/SR.20, para. 73.

[26] A/C.6/69/SR.19, para. 166.

[27] *Ibid.*, para. 72.

[28] A/C.6/67/SR.18, para. 125.

[29] A/C.6/69/SR.20, para. 24.

[30] A/C.6/67/SR.19, para. 10, and A/C.6/68/SR.24, para. 69.

[31] A/C.6/66/SR.24, para. 27; A/C.6/67/SR.20, para. 43; A/C.6/68/SR.25, para. 67; and A/C.6/69/SR.21, para. 54.

[32] A/C.6/64/SR.21, para. 2.

of non-intervention as enshrined in the Charter of the United Nations. Cuba was of the view that the draft articles should not, under any circumstances, give rise to interpretations that violated that principle.[33] Indonesia expressed the concern that the draft articles had not yet fully achieved a balance between the core principles of sovereignty and non-intervention and the duty to protect persons in the event of disasters.[34] The European Union supported the effort to strike a balance in the draft articles between the need to safeguard the national sovereignty of the affected States and the need for international cooperation regarding the protection of persons in the event of disasters, and emphasized the need, in humanitarian emergencies, for full respect for humanitarian principles and human rights.[35]

10. The decision of the Commission to exclude the concept of "responsibility to protect" from the scope of application of the draft articles was endorsed by China,[36] Colombia,[37] Cuba,[38] the Czech Republic,[39] Ghana,[40] Ireland,[41] the Islamic Republic of Iran,[42] Israel,[43] Japan,[44] Myanmar,[45] the Russian Federation,[46] Spain,[47] Sri Lanka,[48] Thailand[49] and the Bolivarian Republic of Venezuela.[50] Conversely, Poland[51] was of the view that the concept should apply to disaster situations. Finland, on behalf of the Nordic States,[52] Hungary,[53] and Portugal[54] suggested that it be kept in mind. Austria, while acknowledging that the Commission had excluded the concept, observed that it was conceivable that international law could evolve.[55]

11. The Israel[56] and United States[57] expressed reservations regarding the resort to a rights/duty approach, and preferred a focus on providing practical guidance to countries in need of, or providing, disaster relief. Trinidad and Tobago[58] supported the rights/duty approach, but expressed the belief that such an approach could apply between the affected State and its population only. South Africa encouraged the Commission to incorporate a stronger rights/duty approach between States and populations affected by disasters by, for example, strongly encouraging States to enter into national, multilateral, regional and bilateral agreements that would ensure that in the event an affected State was unable to provide adequate relief and assistance to its population owing to a lack of resources, States parties to the agreements would have a legally binding duty to provide assistance.[59]

12. Slovenia maintained that the Commission should establish a set of principles and rules underpinning international disaster relief based on recognition of rights and obligations of the States involved.[60]

13. The European Union recommended that a reference to regional integration organizations be included in the draft texts or in the commentaries thereto.[61]

14. Ecuador called for the inclusion of provisions recognizing the right of displaced persons to protection and security in situations of disasters.[62]

2. Comments and observations received in response to the request of the Commission

15. Australia was hopeful that the Commission's work in highlighting the complex array of challenges inherent in international disaster risk reduction and response, coupled with the adoption in March 2015 of the Sendai Framework, would reinforce continued international cooperative efforts. It also encouraged further discussion as to whether the proposed creation of new duties for States or the novel application of principles drawn from other areas represented the most effective approach. It further called for a careful balance to be struck between those elements of the draft articles that could encroach on the core international law principles of State sovereignty and non-intervention, and the likelihood that their implementation would effectively assure tangible and practical benefits in terms of reducing the risk of, ameliorating the effects of or improving recovery from disasters.

16. The Czech Republic was of the view that the Commission had struck an appropriate balance between the principles of non-intervention and sovereignty and the humanitarian principles and human rights that guided the provision of assistance by the assisting actors to the affected State.

17. Finland, on behalf of the Nordic States, maintained that the draft articles presented a coherent set of codified norms in an increasingly relevant area of public international law. It further expressed the view that the draft articles set a clear duty for the State affected by a disaster to initiate, organize, coordinate and implement external assistance within its territory when necessary and, in the

[33] A/C.6/66/SR.24, para. 27, and A/C.6/67/SR.20, para. 43.

[34] A/C.6/66/SR.24, para. 70.

[35] A/C.6/67/SR.18, para. 69.

[36] A/C.6/64/SR.20, para. 22, and A/C.6/66/SR.23, para. 42.

[37] A/C.6/66/SR.22, para. 25.

[38] A/C.6/64/SR.21, para. 10.

[39] A/C.6/64/SR.20, para. 43.

[40] A/C.6/64/SR.22, para. 12.

[41] *Ibid.*, para. 14.

[42] *Ibid.*, para. 82, and A/C.6/65/SR.24, para. 36.

[43] A/C.6/64/SR.23, para. 40.

[44] A/C.6/66/SR.25, para. 26.

[45] Statement of 30 October 2009, 21st meeting of the Sixth Committee, sixty-fourth session of the General Assembly.

[46] A/C.6/64/SR.20, para. 46.

[47] *Ibid.*, para. 48.

[48] A/C.6/64/SR.21, para. 53, and A/C.6/66/SR.27, para. 18.

[49] A/C.6/64/SR.21, para. 16; A/C.6/66/SR.24, para. 89; and A/C.6/67/SR.19, para. 40.

[50] A/C.6/64/SR.21, para. 41.

[51] *Ibid.*, para. 76; A/C.6/65/SR.23, para. 101; A/C.6/66/SR.21, para. 85; and A/C.6/68/SR.24, para. 108.

[52] A/C.6/63/SR.22, para. 55.

[53] A/C.6/65/SR.21, para. 33.

[54] A/C.6/63/SR.25, para. 6.

[55] A/C.6/65/SR.23, para. 39.

[56] A/C.6/68/SR.25, para. 76, and A/C.6/69/SR.20, para. 66.

[57] A/C.6/65/SR.25, para. 15, and A/C.6/68/SR.23, para. 48.

[58] A/C.6/69/SR.26, para. 116.

[59] A/C.6/69/SR.20, para. 106.

[60] A/C.6/67/SR.18, para. 129.

[61] A/C.6/68/SR.23, para. 32.

[62] Comments submitted in writing, 11 February 2015.

absence of sufficient national response capacity or will, to seek external assistance to ensure that the humanitarian needs of the affected persons were met in a timely manner. The Nordic States applauded the particular attention given to the needs of the individuals affected by disasters, with full respect for their rights, and pointed to the need for special measures for protection and assistance of particularly vulnerable persons. Reference was also made to the diverse roles of other actors, including intergovernmental, regional and relevant non-governmental organizations or other entities such as the Red Cross and the Red Crescent societies.

18. Germany maintained that, in general, the draft articles provided good recommendations that supported international practice and domestic legislation.

19. The Netherlands expected that the draft articles would play an important role, particularly in situations where the scale of a disaster exceeded the response capacity of the affected State.

20. The Council of Europe expressed its satisfaction with the draft articles, which it viewed as an initial step towards protecting the rights of people in emergency situations associated with disasters. At the same time, it called for more attention to be devoted to vulnerable groups, as well as to prevention, including education for risk and preparedness. It also considered important the right of victims to receive aid for the recovery of their lives after a disaster.

21. The European Union welcomed the draft articles as an important contribution to international disaster law, but called for sufficient room to be provided in the draft articles for the specificities of the European Union as a regional integration organization.

22. ICRC commended the Commission for its work on the draft articles and the commentaries, and maintained that they would constitute an important contribution to contemporary international law, in line with the leading role played by the Commission in the codification and progressive development thereof. The thrust of the comments of ICRC concerned preserving the integrity of international humanitarian law and the ability of humanitarian organizations to conduct, in times of armed conflict (whether international or not, even when occurring concomitantly with natural disasters), their humanitarian activities in accordance with a neutral, independent, impartial and humanitarian approach.

23. While IFRC felt that the draft articles had a number of strong elements, including an emphasis on human dignity, human rights, cooperation and respect for sovereignty, as well as disaster risk reduction, it also felt they could be strengthened in several respects. As drafted, they were not sufficiently operational to have a direct impact on the most common regulatory problem areas in international response. They were also overly cautious with regard to the issue of protection. However, IFRC considered the reference to non-State humanitarian actors to be a positive development given the important contributions they made with regard to disaster response.

24. IOM was of the opinion that the draft articles and their commentaries did not reflect the importance of issues related to human mobility in the context of disasters. The second issue of concern for IOM was the specific plight of migrants in disaster situations, which was an issue that had attracted increased attention from States. It noted that, while the commentary to draft article 1 specified that the draft articles applied to all persons present on the territory of the affected State, irrespective of nationality, the subsequent draft articles did not fully take into account the specific vulnerability of those affected persons who did not have the nationality of the affected State in disaster situations. Nor was any reference made to the need to ensure the access of foreign States to their nationals, including for the purpose of evacuation when protection and assistance *in situ* could not be guaranteed.

25. The Office for the Coordination of Humanitarian Affairs indicated its broad agreement with the substance of the draft articles and expressed support for the focus on persons in need, coupled with a rights-based approach.

26. The United Nations Office for Disaster Risk Reduction considered that the work of the Commission on the topic constituted a critical and timely contribution to the efforts of States and other stakeholders to manage disaster risk. Its assessment was that, overall, there existed a strong alignment and complementarity, as well as a functional relationship, between the draft articles and the Sendai Framework, in that the former articulated the duty to reduce the risk of disasters and to cooperate, while the latter established the modalities and measures that States needed to adopt to discharge such duty.

27. WFP welcomed the draft articles as it shared their objective: the protection of persons in the event of disasters. It especially welcomed the real progress that the draft articles could make in advancing the development of rules in the area, as well as in the fields of disaster prevention and relief assistance. It also welcomed further discussion with regard to the adoption of common international standards through either the development of additional technical annexes on the detailed aspects of relief assistance or the establishment of a specific technical body comprising experts of State parties or a secretariat whose responsibility was to perform additional tasks related to the development of technical standards.

3. Recommendation of the Special Rapporteur

28. The Special Rapporteur sees no need at the present, late stage, when the Commission is about to embark upon the second reading process, to make a recommendation, based on general comments and observations, on his approach to the topic, which after arduous discussion has been essentially adopted by the Commission and received widespread endorsement by States and international organizations. Accordingly, for the sake of efficiency, and without prejudice to the exercise by the Commission of its discretion as to how to organize the second reading, the Special Rapporteur will not entertain in the present report isolated suggestions for changes to the text of draft articles, made in that general context or in the context of concrete draft articles, when they are intended to revive a largely superseded debate for the purpose of

fundamentally altering the Commission's basic approach; or specific suggestions which, by constant repetition, aim at disproportionally tilting in only one direction the delicate balance achieved throughout the draft between the paramount principles of sovereignty and non-intervention on the one hand and the no-less-vital protection of the individuals affected by a disaster on the other. Other specific textual suggestions made in the general context, such as the inclusion of a reference to "displacement", will be dealt with below under the relevant provisions of the first reading draft.

B. Draft article 1 [1]: Scope

"The present draft articles apply to the protection of persons in the event of disasters."

1. Comments and observations made prior to the adoption of the first reading draft

29. Draft article 1 [1] was discussed during the consideration of the draft articles, as proposed by the Commission, in the Sixth Committee at the sixty-fourth, sixty-fifth and sixty-ninth sessions of the General Assembly. Chile,[63] Finland, on behalf of the Nordic States,[64] Ireland,[65] the Netherlands,[66] the Russian Federation[67] and Spain[68] expressed their satisfaction with draft article 1 [1]. Finland, on behalf of the Nordic States[69] and Germany[70] also agreed that a strict distinction between natural and human-made disasters would not be reasonable from the point of view of the affected person and that such a distinction could be artificial and difficult to sustain in practice in view of the complex interaction of different causes leading to disasters.

30. Austria,[71] Chile,[72] Hungary[73] and the United Kingdom[74] further expressed their agreement with the Commission's choice to articulate the draft articles' purpose in a separate provision (draft article 2 [2]). El Salvador[75] recommended that the content of draft article 1 [1] could be supplemented by more detail on the scope *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*. Further, IFRC[76] suggested that it should be clear that both domestic and international disaster responses were intended to be addressed, since the lack of such distinction could have negative implications for other draft articles, such as draft articles 5 [7] and 6 [8], which seemed to cover international disaster response only.

31. Ghana[77] suggested that the term "protection" be clarified. The Islamic Republic of Iran[78] and United Kingdom[79] considered that the terms "assistance" or "assistance and relief" in draft article 1 [1] were preferable. The United Kingdom[80] stated its understanding that assistance provided by States to their nationals abroad and consular assistance were excluded from the scope of application of the draft articles.

32. China[81] and the Russian Federation[82] supported the dual-axis approach, by which the Commission would concentrate on the rights and obligations of States *vis-à-vis* each other. Portugal,[83] on the other hand, expressed its concerns with such an approach and, along with Spain[84] and Switzerland[85] expressed appreciation for the Commission's emphasis, in draft article 1 [1], on the protection of the affected persons. France[86] and Sri Lanka[87] called for a clear articulation of the specific rights and obligations of States and those of individuals applicable in disaster situations.

33. Ireland[88] and Mexico[89] preferred that the scope *ratione personae* remained focused only on natural persons affected by disasters, as opposed to legal persons. China[90] and the Islamic Republic of Iran[91] expressed the view that the draft articles should focus exclusively on States. Ireland,[92] the Russian Federation[93] and the United Kingdom[94] supported the Commission's focus on the activities of States before considering other actors. Portugal[95] emphasized the important role of non-State actors and IFRC[96] observed that the lack of clearly articulated rules for the involvement of civil society actors had been a major problem in international disaster relief. The European Union,[97] while welcoming the applicability of the draft articles to international organizations and other humanitarian actors, suggested that an express reference to regional integration organizations be included in either the draft articles or the accompanying commentary.

34. The importance of covering all phases of disaster *ratione temporis*, including the prevention phase, was

[63] A/C.6/64/SR.20, para. 28.
[64] *Ibid.*, para. 7.
[65] A/C.6/64/SR.22, para. 14.
[66] A/C.6/64/SR.21, para. 90.
[67] A/C.6/64/SR.20, para. 45.
[68] A/C.6/69/SR.21, para. 39.
[69] A/C.6/64/SR.20, para. 7.
[70] Comments submitted in writing, 26 February 2009.
[71] A/C.6/64/SR.20, para. 12.
[72] *Ibid.*, para. 28.
[73] A/C.6/64/SR.18, para. 60.
[74] A/C.6/64/SR.20, para. 39.
[75] A/C.6/65/SR.23, para. 63.
[76] A/C.6/65/SR.25, para. 48, and statement of 29 October 2010, 25th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.
[77] A/C.6/64/SR.22, para. 11.
[78] A/C.6/64/SR.22, para. 80.
[79] A/C.6/64/SR.20, para. 39.
[80] *Ibid.*, para. 40.
[81] *Ibid.*, para. 22.
[82] *Ibid.*, para. 45.
[83] A/C.6/64/SR.21, para. 82.
[84] A/C.6/69/SR.21, para. 39.
[85] A/C.6/65/SR.22, para. 36.
[86] A/C.6/64/SR.21., para. 19.
[87] *Ibid.*, para. 53.
[88] A/C.6/65/SR.24, para. 53, and A/C.6/69/SR.19, para. 173.
[89] Comments submitted in writing, 5 November 2008.
[90] A/C.6/64/SR.20, para. 22.
[91] A/C.6/65/SR.24, para. 36.
[92] A/C.6/64/SR.22, para. 14.
[93] A/C.6/64/SR.20, para. 46.
[94] *Ibid.*, para. 38.
[95] A/C.6/64/SR.21, para. 82.
[96] A/C.6/65/SR.25, para. 47.
[97] A/C.6/66/SR.21, para. 57, and A/C.6/67/SR.18, para. 73.

underlined by Chile,[98] China,[99] Cuba,[100] Germany,[101] Ghana,[102] Finland, on behalf of the Nordic States,[103] Israel,[104] Poland,[105] the Russian Federation,[106] Thailand,[107] Tonga,[108] Tonga, on behalf of the 12 Pacific small island developing States that were also Members of the United Nations[109] and the European Union.[110] Malaysia[111] suggested that the phrase "disaster" in draft article 1 [1] should include, by implication, the pre-disaster phase. The Council of Europe supported the consideration of the entire disaster cycle (preparation, emergency response and recovery).[112] Ireland[113] expressed its support for a flexible scope *ratione loci* that was not limited to activities in the arena of the disaster but also encompassed activities within assisting and transit States.[114]

2. Comments and observations received in response to the request of the Commission

35. Qatar proposed adding the phrase "and other similar events", at the end of the draft article.

36. IOM suggested that it be recalled in the commentary that States had the obligation to protect all persons present on their territory, irrespective not only of nationality but also of legal status. It also was of the view that the focus on the rights and obligations of States in relation to one another, and to a lesser extent on the rights of individuals, was not justified in the light of both the topic of the protection of persons in the event of disasters and the contemporary recognition of the importance of the protection of human rights in disaster situations. The draft articles represented an important opportunity to clarify how the human rights framework applied in the context of disasters. IOM made further suggestions for drafting improvements to the commentary.

3. Recommendation of the Special Rapporteur

37. The Special Rapporteur recommends that draft article 1 [1], as adopted on first reading, be referred to the Drafting Committee. The definition of "disaster" in draft article 3 [3] as adopted on first reading being all-encompassing, there is no need to add the specification "and other similar events" at the end of draft article 1 [1].

[98] A/C.6/64/SR.20, para. 28.

[99] A/C.6/68/SR.26, para. 11.

[100] A/C.6/65/SR.23, para. 94; A/C.6/68/SR.25, para. 67; and A/C.6/69/SR.21, para. 53. See also comments submitted in writing, 5 January 2011.

[101] Comments submitted in writing, 26 February 2009.

[102] A/C.6/64/SR.22, paras. 9 and 11.

[103] A/C.6/68/SR.23, para. 39.

[104] A/C.6/68/SR.25, para. 75.

[105] A/C.6/64/SR.21, para. 75; A/C.6/65/SR.23, para. 99; and A/C.6/68/SR.24, para. 106.

[106] A/C.6/64/SR.20, para. 46.

[107] A/C.6/65/SR.23, para. 71.

[108] A/C.6/68/SR.25, para. 84.

[109] A/C.6/69/SR.20, para. 3.

[110] A/C.6/68/SR.23, para. 30.

[111] A/C.6/64/SR.21, para. 38.

[112] Comments submitted in writing, 25 November 2014.

[113] A/C.6/65/SR.24, para. 53.

[114] The inclusion of a provision on transit States, also in draft article 4 (use of terms), was proposed by Ecuador. See para. 88 below.

C. Draft article 2 [2]: Purpose

"The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights."

1. Comments and observations made prior to the adoption of the text on first reading

38. Draft article 2 [2], on the purpose of the draft articles, was discussed in the Sixth Committee at the sixty-fourth, sixty-fifth and sixty-seventh to sixty-ninth sessions of the General Assembly. Finland, on behalf of the Nordic States,[115] Ireland[116] and the Russian Federation[117] supported the draft article's formulation.

39. In considering a rights-based approach versus a needs-based approach, Austria,[118] Finland, on behalf of the Nordic States,[119] France,[120] Ireland,[121] New Zealand,[122] Poland,[123] the Russian Federation,[124] Slovenia,[125] Spain,[126] Thailand,[127] the European Union[128] and IFRC[129] expressed their satisfaction with the balance the Commission struck by emphasizing the importance of meeting the victims' needs, while affirming their entitlement to full respect for their rights. The Islamic Republic of Iran,[130] Israel,[131] Malaysia,[132] Myanmar,[133] Netherlands,[134] the United Kingdom[135] and the United States[136] doubted the practical value of a rights-based approach and emphasized the importance of taking into account the victims' needs in disaster situations. Conversely, Greece,[137] Portugal,[138] and Romania[139] supported a rights-based approach. China[140] and Japan[141] expressed the need to clarify the content of the rights-based approach. Austria,[142] the Islamic

[115] A/C.6/64/SR.20, para. 8.

[116] A/C.6/64/SR.22, para. 14.

[117] A/C.6/64/SR.20, para. 45.

[118] *Ibid.*, para. 11.

[119] *Ibid.*, para. 8.

[120] A/C.6/64/SR.21, para. 21.

[121] A/C.6/69/SR.19, para. 172.

[122] A/C.6/64/SR.22, para. 71.

[123] A/C.6/64/SR.21, para. 74.

[124] A/C.6/64/SR.20, para. 45.

[125] A/C.6/64/SR.21, para. 68.

[126] A/C.6/64/SR.20, para. 49.

[127] A/C.6/64/SR.21, para. 14.

[128] A/C.6/69/SR.19, para. 72.

[129] A/C.6/64/SR.22, para. 30.

[130] *Ibid.*, para. 81.

[131] A/C.6/64/SR.23, para. 40.

[132] A/C.6/64/SR.21, para. 38.

[133] *Ibid.*, para. 2.

[134] *Ibid.*, para. 90.

[135] A/C.6/64/SR.20, para. 38, and A/C.6/67/SR.19, para. 66.

[136] A/C.6/64/SR.21, para. 101, and A/C.6/65/SR.25, para. 15.

[137] A/C.6/64/SR.21, para. 45.

[138] *Ibid.*, para. 82.

[139] A/C.6/64/SR.22, para. 24.

[140] A/C.6/64/SR.20, para. 21.

[141] A/C.6/64/SR.23, para. 27.

[142] A/C.6/64/SR.20, para. 11.

Republic of Iran,[143] Pakistan[144] and Spain[145] pointed to the need to take into account the rights and obligations of States as well. Chile,[146] the Russian Federation[147] and Thailand[148] recalled the importance of referring to all categories of human rights, including economic, social and cultural rights.

40. With regard to the draft article's reference to an "adequate and effective" response to disasters, and El Salvador[149] and France[150] emphasized the importance of requiring an "effective" response. El Salvador[151] also noted that the word "effective" entailed a temporal aspect. While Malaysia[152] suggested clarifying the terms "adequate and effective", the use of the term "effective" was questioned by the Russian Federation,[153] which was concerned that it could imply an obligation by the affected State to accept the assistance of other actors. The United Kingdom[154] proposed replacing the term "adequate and effective" with "timely and effective".

41. France[155] was of the view that the phrase "essential needs" required clarification. El Salvador[156] endorsed the reference to "full respect for their rights", while France[157] considered that the usefulness of the draft articles would depend on the extent to which they ensured respect for those rights. Mexico[158] suggested adding the phrase "including disaster risk reduction measures" at the end of the draft article. Cuba proposed a similar formulation to what was later adopted as draft article 2 [2], but including an additional reference to "all phases of the disaster".[159]

2. Comments and observations received in response to the request of the Commission

42. Austria observed that the draft article did not cover disaster risk reduction, which was addressed in draft articles 10 [5 *ter*] and 11 [16].

43. Qatar proposed including a reference to the "unrestricted respect" for the rights of the persons concerned.

44. The European Union reiterated its support for the balance struck in the provision and agreed that the "needs-based" and "rights-based" approaches were not exclusive, but complementary.

45. IOM suggested adding a paragraph in the commentary acknowledging that those displaced by a disaster were also considered to be directly affected. It observed that the definition of "persons concerned" could also be influenced by the definition of "disaster". Understanding disaster as a consequence of a hazard would allow for the inclusion of a broader range of affected persons, including: not only those displaced by the actual hazard but also those displaced in the aftermath of the hazard owing to the general level of disruption in the functioning of the community; those for whom the disaster could not be singled out as the only cause of displacement; and the host communities affected by the inflow of displaced persons. It proposed that, in addition to persons directly affected, the commentary could refer to persons likely to be affected. IOM also found it difficult to understand that the economic losses of those who were located elsewhere, but might be affected by a disaster, had been excluded from the scope of application of the draft articles. In its view, the impact on persons and not necessarily the physical presence of the person in the affected area should be the guiding criterion. While noting the Commission's choice not to include a list of rights to avoid any *a contrario* interpretation, IOM maintained that, for the work of international organizations and their advocacy role, it would be beneficial to have a non-exhaustive list of rights that were relevant.

3. Recommendation of the Special Rapporteur

46. The Special Rapporteur recommends that draft article 2 [2], as adopted on first reading, be referred to the Drafting Committee. The commonly used term "full" being an all-encompassing one, there is no need to replace it with or add to it the narrower term "unrestricted". Besides, although the term "response" is not necessarily synonymous with "relief", its use mainly denotes the measures that are taken following the occurrence of a disaster, without thereby excluding measures taken to prevent or diminish the risk of such an occurrence. With that understanding, there is no need to make a specific reference in the text to "disaster risk reduction".

D. Draft article 3 [3]: Definition of disaster

" 'Disaster' means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society."

1. Comments and observations made prior to the adoption of the first reading draft

47. Draft article 3 [3] was discussed in the Sixth Committee at the sixty-fourth, sixty-fifth and sixty-ninth sessions of the General Assembly. Chile,[160] China,[161] El Salvador,[162] Finland, on behalf of the Nordic States,[163] Ireland[164] and Thailand[165] supported the general approach

[143] A/C.6/64/SR.22, para. 81, and A/C.6/65/SR.24, para. 36.

[144] Statement of 29 October 2010, 24th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[145] A/C.6/65/SR.24, para. 87.

[146] A/C.6/64/SR.20, para. 28.

[147] *Ibid.*, para. 45.

[148] A/C.6/64/SR.21, para. 14.

[149] A/C.6/65/SR.23, para. 63.

[150] A/C.6/64/SR.21, para. 22.

[151] A/C.6/65/SR.23, para. 63.

[152] A/C.6/64/SR.21, para. 38.

[153] A/C.6/64/SR.20, para. 46.

[154] *Ibid.*, para. 39.

[155] A/C.6/64/SR.21, para. 21.

[156] A/C.6/65/SR.23, para. 63.

[157] A/C.6/64/SR.21, para. 22.

[158] A/C.6/68/SR.25, para. 11.

[159] Comments submitted in writing, 5 January 2011.

[160] A/C.6/64/SR.20, para. 29.

[161] A/C.6/64/SR.20, para. 23.

[162] A/C.6/65/SR.23, para. 64.

[163] A/C.6/64/SR.20, para. 7.

[164] A/C.6/64/SR.22, para. 17

[165] A/C.6/64/SR.21, para. 15.

taken by the Commission of not drawing a strict distinction between natural and human-made disasters, which was considered artificial and difficult to sustain in practice. Austria, while agreeing in principle, noted that the need for such a distinction could arise in connection with possible obligations resulting from unlawful acts that caused disasters.[166] France, while considering the definition to be sufficiently general, nonetheless recommended that it be made clear that the definition was provided only for the purposes of the draft articles.[167] Malaysia expressed a preference for a definition of disaster limited to natural disasters.[168]

48. Poland[169] was of the view that the definition in the draft articles should be guided by that found in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of 1998 (Tampere Convention). Portugal, however, doubted the relevance of the definition in the Tampere Convention owing to a difference in the scope of application of that Convention.[170]

49. Austria[171] and Ireland[172] supported the inclusion within the definition of "disaster" both disasters with a transboundary effect and those without such effect.

50. The Russian Federation expressed support for the inclusion of the possibility of a disaster being constituted of a chain of events.[173] France agreed that, for purposes of the draft articles, a "disaster" meant a relatively massive and serious event.[174] India welcomed the inclusion of the reference to "calamitous event" by way of emphasizing the grave and exceptional situations to which the draft articles apply.[175]

51. Thailand suggested that the phrase "*inter alia*" be inserted prior to "widespread loss of life" in order to track the explanation given in the commentary that the three possible outcomes envisaged in the draft article were not exclusive and had been included to provide guidance.[176]

52. Austria supported the inclusion within the definition of not only human loss but also material and environmental loss, and recommended that consideration be given to whether the different types of effects of disasters similarly implied different types of obligations.[177] Greece,[178] Malaysia[179] and Poland[180] supported the inclusion of the reference to both material and environmental damage. Ireland suggested that an event causing large-scale material or environmental damage alone, without necessarily having an impact on human life, should be sufficient to trigger the applicability of the draft articles.[181]

53. Austria queried whether the requirement of serious disruption of the functioning of society was appropriate, since it could not be excluded that proof of the functioning of the society in the situation of a disaster was evidenced precisely through the taking of relief measures in accordance with well-prepared emergency plans. Disasters arising in such circumstances would seemingly be excluded from the scope of the definition.[182] Austria proposed that the definition be reformulated to refer to "a situation of great distress" or "a sudden event", so as to include a broader range of disasters, including those that did not seriously disrupt the society of an entire State.[183] Greece recommended instead that a broader definition be adopted.[184] Switzerland, while supporting the criterion in principle, expressed the concern that the application of the requirement of widespread loss of life in, for example, a disaster occurring in a remote area, in circumstances where the functioning of society was not disrupted, would result in the inapplicability of the draft articles.[185] Thailand expressed a similar view when it indicated that the requirement of serious disruption of the functioning of society set too high a threshold for the application of the draft articles.[186] Ireland was of the view that the concept of "society" could exclude a disaster affecting a region or regions within a State but not a State as a whole, and that it was not clear whether the concept adequately captured circumstances where a disaster had effects across a border.[187]

54. China recommended that reference also be made to "exceeding local capacity and resources for disaster relief", so as to allow flexibility for States with varying capacities for disaster relief.[188] The Bolivarian Republic of Venezuela supported the inclusion of the criterion of the impact of the event having exceeded the affected State's response capacity in order to qualify as a disaster for the purposes of the draft articles.[189]

55. The Russian Federation[190] and the Bolivarian Republic of Venezuela[191] expressed support for the reference to a disaster being defined in terms of its effects rather than in terms of the factors causing it.

56. Spain supported merging draft article 3 [3] with draft article 4 on "Use of terms".[192]

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[166] A/C.6/64/SR.20, para. 13.

[167] A/C.6/64/SR.21, para. 23.

[168] *Ibid.*, para. 38.

[169] *Ibid.*, para. 73.

[170] *Ibid.*, para. 84.

[171] A/C.6/64/SR.20, para. 16.

[172] A/C.6/64/SR.22, para. 17.

[173] A/C.6/64/SR.20, para. 47.

[174] A/C.6/64/SR.21, para. 23.

[175] A/C.6/65/SR.25, para. 34.

[176] A/C.6/65/SR.23, para. 72.

[177] A/C.6/64/SR.20, para. 16.

[178] A/C.6/64/SR.21, para. 45.

[179] *Ibid.*, para. 38.

[180] *Ibid.*, para. 73.

[181] A/C.6/64/SR.22, para. 17.

[182] A/C.6/64/SR.20, para. 14.

[183] *Ibid.*, para. 15.

[184] A/C.6/64/SR.21, para. 45. See also Portugal, *ibid.*, para. 84 ("the definition of disaster should be as broad as possible").

[185] A/C.6/65/SR.22, para. 36.

[186] A/C.6/65/SR.23, para. 72.

[187] A/C.6/64/SR.22, para. 17; A/C.6/65/SR.24, para. 54; and A/C.6/69/SR.19, para. 173.

[188] A/C.6/64/SR.20, para. 23.

[189] A/C.6/64/SR.21, para. 41.

[190] A/C.6/64/SR.20, para. 47.

[191] A/C.6/64/SR.21, para. 41.

[192] A/C.6/69/SR.21, para. 41.

2. Comments and observations received in response to the request of the Commission

57. Austria queried the use of the term "calamitous", which it considered to be redundant or even confusing. It noted further that the definition seemed to exclude situations resulting from the outbreak of an infectious disease, such as an epidemic or pandemic, that could not always be traced back to a specific event. It also questioned whether the element regarding the disruption of the functioning of society was appropriate. In its view, it was doubtful whether an earthquake, avalanche, flood or tsunami necessarily met the threshold of "seriously disrupting the functioning of society". It accordingly preferred a broader definition, which included all disasters, even if they did not seriously disrupt the society of an entire State.

58. The Czech Republic expressed the view that the definition was well balanced. At the same time, it called on the Commission to elaborate in the commentary on the definition of "seriously disrupting the functioning of society" by providing examples, since such a general definition posed difficulties in determining the threshold that would trigger the application of the draft articles.

59. Cuba recommended that the definition be aligned with that utilized by the Secretariat of the International Strategy for Disaster Reduction, which defined a "disaster" as "[a] serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources".[193]

60. Ecuador supported the inclusion of an express reference to causal factors, so that the definition took a holistic approach to risk management.

61. Germany proposed including a reference to "prolonged process" to cover slow-onset disasters such as droughts.

62. The Netherlands reiterated its preference that draft articles 3 [3] and 4 be merged.

63. The European Union was of the view that the formulation of the provision made it difficult to determine the threshold for triggering the application of the draft articles, which would be problematic if they were to become a legally binding instrument. It noted further that, while the definition was drawn from the one contained in the Tampere Convention, such a definition did not necessarily correspond to other definitions under international law, such as those adopted within the European Union.

64. ICRC expressed its concern that the definition no longer expressly excluded situations of armed conflict. It maintained that such an approach would result in overlap and contradiction between the rules of international humanitarian law and the draft articles, creating confusion and potential conflicts of norms should the draft articles become an international binding instrument. However, the objective that the draft articles would not contradict the rules of international humanitarian law could be achieved either by adding such an exclusion to draft article 3 [3] or by ensuring that the commentary of draft article 21 [4] faithfully reflected the black-letter rule contained in the corresponding draft article.

65. IFRC recommended that the commentary to draft article 3 [3] mention that the definition of disaster could apply equally to sudden-onset events, such as an earthquake or tsunami, and to slow-onset events, such as drought or gradual flooding. In addition, the commentary could point out that "great human suffering and distress" might also be occasioned by non-fatal injuries, disease or other health problems caused by a disaster, and not only by displacement.

66. IOM proposed the inclusion of a reference to displacement in the definition of disaster so as to provide more visibility to the issue of human mobility, and to indicate that, in complying with the other obligations set forth in the draft articles, States should also always take into account the displacement dimension. IOM called for greater clarity as to the use of the term "calamitous" in establishing the threshold for the application of the draft articles. It suggested that a definition of "calamitous" be included in the commentary, and that it include small-scale events that might, nonetheless, cause such disastrous consequences.

67. The Secretariat of the International Strategy for Disaster Reduction was of the view that the definition set a rather high threshold that excluded small-scale disasters, which were however covered by the Sendai Framework. It observed that research and experience had indicated that small-scale disasters caused heavy losses, including in economic terms, thereby negatively affecting resilience, exacerbating existing vulnerabilities and contributing to severe setbacks in human development. Accordingly, it proposed that the Commission reconsider the qualifiers "widespread", "great" and "large-scale", while adding the word "economic" after "environmental", and adjusting the commentary accordingly.

3. Recommendation of the Special Rapporteur

68. Since the draft articles are intended to establish the international legal framework to ensure that persons are protected in the event of a disaster, the definition of "disaster" is crucial to the entirety of the draft, and therefore must be embodied in an autonomous, separate provision. Its meaning cannot be assimilated with the meaning attributed in draft article 4 to derivative terms as used for the purposes of the draft articles.

69. As indicated above in relation to draft article 1 [1], the definition of "disaster" in draft article 3 [3] is an all-encompassing one. As such, it covers not only natural but also human-made disasters, sudden-onset as well as slow-onset and big-scale and small-scale events. While a causal relationship is established between the event, which is qualified as "calamitous" for emphasis, and its consequences, the focus is not on the former but on the latter. A calamitous event, regardless of its nature and magnitude, becomes a disaster for the purposes of the draft

[193] International Strategy for Disaster Reduction, *2009 UNISDR Terminology on Disaster Risk Reduction*.

articles because of the effects it produces, as described in draft article 3 [3]. The resulting "[disruption of] the functioning of society" is envisaged as covering not only the whole nation but also the regions and individual communities within. In the light of the foregoing, the Special Rapporteur sees no need to change the placing of draft article 3 [3], nor alter its drafting except in two respects. To take account of a relatively recent and growing socio-economic phenomenon affecting individuals and nations throughout the world, the Special Rapporteur considers it opportune to add the terms "displacement" and "economic" to the text of the draft article.

70. The Special Rapporteur, therefore, recommends that, with those two additions, the first reading draft article 3 [3] be referred to the Drafting Committee, to read as follows:

"*Draft article 3.* Definition of disaster

" 'Disaster' means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, displacement, or large-scale material, economic or environmental damage, thereby seriously disrupting the functioning of society."

E. Draft article 4: Use of terms

"For the purposes of the present draft articles:

"(*a*) 'affected State' means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

"(*b*) 'assisting State' means a State providing assistance to an affected State at its request or with its consent;

"(*c*) 'other assisting actor' means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

"(*d*) 'external assistance' means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

"(*e*) 'relief personnel' means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

"(*f*) 'equipment and goods' means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction."

1. Comments and observations made prior to the adoption of the first reading draft

71. Draft article 4, on the use of terms, was discussed in the Sixth Committee primarily at the sixty-ninth session of the General Assembly. On that occasion, the Netherlands expressed general support for the provision.[194] The Netherlands[195] and Spain[196] further recommended that it be amalgamated with draft article 3 [3], on the definition of "disaster".

72. Finland, on behalf of the Nordic States,[197] India[198] and Ireland[199] expressed support for the definition of "affected States" in subparagraph (*a*), which also covered complex situations of *de facto* control that a State could exercise over a territory other than its own.

73. With regard to subparagraph (*b*), on "assisting State", Austria was of the view that the phrase "at its request or with its consent" was unnecessary since such conditions would be a result of the application of the substantive provisions of the draft articles and not of the definition.[200] South Africa preferred retaining the reference to "consent" so as to clarify that the affected State's consent had to be a prerequisite to any form of external assistance.[201]

74. With regard to subparagraph (*c*), on "other assisting actor", the European Union recommended that the commentary to the provision indicate that the term "competent intergovernmental organization" also include regional international organizations.[202] Finland, on behalf of the Nordic States, concurred with the view that a State could be qualified as an "assisting State" only once the assistance was being or had been provided.[203] It indicated that it was also important to recognize the role of diverse types of "other assisting actors" in providing assistance, including competent intergovernmental, regional and relevant non-governmental organizations or any other individuals or entities, such as the International Red Cross and Red Crescent Movement.[204] Portugal, while supporting the formulation of the provision, expressed doubts regarding its interaction with other draft articles, some of which made no reference to other entities or individuals.[205] Thailand was of the view that the notion of "other assisting actor" should not include any domestic actors who offered assistance for the purposes of disaster relief or disaster risk reduction.[206]

75. With regard to subparagraph (*d*), on "external assistance", India recommended the inclusion of a reference to the "request or consent" of the affected State, as the legal basis for the provision of such assistance.[207]

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[194] A/C.6/69/SR.20, para. 12.

[195] *Ibid.*

[196] A/C.6/69/SR.21, para. 41.

[197] A/C.6/69/SR.19, para. 78.

[198] A/C.6/69/SR.21, para. 70.

[199] A/C.6/69/SR.19, para. 174.

[200] *Ibid.*, para. 122.

[201] A/C.6/69/SR.20, para. 104.

[202] A/C.6/69/SR.19, para. 75. See also Spain, A/C.6/69/SR.21, para. 40.

[203] A/C.6/69/SR.19, para. 79.

[204] *Ibid.*, para. 79.

[205] *Ibid.*, para. 157, and statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[206] A/C.6/69/SR.20, para. 69.

[207] A/C.6/69/SR.21, para. 70.

76. Switzerland[208] and the European Union[209] pointed to the fact that the definition of "relief personnel", in subparagraph (*e*), to the extent that it referred to not only civilian but also military personnel, deviated from the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines),[210] and the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies (MCDA Guidelines),[211] both of which specify that international military assets should be used as a last resort, when civilian alternatives are exhausted. Germany proposed the insertion of the phrase "in exceptional cases in which civilian assistance cannot sufficiently be provided".[212] Austria observed that the definition had to be reconciled with State practice, since military personnel remained under the full command of the assisting State, irrespective of the operational control of the affected State, and, accordingly, such relief operations remained attributable to the assisting State.[213] Malaysia expressed concerns regarding the provision, since armed presence in a State could be interpreted as an encroachment of its sovereignty, and indicated that, if the reference were kept, it had to be made clear that the affected State would retain overall direction, control, coordination and supervision of assistance within its territory.[214] India suggested that it be made clear that the sending of personnel, especially military personnel or equipment, as a form of external assistance required the prior express and informed "agreement or consent" of the affected State, and that such consent could not be presumed by the assisting States or entities.[215]

77. The European Union proposed that the provision be redrafted to read that relief personnel "means civilian and military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction; military assets should be used only where there is no comparable civilian alternative and only the use of military assets can meet a critical humanitarian need".[216]

78. With regard to subparagraph (*f*), on the definition of "equipment and goods", India suggested that it be clarified that the legal basis for the provision of such assistance was the "request or consent" of the affected State.[217]

79. France further recommended that a definition of the notion of "humanitarian response" be included.[218]

[208] A/C.6/69/SR.19, para. 130.

[209] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[210] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Military and Civil Defence Assets In Disaster Relief, Rev.1.1, November 2007.

[211] United Nations, OCHA, Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies ("MCDA Guidelines"), Rev.1, January 2006.

[212] Comments submitted in writing, 29 May 2015.

[213] A/C.6/69/SR.19, para. 122.

[214] A/C.6/69/SR.21, para. 49.

[215] *Ibid.*, para. 70.

[216] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[217] A/C.6/69/SR.21, para. 70.

[218] A/C.6/65/SR.23, para. 84.

2. Comments and observations received in response to the request of the Commission

80. Austria reiterated its doubt that the definitions of "assisting State" and "other assisting actor" in subparagraphs (*b*) and (*c*) needed the qualifier "at its request or with its consent".

81. The Czech Republic suggested that, in the context of the definition of "affected State" in subparagraph (*a*), the Commission could recommend criteria that might be applicable in situations when two or more States might be regarded as "affected States". The Netherlands agreed that the issue of consent of the affected State in situations where there might be multiple affected States merited further attention. The Netherlands also supported the inclusion of the phrase "or otherwise under the jurisdiction or control" in subparagraph (*a*), which broadened the scope of the term "affected State".

82. The Office for the Coordination of Humanitarian Affairs expressed support for the definition of the term "affected State" in subparagraph (*a*) insofar as it emphasized the primary role and responsibility of the State in whose territory the disaster occurred to protect persons, property and the environment from the effects of disaster. It also supported the inclusion of situations in which a State exercised *de facto* control over a territory other than its own. At the same time, it considered that it would be useful to clarify in the commentary that the term "affected State" was not intended to include a State that had jurisdiction under international law over individual persons affected by a disaster outside the State's territory.

83. With regard to subparagraph (*c*), on "other assisting actor", the European Union reiterated its request for the inclusion of a reference to "regional integration organizations", either in the text or its accompanying commentary.

84. Regarding the definition of "external assistance" in subparagraph (*d*), Cuba proposed the inclusion of the phrase "at the request or with the consent of the affected State or as previously agreed through cooperation and/or collaboration" at the end. IFRC suggested including "financial support".

85. With regard to subparagraph (*e*), on the definition of "relief personnel", Austria reiterated its view that the definition needed to be reconciled with State practice, since military personnel remained under the full command of the assisting State irrespective of the operational control of the affected State. Accordingly, such relief operations remained attributable to the assisting State. The Czech Republic, Germany, the European Union and the Office for the Coordination of Humanitarian Affairs recommended that the Commission take into account the Oslo Guidelines, which specify that international military assets are to be used only as a last resort when civilian alternatives are exhausted. The Netherlands and the European Union called for greater coherence in the terminology between draft articles 4 and 17 [14].

86. IFRC recommended including "telecommunications equipment" and "medicines" within the list of goods and equipment in subparagraph (*f*).

87. The Secretariat of the International Strategy for Disaster Reduction recommended deleting the references to "disaster risk reduction" in subparagraphs (*d*), (*e*) and (*f*), as they were more relevant to the provision of relief than applicable for the purpose of disaster risk reduction.

88. Ecuador proposed the inclusion of a definition of "transit States". Cuba requested that the Commission reconsider its decision not to include a definition of "disaster risk reduction", which could be based on that adopted by the Secretariat of the International Strategy for Disaster Reduction. The Office for the Coordination of Humanitarian Affairs proposed the inclusion of a definition of "services". The Netherlands concurred with the decision not to include definitions for "relevant non-governmental organization" and "disaster risk reduction".

3. Recommendation of the Special Rapporteur

89. The Special Rapporteur is of the view that no changes are called for in the English text of subparagraphs (*a*), (*b*) and (*c*) of draft article 4. When more than one State is struck by the same disaster, each becomes an "affected State", as defined in subparagraph (*a*), with the consequences for each such State which attach to that characterization throughout the draft. The phrase "at [the affected State's] request or with its consent" in subparagraphs (*b*) and (*c*) reflects a fundamental tenet of the draft as a whole and reinforces the delicate balance it has achieved between the principles of sovereignty and non-intervention on the one hand and the protection of the individual on the other. In subparagraph (*c*), the French equivalent of the word "relevant", which at present is *pertinentes*, might be replaced by *appropriées*.

90. With regard to subparagraphs (*d*), (*e*) and (*f*), the Special Rapporteur agrees that, given the main focus of the draft as a whole, as explained above under draft article 2 [2], there is no need to maintain in all three subparagraphs the reference to "or disaster risk reduction". With respect to subparagraph (*d*), there is also no need to add the phrase "at the request or with the consent of the affected State". Such an element is already imported into that subparagraph when it expressly refers to "assisting States or other assisting actors", whose definitions in subparagraphs (*b*) and (*c*) already include the suggested phrase.

91. As far as subparagraph (*e*) is concerned, the Special Rapporteur concurs with the suggestions to take account of the Oslo Guidelines in the text. That can be done by inserting at the end of the subparagraph the phrase "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need".

92. The Special Rapporteur also agrees that subparagraph (*f*) would gain from the addition of an express reference to "telecommunications equipment". As for the term "medicines", it is already covered in the text under "medical supplies".

93. For the Special Rapporteur, there is no room for the inclusion in draft article 4 of a definition of "transit State" since that term is not used in the draft as a whole. The same can be said of the word "services", which only appears as an element of the definition of the term "external assistance" in subparagraph (*d*).

94. In the light of the foregoing, the Special Rapporteur recommends that, with the indicated changes, the first reading text of draft article 4 be referred to the Drafting Committee, to read as follows:

"Draft article 4. Use of terms

"For the purposes of the present draft articles:

"(*a*) 'affected State' means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

"(*b*) 'assisting State' means a State providing assistance to an affected State at its request or with its consent;

"(*c*) 'other assisting actor' means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

"(*d*) 'external assistance' means relief personnel, equipment and goods and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance;

"(*e*) 'relief personnel' means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance; military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need;

"(*f*) 'equipment and goods' means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment and other objects for disaster relief assistance."

F. Draft article 5 [7]: Human dignity

"In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person."

1. Comments and observations made prior to the adoption of the first reading draft

95. Draft article 5 [7] was discussed in the Sixth Committee at the sixty-fifth to sixty-ninth sessions of the General Assembly.

96. The inclusion of draft article 5 [7] in its current form and position was supported by Chile[219] Colombia,[220] the

[219] Statement of 31 October 2014, 24th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[220] A/C.6/66/SR.22, para. 26.

Czech Republic,[221] El Salvador,[222] Indonesia,[223] Mexico,[224] Pakistan,[225] Poland,[226] Portugal,[227] Spain,[228] Sri Lanka[229] and Switzerland.[230] IFRC also supported the provision, while expressing the hope that subsequent draft articles could provide more specific guidance as to what the notion of "human dignity" meant in practice in terms of the treatment of affected persons.[231] Belarus was of the view that the text remained declarative and somewhat vague.[232]

97. While supporting the inclusion of draft article 5 [7], some States suggested that its wording could be modified. Commenting on the notions of human dignity and human rights, China[233] and the Russian Federation[234] pointed out that the occurrence of a disaster might call for a limitation or a suspension of individual rights, and maintained that the draft articles should include language acknowledging such a possibility. The Russian Federation also requested clarification regarding the persons to whom the obligations deriving from the provision should apply, and emphasized that all actors working to overcome a disaster should take action on the basis of respect for human dignity, and not only those actors listed in the draft article.[235] France suggested that the reference to non-governmental organizations be preceded by the adjective "appropriate" (*appropriées*) rather than "relevant" (*pertinentes*).[236] Poland was of the view that the inclusion of the pre- and post-disaster phases within the scope of the draft articles called for an amendment to the text of other draft articles, such as draft article 7 [6], which only covered disaster response.[237]

98. The Netherlands mentioned the need to clarify how draft article 5 [7] related to draft articles 7 [6] and 6 [8], concluding that it might be usefully merged with draft article 7 [6], which sets out the humanitarian principles to be followed in disaster response activities.[238] Belarus emphasized the inextricable link between the protection of human dignity and that of human rights, and suggested that draft article 5 [7] be merged with draft article 6 [8].[239] Pakistan,[240] Indonesia[241] and Mexico[242] considered it useful to preserve the autonomy of draft article 5 [7], and rejected the idea of merging it with other provisions.

99. Ireland suggested that human dignity and human rights were overarching principles that would better be dealt with in a preamble, with the draft articles focusing instead on operational matters.[243] Greece maintained that the draft article should be suitably positioned within the body of the draft articles in the same spirit as the approach taken in connection with the principle of humanity.[244] The Republic of Korea noted that the concepts of human dignity and human rights were key to the whole project and would therefore best be placed at the beginning of the text.[245]

100. Lastly, Hungary expressed the view that draft article 5 [7] should be deleted, as it was not clear whether the principle of human dignity should have an additional meaning beyond human rights.[246]

2. Comments and observations received in response to the request of the Commission

101. Austria expressed the view that the broad wording of the provision imposed the relevant obligation on actors other than those assisting in the case of a disaster.

102. Cuba recommended the addition of the phrase "as well as the domestic laws of the affected State and its sovereign decisions with regard to the assistance offered" at the end of the provision.

103. IFRC considered the emphasis placed on human dignity to be a very positive aspect. In its view, establishing a hard-law basis for the humanitarian principles in disasters would be a very valuable addition to the contemporary international normative framework.

104. While the Office for the Coordination of Humanitarian Affairs supported the inclusion of draft article 5 [7], it noted that, as the provision did not refer to the term "any other entity or individual" found in draft article 4, subparagraph (*c*), it was preferable to refer to "States and other assisting actors" as defined in draft article 4, subparagraph (*c*), to ensure that draft article 5 [7] encompassed all relevant actors providing "external assistance".

3. Recommendation of the Special Rapporteur

105. For the Special Rapporteur, the inclusion of "human dignity" in a separate, autonomous provision in the body of the draft, as draft article 5 [7], is a signal achievement of the Commission, extending beyond its work on the protection of persons in the event of disasters. He therefore cannot agree to its deletion and sees no advantage to be gained by merging it with either draft articles 6 [8] or 7 [6], or by transferring its text to the preamble.

106. Given the nature of the provision, to insert in its text a reference to the duty to respect and protect the domestic law and the sovereign decisions of the affected State would be out of place in draft article 5 [7]. Such a reference is already found elsewhere in the draft articles.

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[221] A/C.6/69/SR.20, para. 9.

[222] Comments submitted in writing, 17 January 2011.

[223] A/C.6/65/SR.24, para. 69.

[224] A/C.6/65/SR.25, para. 4.

[225] A/C.6/65/SR.24, para. 57.

[226] A/C.6/65/SR.23, para. 100, and A/C.6/67/SR.19, para. 73.

[227] A/C.6/65/SR.23, para. 11.

[228] A/C.6/65/SR.24, para. 87.

[229] A/C.6/65/SR.26, para. 43.

[230] A/C.6/65/SR.22, para. 37.

[231] Statement of 29 October 2010, 25th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[232] A/C.6/69/SR.20, para. 82.

[233] A/C.6/65/SR.22, para. 64.

[234] A/C.6/65/SR.23, para. 57, and A/C.6/69/SR.19, para. 100.

[235] A/C.6/69/SR.19, para. 98.

[236] A/C.6/68/SR.17, para. 111.

[237] A/C.6/68/SR.24, para. 106.

[238] A/C.6/65/SR.23, para. 44.

[239] A/C.6/69/SR.20, para. 82.

[240] A/C.6/65/SR.24, para. 57.

[241] *Ibid.*, para. 69.

[242] A/C.6/65/SR.25, para. 4.

[243] A/C.6/65/SR.24, para. 55, and A/C.6/66/SR.25, para. 20.

[244] A/C.6/65/SR.22, para. 51.

[245] A/C.6/66/SR.24, para. 82.

[246] A/C.6/65/SR.21, para. 33.

107. The Special Rapporteur, for the sake of coherence throughout the draft, can subscribe to the suggestion to replace the phrase "competent intergovernmental organizations and relevant non-governmental organizations" with "and other assisting actors", a term that, as defined in draft article 4, subparagraph (*c*), includes those two types of organizations. As a result, the suggestion for a change in the French text of article 5 [7] from *pertinentes* to *appropriées*, which has already been reflected above in connection with draft article 4, subparagraph (*c*), would become moot.

108. He therefore recommends that, with the indicated change, the first reading text of draft article 5 [7] be referred to the Drafting Committee, to read as follows:

"*Draft article 5. Human dignity*

"In responding to disasters, States and other assisting actors shall respect and protect the inherent dignity of the human person."

G. Draft article 6 [8]: Human rights

"Persons affected by disasters are entitled to respect for their human rights."

1. Comments and observations made prior to the adoption of the first reading draft

109. Draft article 6 [8] and the relevance of international human rights law for the draft articles were discussed in the Sixth Committee at the sixty-third and sixty-fifth to sixty-ninth sessions of the General Assembly.

110. Several States expressed support for the Commission's choice to explicitly include respect for human rights among the elements to be considered. Chile stressed that, in its work, the Commission should take into account all pertinent sources of law, including international human rights law.[247] Austria was of the view that the topic was closely related to international human rights law and that certain rights would have a particular bearing.[248] The Czech Republic,[249] Jamaica[250] and Poland[251] also considered respect for human dignity and international human rights part of the relevant legal framework.

111. Denmark, on behalf of the Nordic States,[252] and Thailand[253] pointed to the importance of human rights and of humanitarian principles in informing relief operations. The Czech Republic expressed the view that the provision of assistance should be guided by the interests and needs of persons affected by disasters as well as by the need to protect their basic human rights.[254] The European Union also made it clear that in humanitarian emergencies, humanitarian principles and human rights should be fully respected.[255] Brazil,[256] Portugal,[257] Slovenia[258] and Spain[259] recognized the importance of the Commission's work in maintaining a balance between State sovereignty and human rights. Slovenia reaffirmed the duty of States affected by natural disasters to preserve victims' lives and protect their human rights, including the rights to life, food, health, drinking water and housing.[260] According to Chile, the protection of the various human rights directly implicated in the context of disasters, such as the rights to life, food, health and medical care, was a relevant element.[261] Greece further highlighted the importance of the draft article in assessing whether the consent of the affected State had been arbitrarily denied, in accordance with draft article 14 [11].[262]

112. IFRC backed the inclusion of draft article 6 [8], but expressed the hope that subsequent draft articles would provide specific guidance as to what was meant in practice in terms of the treatment of affected persons.[263] Thailand also requested further clarification in the commentary so as to provide concrete indications for action with respect to certain specific rights.[264] Greece suggested the inclusion of a specific reference to the right to water in the commentary.[265]

113. While Sri Lanka[266] and Switzerland[267] expressed their support for the formulation of draft article 6 [8], Japan was of the view that it was too vague, and suggested that it be improved in order to provide useful guidance in individual cases.[268] According to Algeria, the wording was too general in the context of disasters and raised questions regarding its scope of application and interpretation.[269] China[270] and the Russian Federation[271] were of the view that the formulation ought to be modified in order to allow flexibility and to reflect the reality that certain rights might be limited or suspended in disaster settings. Greece expressed the concern that draft article 6 [8] could convey the *a contrario* impression that the applicability of international human rights recognized in other texts required confirmation, thereby casting doubt on the provision's interplay with certain well-known provisions of international human rights instruments regarding derogable rights in cases of emergency.[272] El Salvador expressed the view that the reference to "are entitled" was insufficiently categorical, and proposed that the provision

[247] A/C.6/63/SR.22, para. 15.

[248] A/C.6/63/SR.23, para. 10.

[249] A/C.6/69/SR.20, para. 9.

[250] A/C.6/67/SR.22, para. 9.

[251] A/C.6/67/SR.19, para. 73.

[252] A/C.6/67/SR.18, para. 52.

[253] A/C.6/65/SR.23, para. 70.

[254] A/C.6/69/SR.20, para. 9.

[255] A/C.6/67/SR.18, para. 69.

[256] A/C.6/65/SR.26, para. 72.

[257] A/C.6/69/SR.19, para. 156.

[258] A/C.6/68/SR.21, para. 48.

[259] A/C.6/65/SR.24, para. 87.

[260] A/C.6/66/SR.20, para. 11.

[261] A/C.6/66/SR.24, para. 8.

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

[263] Statement of 29 October 2010, 25th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[264] A/C.6/66/SR.24, para. 89.

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

[266] A/C.6/65/SR.26, para. 43.

[267] Statement of 1 November 2012, 18th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[268] A/C.6/65/SR.25, para. 40.

[269] *Ibid.*, para. 32.

[270] A/C.6/65/SR.22, para. 64.

[271] A/C.6/65/SR.23, para. 57, and A/C.6/69/SR.19, paras. 99–100.

[272] A/C.6/65/SR.22, para. 52.

be reformulated to indicate that such persons "have" certain human rights.[273]

114. The Republic of Korea was of the view that the provision addressed key principles, and therefore suggested that it be moved to the beginning of the text.[274] France[275] and Ireland,[276] while acknowledging the significance of international human rights to the topic, contended that reference to them could be confined to a preamble. Belarus suggested that draft articles 5 [7] and 6 [8] be merged, given the inextricable link between the protection of human dignity and that of human rights.[277]

2. Comments and observations received in response to the request of the Commission

115. Australia welcomed the confirmation that existing human rights conventions continued to apply in disaster situations, and noted that such conventions contained derogable and non-derogable rights, absolute rights and an obligation to take steps, including through international assistance and cooperation, to the maximum of a State's available resources to progressively realize economic, social and cultural rights.

116. Finland, on behalf of the Nordic States, considered the principle outlined in draft article 6 [8] to be highly essential in any humanitarian response. From its perspective, while it was neither necessary nor advisable to employ very specific and restrictive language, some further elaboration of the obligation was necessary. For example, it suggested that the draft article could read: "States must ensure that the rights of affected persons under international human rights law are respected, protected and fulfilled without discrimination."

117. Qatar suggested including a reference to both disasters occurring in conflict situations and in States under occupation.

118. For FAO, the recognition of the human rights of persons affected by disasters was of the utmost importance. It observed that, while the draft article referred only to the obligation to "respect" human rights, a number of international instruments recognized that States had additional obligations, such as the obligation to "protect", "promote" and "fulfil (facilitate)". Moreover, in the context of disaster relief and the enjoyment of the right to food, the recognition of an obligation to "provide" was appropriate.

119. IFRC reiterated its observation that the provision offered no guidance to States or other stakeholders as to how to protect persons in disasters and was therefore not likely to have any impact on their behaviour in operations. It was conscious of the fact that it would be impossible to enunciate every right that could prove relevant in a disaster operation and that mentioning some examples might be misread to imply that rights not enunciated did not apply. Nonetheless, there existed certain rights issues that were of frequent concern in disaster settings that it might be useful to underline in the draft articles, such as: the right to receive humanitarian assistance; the rights of particularly vulnerable groups, such as women, children, seniors and persons with disabilities, to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives; and the right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement.

120. IOM called for more specific reference in the commentary to applicable non-binding instruments, such as the Guiding Principles on Internal Displacement,[278] as well as the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters of the Inter-Agency Standing Committee.[279] Mentioning those standards in the draft articles would represent an important opportunity to fill the obligations deriving from human rights instruments with more specific content with regard to their application in disaster situations. It expressed the view that the term "respect" appeared too restrictive to capture the full array of obligations that States and other actors had, and recommended that a reference to the "protection" of rights be added. It noted that references to specific rights were made in the commentaries to some of the other draft articles. It suggested grouping all such references in the commentary to the present draft article. It further proposed including a reference to the impact of human rights violations, committed through State acts or omissions in the pre- and post-disaster phases, on displacement.

3. Recommendation of the Special Rapporteur

121. Although the topic under consideration concerns the protection of persons in a concrete situation, namely that of a disaster, the Commission's work thereon has not been geared to the development of yet another specialized human rights instrument. International human rights law is an autonomous, well-developed branch of international law, and the Commission has been careful to ensure that no provision of its draft on the present, distinct topic will interfere in the slightest with that existing body of law. To that end, it has limited itself to making in draft article 6 [8] a necessary but general reference to human rights, without entering into hierarchical distinctions grounded on their greater or lesser relevance in cases of disaster. The *renvoi* to human rights in draft article 6 [8] is to the whole of international human rights law, including in particular its treatment of derogable and non-derogable rights. For the Special Rapporteur, seen from that perspective, the existing reference found in draft article 6 [8] to human rights *tout court* suffices.

122. It is precisely in order to achieve total conformity between the present draft and international human rights law that the Special Rapporteur can go along with the suggestion to add to the text of draft article 6 [8] by using the

[273] Comments submitted in writing, 17 January 2011.

[274] A/C.6/66/SR.24, para. 82.

[275] A/C.6/65/SR.23, para. 85.

[276] A/C.6/65/SR.24, para. 55, and A/C.6/66/SR.25, para. 20.

[277] A/C.6/69/SR.20, para. 82.

[278] Addendum to the Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, E/CN.4/1998/53/Add.2, annex.

[279] Addendum to the Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/16/43/Add.5, annex.

standard formula "respect, protect and fulfil" instead of mentioning only "respect". It must be observed that the words "entitled to" found in the text qualify those three verbs and not the noun "human rights".

123. Consequently, the Special Rapporteur recommends that, as amended, the first reading text of draft article 6 [8] be referred to the Drafting Committee, to read as follows:

"*Draft article 6. Human rights*

"Persons affected by disasters are entitled to the respect, protection and fulfilment of their human rights."

H. Draft article 7 [6]: Humanitarian principles

"Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."

1. Comments and observations made prior to the adoption of the first reading draft

124. Draft article 7 [6] on humanitarian principles was discussed in the Sixth Committee at the sixty-fifth to sixty-ninth sessions of the General Assembly. Argentina,[280] China,[281] the Czech Republic,[282] Greece,[283] India,[284] Indonesia,[285] Ireland,[286] the Islamic Republic of Iran,[287] Jamaica,[288] Monaco,[289] New Zealand,[290] Pakistan,[291] Poland,[292] Portugal,[293] the Russian Federation,[294] Spain,[295] Sri Lanka,[296] the United States[297] and IFRC[298] expressed support for the reference to the principles of humanity, neutrality and impartiality in the draft article. New Zealand[299] and Pakistan[300] considered the principles to be directly relevant to the protection of individuals and the facilitation of immediate assistance and relief.

125. Japan,[301] the Niger[302] and the United States[303] called for further analysis and clarification on how the principles related to disaster response specifically. Poland[304] proposed further developing the content of the principles in the commentaries. Ireland[305] noted that draft article 7 [6] should be clearly distinguished from draft articles 5 [7] and 6 [8], on human dignity and human rights, respectively, and the Netherlands[306] suggested that a distinction should be drawn between draft article 7 [6], on the one hand, and draft articles 6 [8] and 8 [5] on human rights and duty to cooperate, respectively, on the other. France[307] suggested changing the title of the draft article to refer to "the principles of humanitarian response" so as to avoid confusion with international humanitarian law.

126. Algeria[308] agreed with the Commission's view that there was no need to ascertain whether the principles constituted general principles of international law. Ireland[309] emphasized the need to identify the legal bases of the principles referred to in draft article 7 [6].

127. With regard to the principle of humanity, the Netherlands[310] agreed with a proposal made in the Commission to distinguish it from the other principles mentioned in the draft article, which in its view were of a different nature. Greece[311] did not doubt the overarching importance of the principle, but observed that it was hardly measurable in legal terms and therefore ought to be moved to a declaratory part of the text, most likely a preamble. France[312] emphasized the need to qualify the content of the principle to clearly distinguish it from the principle of human dignity set out in draft article 5 [7].

128. Regarding the principle of neutrality, China,[313] Mexico,[314] Monaco,[315] Pakistan,[316] the Russian Federation[317] and Switzerland[318] stressed the importance of the principle which ensured the non-political nature of any assistance. Austria,[319] El Salvador,[320] Estonia,[321] Greece,[322] India,[323] Ireland,[324] the Netherlands,[325] Portugal[326] and the United Kingdom[327] expressed doubts as to whether the principle of neutrality was relevant, as it was closely connected to the situation of armed conflict, which was

[280] A/C.6/65/SR.25, para. 25.
[281] A/C.6/65/SR.22, para. 62.
[282] A/C.6/65/SR.23, para. 24, and A/C.6/69/SR.20, para. 9.
[283] A/C.6/65/SR.22, para. 50.
[284] A/C.6/67/SR.20, para. 19.
[285] A/C.6/65/SR.24, para. 68.
[286] *Ibid.*, para. 55.
[287] *Ibid.*, para. 37, and A/C.6/69/SR.21, para. 24.
[288] A/C.6/67/SR.22, para. 9.
[289] A/C.6/65/SR.23, para. 87.
[290] A/C.6/65/SR.23, para. 16.
[291] A/C.6/65/SR.24, para. 57.
[292] A/C.6/65/SR.23, para. 100, and A/C.6/67/SR.19, para. 73.
[293] A/C.6/65/SR.23, para. 11.
[294] A/C.6/69/SR.19, para. 101.
[295] A/C.6/65/SR.24, para. 87.
[296] A/C.6/65/SR.26, para. 43.
[297] A/C.6/65/SR.25, para. 16, and A/C.6/66/SR.21, para. 69.
[298] Statement of 29 October 2010, 25th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.
[299] A/C.6/65/SR.23, para. 16.
[300] A/C.6/65/SR.24, para. 57.
[301] A/C.6/65/SR.25, para. 40.
[302] A/C.6/66/SR.23, para. 54.
[303] A/C.6/65/SR.25, para. 16, and A/C.6/66/SR.21, para. 69.
[304] A/C.6/65/SR.23, para. 100.
[305] Statement of 29 October 2010, 24th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.
[306] A/C.6/65/SR.23, para. 44.
[307] *Ibid.*, para. 84.
[308] A/C.6/66/SR.25, para. 31.
[309] A/C.6/65/SR.24, para. 55.
[310] A/C.6/65/SR.23, para. 44.
[311] A/C.6/65/SR.22, para. 50.
[312] A/C.6/65/SR.23, para. 84.
[313] A/C.6/66/SR.23, para. 41.
[314] A/C.6/65/SR.25, para. 5.
[315] A/C.6/65/SR.23, para. 87.
[316] A/C.6/65/SR.24, para. 57.
[317] A/C.6/65/SR.23, para. 56.
[318] A/C.6/65/SR.22, para. 37.
[319] A/C.6/65/SR.23, para. 38.
[320] Comments submitted in writing, 17 January 2011.
[321] A/C.6/65/SR.23, para. 68.
[322] A/C.6/65/SR.22, para. 50.
[323] A/C.6/65/SR.25, para. 35.
[324] A/C.6/65/SR.24, para. 55.
[325] A/C.6/65/SR.23, para. 44.
[326] *Ibid.*, para. 11.
[327] A/C.6/65/SR.24, para. 64.

outside the scope of the draft articles. In their view, the principles of impartiality and non-discrimination would cover the same ground in peacetime. In that respect, Chile,[328] Estonia[329] and the Netherlands[330] suggested adding clarifications, including in the commentaries. Austria[331] proposed avoiding the term "principle of neutrality" and only mentioning "impartiality", and referred with approval to the formulation in the resolution on humanitarian assistance adopted by the Institute of International Law in 2003 ("Humanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups").[332] Chile[333] underlined the need to clarify the scope of the principle of neutrality in relation to the principle of impartiality.

129. With respect to the principle of impartiality, Greece,[334] the Netherlands[335] and Monaco[336] stressed the general recognition that the principle enjoyed in the international community. Pakistan[337] observed that the principle provided a functional framework for relief efforts that excluded political considerations and was guided solely by the needs of the persons affected. Regarding the principle's proportionality component, China[338] believed that disaster response should always be proportionate to the practical needs of regions and peoples as well as to the capacity of affected States. Switzerland[339] emphasized that economic considerations should not, under any circumstances, play a role in the provision of assistance. Ireland[340] doubted whether a reference to the principle of proportionality was useful and Brazil[341] believed that proportionality was best achieved on a case-by-case basis.

130. The Netherlands[342] and IFRC[343] felt that a reference to the principle of non-discrimination might not be necessary, as it was covered by the principle of impartiality. IFRC suggested avoiding confusion by adding the phrase "and in particular" after the word "impartiality".[344] Greece,[345] Hungary[346] and Ireland[347] supported its inclusion in the draft article because it was a valuable and well-accepted legal principle. Indonesia[348] agreed but noted that the principle of non-discrimination was complementary to the other three principles mentioned in draft article 7 [6]. El Salvador sought to distinguish the two principles by noting that the principle of non-discrimination was one of substance, with the goal of protecting persons, while the principle of impartiality related to the process of protection.[349]

131. France[350] observed that it was important to emphasize that the phrase "while taking into account the needs of the particularly vulnerable" did not imply that the differential treatment of persons who were in different situations was discriminatory. The Niger[351] suggested clarifying the exact meaning of the reference to "the particularly vulnerable" with a view to determining who would assess their needs. El Salvador observed that the clause was of necessity indeterminate, since who was to be considered "particularly vulnerable" would depend on each case.[352] The Council of Europe called on the Commission to devote more attention in the draft articles to vulnerable groups.[353]

132. In relation to other relevant principles, the Czech Republic[354] and Thailand[355] proposed including the principle of independence as a fourth core humanitarian principle, supplementing the principles of humanity, neutrality and impartiality. India,[356] Indonesia,[357] the Islamic Republic of Iran,[358] Malaysia,[359] and the Russian Federation[360] emphasized the importance of adherence to the principles of sovereignty, territorial integrity and non-interference. Brazil[361] believed that the principle of State sovereignty should be balanced with the protection of human rights. Cuba[362] and the Russian Federation[363] proposed including a reference to the principles of State sovereignty and non-intervention. South Africa[364] suggested inserting a caveat similar to the one contained in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which provides, in article 5, paragraph 12, that nothing in that article shall prejudice the principles of sovereignty and territorial integrity of States. Portugal[365] noted that the concern regarding the interference in domestic affairs had already been sufficiently covered by the principle of impartiality.

[328] A/C.6/65/SR.26, para. 11.

[329] A/C.6/65/SR.23, para. 68.

[330] *Ibid.*, para. 44.

[331] *Ibid.*, para. 38.

[332] Resolution by the Institute of International Law on "Humanitarian assistance" on 2 September 2003, Institute of International Law, *Yearbook*, vol. 70 (2004), Session of Bruges (2003), Part II, p. 262 (available from www.idi-iil.org, *Publications and Works*, *Resolutions*), at p. 269, art. II, para. 3.

[333] A/C.6/65/SR.26, para. 11.

[334] A/C.6/65/SR.22, para. 50.

[335] A/C.6/65/SR.23, para. 44.

[336] *Ibid.*, para. 87.

[337] A/C.6/65/SR.24, para. 57.

[338] A/C.6/65/SR.22, para. 63.

[339] Statement of 27 October 2010, 22nd meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[340] Statement of 29 October 2010, 24th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[341] A/C.6/65/SR.26, para. 72.

[342] A/C.6/65/SR.23, para. 44.

[343] A/C.6/65/SR.25, para. 49.

[344] *Ibid.*

[345] A/C.6/65/SR.22, para. 50.

[346] A/C.6/65/SR.21, para. 33.

[347] A/C.6/65/SR.24, para. 55.

[348] *Ibid.*, para. 68.

[349] Comments submitted in writing, 17 January 2011.

[350] A/C.6/65/SR.23, para. 84.

[351] A/C.6/66/SR.23, para. 54.

[352] Comments submitted in writing, 17 January 2011.

[353] Comments submitted in writing, 25 November 2014.

[354] A/C.6/65/SR.23, para. 24.

[355] *Ibid.*, para. 70.

[356] A/C.6/67/SR.20, para. 19.

[357] A/C.6/68/SR.25, para. 60.

[358] A/C.6/69/SR.21, para. 24.

[359] A/C.6/66/SR.24, para. 112.

[360] A/C.6/65/SR.23, para. 56.

[361] A/C.6/65/SR.26, para. 72.

[362] A/C.6/65/SR.23, para. 94, and A/C.6/66/SR.24, para. 27.

[363] A/C.6/69/SR.19, para. 101.

[364] Statement of 2 November 2012, 19th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[365] Statement of 28 October 2010, 23rd meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

2. Comments and observations received in response to the request of the Commission

133. Ecuador proposed the addition of a reference to both the "no harm" and "independence" principles.

134. With regard to the neutrality principle, Finland, on behalf of the Nordic States, observed that it was pivotal that the relevant draft articles more clearly distinguish between military personnel and humanitarian response and emphasize the fundamentally civilian character of humanitarian assistance. It also pointed to the protection of vulnerable groups in disasters as another area to be highlighted. It was pleased that the Commission had made explicit reference to the needs of the particularly vulnerable as an important humanitarian principle. At the same time, it maintained that some elaboration could add practical value to the draft article. The Nordic States also emphasized the importance of including a reference to the "no harm" principle.

135. The European Union, while expressing support for the principles enumerated in draft article 7 [6], called on the Commission to also consider inserting a reference to the principle of independence.

136. IFRC expressed the concern that referring to the principles of "impartiality" and "non-discrimination" as separate concepts was confusing, since the meaning of "impartiality" was fundamentally based on non-discrimination. It reiterated its recommendation to avoid such confusion by adding the phrase "and in particular" after the word "impartiality".

137. IOM observed that, in the light of the broad scope of application of the draft articles, the phrase "response to disasters" needed to include "pre-disaster risk reduction" where relevant. The principle of non-discrimination was particularly relevant also in the context of the prevention of disasters. It also welcomed the reference in the commentary to nationality among the grounds for non-discrimination, in the light of the risk of stigmatization and exclusion of non-nationals in disaster response situations.

138. The Office for the Coordination of Humanitarian Affairs expressed support for draft article 7 [6], but indicated that it would also support the inclusion of a reference to the obligation for humanitarian organizations to respect the principle of independence, in accordance with General Assembly resolution 58/114 of 17 December 2003. It noted that the element of community participation in considering the needs of the particularly vulnerable was missing from the draft article and its commentary.

3. Recommendation of the Special Rapporteur

139. The Special Rapporteur points out that the overarching principles of sovereign equality and non-intervention inform the whole draft, while draft article 7 [6] is concerned with those principles that can be specifically termed "humanitarian principles". The principles enunciated in draft article 7 [6], originally found in international humanitarian law and in the fundamental principles of the Red Cross, are widely used and accepted in the context of response to disasters. The Special Rapporteur finds, therefore, justification in the suggestion to replace the title of the draft article with "Principles of humanitarian response".

140. The principles enumerated can be usefully supplemented, as has been suggested, by a reference to two other principles with which they are often listed in relevant instruments: the principles of independence and of "no harm". The Special Rapporteur can also accept the suggestion repeatedly made to add "in particular" after "impartiality". He would then, strictly as a matter of drafting, replace the word "particularly" with "most" before "vulnerable".

141. In the light of the foregoing, the Special Rapporteur recommends that, with the indicated changes, the first reading text of draft article 7 [6] be referred to the Drafting Committee, to read as follows:

"*Draft article 7. Principles of humanitarian response*

"Response to disasters shall take place in accordance with the principles of humanity, no harm, independence, neutrality and impartiality, in particular on the basis of non-discrimination, while taking into account the needs of the most vulnerable."

I. Draft article 8 [5]: Duty to cooperate

"In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations."

1. Comments and observations made prior to the adoption of the first reading draft

142. Draft article 8 [5] was discussed in the Sixth Committee at the sixty-fourth to sixty-seventh and sixty-ninth sessions of the General Assembly.

143. Chile[366] and Estonia[367] supported the need to further specify in the draft article the duties stemming from the primary responsibility of the affected State. In particular, Chile[368] suggested that the relationship between the primary responsibility of the affected State and the obligation to cooperate needed to be further emphasized.

144. Ireland,[369] while agreeing in principle with the insertion in the draft articles of a general reference to a duty to cooperate "as appropriate", pointed out that such a provision should not go beyond the understanding of the concept under customary international law and suggested that such a limitation could be made more explicit in the commentary.[370]

[366] A/C.6/65/SR.26, para. 11.

[367] A/C.6/65/SR.23, para. 69.

[368] A/C.6/65/SR.26, para. 11.

[369] A/C.6/64/SR.22, para. 19.

[370] A/C.6/69/SR.19, para 175.

145. Denmark, on behalf of the Nordic States,[371] pointed to the need to strike a balance between three different elements of the duty to cooperate, namely, the sovereignty of the affected State, the obligation of conduct imposed on assisting States and the limitation of disaster relief assistance to the specific elements that normally made up cooperation on the matter. The need to find a balance between the principle of cooperation among States and other applicable principles of international law was stressed by Romania, which suggested analysing whether disaster response should take place only following a request from the affected State or whether other States could act on their own initiative to protect the rights of the victims.[372]

146. Malaysia[373] was of the view that the duty to cooperate enshrined in the draft article needed to be clearly defined in order to enable States to understand the extent of their obligations. Myanmar maintained that requiring the affected State to cooperate with any particular entity would be counterproductive and had to be avoided.[374] Similarly, Greece[375] noted that the use of a mandatory language, in particular the use of the word "shall", did not find support in State practice. The United Kingdom[376] was of the view that the recourse to "duties" was at odds with the essentially voluntary nature of the principle of cooperation. According to Israel,[377] the draft article needed to clarify that the envisaged cooperation was not an obligation imposed on the assisting State. Concerns about the use of the word "shall" in the draft article were also expressed by Denmark, on behalf of the Nordic States,[378] and Austria.[379] The Russian Federation[380] noted that the duty enshrined in the draft did not represent a well-established principle of international law. In its view, the draft article needed to specify that the affected State had a right to choose from whom to accept assistance and with whom it would cooperate in reducing the risk and effects of a disaster.[381]

147. Hungary supported including the duty to provide assistance when requested.[382]

148. The Islamic Republic of Iran[383] was of the view that the affected State did not have the same obligation to cooperate with other international organizations as it had with the United Nations. In its view, the draft article should be redrafted in order to clarify the scope and limits of the duty to cooperate under the Charter of the United Nations and international law. Cuba made a similar proposal and called for, *inter alia*, the inclusion of a reference to the principle of non-intervention in the domestic affairs of States.[384] The Islamic Republic of Iran[385] also proposed that the draft article distinguish between States and international organizations, on the one hand, and relevant non-governmental organizations, on the other, since the affected State had no duty to seek assistance from the latter organizations. Moreover, the Islamic Republic of Iran[386] expressed doubt regarding the reference to ICRC, due to its unique role in dealing with situations under international humanitarian law.

149. The Russian Federation suggested that draft article 8 [5] be merged with draft article 9 [5 *ter*].[387]

2. Comments and observations received in response to the request of the Commission

150. Austria reiterated its concern that draft article 8 [5] should not be interpreted as establishing a duty by States to provide assistance when requested by the affected State.

151. Ecuador proposed including a reference to the obligations of the organizations and entities mentioned in draft article 8 [5].

152. The Association of Caribbean States recommended that the provision specify that cooperation should be undertaken on the basis of existing legal arrangements.

153. The European Union welcomed the fact that the draft articles encompassed the broader notion of "assisting actors" and that a key feature of activity in the field of disaster relief assistance was international cooperation not only among States, but also with competent intergovernmental and non-governmental organizations. It pointed out that such expression of good practice should extend to cover cooperation on, *inter alia*, needs assessments, situation overview and delivery of assistance. It noted that, under the present formulation, the draft article could be read to exclude cooperation between international actors, and suggested that the point be covered in the commentary.

154. FAO acknowledged that, while the obligation to cooperate did not amount to a general duty to provide assistance, it could be construed as an obligation to consider early warning reports and requests for assistance, without there being a duty to accede to such requests.

155. IFRC was appreciative that it was expressly mentioned in the draft article, but maintained that there was a strong normative and practical reason to include its national societies as well. Accordingly, it recommended replacing the reference to "the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross" with "the components of the International Red Cross and Red Crescent Movement".

156. The Office for the Coordination of Humanitarian Affairs welcomed the emphasis in draft article 8 [5] on cooperation between a range of different "assisting actors". It reiterated its recommendation that reference also be made to "any other entity or individual", as

[371] A/C.6/67/SR.18, para. 53.
[372] A/C.6/64/SR.22, para. 25.
[373] A/C.6/66/SR.24, para. 120.
[374] A/C.6/64/SR.21, para. 3.
[375] A/C.6/67/SR.19, para. 58.
[376] *Ibid.*, para. 65.
[377] A/C.6/67/SR.20, para. 38.
[378] A/C.6/67/SR.18, para. 53.
[379] *Ibid.*, para. 88.
[380] A/C.6/68/SR.25, para. 38.
[381] A/C.6/69/SR.19, para. 102.
[382] A/C.6/68/SR.18, para. 63.
[383] A/C.6/64/SR.22, para. 82.
[384] Comments submitted in writing, 5 January 2011.
[385] A/C.6/67/SR.20, para. 15.
[386] A/C.6/69/SR.21, para. 25.
[387] A/C.6/68/SR.25, para. 38.

private actors also had an important role to play. It further requested an express reference to the responsibility of the Emergency Relief Coordinator in accordance with General Assembly resolution 46/182 of 19 December 1991, with appropriate explanation in the commentary. It also called for the inclusion in the commentary of a reference to a "duty to inform" or a "duty to notify" analogous to that contained in article 17 of the articles on prevention of transboundary harm from hazardous activities,[388] which entail a duty to notify those actors that have a mandated role to gather information, provide early warning and coordinate assistance from the international community.

157. The World Bank pointed out that clarity as to the legal/regulatory framework under which cooperation was to take place would significantly affect the speed of constituting and operationalizing such cooperation. It called for greater specificity regarding the rules and logistics for coordination. It expressed the view that, if cooperation were made a duty, there would need to be a clear set of rules in order that such duty did not become a debilitating factor.

3. Recommendation of the Special Rapporteur

158. At the outset, the Special Rapporteur draws attention to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[389] adopted on the occasion of the twenty-fifth anniversary of the Organization. The Declaration authoritatively codified and progressively developed the seven fundamental principles of international law that inform that treaty of treaties, the Charter of the United Nations. The Declaration solemnly proclaimed the principle of cooperation ("the duty [under international law] to cooperate"). In conformity with the Charter and the Declaration, draft article 8 [5] simply embodies that universally recognized Charter principle, in its authoritative formulation as the "duty to cooperate", for the purposes of the present draft articles.

159. The Special Rapporteur sees no alteration to the basic thrust of draft article 8 [5] with the insertion of an express reference to the Emergency Relief Coordinator in the text, nor with replacing the reference to "the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross" with one to "the components of the Red Cross and Red Crescent Movement".

160. For the Special Rapporteur, the text can be further streamlined by replacing the expressions "other competent intergovernmental organizations" and "relevant non-governmental organizations" with "other assisting actors", a term which, as defined in draft article 4, subparagraph (*c*), includes those two types of organizations.

161. As a result, the Special Rapporteur recommends that, with the indicated changes, the first reading text of draft article 8 be referred to the Drafting Committee, to read as follows:

"*Draft article 8. Duty to cooperate*

"In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, in particular its Emergency Relief Coordinator, with the components of the Red Cross and Red Crescent Movement and with other assisting actors."

J. Draft article 9 [5 *bis*]: Forms of cooperation

"For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources."

1. Comments and observations made prior to the adoption of the first reading draft

162. Draft article 9 [5 *bis*] was discussed in the Sixth Committee at the sixty-seventh to sixty-ninth sessions of the General Assembly.

163. Chile,[390] France,[391] Hungary,[392] Indonesia,[393] Malaysia,[394] Mexico,[395] Slovenia,[396] South Africa,[397] the United States[398] and the European Union[399] generally welcomed the draft article.

164. Pakistan[400] stressed that the affected State retained primacy in all forms of cooperation, including humanitarian assistance and coordination of international relief actions. El Salvador[401] noted that draft article 9 [5 *bis*] rightly maintained the discretionary nature of cooperation between States.

165. Singapore[402] asserted that, beyond the duty to cooperate set out in draft article 8 [5], draft article 9 [5 *bis*] did not create an additional duty for the affected State to request the forms of cooperation described in the list, nor did it establish an additional duty for other States to offer them. According to the Russian Federation,[403] draft article 9 [5 *bis*] was not to be regarded as creating legal obligations; the forms of assistance offered to an affected

[388] General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98.

[389] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[390] A/C.6/67/SR.19, para. 10.

[391] *Ibid.*, para. 95.

[392] A/C.6/67/SR.20, para. 52, and A/C.6/68/SR.18, para. 63.

[393] A/C.6/67/SR.20, para. 28.

[394] A/C.6/67/SR.19, para. 110.

[395] *Ibid.*, para. 18.

[396] A/C.6/67/SR.18, para. 126.

[397] A/C.6/67/SR.19, para. 83.

[398] *Ibid.*, para. 115.

[399] A/C.6/67/SR.18, para. 71.

[400] A/C.6/68/SR.24, para. 116.

[401] A/C.6/67/SR.19, para. 49.

[402] A/C.6/68/SR.25, para. 108.

[403] *Ibid.*, para. 37, and A/C.6/69/SR.19, para. 104.

State had to be based on the State's own request. Similarly, Slovenia[404] was of the view that draft article 9 [5 *bis*] could not be taken to imply that States had a duty to provide assistance, since such a duty had no basis in existing international law and practice.

166. Mexico[405] indicated that the wording of draft article 9 [5 *bis*] should not be interpreted as limiting States' ability to offer forms of cooperation other than those mentioned, and that the draft article should be clarified to confirm that States have that option. Ireland,[406] the Russian Federation[407] and Singapore[408] recalled that the list of forms of cooperation contained in article 9 [5 *bis*] was not intended to be exhaustive.

167. Indonesia[409] was of the view that, given the unpredictable nature of disasters, the draft articles should not attempt to provide an exhaustive list of all forms of assistance. Greece[410] also supported having an indicative list, as opposed to a restrictive one, of the types of assistance that might be provided.

168. With regard to the types of assistance envisaged by draft article 9 [5 *bis*], the European Union[411] recommended that specific reference should be made in the commentary to the use of satellite imagery as an important means of delivering technical assistance during emergency response. Ireland[412] wondered whether reference might usefully be made to needs assessment. Romania[413] suggested including financial assistance among the types of cooperation envisaged. South Africa[414] noted that draft article 9 [5 *bis*] made no reference to any form of consultation between the States concerned as to the type of cooperation or assistance required and expressed the view that the lack of consultation could result in the rendering of ineffective or inadequate assistance.

169. Austria[415] was of the view that there was no need to retain draft article 9 [5 *bis*], since, as the commentary itself had stated, it did not contain any normative substance, but only a demonstrative enumeration of possible forms of cooperation.

2. Comments and observations received in response to the request of the Commission

170. Austria reiterated its view that the draft article was not necessary. In its view, an inventory of the various measures taken by States was best located in the commentary.

171. Cuba suggested including a reference to "international assistance" as a form of cooperation.

172. IFRC maintained that draft articles 9 [5 *bis*] and 10 [5 *ter*] should also include reference to recovery, and suggested the inclusion of financial support, training, information-sharing and joint simulation exercises and planning as additional forms of cooperation.

173. IOM suggested including cooperation with the countries of origin of non-nationals that are present in the territory in the form of bilateral coordination aimed at ensuring access to nationals during crisis, coordinating evacuation procedures and facilitating documentation, among other things.

174. The Office for the Coordination of Humanitarian Affairs proposed including "services" as a form of cooperation, because it was referred to in draft article 4, subparagraph (*d*).

3. Recommendation of the Special Rapporteur

175. As is intended to be made clear by the use of the verb "includes", the list of forms of cooperation found in draft article 9 [5 *bis*] is merely indicative. Other such forms are also covered, even if not mentioned by name in the text. Consequently, the Special Rapporteur sees no need to amend draft article 9 [5 *bis*] by adding more examples to those already given. Besides, a specific mention of "international assistance" is unnecessary as it is subsumed in the express reference the draft article makes to "humanitarian assistance".

176. The Special Rapporteur, therefore, recommends that the text of the first reading draft article 9 [5 bis] be referred to the Drafting Committee unchanged.

K. Draft article 10 [5 *ter*]: Cooperation for disaster risk reduction

"Cooperation shall extend to the taking of measures intended to reduce the risk of disasters."

1. Comments and observations made prior to the adoption of the first reading draft

177. Draft article 10 [5 *ter*] was discussed in the Sixth Committee at the sixty-eighth and sixty-ninth sessions of the General Assembly.

178. Tonga[416] noted that draft article 10 [5 *ter*] confirmed that the States' duty to cooperate, as set out in draft article 8 [5], encompassed measures intended to reduce the risk of disasters. Greece[417] and South Africa[418] on the other hand, argued that draft article 10 [5 *ter*] provided an unclear requirement for States and other stakeholders to cooperate. For Greece,[419] it would have been preferable if a straightforward reference to draft article 10 [5 *ter*] had been included in draft article 11 [16], which would read that each State, in the performance of its duty to reduce the risk of disasters, might "ask and seek the cooperation provided for in article [10 [5 *ter*]], where appropriate".

[404] A/C.6/67/SR.18, para. 126.
[405] A/C.6/67/SR.19, para. 18.
[406] *Ibid.*, para. 22.
[407] A/C.6/68/SR.25, para. 37, and A/C.6/69/SR.19, para. 104.
[408] A/C.6/68/SR.25, para. 108.
[409] A/C.6/67/SR.20, para. 28.
[410] A/C.6/67/SR.19, para. 58.
[411] A/C.6/67/SR.18, para. 71.
[412] A/C.6/67/SR.19, para. 22.
[413] *Ibid.*, para. 89.
[414] *Ibid.*, para. 83.
[415] A/C.6/68/SR.23, para. 62.
[416] A/C.6/68/SR.25, para. 85.
[417] A/C.6/68/SR.24, para. 33.
[418] *Ibid.*, para. 12.
[419] *Ibid.*, para. 33.

Conversely, the European Union[420] suggested that it would be advisable to include a reference to draft article 11 [16] in draft article 10 [5 *ter*].

179. South Africa[421] affirmed that, to give full effect to draft article 10 [5 *ter*], it should be incorporated into draft article 8 [5]. The Russian Federation[422] also spoke in favour of draft article 10 [5 *ter*] being incorporated into draft article 8 [5]. It proposed the following wording on cooperation: "States shall, as far as they are able, cooperate among themselves and, as appropriate, with international organizations to provide assistance to an affected State and to provide assistance among themselves on disaster risk reduction."[423] The Netherlands[424] supported the intention to merge draft article 10 [5 *ter*] with draft article 8 [5] or 9 [5 *bis*], which would avoid giving too much prominence to the pre-disaster phase. India[425] agreed with the possibility of grouping together the draft articles dealing with aspects of cooperation.

180. Malaysia[426] noted that the term "measures" appeared to correlate with the specific measures detailed in draft article 11 [16], paragraph 1, which could unduly extend the duty to cooperate. Furthermore, Malaysia expressed the concern that the combination of draft articles 8 [5], 10 [5 *ter*] and 11 [16] could lead to the usurpation of the sovereign right of the affected State by a supranational body.[427] Thailand[428] maintained that draft article 10 [5 *ter*] should be construed in the light of draft articles 14 [11] and 15 [13]. Read together, those draft articles recognized the right of the affected State to reject offers of assistance if it deemed that the offering State or entity harboured an ulterior motive that could prejudice its sovereignty or a crucial national interest.

181. The European Union[429] suggested that, in line with the Hyogo Framework for Action,[430] the words "and to build resilience thereto" should be added at the end of draft article 10 [5 *ter*]. Furthermore, it specified that it should be clear from a full reading of draft articles 8 [5], 9 [5 *bis*] and 10 [5 *ter*] that cooperation extended *ratione temporis* not only to the response phase of a disaster but also to the pre- and post-disaster phases.

2. Comments and observations received in response to the request of the Commission

182. Austria expressed the concern that, given the broad definition of disasters, the provision would oblige States to cooperate in reducing the risk of terrorist acts or civil strife below the level of a non-international armed conflict (which was already covered by existing rules of international law).

183. The Netherlands reiterated its preference for a clear focus on the response phase of the actual disaster, as was suggested by the title of the study.

184. Qatar proposed including a reference to the mitigation of the consequences of disasters.

185. The European Union and the Secretariat of the International Strategy for Disaster Reduction recommended referring to the recommendations contained in the Sendai Framework. The Secretariat of the International Strategy for Disaster Reduction was of the view that, were the draft article to be incorporated in draft article 8 [5], it would be preferable to retain it as a separate paragraph and to preserve its current formulation. The World Bank called for clarification as to whether the draft article would also apply to post-disaster risk reduction beyond immediate relief and recovery.

186. WFP considered that the inclusion of universal international obligations on the prevention of disasters, including disaster risk reduction, would facilitate its work insofar as it would prompt States to adopt domestic disaster prevention regulation, thereby increasing the likelihood that robust systems would be in place when disaster struck.

3. Recommendation of the Special Rapporteur

187. The comments and observations made on draft article 10 [5 *ter*] relate mainly to its placing, not its text. In that connection, the Special Rapporteur stresses that, as already explained above in connection with draft article 2 [2], the main, though not exclusive, focus of the present set of draft articles is the response phase of the disaster cycle, without excluding from its scope measures taken to prevent or reduce the risk of a disaster at the pre-disaster phase. In order to highlight the growing importance that attaches to that latter phase, two related draft articles, 10 [5 *ter*] and 11 [16] have been included consecutively as separate, autonomous provisions. While draft article 8 [5] is couched in general terms, the forms of cooperation exemplified in the immediately following provision, draft article 9 [5 *bis*], clearly relate to the disaster proper and post-disaster phase. Draft article 10 [5 *ter*] combines in one single provision, as far as disaster risk reduction is concerned, both the duty to cooperate as embodied in draft article 8 [5] and a general reference to whatever measures may be taken to reduce the risk of disasters, examples of which are listed in paragraph 2 of the next provision, draft article 11 [16]. To merge draft article 10 [5 *ter*] with either draft articles 8 [5] or 9 [5 *bis*] would mix their distinctive character and disrupt their logical sequence, leading to confusion.

188. In the light of the foregoing, the Special Rapporteur recommends that the first reading text of draft article 10 [5 *ter*] be referred to the Drafting Committee, reformulated to read as follows:

"Draft article 10. Cooperation for disaster risk reduction

"The duty to cooperate enshrined in draft article 8 shall extend to the taking of measures intended to reduce the risk of disasters."

[420] A/C.6/68/SR.23, para. 31.

[421] A/C.6/68/SR.24, para. 12.

[422] A/C.6/68/SR.25, para. 38.

[423] A/C.6/69/SR.19, para. 103.

[424] A/C.6/68/SR.25, para. 98.

[425] A/C.6/68/SR.24, para. 123.

[426] A/C.6/68/SR.25, para. 23.

[427] *Ibid.*

[428] A/C.6/68/SR.25, para. 88.

[429] A/C.6/68/SR.23, para. 31.

[430] Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, see Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

L. Draft article 11 [16]: Duty to reduce the risk of disasters

"1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

"2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems."

1. Comments and observations made prior to the adoption of the first reading draft

189. The question of including disaster risk reduction in the set of draft articles was considered in the debate in the Sixth Committee as early as the sixty-fourth session of the General Assembly. Draft article 11 [16], in its initial manifestation as draft article 16, was discussed in the Sixth Committee at the sixty-eighth and sixty-ninth sessions of the Assembly.

190. Early on, France took the view that the study of the topic should focus, *ratione temporis*, only on disaster response, since any attempt to codify the duty to prevent disasters would pose a daunting challenge, as the type of prevention needed would vary according to the situation.[431] Cuba,[432] Ghana,[433] Greece,[434] Poland[435] and Thailand,[436] on the other hand, expressed support for a comprehensive approach to the topic focusing on the various phases of activities connected with disasters, including prevention. Ireland[437] and Portugal[438] indicated that, while they accepted an initial focus on response, the Commission nonetheless should include questions of prevention and disaster reduction and mitigation within the scope of the draft articles.

191. Chile,[439] China,[440] Germany,[441] Greece,[442] Ireland,[443] Japan,[444] Mexico,[445] Poland,[446] Slovenia,[447] South Africa[448] and the European Union[449] subsequently welcomed the inclusion of draft article 11 [16]. The Netherlands, which had initially expressed doubts about addressing prevention or preparedness,[450] expressed support for the wording of the draft article, which it considered as appropriately clarifying the nature of the duty.[451] IFRC strongly supported the inclusion of draft article 11 [16] and indicated its view that a clearly affirmed international duty would be a helpful tool to address accountability gaps at domestic levels, which remained a frequent barrier to success in the reduction of risk.[452]

192. Thailand envisaged a comprehensive provision on the prevention and mitigation of disasters that included elements such as information-sharing, the right to receive appropriate warning and correct information, public participation in the provision of relief and risk management, better coordination to cope with disasters and post-disaster rehabilitation.[453] Greece called for a clearer linkage in the text between draft articles 11 [16] and 10 [5 *ter*] on cooperation for disaster risk reduction, which it proposed would read that each State, in the performance of its duty to reduce the risk of disasters, might ask and seek the cooperation provided for in draft article [10 [5 *ter*]], where appropriate.[454] Poland called on the Commission to harmonize the formulation of other provisions, such as draft articles 5 [7] and 7 [6], so as to take into account the inclusion of disaster risk reduction within the scope of application of the draft articles.[455]

193. The United States disputed the assertion that each State had an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters. In its view, the information gathered by the Commission had not substantiated the existence of a rule of customary international law, nor was the progressive development of international law in that direction advisable, since it was for each State to decide what risk reduction measures would be necessary and appropriate.[456] Austria expressed the view that the inclusion of a duty to reduce the risk of disasters seemed to exceed the original mandate of the topic, and that such a broad duty risked interfering with existing legal regimes regarding the prevention of certain kinds of disasters; the focus could instead be placed on the prevention and reduction of the *effects* of disasters.[457] The Republic of Korea was of the opinion that it went beyond contemporary public international law to posit the duty to prevent as a general principle, other than in certain specific fields, such as environmental law, and that any attempt to characterize it as such would bring about a diminution of State sovereignty.[458] The Russian Federation disputed the validity of the analogy drawn with international human rights law and international environmental law, and recommended that the provision be recast in the form of a recommendation and include the qualifier "within its capacity".[459] France[460] and the Islamic Republic of Iran[461] expressed

[431] A/C.6/64/SR.21, para. 20. See also A/C.6/68/SR.17, para. 112.
[432] A/C.6/65/SR.23, para. 94.
[433] A/C.6/64/SR.22, para. 9.
[434] A/C.6/67/SR.19, para. 59.
[435] A/C.6/64/SR.21, para. 75, and A/C.6/65/SR.23, para. 99.
[436] A/C.6/65/SR.23, para. 71.
[437] A/C.6/64/SR.22, para. 14.
[438] A/C.6/64/SR.21, para. 83.
[439] A/C.6/68/SR.24, para. 66.
[440] A/C.6/68/SR.26, para. 11.
[441] A/C.6/68/SR.24, para. 58, and A/C.6/69/SR.19, para. 170.
[442] A/C.6/68/SR.24, para. 33.
[443] A/C.6/68/SR.25, para. 117.
[444] A/C.6/68/SR.23, para. 72.
[445] A/C.6/68/SR.25, para. 11.
[446] A/C.6/68/SR.24, para. 106.
[447] A/C.6/68/SR.21, para. 49.
[448] A/C.6/68/SR.24, paras. 13–18.
[449] A/C.6/68/SR.23, para. 31.
[450] A/C.6/67/SR.19, para. 30.
[451] A/C.6/68/SR.25, para. 98.
[452] A/C.6/68/SR.26, para. 17.
[453] A/C.6/67/SR.19, para. 42.
[454] A/C.6/68/SR.24, para. 33.
[455] *Ibid.*, para. 106.
[456] A/C.6/68/SR.23, para. 48, and A/C.6/69/SR.20, para. 120.
[457] A/C.6/68/SR.23, para. 63.
[458] A/C.6/68/SR.24, para. 91.
[459] A/C.6/68/SR.25, para. 41, and A/C.6/69/SR.19, para. 105.
[460] A/C.6/68/SR.17, para. 113.
[461] Statement of 5 November 2013, 26th meeting of the Sixth Committee, sixty-eighth session of the General Assembly.

doubts as to the existence of an international legal obligation to prevent the risk of disasters.

194. With regard to the formulation of draft article 11 [16], France proposed that the title be amended to read "*Prévention des catastrophes* (Disaster prevention)" so as to avoid broad generalizations with respect to existing law.[462] The United States proposed that the title be amended to "Reduction of risk of disasters".[463]

195. With regard to paragraph 1, Chile[464] and Finland, on behalf of the Nordic States,[465] emphasized the significance of the reference to "each State", which was considered as appropriately reflecting the existence of a legal obligation for every State, acting on an individual basis, to take measures. The European Union proposed including a reference to the taking of "systematic" measures to ensure the reduction of the risk of disasters, which would track the language found in the Hyogo Framework for Action, and to the "effective" implementation of legislation. In addition, the European Union suggested that multi-hazard assessments include the identification of vulnerable people or communities and pertinent infrastructure in relation to the relevant hazards.[466] Chile was of the view that the reference to "including through legislation and regulations" was appropriate.[467] South Africa suggested that it be rendered as "including, in particular, through legislation and regulations" so as to emphasize the importance of domestic legislation.[468] Chile also endorsed the reference to the ultimate aim of measures taken by States, namely "to prevent, mitigate, and prepare for disasters".[469] South Africa proposed adding the phrase "among others" as reference to the possibility of alternative measures that might be available.[470] Malaysia expressed a preference for the initial proposal of the Special Rapporteur, which had limited the adoption of "appropriate measures" to the establishment of institutional arrangements, without reference to the adoption of legislation and regulations.[471] Belarus recommended that the provision be reformulated to better reflect the economic and other constraints on the capacity of States to minimize natural disasters and to emphasize the importance of technical and other forms of assistance to affected States.[472]

196. Portugal recommended that the Commission further consider clarifying the degree of risk expected, so as to clarify when the duty to reduce the risk of disaster and the obligation to take measures to prevent, mitigate and prepare for disasters arise for States.[473] South Africa observed that not all States had the capacity or resources to take necessary and appropriate measures and therefore would fail to comply with the provision, especially when such States lacked a national legal framework that regulated disaster risk reduction.[474] India observed that it was unclear whether the provision applied also to industrial disasters, and suggested that account be taken of the principle of common but differentiated responsibility, envisaged under environmental law for developing States.[475] Tonga suggested that the commentary to the draft article clarify that a State's duty to prevent disasters included a duty to take necessary and appropriate measures to ensure that its actions did not increase the risk of disaster in other States.[476]

197. With regard to paragraph 2, the European Union proposed that reference also be made to practical preemptive measures that assisted people or communities in reducing their exposure and enhancing their resilience.[477] Chile,[478] Finland, on behalf of the Nordic States,[479] and Japan[480] recalled that the list of measures was not exhaustive. South Africa proposed further clarifying that point with the addition of the phrase "among others".[481] Finland, on behalf of the Nordic States, expressed the view that, while national legislation was important, it was not enough: effective practical measures were needed to reduce the risk and consequences of disasters.[482] Chile confirmed its understanding that, while the obligation to reduce risk entailed the adoption of measures primarily at the national level, if the measures required interaction between States or with other international actors then the applicable rule was to be found in draft article 8 [5], taken together with draft article 9 [5 *ter*].[483] China encouraged the Commission to include a reference to the role of space technology and other new technologies.[484] IFRC recommended that reference also be made to assessing and reducing the vulnerability and increasing the resilience of communities faced with natural hazards, as well as to empowering communities to make themselves safer through information, education and engagement in disaster risk reduction planning and activities.[485]

198. Malaysia expressed the concern that the requirement for States to collect and disseminate risk and past loss information might touch on matters affecting a State's national security, and expressed its preference that such obligation not be absolute but instead be guided by each State's existing laws, rules, regulations and national policies.[486]

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[462] A/C.6/68/SR.17, para. 113.

[463] A/C.6/68/SR.23, para. 48.

[464] A/C.6/68/SR.24, para. 67.

[465] A/C.6/68/SR.23, para. 40.

[466] *Ibid.*, para. 32.

[467] A/C.6/68/SR.24, para. 67.

[468] *Ibid.*, para. 16.

[469] *Ibid.*, para. 67.

[470] *Ibid.*, para. 17.

[471] A/C.6/68/SR.25, para. 24.

[472] A/C.6/69/SR.20, para. 82.

[473] A/C.6/68/SR.23, para. 76.

[474] A/C.6/68/SR.24, para. 15.

[475] *Ibid.*, para. 122.

[476] A/C.6/68/SR.25, para. 86.

[477] A/C.6/68/SR.23, para. 32, and statement of 4 November 2013, 23rd meeting of the Sixth Committee, sixty-eighth session of the General Assembly.

[478] A/C.6/68/SR.24, para. 68.

[479] A/C.6/68/SR.23, para. 40, and statement of 4 November 2013, 23rd meeting of the Sixth Committee, sixty-eighth session of the General Assembly.

[480] A/C.6/68/SR.23, para. 72.

[481] A/C.6/68/SR.24, para. 17.

[482] A/C.6/68/SR.23, para. 40.

[483] A/C.6/68/SR.24, para. 68.

[484] A/C.6/68/SR.26, para. 12.

[485] A/C.6/68/SR.25, para. 18.

[486] *Ibid.*, para. 24.

2. Comments and observations received in response to the request of the Commission

199. Australia reiterated its suggestion that it would be worthwhile to further consider the capacity of all States to fulfil the duties embodied in the draft article.

200. Finland, on behalf of the Nordic States, emphasized the importance of the principle of due diligence, as partly reflected in the duty of States to take preventive measures to reduce the risk of disasters set forth in draft article 11 [16]. It suggested that the commentary give further details on the element of risk prevention. In addition, the Nordic States noted that it was necessary to establish a duty for States not only to take relevant domestic measures, but also to engage in international cooperation, as mentioned in draft article 10 [5 *ter*].

201. Cuba proposed that paragraph 2 be amended to specify the different phases of "early warning".

202. Germany pointed to the need to adhere to the Sendai Framework and suggested the inclusion of a reference to early warning systems and risk transfer mechanisms.

203. The Association of Caribbean States observed that the concept of "dissemination", in paragraph 2, could add to the burden of the affected State if it were expected to develop a platform of data collected, and introduced issues of accessibility, maintenance and sharing protocols, among other things.

204. The European Union recommended reflecting in the draft article the recommendations of the Sendai Framework.

205. FAO agreed that the resilience of local populations was very important and should be addressed during both the pre-disaster and post-disaster phases. It observed that the commentary to the draft article could benefit from an analysis of the relationship between reducing the risk of disasters and the concept of resilience.

206. IFRC reiterated its position that asserting the duty to take necessary and appropriate steps to reduce disaster risks in a binding instrument would provide a helpful tool for champions of disaster risk reduction within Governments to make the case for greater attention to that critical activity. It was of the opinion that the list of measures in paragraph 2 should not be limited to assessing risk but also extend to assessing and reducing the vulnerability and increasing the resilience of communities faced with natural hazards.

207. IOM also supported the inclusion of an express reference to the Sendai Framework. It further expressed the view that the examples of measures listed in paragraph 2 were too narrow. It recalled that neither the Hyogo Framework for Action nor the Sendai Framework linked disaster risk reduction with humanitarian interventions *per se*. Reducing risk was a process mainly dependent on non-humanitarian actors, in particular when considering that its core elements were rooted in sustainable development and long-term local-level empowerment practices. The draft article needed to acknowledge more strongly the importance of interventions aimed at reducing vulnerability and building resilience.

208. The Secretariat of the International Strategy for Disaster Reduction welcomed the draft article, which it characterized as representing a critical advancement for disaster risk reduction and accountability in disaster risk management. At the same time, it proposed a number of refinements to the draft article and its commentary to place greater emphasis on risk.

209. The World Bank recommended making reference to existing standards and good practices for legislation, regulations and measures for disaster prevention and proposed the inclusion of spatial planning within the measures listed in paragraph 2.

3. Recommendation of the Special Rapporteur

210. The text of draft article 11 [16] was adopted on first reading before the adoption in 2015 of the Sendai Framework, which reflects current thinking about a rapidly evolving concept. The Special Rapporteur is, therefore, aware of the need to keep in mind the Sendai Framework when drafting the text of draft article 11 [16] to be adopted on second reading. As has been pointed out, the Sendai Framework goes beyond the focus on "disaster" by focusing on "risk". Accordingly, the Special Rapporteur can accept the suggestion to add in paragraph 1, after the word "prevent", the phrase "the creation of new risk and reduce existing risk"; as well as accept the change in the title of the draft article from "Duty to reduce the risk of disasters" to "Reduction of risk of disasters". To add the word "systematic" after "measures", as suggested, is not necessary since it is covered by the formula "necessary and appropriate" already found in the text.

211. As for paragraph 2, the Special Rapporteur deems it appropriate to repeat here the explanation given elsewhere, that the use of the verb "include" is intended to denote the non-exhaustive character of the list of measures mentioned.

212. In the light of the foregoing, the Special Rapporteur recommends that the first reading text of draft article 11 [16] be referred to the Drafting Committee as amended, to read as follows:

"Draft article 11. Reduction of risk of disasters

"1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent the creation of new risk and reduce existing risk and to mitigate and prepare for disasters.

"2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information and the installation and operation of early warning systems."

M. Draft article 12 [9]: Role of the affected State

"1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

"2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance."

1. Comments and observations made prior to the adoption of the first reading draft

213. Draft article 12 [9] was discussed in the Sixth Committee at the sixty-fifth, sixty-sixth and sixty-ninth sessions of the General Assembly.

214. It received general support from Colombia,[487] the Czech Republic,[488] El Salvador,[489] France,[490] Ireland,[491] Malaysia,[492] Romania,[493] Sri Lanka,[494] Switzerland,[495] Tonga[496] and the European Union.[497]

215. Pakistan considered draft article 12 [9] to be the essential provision in the draft articles, and indicated that the primacy of the affected State in the provision of disaster relief assistance was based on the central principle of international law, i.e., State sovereignty.[498] India maintained that the draft articles needed to recognize the sovereignty of the affected State, its responsibility towards its own nationals and its right to decide whether it required international assistance, as the affected State was in the best position to assess the needs of the situation and its own capacity to respond, and, if it accepted international assistance, the right to direct, coordinate and control such assistance within its territory.

216. Chile preferred to emphasize the relationship between the primary responsibility of the affected State for dealing with a disaster and the obligation to cooperate under international law, which was a relationship that did not detract from the sovereignty of the affected State.[499] Hungary, while affirming that the Commission's approach was in line with the principle of non-intervention, signalled the need to keep in mind recent developments, such as the principle of the responsibility to protect.[500] Finland, on behalf of the Nordic States, expressed the view that the responsibility of the affected State should not be exclusive, and called on the Commission to find the right balance between State sovereignty and the duty to cooperate.[501] Moreover, it pointed to the need to clarify the scope and limits of the affected State's exercise of its primary responsibility to protect persons affected by a disaster.[502] Spain, while supporting the provision, considered that further reflection was needed, since the absolute primacy of the will of the affected State might conflict with other fundamental international law norms and particularly with the principle of protection of human rights.[503]

217. With regard to paragraph 1, Pakistan supported a reference to the primacy of the affected State,[504] while Algeria agreed on the use of the term "duty" with respect to the role of the affected State.[505] Romania maintained that the affected State's duty to protect the persons in its territory was a duty towards such persons, and suggested the addition of a third paragraph on the affected State's duty towards the international community as a whole.[506] Ghana expressed the view that the primary responsibility of the affected State implied a duty to respect the right of victims, both citizens and foreign nationals, to receive assistance.[507]

218. The United Kingdom remarked that the provision did not make clear in legal terms what the content of the affected State's duty to ensure the protection of persons would be, nor to whom it would be owed or what it would entail in practice.[508] The Czech Republic[509] and the Netherlands[510] stressed the need to clarify the consequences of a failure by the affected State to provide assistance. The Netherlands also suggested examining the relationship between the principles in draft article 7 [6] and the assistance provided by the affected State.[511] The Islamic Republic of Iran called on the Commission to focus only on the rights and obligations of States. It did not share the view that the refusal of a State to accept international aid could be characterized as an internationally wrongful act if such refusal jeopardized the rights of victims of the disaster. In its view, it was for the affected State to determine whether receiving external assistance was appropriate or not, without such refusal triggering its international responsibility.[512] The Russian Federation, while conceding that the affected State had a responsibility to take measures to ensure the protection of persons on its territory, maintained that it was not a legal obligation.[513] It recommended replacing the expression "to ensure the protection", the meaning of which was not clear, with "to take all necessary measures to provide assistance".[514]

219. Mexico[515] expressed general support for paragraph 2. According to Argentina, the provision reflected reality. In its view, that primary role was also exclusive unless the affected State expressly delegated it.[516] The Russian Federation maintained that the formulation of the second paragraph could imply the transfer of the affected State's responsibility to any other party without

[487] A/C.6/66/SR.22, para. 27.

[488] A/C.6/65/SR.23, para. 25.

[489] Comments submitted in writing, 17 January 2011.

[490] A/C.6/66/SR.23, para. 38.

[491] A/C.6/66/SR.25, para. 21.

[492] A/C.6/66/SR.24, para. 122.

[493] *Ibid.*, para. 48.

[494] A/C.6/65/SR.26, para. 44.

[495] A/C.6/65/SR.22, para. 38.

[496] A/C.6/69/SR.20, para. 6.

[497] A/C.6/66/SR.21, para. 55.

[498] A/C.6/65/SR.24, para. 58.

[499] A/C.6/65/SR.26, para. 11.

[500] A/C.6/65/SR.21, para. 33. For general comments on the concept of the "responsibility to protect", see para. 10 above.

[501] A/C.6/65/SR.22, para. 31.

[502] *Ibid.*

[503] A/C.6/65/SR.24, para. 87.

[504] *Ibid.*, para. 58.

[505] A/C.6/66/SR.25, para. 31.

[506] *Ibid.*, para. 17.

[507] A/C.6/65/SR.24, para. 80.

[508] A/C.6/65/SR.24, para. 65.

[509] A/C.6/65/SR.23, para. 25.

[510] *Ibid.*, para. 45.

[511] *Ibid.*

[512] A/C.6/65/SR.24, para. 36.

[513] A/C.6/65/SR.23, para. 58.

[514] A/C.6/69/SR.19, para. 105.

[515] A/C.6/65/SR.25, para. 6.

[516] A/C.6/66/SR.25, para. 10.

the consent of the State in question, and consequently preferred the formula of "duty of the affected State".[517] Italy suggested that the term "primary role" be clarified in order to specify how the role of the affected State related to that of other States and international organizations and their access to disaster victims.[518]

220. IFRC called for clarification of the term "control", which was used in some treaties but not in General Assembly resolution 46/182 nor in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance developed by IFRC (IFRC Guidelines).[519] In its opinion, the commentary needed to address the issue, recognizing in particular the need for the affected State to respect the capacity of humanitarian organizations to abide by humanitarian principles.[520] Japan, while supporting the provision, cautioned that, in the light of the overarching purpose of protecting affected persons, it might be necessary for the affected State to coordinate aid offered by other States and non-State actors.[521] Austria placed on record its view that military relief personnel remained under the full command of the assisting State.[522] Greece recommended including an express reference to persons with disabilities.[523]

2. Comments and observations received in response to the request of the Commission

221. While Australia welcomed the reflection in draft article 12 [9] of the primary role of the affected State in preventing and responding to disasters, it advised caution when dealing with the assertion, in paragraph 1, of an unqualified duty on the part of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory.

222. Cuba proposed the inclusion of the phrase "and in accordance with its national legislation" after "sovereignty".

223. Germany expressed support for the approach that sovereignty entailed the duty of the affected State to ensure within its jurisdiction the protection of persons and the provision of disaster relief.

224. Switzerland expressed the view that paragraph 2 was more concerned with sovereignty and more intrusive towards humanitarian action than international humanitarian law.

225. The European Union welcomed the balance between the need to safeguard the national sovereignty of affected States, on the one hand, and the duty to cooperate, on the other, as provided for by the interplay of draft articles 13 [10], 14 [11] and 16 [12].

226. ICRC was of the view that the commentary did not sufficiently delineate the meaning of the terms "direction, control, coordination and supervision of such relief and assistance". In its view, the draft articles were potentially intrusive for impartial humanitarian organizations such as ICRC. It further recalled that no such requirements of direction, coordination and supervision were to be found in the relevant international humanitarian law rules. As such, the draft articles were oriented more towards sovereignty than the corresponding international humanitarian law provisions governing humanitarian access.

227. The Office for the Coordination of Humanitarian Affairs expressed support for the approach adopted in draft articles 12 [9] to 15 [13] to the concept of sovereignty, in particular the notion that sovereignty entailed the duty of the affected State to ensure within its territory the protection of persons and the provision of disaster relief.

228. The World Bank found the interaction between draft articles 12 [9] to 15 [13] to be confusing. It expressed the concern that such a legal framework could actually introduce additional formal due diligence requirements that could result in delays.

3. Recommendation of the Special Rapporteur

229. The concerns reflected in the comments and observations made do not call for changes to the text of draft article 12 [9], as adopted on first reading. The suggested inclusion of the phrase "and in accordance with its national legislation" after "sovereignty" appears unnecessary, as the exercise of sovereign powers must inevitably conform to the national legislation enacted by virtue of those powers. Consequently, the Special Rapporteur recommends that the first reading text of draft article 12 [9] be referred unchanged to the Drafting Committee.

N. Draft article 13 [10]: Duty of the affected State to seek external assistance

"To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate."

1. Comments and observations made prior to the adoption of the first reading draft

230. Draft article 13 [10] was discussed in the Sixth Committee at the sixty-sixth, sixty-seventh and sixty-ninth sessions of the General Assembly.

231. The draft article was supported by the Czech Republic,[524] Finland, on behalf of the Nordic States,[525] India[526] Romania,[527] Spain,[528] and Tonga, on behalf of the

[517] A/C.6/69/SR.19, para. 106.

[518] A/C.6/65/SR.23, para. 26.

[519] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, 2007.

[520] Statement of 29 October 2010, 25th meeting of the Sixth Committee, sixty-fifth session of the General Assembly.

[521] A/C.6/65/SR.25, para. 41.

[522] A/C.6/69/SR.19, para. 122.

[523] A/C.6/66/SR.24, para. 24.

[524] A/C.6/66/SR.23, para. 19.

[525] A/C.6/66/SR.21, para. 60.

[526] A/C.6/66/SR.25, para. 13.

[527] *Ibid.*, para. 18.

[528] A/C.6/66/SR.23, para. 50.

12 Pacific small island developing States.[529] Ireland expressed its appreciation for the formula "duty to seek" instead of a "duty to request".[530] The European Union remarked that the provision was premised on the primary responsibility of the affected State.[531] Spain asserted that the fact that the affected State had both a right and a duty to assist its own population was an essential consideration in judging the scope of the obligation of an affected State to consider and accept offers of external assistance, especially from States and international organizations.[532]

232. El Salvador remarked that the clause "to the extent that the disaster exceeds its national response capacity" could lead to delays in the provision of assistance, and proposed to substitute it with the wording used in the IFRC Guidelines.[533]

233. France agreed with the view expressed in the commentary that the affected State would be in the best position to determine the limits of its response capacity and suggested that such a view be reflected in the text of the draft articles.[534] Similarly, Malaysia stressed that the affected State should retain the right to determine whether a disaster exceeded its national response capacity.[535] Algeria remarked that draft article 13 [10] raised questions as to how to assess national response capacity, especially in an emergency situation.[536] The Republic of Korea pointed to the difficulties in determining whether a disaster exceeded the national response capacity of an affected State.[537] South Africa[538] and Cuba[539] were of the view that the affected State had the right to determine whether or not its internal capacity was sufficient to protect disaster victims within its jurisdiction and that it should not be obliged to seek or request such assistance. China stated that the affected State, by virtue of its sovereignty, had the right to decide whether or not to invite other States to participate in rescue and relief activities or to accept external assistance, in conformity with the universally accepted principle of consent of the affected State.[540]

234. The Netherlands expressed a preference for the previous formulation of the draft article (i.e., "if the disaster exceeds its national response capacity"). The formulation adopted on first reading, in its view, seemed narrower in scope, requiring a precise overview of all aspects of the national response capacity which, in the circumstances of a disaster, could impose a heavy burden on the affected State.[541]

235. Israel was of the view that international law recognized that an affected State was best placed to determine the gravity of an emergency situation on its territory and to frame appropriate responses, and accordingly it called for further clarification with respect to the responsibility of the affected State when the disaster exceeded its national response capacity, and invited the Commission to consider the scope and content of such a duty.[542] The Netherlands[543] and Portugal[544] invited the Commission to consider a situation in which the affected State was unwilling to provide assistance, or where it failed in its duty to seek assistance. According to Austria[545] and the Russian Federation,[546] it was not clear what the consequence of a denial, on the part of the State, that the disaster exceeded its national capacity would be. Poland observed that a duty to seek assistance raised the question of whether a State that did not seek external assistance would, by that fact alone, breach international law and, if so, what form of reparation such a violation would entail.[547] Austria,[548] France,[549] Malaysia,[550] the Russian Federation[551] and the United Kingdom[552] affirmed that under current international law there was no legal obligation on the affected State to seek assistance. Italy considered it useful to provide incentives to the affected State to seek assistance at an even earlier stage, as soon as it appeared appropriate to give prompt relief to the victims.[553]

236. According to Indonesia, the duty to seek assistance undermined sovereignty and was inconsistent with the right of the affected State not to consent to external assistance.[554]

237. Pakistan asserted that the assumption of the draft article that States might not seek external assistance did not reflect the current practice of international cooperation in the event of a disaster.[555] The Islamic Republic of Iran suggested reformulating the draft article so as to provide that the affected State "should" seek assistance.[556] China was of the view that the relationship between the affected State and the international community could not be simply defined as one between duties and rights, whereby the duty of the former to seek assistance and the right of the latter to offer it would be artificially set against each other, thereby negatively affecting international cooperation.[557] It considered it best to avoid the term "duty".[558]

238. The Islamic Republic of Iran was of the view that the obligation to cooperate was limited to subjects of international law, excluding non-governmental organizations,

[529] A/C.6/69/SR.20, para. 6.
[530] A/C.6/66/SR.25, para. 21.
[531] A/C.6/66/SR.21, para. 56.
[532] A/C.6/66/SR.23, para. 50.
[533] A/C.6/66/SR.22, para. 12.
[534] A/C.6/66/SR.23, para. 38.
[535] A/C.6/66/SR.24, paras. 112–113.
[536] A/C.6/66/SR.25, para. 33.
[537] A/C.6/66/SR.24, para. 82.
[538] A/C.6/69/SR.20, para. 102.
[539] A/C.6/66/SR.24, para. 27.
[540] A/C.6/65/SR.22, para. 65.
[541] A/C.6/66/SR.23, para. 48.
[542] *Ibid.*, para. 33.
[543] *Ibid.*, para. 48.
[544] A/C.6/66/SR.24, para. 66.
[545] A/C.6/66/SR.23, para. 23.
[546] A/C.6/69/SR.19, para. 107.
[547] A/C.6/67/SR.19, para. 73.
[548] A/C.6/66/SR.23, para. 23.
[549] *Ibid.*, para. 38.
[550] A/C.6/66/SR.24, para. 114.
[551] *Ibid.*, para. 37.
[552] A/C.6/66/SR.23, para. 45.
[553] A/C.6/66/SR.21, para. 91.
[554] A/C.6/66/SR.24, para. 70.
[555] A/C.6/66/SR.25, para. 7.
[556] A/C.6/66/SR.24, para. 50, and A/C.6/67/SR.20, para. 15.
[557] A/C.6/66/SR.23, para. 42.
[558] A/C.6/69/SR.20, para. 25.

and that, once the State accepted the relief, it retained, in accordance with its domestic law, the right to direct, control, supervise and coordinate the assistance provided in its territory.[559]

239. Thailand suggested reformulating the draft article as follows: "To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations." In its opinion, that wording would clarify that the affected State did have discretion as to which sources of assistance to accept, as opposed to what was implied by the words "as appropriate" in the existing draft.[560]

240. IFRC, while supporting the provision, expressed the need to clarify that the expression "as appropriate" meant that States could choose which actors to seek assistance from, and remarked that, on the basis of its experience, States could and should be selective. In its view, such an approach would minimize the problems associated with inappropriate assistance.[561]

2. Comments and observations received in response to the request of the Commission

241. While it recognized that all States were obliged to provide for an appropriate disaster relief system in order to protect their citizens, Austria was not convinced that the formulation struck the right balance between State sovereignty and the protection of the individuals. It maintained that, while the affected State should seek assistance to meet its responsibility in cases in which the national response capacity was exceeded, it was not under a duty to do so. It also pointed out that the draft article should not be understood to exclude the right of a State to seek assistance in the case of disaster where its response capacity had not been exceeded.

242. Cuba proposed changing the reference to the affected State from having the "duty" to seek assistance to having the "right" to do so.

243. Ecuador proposed including a reference to international appeals for assistance.

244. The European Union proposed the inclusion of a reference to the capacity to "cope" contained in the definition adopted by the Secretariat of the International Strategy for Disaster Reduction. It further noted that the requirement that "a disaster exceeds its national response capacity" accorded a certain discretional flexibility to the affected State without referring to objective criteria, which would determine when the respective requirement was fulfilled.

245. While IFRC concurred with the assertion that States sometimes had a duty to seek external assistance, it did not believe that States necessarily had to accept it from anyone who chose to offer it. It was often valid for States to choose among providers with the capacity and competence to provide assistance of appropriate quality. It was suggested that the commentary could be more explicit in explaining that the duty was to seek help, not to seek it from any one external actor.

246. The Office for the Coordination of Humanitarian Affairs called for the insertion in the commentary to draft article 13 [10] of a reference to the role of the Emergency Relief Coordinator and Resident Coordinator, in accordance with General Assembly resolution 46/182, together with an explanation of the key procedures that the affected State should follow when requesting external assistance.

247. WFP welcomed the inclusion of draft article 13 [10].

3. Recommendation of the Special Rapporteur

248. The Special Rapporteur points out that the expression "as appropriate" at the end of draft article 13 [10] is not intended to grant to the affected State discretion over whether or not to seek assistance, but rather to choose which actors to accept it from. The Special Rapporteur is also of the view that the text of draft article 13 [10] would benefit from making explicit that it was up to the affected State to determine whether a disaster exceeded its national response capacity. The text can be streamlined by having recourse to the term "other assisting actor" which, as defined in draft article 4, subparagraph (*c*), covers both other competent intergovernmental organizations and relevant non-governmental organizations. For obvious reasons, the defined term must be qualified by the adjective "potential".

249. Consequently, the Special Rapporteur recommends that the first reading draft article 13 [10] be referred to the Drafting Committee, reformulated to read as follows:

"Draft article 13. Duty of the affected State to seek external assistance

"When an affected State determines that a disaster exceeds its national response capacity, it has the duty to seek assistance from among other States, the United Nations and other potential assisting actors, as appropriate."

O. Draft article 14 [11]: Consent of the affected State to external assistance

"1. The provision of external assistance requires the consent of the affected State.

"2. Consent to external assistance shall not be withheld arbitrarily.

"3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer."

1. Comments and observations made prior to the adoption of the first reading draft

250. Draft article 14 [11] was discussed in the Sixth Committee at the sixty-fifth to sixty-ninth sessions of the General Assembly.

[559] A/C.6/66/SR.24, para. 51, and A/C.6/67/SR.20, para. 15.

[560] A/C.6/66/SR.24, para. 90.

[561] A/C.6/66/SR.25, paras. 41–42.

251. Chile maintained that draft article 14 [11] reflected a balanced conception of the modern concept of sovereignty.[562] Colombia emphasized that draft article 14 [11] reflected a balance between conflicting interests and values.[563] Spain[564] was satisfied with the approach adopted, which it considered to be fully consistent with the 1989 resolution of the Institute of International Law.[565] Pakistan expressed the view that the assumption underlying draft article 14 [11], that States would not seek assistance from the international community, undermined the practice of international cooperation in the event of disaster.[566] The Russian Federation observed that the logic of draft article 14 [11] was unclear in that it implied that the entire process of providing assistance was launched not by the request of the affected State but by the right of other actors to offer such assistance and, as such, it addressed more the question of consent than the process of requesting assistance.[567]

252. The inclusion in paragraph 1 of the principle according to which external assistance could only be provided with the consent of the affected State was welcomed by Austria,[568] China,[569] El Salvador,[570] France,[571] India,[572] Indonesia[573] Israel,[574] Malaysia,[575] Romania,[576] Sri Lanka,[577] and the Sudan.[578]

253. Austria remarked that such consent had to be valid consent pursuant to article 20 of the 2001 articles on responsibility of States for internationally wrongful acts[579] and recommend that this be mentioned in the commentary.[580] The Niger affirmed that the requirement to obtain the consent of the affected State was reasonable, but it could cause delay in cases where rapid reaction was needed.[581] Finland, on behalf of the Nordic States, indicated that, whereas draft article 14 [11] referred to the consent of the affected State for external assistance, it was important to underline that the affected State had the duty to ensure protection and assistance to those within its territory in the event of a disaster and to guarantee the access of humanitarian assistance to persons in need.[582]

254. Malaysia expressed its concern regarding the possibility of consent being implied in certain situations, in particular where no functioning government existed to provide consent. Whereas such a situation could be acceptable from a humanitarian standpoint, given that no consent could be given when a government did not exist, it did, however, raise the question of who was to decide whether a functioning government existed.[583]

255. Regarding paragraph 2, Chile supported maintaining the word "withheld", as proposed by the Commission, which denoted an obligation on the affected State, balanced with the sovereign right recognized in paragraph 1.[584] Paragraph 2 was supported by Austria[585] and the United Kingdom,[586] the latter of which noted that, in the context of armed conflict, such a refusal could amount to a breach of international humanitarian law. The Sudan agreed that it was important to clarify that consent should not be withheld arbitrarily and recommended that it be made clear that the failure to consent should not prejudice affected persons.[587] The possibility of exploring the legal consequences in cases where consent was arbitrarily withheld was suggested by the United Kingdom,[588] Ireland[589] and Portugal, the latter of which maintained that such a refusal could give rise to an internationally wrongful act if it undermined the rights of affected persons under international law.[590] Austria noted that, under existing international law, other States would not be able to act without the consent of the affected State, even if the latter incurred international responsibility by refusing assistance.[591]

256. Ireland recommended that paragraph 2 also include a reference to withdrawal of consent, such that consent to external assistance may not be withheld or withdrawn arbitrarily.[592] China suggested a reformulation of paragraph 2. In its opinion, the words "shall not" should be changed to "should not", given that neither customary international law nor State practice recognized a legal obligation on affected States to accept external assistance.[593] For the Russian Federation, the purpose of the draft article was to stipulate the moral and political duty of an affected State rather than a legal obligation that would entail international legal consequences in the event of non-compliance.[594]

257. Argentina,[595] India[596] and Israel[597] suggested further clarification of the meaning of the notion of

[562] A/C.6/66/SR.24, para. 9.

[563] A/C.6/66/SR.22, para. 27.

[564] A/C.6/69/SR.21, para. 38.

[565] Resolution by the Institute of International Law on "The protection of human rights and the principle of non-intervention in internal affairs of States", adopted on 13 September 1989, *Yearbook*, vol. 63 (1990), Session of Santiago de Compostela (1989), Part II, p. 339 (available from www.idi-iil.org, *Publications and Works*, *Resolutions*).

[566] A/C.6/66/SR.25, para. 7.

[567] A/C.6/69/SR.19, para. 108.

[568] A/C.6/66/SR.23, para. 24.

[569] *Ibid.*, para. 42.

[570] A/C.6/66/SR.22, para. 13.

[571] A/C.6/66/SR.23, para. 39.

[572] A/C.6/66/SR.25, para. 13.

[573] A/C.6/69/SR.21, para. 8.

[574] A/C.6/66/SR.23, para. 33.

[575] A/C.6/66/SR.24, para. 116.

[576] A/C.6/66/SR.25, para. 19.

[577] A/C.6/66/SR.27, para. 20.

[578] A/C.6/69/SR.25, para. 11.

[579] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[580] A/C.6/66/SR.23, para. 24.

[581] *Ibid.*, para. 54.

[582] A/C.6/66/SR.21, para. 60.

[583] A/C.6/66/SR.24, para. 116.

[584] *Ibid.*, para. 9.

[585] A/C.6/66/SR.23, para. 24.

[586] A/C.6/69/SR.19, para. 166.

[587] A/C.6/69/SR.25, para. 11.

[588] A/C.6/66/SR.23, para. 45.

[589] A/C.6/66/SR.25, para. 22.

[590] A/C.6/65/SR.23, para. 13, and A/C.6/66/SR.24, para. 66.

[591] A/C.6/66/SR.23, para. 24.

[592] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[593] A/C.6/66/SR.23, para. 42.

[594] A/C.6/66/SR.24, para. 37.

[595] A/C.6/66/SR.25, para. 10.

[596] A/C.6/67/SR.20, para. 20.

[597] A/C.6/66/SR.23, para. 33.

arbitrariness. Ireland[598] and Malaysia[599] and sought clarification as to who was to decide on the seriousness of the situation requiring assistance and who would decide whether there was an arbitrary refusal of consent. The United Kingdom pointed to the difficulty in ascertaining arbitrariness.[600] France queried the exact scope of the provision.[601] The Islamic Republic of Iran expressed its concern that the term "arbitrarily" could lead to subjective biases and judgments concerning the behaviour of the affected State, which was within its rights to decide to refrain from accepting foreign assistance, and suggested referring to the relevant principles of the Charter of the United Nations to ensure that the cause of humanitarian assistance would not be abused by impinging on the sovereign rights of the affected State or interfering in its internal affairs.[602] It suggested that reference be made instead to the notion of "good faith",[603] so that the paragraph would be reformulated as "consent to external assistance shall be decided in good faith". It also expressed the view that the refusal to consent could not be regarded as arbitrary if the affected State had previously accepted appropriate assistance from another source.[604] Portugal called for the circumstances in which an affected State could refuse offers of assistance to be clearly defined.[605] South Africa requested that provision be made in the draft articles for situations in which an affected State might reject offers of assistance because it had the capacity and resources to address the situation itself or because it had already accepted assistance from another State or actor.[606]

258. Greece proposed including a specific explanation in the draft article, according to which: "Consent is considered to be arbitrary, in particular when in contravention of article [6 [8]]."[607] Thailand suggested revising the paragraph to read: "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably."[608] Algeria was of the view that the notion of a reasonable time frame in determining arbitrariness should be considered.[609] The Netherlands proposed the possibility of using the term "unreasonably" rather than the current word "arbitrarily".[610]

259. Whereas IFRC supported the conditionality on the power to withhold consent provided in paragraph 2, it remained concerned that the text did not clearly indicate that affected States could be selective about the external assistance they accept.[611]

260. With regard to paragraph 3, Portugal requested further clarification on the affected State making its decision regarding the offer of assistance "whenever possible". It suggested that the Commission specify what would occur in a scenario where it was not possible to make a decision and what the consequences would be with regard to the protection of persons.[612] El Salvador was of the view that the expression "whenever possible" was vague and could allow affected States excessive discretion in communicating their decision regarding the acceptance of assistance. According to El Salvador, the content of paragraph 3 should be divided to express two distinct ideas: first, that the State had a duty to communicate its response to an offer of assistance in a timely manner, bearing in mind the type of disaster that had occurred and the needs of the population; and, second, that in extreme situations, States might, for good reasons, not be able to respond immediately, or indeed at all, to an offer of assistance.[613] According to Thailand, the phrase "whenever possible" should also be understood to cover the situation where the affected State could not make its decision known because it might jeopardize international relations with another State.[614] France observed that it would appear to be difficult to require the affected State to provide its reasons in the event of refusal of assistance.[615]

261. According to IFRC, there was no indication in the draft articles as to who would make formal offers of assistance to an affected State. Neither IFRC nor its 186 member national societies generally made formal offers to States; many non-governmental organizations also rarely made formal offers to States concerning the assistance they provided. Paragraph 3 referred to offers made "in accordance with the present draft articles"; however, no procedure for making offers had been included in the draft articles. Moreover, notwithstanding the explanations in the commentary, it was unclear whether any temporal deadline for responding to offers was implied in paragraph 3. It noted that a reference should be made to such decisions being taken as quickly as possible in the light of the potentially urgent humanitarian needs.[616]

262. The Netherlands proposed reversing the order of draft articles 14 [11] and 16 [12] to have the right of third States and other entities to offer assistance to the affected State appear first, followed by the duty of the affected State not to arbitrarily withhold consent to such assistance.[617]

2. Comments and observations received in response to the request of the Commission

263. Reiterating its agreement with the basic requirement of consent of the affected State, Australia expressed reservations, however, about the duty placed on the affected State not to "arbitrarily" withhold its consent. In its view, no such duty existed under customary international law. It was not clear against which standards, and by whom, any perceived "arbitrariness" would be measured

[598] A/C.6/66/SR.25, para. 22.

[599] A/C.6/66/SR.24, para. 118, and A/C.6/69/SR.21, para. 48.

[600] A/C.6/66/SR.23, para. 45.

[601] A/C.6/66/SR.23, para. 39.

[602] A/C.6/66/SR.24, para. 52.

[603] Statement of 2 November 2012, 20th meeting of the Sixth Committee, sixty-seventh session of the General Assembly, and statement of 5 November 2013, 26th meeting of the Sixth Committee, sixty-eighth session of the General Assembly.

[604] A/C.6/66/SR.24, para. 52.

[605] *Ibid.*, para. 66.

[606] A/C.6/67/SR.19, para. 84.

[607] A/C.6/66/SR.24, para. 25.

[608] *Ibid.*, para. 91.

[609] A/C.6/66/SR.25, para. 33.

[610] A/C.6/66/SR.23, para. 48.

[611] A/C.6/66/SR.25, para. 43.

[612] A/C.6/66/SR.24, para. 66.

[613] A/C.6/66/SR.22, para. 13.

[614] A/C.6/66/SR.24, para. 91.

[615] A/C.6/66/SR.23, para. 39.

[616] A/C.6/66/SR.25, para. 43.

[617] A/C.6/66/SR.23, para. 48.

and whether it would be beneficial in practice to place on States a duty to seek or accept external assistance when they may be reluctant to do so. Failure to comply with any such duty would not give rise to any corresponding right of intervention by other States wishing to provide assistance.

264. Austria reiterated its endorsement of the principle of consent, which in its view should be valid consent in the sense of article 20 of the articles on responsibility of States for internationally wrongful acts. Austria also concurred with the duty not to deny consent arbitrarily. Even if consent was denied arbitrarily, under existing international law no other States would be entitled to substitute for the affected State and act without its consent, irrespective of any international responsibility incurred by the affected State. It also welcomed the duty of the affected State to publish its decision on any offer of assistance.

265. Finland, on behalf of the Nordic States, noted with satisfaction the requirement that consent to external assistance shall not be withheld arbitrarily. It recommended that the term "arbitrarily" be clearly defined in the commentary.

266. Germany was of the view that, although the consent of the affected State shall not be withheld arbitrarily, consent was nevertheless an indispensable requirement for every provision of external assistance.

267. Qatar proposed adding the phrase "or in a manner that indicates it was so withheld" at the end of paragraph 2.

268. The European Union preferred a case-by-case approach, suggesting that the commentary provide more detail on what was meant by the phrase "withheld arbitrarily" with regard to consent and what kind of motivation should be deemed acceptable, if an affected State refused assistance. It suggested that the commentary to draft article 14 [11] could include a link to draft article 15 [13] concerning the formulation of conditions on the provision of external assistance, given that the formulation of such conditions could contain the justification for refusing assistance or withholding consent.

269. IFRC concurred with the basic assertion that, whereas States' consent was required prior to the provision of outside assistance, such consent should not be withheld arbitrarily. IFRC was of the view that the rule set out a reasonable approach, leaving significant discretion with the State but affirming that such discretion should be not be abused in the face of humanitarian need. Given the opposition to the provision expressed by a number of States, however, it feared that its inclusion in the draft articles could jeopardize support for the project overall and noted that the problem of States refusing all offers of international aid was relatively rare in the context of disasters.

270. The Office for the Coordination of Humanitarian Affairs proposed rearranging the order of draft articles 14 [11] to 17 [14] to first refer to offers of external assistance, then consent, facilitation and conditions. The Office expressed support for paragraph 2 and noted that, in certain circumstances, an arbitrary withholding of consent might amount to a breach of international human rights law. It recommended that the provision also include a reference to the withdrawal of consent, such that consent to external assistance shall not be withheld *or withdrawn* arbitrarily. With regard to paragraph 3, the Office proposed including a requirement as to timeliness, such that the affected State shall, whenever possible, make known its decision regarding the offer within a reasonable time frame.

271. WFP also recommended the rearrangement of the sequence of 14 [11] to 16 [12].

272. The World Bank expressed the concern that the introduction of due diligence-type requirements could lead to delays in the provision of assistance.

3. Recommendation of the Special Rapporteur

273. The Special Rapporteur draws attention to the suggestion, with which he agrees, to rearrange the order of draft articles 14 [11] to 16 [12]. As currently numbered, the sequence he proposes is as follows: 16 [12], 14 [11], 15 [13]. For the purposes of the present report, however, and in order to avoid confusion, he will deal with each of those three draft articles in the order in which they appear in the first reading draft, with the understanding that their eventual referral to the Drafting Committee will be on the assumption that their order and numbering will be as he proposes.

274. Suggestions were made regarding the text of paragraphs 2 and 3 of draft article 14 [11]. With regard to paragraph 2, whereas some reservations were expressed regarding the provision requiring that consent not be arbitrarily withheld, only one suggestion was made for its suppression, on the grounds of expediency. However, for the Special Rapporteur and for many States and international organizations, that provision finds its rightful place in draft article 14 [11]. In this connection, he draws attention to the Secretary-General's request to the Office for the Coordination of Humanitarian Affairs, made in his report on the protection of civilians in armed conflict (S/2013/689), to engage in further analysis on the issue of arbitrary withholding of consent to humanitarian relief operations and the consequences thereof. As a result, as indicated in the introduction above, the Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflict have recently been completed, which deal in detail with the issue. Although the guidance document has been prepared in the context of armed conflict, its analysis of the arbitrary withholding of consent offers helpful insight that gives additional support to the inclusion of a similar provision in the final text of the draft articles on the protection of persons in the event of disasters.

275. With respect to some suggestions made for improvement of the text of paragraph 2, the Special Rapporteur sees no advantage in replacing the standard term "arbitrary" with "unreasonable" or "unjustified", given that those two latter terms are, in fact, component elements of the accepted meaning commonly attributed to what is "arbitrary". He agrees, however, that, as suggested, the text of paragraph 2 would benefit from adding a reference to the withdrawal of consent.

276. With regard to paragraph 3, the Special Rapporteur points out that the reference to "in accordance with the present draft articles" refers to the conformity of any offer of assistance with the letter and spirit of the draft articles and has nothing to do with compliance with any set formality not established by the draft. Good faith offers of assistance can be advanced in whatever form the potential assisting actor finds that can best serve their intended purpose. The Special Rapporteur, accordingly, finds merit in the suggestion to make express reference in the text to "good faith" in its wider commonly accepted meaning and not necessarily in its stricter definition as a principle of international law found in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. He can also support the suggestion to introduce the element of "timeliness" into the text.

277. In the light of the foregoing, the Special Rapporteur recommends that the amended first reading text of draft article 14 [11] be referred to the Drafting Committee, to read as follows:

"Draft article 14. Consent of the affected State to external assistance

"1. The provision of external assistance requires the consent of the affected State.

"2. Consent to external assistance shall not be withheld or withdrawn arbitrarily.

"3. When a good faith offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner."

P. Draft article 15 [13]: Conditions on the provision of external assistance

"The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought."

1. Comments and observations made prior to the adoption of the first reading draft

278. Draft article 15 [13] was discussed in the Sixth Committee at the sixth-seventh, sixty-eighth and sixty-ninth sessions of the General Assembly.

279. The need for any conditions on the provision of external assistance to be reasonable and in accordance with the duties of States to protect persons in their territory was affirmed by Slovenia.[618] South Africa also mentioned that only conditions that were reasonable, deemed necessary in the circumstances and in compliance with the provisions of the domestic law of the affected State and international law could be imposed by an affected State to ensure the realization of the primary goal of the protection of its people.[619] According to Indonesia, to strike a proper balance between a State's duty to protect its people in the event of disaster and its right to uphold its sovereignty, the conditions imposed by the affected State should be reasonable and not undermine the duty to protect.[620]

280. Mexico[621] and Portugal[622] maintained that conditions on the provision of external assistance had to be imposed in good faith, such that the affected State did not arbitrarily withhold consent for external assistance, given that to do so would amount to a breach of its obligation to ensure the protection of its people. The Russian Federation indicated that the formulation of draft article 15 [13] allowed the affected State a broad freedom of interpretation in formulating the conditions of such assistance and created the risk that references to international and national law could be made in bad faith, with the purpose of preventing the provision of assistance.[623] Portugal suggested that the Commission could consider situations where the conditions proved to be unreasonable or restrict assistance in a way that adversely affected its quality and did not offer proper protection to the persons affected by disaster, including cases involving violations of international law.[624] It was also of the view that it was worth considering the consequences of an incorrect assessment of the needs of the persons affected or a situation in which the affected State could not make such an assessment.[625]

281. Austria emphasized that draft article 15 [13] should reflect the rules on cooperation contained in draft article 8 [5].[626] Accordingly, an affected State was not free to impose conditions unilaterally; such conditions had to be the result of consultations between the affected State and the assisting actors, taking into account the general principles governing such assistance and the capacities of the assisting actors. The need for the affected State to undertake a needs assessment, preferably in cooperation with the relevant humanitarian agencies and assisting States, was suggested by Slovenia.[627]

282. Thailand, expressing its support for the formulation as adopted on first reading, was of the view that assisting actors should be sensitive to local factors, including food, culture, religion, language and gender. It observed that the conditions within an affected State could vary according to time frame and limits on quality and quantity of aid owing to the specific circumstances, need, security and safety of the country.[628]

[618] A/C.6/67/SR.18, para. 127.

[619] A/C.6/67/SR.19, para. 84.

[620] A/C.6/67/SR.20, para. 29.

[621] A/C.6/67/SR.19, para. 19.

[622] *Ibid.*, para. 61.

[623] Statement of 2 November 2012, 19th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[624] A/C.6/67/SR.19, para. 61.

[625] *Ibid.*

[626] A/C.6/67/SR.18, para. 85.

[627] *Ibid.*, para. 127.

[628] A/C.6/67/SR.19, para. 41.

283. Pakistan was of the view that an affected State should be able to impose whatever conditions it deemed necessary before accepting an offer of external assistance. It explained that the affected State, having primary responsibility, would be far more concerned than external actors with providing expedited facilitation of assistance and protection for persons in its territory.[629] The Islamic Republic of Iran maintained that, whereas the affected State had an obligation to facilitate the provision of humanitarian assistance, it could not be expected to yield to hefty legal commitments.[630] The Netherlands indicated that the draft article could place more emphasis on the need for the affected State to remove obstacles in national law that would hamper the speedy provision of assistance in cases where national capacity was insufficient.[631]

284. Mexico maintained that conditions on the provision of external assistance had to be in accordance with international law and national legislation,[632] as also affirmed by Chile,[633] France,[634] Spain[635] and Switzerland. Switzerland also pointed to the linkage with the humanitarian principles included in draft article 7 [6].[636] Slovenia emphasized that conditions must also not contravene the principles of humanity, neutrality, impartiality and non-discrimination or the basic human rights applicable in disaster situations.[637]

285. With regard to the term "national law", Malaysia observed that disasters were addressed by affected States not only through national legislation, but also through national administrative frameworks and policies. Malaysia thus proposed that the scope of draft article 15 [13] be broadened to indicate that the formulation of such conditions should also be in accordance with national law and the applicable national policies of the affected State.[638]

286. On "the identified needs of the persons affected by disasters", the European Union indicated that, under a needs-based approach, such a formulation appeared too vague: instead of only "taking into account" the identified needs, conditions should "actually reflect" the identified needs of the affected persons.[639] The United Kingdom agreed that a needs-based approach was preferable to a rights-based one.[640] El Salvador welcomed the use of the term "identified needs" as opposed to "identifiable needs", given that the needs of a population in the wake of a disaster existed as such, irrespective of the ease or difficulty with which they could be identified.[641] According to Portugal, reference to the identified needs of the persons affected by disaster and the quality of the assistance limited the possibility of broad interpretations and the imposition of random conditions.[642] Hungary welcomed the recognition of the obligation of the affected State to take into account the identified needs of the persons affected by disasters when formulating the conditions of external assistance.[643]

287. The Russian Federation objected to the reference, in paragraph (8) of the commentary, to the need for a procedure of objective assessment of the assistance required, which it considered as suggesting that the evaluation of the affected State could not be trusted.[644] Conversely, Ireland supported paragraph (8) of the commentary.[645]

288. The European Union proposed adding a reference to the special needs of women and in particular vulnerable or disadvantaged groups, including children, older persons and persons with disabilities, in the text of draft article 15 [13].[646]

289. With regard to the final sentence of draft article 15 [13], Malaysia confirmed that the identification of scope and type of assistance and the subsequent indication of the same to the external parties providing assistance was an essential step in the process of responding to a disaster in an affected State.[647] It was of the view that the duty/right of the affected State to indicate the scope and type of assistance sought should be addressed in a draft article separate from draft article 15 [13].[648] Pakistan agreed that the affected State should indicate the scope and type of assistance sought from other States.[649] Hungary welcomed the obligation of the affected State to take into account the quality of assistance when formulating the conditions of external assistance.[650] Singapore requested that the Commission consider the situation where an affected State received unsolicited offers of assistance. According to Singapore, it was unclear whether, in such a situation, an affected State could specify conditions without having to indicate the scope and type of assistance sought.[651] The Russian Federation suggested that the same limitations on formulating conditions should be imposed on States that provide assistance.[652]

290. In the view of IFRC, the third and fourth sentences of draft article 15 [13] could be read to imply that States should determine their "conditions" on aid on an *ad hoc* basis, after each disaster. IFRC recommended that States carefully consider and design the types of requirements

[629] A/C.6/67/SR.20, para. 32.

[630] Statement of 2 November 2012, 20th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[631] A/C.6/67/SR.19, para. 29.

[632] *Ibid.*, para. 19.

[633] *Ibid.*, para. 12.

[634] *Ibid.*, para. 95.

[635] A/C.6/67/SR.18, para. 117.

[636] *Ibid.*, para. 79.

[637] *Ibid.*, para. 127.

[638] A/C.6/67/SR.19, para. 111.

[639] A/C.6/67/SR.18, para. 72.

[640] A/C.6/67/SR.19, para. 66.

[641] *Ibid.*, para. 49.

[642] *Ibid.*, para. 61.

[643] A/C.6/67/SR.20, para. 52.

[644] A/C.6/68/SR.25, para. 39.

[645] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[646] A/C.6/67/SR.18, para. 72. See also Romania, in A/C.6/68/SR.24, para. 82.

[647] Statement of 2 November 2012, 19th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[648] *Ibid.*

[649] A/C.6/67/SR.20, para. 32.

[650] *Ibid.*, para. 52.

[651] A/C.6/68/SR.25, para. 109.

[652] *Ibid.*, para. 39.

that they would impose on external aid providers before a disaster struck, as a preparedness measure.[653] Ideally, those conditions would draw upon widely accepted standards of humanitarian quality and conduct, such as those contained in the Humanitarian Charter and Minimum Standards in Humanitarian Response of the Sphere Project[654] and the minimum standards in humanitarian response contained in the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.[655] The Republic of Korea suggested that every State put into place domestic measures and national legislation, with emphasis placed on prevention, before disasters occur.[656]

2. Comments and observations received in response to the request of the Commission

291. Austria reiterated its view that the conditions under which assistance is provided should not be the result of the unilateral decision of the affected State, but that of consultations between the affected State and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

292. Cuba proposed adding the following sentence at the end of the draft article: "The provision of external assistance cannot be dependent on elements that undermine the sovereignty of the affected State."

293. The Czech Republic agreed that the affected State could place conditions on the provision of external assistance and indicate the scope and type of assistance sought. It recommended that it be stated in the commentary that the affected State may indicate the general conditions of such assistance, *inter alia*, transport and security conditions, and points of contacts.

294. Finland, on behalf of the Nordic States, was of the view that the key aspect in draft article 15 [13] was the right of the affected State to deny unwanted or unneeded assistance and to determine the appropriateness of assistance. It suggested elaborating further on this aspect of humanitarian assistance in the commentary, by indicating that unsolicited or inappropriate assistance had been a problem in many affected States. The Nordic States also suggested that the expression "take into account" be replaced with "verifiably reflect".

295. The European Union was of the view that the right to apply conditions to assistance was not unlimited and had to be exercised in accordance with the draft articles and applicable rules of international and national law. It noted that, whereas reference was made to "needs" and "quality", the notion of "conditions" remained vague. It suggested that the Commission could either use a stronger formulation than "take into account" or add more explanations in the commentary. It also suggested that its relationship to draft article 17 [14] on the facilitation of external assistance be further clarified in the commentary.

296. ICRC distinguished the approach taken in the draft article, which it described as conferring on the affected State a "pick and choose" option, from the position prevailing under international humanitarian law.

297. IFRC observed that the draft article left it largely up to affected States to articulate any other "conditions" of assistance. In its view, this provided little incentive for a harmonized approach with regard to the quality of relief and failed to commit providers to minimum standards within the scope of this international instrument. It recommended that the draft article be enhanced with greater detail, taking inspiration from the IFRC Guidelines and binding international instruments.

298. IOM was of the view that the provision of external assistance should take into account the needs of persons affected by a disaster, in line with draft article 2 [2], including the special needs of vulnerable persons, which it suggested should include displaced persons and migrants (non-nationals). It recommended that the commentary indicate that conditions imposed on the provision of external assistance should not disproportionally limit the right of foreign States to provide assistance to their nationals caught in a crisis situation.

3. Recommendation of the Special Rapporteur

299. For the Special Rapporteur, the use of the term "national law" is not limited to legislation but extends to other regulatory options. The requirement that conditions must be in accordance with national law, which pre-exists the disaster, can be fulfilled either in advance or after its occurrence. Furthermore, the Special Rapporteur fails to see what advantage would be gained by moving unchanged the last sentence of draft article 15 [13] into a separate draft article. But if separation is meant to add something, the same result can be achieved by doing so within the draft article itself. In addition, he can subscribe to the suggestion to replace the expression "take into account" with "reflect".

300. The Special Rapporteur thus recommends that the first reading text of draft article 15 [13], as amended, be referred to the Drafting Committee, to read as follows:

"Draft article 15. Conditions on the provision of external assistance

"1. The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall reflect the identified needs of the persons affected by disasters and the quality of the assistance.

"2. When formulating conditions, the affected State shall indicate the scope and type of assistance sought."

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[653] A/C.6/67/SR.20, para. 63.

[654] The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response*.

[655] Code of Conduct for the International Red Cross and Red Crescent Movement and NonGovernmental Organizations in Disaster Relief, in "Principles and response in international humanitarian assistance and protection", document 95/C.II/2/1, 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, annex VI (see also *International Review of the Red Cross*, vol. 36, No. 310 (1996), annex VI).

[656] A/C.6/67/SR.18, para. 122.

Q. Draft article 16 [12]: Offers of external assistance

"In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State."

1. Comments and observations made prior to the adoption of the first reading draft

301. Draft article 16 [12] was discussed in the Sixth Committee at the sixty-sixth to sixty-ninth sessions of the General Assembly.

302. Austria,[657] the Czech Republic,[658] Finland, on behalf of the Nordic States,[659] France,[660] Poland,[661] Romania,[662] the Russian Federation,[663] and Slovenia[664] expressed their support for draft article 16 [12]. El Salvador considered that the question of whether there existed a right to offer assistance or simply a capacity to do so on the part of third actors merited further consideration.[665] The United States remarked that the question of the extent to which third actors had a right to offer assistance was likely to attract a wide range of divergent views and advised the Commission to structure its work in a way that would avoid the need for a definitive pronouncement on such issues.[666] Similarly, Greece considered the use of the term "right" to be confusing and suggested reformulating the draft article with a focus on the constructive character of the offer rather than on its legal qualifications.[667] Singapore,[668] Israel,[669] Pakistan[670] and Poland[671] doubted that offers of assistance were permissible as a right. According to Singapore, the focus should be on the duty of the affected State to give consideration to the offers of assistance received.[672] In its view, the draft article was not strictly necessary. A similar view was expressed by Indonesia.[673] The United Kingdom considered the provision to be superfluous in that, as a matter of sovereignty, States could always offer whatever they wanted.[674] The Russian Federation maintained that the provision restated the obvious.[675] India remarked that the question of whether such a right existed in the context of international cooperation needed to be clarified, bearing in mind that the guiding principle for receiving disaster assistance was the consent of the affected State.[676]

303. According to Mexico, the exercise of the right to offer assistance was subject to two constraints: first, only subjects of international law were entitled to exercise it and, second, it had to be exercised in accordance with the principle of noninterference in internal affairs.[677] South Africa maintained that the draft article should clearly state that the asserted right to offer assistance must not interfere in the internal affairs of the affected State.[678] El Salvador proposed reformulating the draft article to extend the right to offer assistance to all persons, both natural and legal.[679] Chile was of the view that offers of assistance should not be accompanied by conditions that were unacceptable to the affected State or delivered on a discriminatory basis.[680]

304. Poland,[681] Sri Lanka[682] and Thailand[683] proposed reformulating the draft article to state that it was a duty of the international community to provide assistance. Hungary supported the notion that the duty of cooperation with the affected State should include a duty to provide assistance, but it considered it wiser to formulate such an obligation as a strong recommendation.[684] Malaysia asserted that the duty to seek assistance set out in draft article 13 [10] would need to be mutually supported by a corresponding duty to assist, but it considered that the latter duty could not be categorically imposed on States and that States should be permitted to respond to requests for assistance in all manners that they deemed fit.[685] Accordingly, it proposed that the draft article read: Without prejudice to the right of the affected State to consent to/accept offers of assistance, in responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations may offer assistance to the affected State if the disaster exceeds its national response capacity.[686]

305. Belgium,[687]Germany,[688] Greece,[689] Ireland,[690] the Netherlands,[691] Slovenia[692] and Spain[693] expressed the view that, under contemporary international law, there existed no legal obligation on third States to provide assistance. Belgium was of the view that, if the Commission

[657] A/C.6/66/SR.23, para. 25.
[658] *Ibid.*, para. 19.
[659] A/C.6/66/SR.21, para. 60.
[660] A/C.6/67/SR.19, para. 95.
[661] A/C.6/68/SR.24, para. 107.
[662] A/C.6/66/SR.25, para. 19.
[663] A/C.6/66/SR.24, para. 37.
[664] A/C.6/66/SR.20, para. 12.
[665] A/C.6/69/SR.20, para. 90.
[666] A/C.6/66/SR.21, para. 69.
[667] A/C.6/67/SR.19, para. 57.
[668] A/C.6/66/SR.21, para. 75.
[669] A/C.6/66/SR.23, para. 33.
[670] A/C.6/66/SR.25, para. 7.
[671] A/C.6/66/SR.21, para. 86.
[672] *Ibid.*, para. 75.
[673] A/C.6/68/SR.25, para. 61.
[674] A/C.6/66/SR.23, para. 45.
[675] A/C.6/68/SR.25, para. 39.
[676] A/C.6/67/SR.20, para. 20.
[677] A/C.6/66/SR.22, para. 20.
[678] A/C.6/67/SR.19, para. 84.
[679] A/C.6/66/SR.22, para. 14.
[680] A/C.6/66/SR.24, para. 10.
[681] A/C.6/66/SR.21, para. 86.
[682] A/C.6/66/SR.27, para. 20.
[683] A/C.6/67/SR.19, para. 40.
[684] A/C.6/66/SR.24, para. 59.
[685] *Ibid.*, para. 120.
[686] A/C.6/67/SR.19, para. 110, and statement of 2 November 2012, 19th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.
[687] Comments submitted in writing, 8 May 2012.
[688] A/C.6/66/SR.23, para. 28.
[689] A/C.6/67/SR.19, para. 56.
[690] A/C.6/66/SR.25, para. 21.
[691] A/C.6/66/SR.23, para. 48.
[692] A/C.6/66/SR.20, para. 12.
[693] A/C.6/66/SR.23, para. 50.

were to propose such an obligation, it would have to be one of conduct, not of result.[694]

306. The Czech Republic,[695] Germany,[696] Pakistan[697] and Singapore[698] expressed their opposition to the treatment of States, intergovernmental organizations and non-governmental organizations on the same juridical footing. Austria welcomed the distinction introduced in the wording of the draft article as adopted on first reading.[699] The United States[700] proposed eliminating the distinction. In its view, whereas non-governmental organizations clearly had a different nature and legal status, that fact did not affect their capacity to offer assistance to an affected State in accordance with applicable law; indeed, they should be encouraged to do so. Accordingly, it proposed that the draft article be reworded to provide that States, the United Nations, intergovernmental organizations and non-governmental organizations "may offer assistance to the affected State, in accordance with international law and applicable domestic laws".[701] Germany affirmed that the draft article's formulation gave the impression that it conferred international rights directly on non-governmental organizations.[702]

307. The European Union reiterated its request that an express reference to regional integration organizations be made in the draft article or that a clarification that such entities were also covered by the reference be added in the commentary.[703] IFRC expressed the concern that neither it nor its member national societies were mentioned and suggested an appropriate clarification in the commentary.[704] Ireland welcomed the focus, in the commentary, on the role played by non-governmental organizations.[705]

2. Comments and observations received in response to the request of the Commission

308. Austria expressed its concern about treating international organizations, nongovernmental organizations and States as if they were on the same footing.

309. Cuba proposed the addition of the following sentence: "In all cases, the affected State shall be the one that requests external assistance and the offer of such assistance may not be subject to conditions."

310. The Czech Republic observed that the commentary did not refer to offers of assistance by individuals.

311. Switzerland noted that the provision was more concerned with sovereignty and intruding more upon humanitarian action than international humanitarian law.

312. ICRC noted that stating that non-governmental humanitarian agencies only may offer their services changes—and in a way denies—the right of initiative, to which impartial humanitarian organizations such as ICRC are entitled under international humanitarian law and which places such organizations in a privileged position.

313. IFRC considered it unnecessary to refer to a "right to offer", given that it addressed a problem that in practical terms did not exist. However, if the Commission were to keep the reference, additional wording qualifying or characterizing the assistance could be included, along the lines of article 3, paragraph 2, of the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts, which provided that assistance shall not be used as a "justification for intervening, directly or indirectly, … in the internal or external affairs" of the affected State. IFRC further reiterated its request for a clarification in the commentary concerning its relationship to its member national societies.

3. Recommendation of the Special Rapporteur

314. The Special Rapporteur observes that the use of the word "right" in draft article 16 [12] serves to emphasize that there exists no "duty" on the part of any assisting actor to provide assistance to an affected State. No duty exists for States either, when it is a question of simply making an offer of assistance, which is the proper subject matter of draft article 16 [12]. In this latter respect, it may not necessarily apply to competent intergovernmental organizations, relevant nongovernmental organizations and other entities, if their constituent instruments mandate them to make such offers. The words "right" in relation to the first and "may" in relation to the second type of organization, was meant to recognize their respective powers of initiative to offer assistance. The different terminology was chosen in order to stress that States and intergovernmental organizations, on the one hand, and non-governmental organizations, on the other, were not being placed on the same footing.

315. However, such a distinction, exacerbated by the use of the word "right", may in reality be a false one when placed in the perspective of the offer of assistance. In this context, what matters is the possibility open to all assisting actors to make an offer of assistance, regardless of the legal grounds on which they can base their action. This being the case, it becomes possible to remove the explicit mention of "other competent intergovernmental organizations" and "relevant non-governmental organizations" by employing the term "other assisting actor", as defined in draft article 4, subparagraph (*c*), qualified, as in draft article 13 [10], by the adjective "potential".

316. In the light of the foregoing, the Special Rapporteur recommends that the first reading text of draft article 16 [12] be referred to the Drafting Committee, reformulated to read as follows:

"*Draft article 16 . Offers of external assistance*

"In responding to disasters, States, the United Nations and other potential assisting actors may address an offer of assistance to the affected State."

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[694] *Ibid.*
[695] A/C.6/66/SR.23, para. 19.
[696] *Ibid.*, para. 28.
[697] A/C.6/66/SR.25, para. 7.
[698] A/C.6/66/SR.21, para. 75.
[699] A/C.6/68/SR.23, para. 62.
[700] A/C.6/68/SR.23, para. 47.
[701] *Ibid.*
[702] A/C.6/66/SR.23, para. 28.
[703] A/C.6/66/SR.21, para. 57.
[704] A/C.6/66/SR.25, para. 44.
[705] A/C.6/68/SR.25, para. 117.

R. Draft article 17 [14]: Facilitation of external assistance

"1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding in particular:

"(*a*) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

"(*b*) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

"2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law."

1. Comments and observations made prior to the adoption of the first reading draft

317. Draft article 17 [14] was discussed in the Sixth Committee at the sixth-seventh, sixty-eighth and sixty-ninth sessions of the General Assembly.

318. Several States, including Chile,[706] Japan[707] and Slovenia[708] expressed their general support for the content of the draft article, which was considered relevant for the effective and timely provision of disaster relief assistance. Belarus maintained that the commitment of all States, not just those directly affected, to promptly adopting appropriate legislative measures might be required by way of the progressive development of international law.[709]

319. Mexico was of the view that exemptions from compliance with domestic law should be provided for by the affected State under its laws, through mechanisms that were consistent with international law.[710] Indonesia maintained that, whereas the power to set conditions was essential for a State, the basis of cooperation was consultation and consent, elements that needed to be incorporated in the draft articles.[711]

320. According to El Salvador, the decision to waive domestic laws in order to ensure the provision of assistance was an internal matter for the affected State.[712] Given that the provision of humanitarian assistance in the wake of natural disasters was a dynamic process, Pakistan affirmed that the affected State should have a right to review the situation in the light of changes on the ground.[713]

321. Regarding the nature of measures to be adopted in this area, Malaysia took note of the understanding in the Drafting Committee that the reference to "take the necessary measures, within its national law", referred to, *inter alia*, legislative, executive and administrative measures, which could include actions taken under emergency legislation, and thus also extends to non-legal, practical measures designed to facilitate external assistance.[714]

322. The European Union suggested the deletion of the words "civilian and military" from draft article 17 [14], in order to refer only to "relief personnel",[715] whereas Switzerland expressed some concerns on the current wording, given that it appeared not to make any distinction between military aid and civilian aid.[716] Furthermore, taking into account that, under draft article 4, subparagraph (*e*), the term "relief personnel" extended its application to personnel sent for the purpose of providing disaster relief assistance or disaster risk reduction, Switzerland[717] and IFRC[718] emphasized that draft article 17 [14] equated persons sent to provide humanitarian relief in a time of crisis with those sent to assist in disaster risk reduction and development-related disaster preparedness in a time of calm, in particular with regard to the degree of protection required from affected States.

323. Austria supported the further elaboration of draft article 17 [14] in order to include additional issues in the list of measures aimed at facilitating the prompt and effective provision of external assistance. Reference was made to elements such as liability issues, reimbursement of costs, confidentiality, control, competent authorities, overflight and landing rights, telecommunications facilities, privileges and immunities and exemption from any requisition, export and transit restrictions.[719] The United States suggested adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon the termination of external assistance.[720] Conversely, Poland suggested removing the phrase "privileges and immunities" from draft article 17 [14], paragraph 1 (*a*). Given that the list of measures presented in the provision was not exhaustive, Poland considered it undesirable to place emphasis on the issue of granting privileges and immunities to relief personnel.[721]

324. Pakistan supported the obligation for the affected State to facilitate the assistance by making its legislation and regulations available to ensure the compliance of external actors with its national law and disaster preparedness framework, once the conditions of the affected State had been met.[722]

2. Comments and observations received in response to the request of the Commission

325. Australia reiterated its query as to whether all States possessed the capacity to fulfil the duty embodied in the provision.

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[706] A/C.6/67/SR.19, para. 13.

[707] A/C.6/69/SR.20, para. 54.

[708] A/C.6/67/SR.18, para. 128.

[709] A/C.6/69/SR.20, para. 82.

[710] A/C.6/67/SR.19, para. 19.

[711] A/C.6/67/SR.20, para. 29.

[712] A/C.6/67/SR.19, para. 49.

[713] A/C.6/67/SR.20, para. 33.

[714] A/C.6/67/SR.19, para. 112.

[715] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[716] A/C.6/67/SR.18, para. 79.

[717] A/C.6/69/SR.19, para. 129.

[718] A/C.6/69/SR.21, para. 74.

[719] A/C.6/67/SR.18, para. 86.

[720] A/C.6/68/SR.23, para. 49.

[721] A/C.6/68/SR.24, para. 107.

[722] A/C.6/67/SR.20, para. 33.

326. Austria reiterated its suggestion that a reference should be included to other issues addressed by the legislation, such as confidentiality, liability issues, reimbursement of costs, privileges and immunities, control, competence of authorities, overflight and landing rights, telecommunications facilities, exemption from any requisition, import, export and transit restrictions and customs duties for relief goods and services and the prompt granting of visas or other authorizations free of charge.

327. The Netherlands agreed with the decision not to merge draft article 18 with draft article 17 [14].

328. The Association of Caribbean States was of the view that the phrase "prompt and effective" could put undue burden on the affected State, which may very well be operating in crisis mode with the legal suspension of national legislation, such as a state of emergency. During such times, the focus should be on providing support as opposed to focusing on the facilitation of assistance. In its opinion, the duty of care rested with the responding actors.

329. IFRC recommended that the draft article be enhanced with greater detail, taking inspiration from the IFRC Guidelines and binding instruments such as the Tampere Convention or the AEAN Agreement on Disaster Management and Emergency Response. It further observed that draft articles 4 and 17 [14] treated civilian and military responses exactly the same in terms of the facilitation of assistance. Many States and the humanitarian community, however, supported the approach of the Oslo Guidelines, which called for military assets to be used only when civilian alternatives were inadequate and, when those alternatives were used, they should seek to avoid the direct dissemination of aid, providing instead infrastructure, transport and other more indirect support.

330. The World Bank expressed the concern that the reference to "within its national law" in the *chapeau* could result in lengthy delays in the delivery of relief where national laws did not specifically allow exception in cases of emergency.

3. Recommendation of the Special Rapporteur

331. The Special Rapporteur again points to the non-exhaustive character of the issues listed, made clear in draft article 17 [14] by the use of "in particular" in paragraph 1 and "such as" in its subparagraphs (*a*) and (*b*). He therefore sees no need to burden its text by adding to the examples given a long, still non-exhaustive number of relevant issues, which may be mentioned in the corresponding commentary. He is also not in favour of deleting the reference in subparagraph (*a*) to "privileges and immunities", a term of art which, given its comprehensive nature, is particularly apposite in the context of measures intended to facilitate external assistance. Furthermore, the Special Rapporteur considers that, given his recommended reformulation of the definition of the term "relief personnel" given in draft article 4, subparagraph (*e*), the term alone would suffice for paragraph 1 (*a*) of draft article 17 [14], without need for the qualifiers "civilian and military" or the addition of those set out in the Oslo Guidelines.

332. In the light of the foregoing, the Special Rapporteur recommends that, as reformulated, the first reading text of draft article 17 be referred to the Drafting Committee, to read as follows:

"Draft article 17. Facilitation of external assistance

"1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding in particular:

"(*a*) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement;

"(*b*) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

"2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law."

S. Draft article 18: Protection of relief personnel, equipment and goods

"The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance."

1. Comments and observations made prior to the adoption of the first reading draft

333. Draft article 18 was discussed in the Sixth Committee at the sixty-ninth session of the General Assembly. General support was expressed for the provision, especially regarding the inclusion of the expression "appropriate measures", as indicated in the statements of India,[723] Malaysia,[724] New Zealand,[725] South Africa[726] and Spain.[727] Finland, on behalf of the Nordic States,[728] Indonesia,[729] the Netherlands,[730] South Africa[731] and Spain[732] considered the obligation in question to be an obligation of conduct rather than of result.

334. Malaysia suggested the insertion of the phrase "subject to the available resources and capabilities" after the opening phrase "the affected State shall". Such a reference would emphasize the fact that the standard of care or due diligence might vary depending on the circumstances, including the economic situation of the affected State, the availability of technical expertise and resources and the magnitude of the disaster.[733]

[723] A/C.6/69/SR.21, para. 71.

[724] *Ibid.*, para. 50.

[725] *Ibid.*, para. 31.

[726] A/C.6/69/SR.20, para. 107.

[727] A/C.6/69/SR.21, para. 39.

[728] A/C.6/69/SR.19, para. 80.

[729] A/C.6/69/SR.21, para. 10.

[730] A/C.6/69/SR.20, para. 12.

[731] *Ibid.*, para. 107, and statement of 28 October 2014, 20th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[732] A/C.6/69/SR.21, para. 39.

[733] A/C.6/69/SR.21, para. 50.

335. Taking into account that, under draft article 4, subparagraph (*e*), the definition of the term "relief personnel" included personnel sent for the purpose of providing disaster relief assistance or disaster risk reduction, Switzerland[734] and IFRC[735] suggested that draft article 18 call upon States to take extraordinary measures to protect the security of personnel—to exactly the same degree for a disaster risk reduction adviser in a time of calm as for humanitarian relief personnel in the midst of a crisis.

2. Comments and observations received in response to the request of the Commission

336. Australia queried the capacity of all States to fulfil the duties embodied in the provision.

337. Finland, on behalf of the Nordic States, recommended some refinements to the commentary. It reiterated the Nordic States' agreement with the expression "appropriate measures", which it regarded as an obligation of conduct for the affected State rather than one of result, owing to the fact that several factors remained beyond the State's control in a disaster situation. It further proposed highlighting the duty of the affected State to take the best possible and reasonable measures available in the particular circumstances to protect the humanitarian personnel, equipment and goods, while following the principle of due diligence.

338. Germany reiterated its support for the draft article, given that the sufficient protection of deployed personnel, their equipment and goods was crucial to allow for States and other actors to provide humanitarian assistance efficiently.

339. Switzerland noted that, whereas draft article 18 considered the obligation to protect relief personnel, equipment and goods as an obligation of means, under international humanitarian law it was an obligation of result.

340. Whereas IFRC acknowledged the significance of the obligation of affected States to take appropriate measures to ensure the protection of relief personnel in their territory, it observed that the draft article did not recognize any corresponding rights and obligations of actors providing external assistance. In its view, the provision could benefit from additional text to confirm the duties of external actors to consult and cooperate with the affected State on matters of protection and security.

341. The Office for the Coordination of Humanitarian Affairs welcomed the inclusion of the draft article. It observed that sufficient protection of relief personnel, equipment and goods was an essential condition in order for any relief operation to be carried out effectively.

342. The World Bank pointed to the possibility that the affected State might not be able to provide protection for relief personnel, equipment and goods and raised the question of whether, in such circumstances, its obligation would extend to permitting the entry into its territory of security personnel engaged to provide the necessary protection.

343. WFP welcomed the inclusion in draft article 18 of the provision on the duty to protect relief personnel, equipment and goods, given that it could provide significant protection in addition to that which was set out in the Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol.

3. Recommendation of the Special Rapporteur

344. The Special Rapporteur recalls that no reference to "disaster risk reduction" is retained in his proposed reformulation of the definitions contained in subparagraphs (*d*), (*e*) and (*f*) of draft article 4. In addition, he sees no advantage to inserting the suggested phrase "subject to the available resources and capabilities" in this draft article, which is concerned with the protection of relief personnel, equipment and goods, given that such a provision so would refer to the situation that triggers the fulfilment of the duty to seek assistance. Such a situation is characterized in draft article 13 [10], which is concerned with a disaster that exceeds the affected States' national response capacity, informs the whole of the draft and therefore warrants no repetition in other individual draft articles.

345. The Special Rapporteur recommends that draft article 18, as adopted on first reading, be referred unchanged to the Drafting Committee.

T. Draft article 19 [15]: Termination of external assistance

"The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification."

1. Comments and observations made prior to the adoption of the first reading draft

346. Draft article 19 [15] was discussed in the Sixth Committee at the sixty-seventh, sixty-eighth and sixty-ninth sessions of the General Assembly.

347. Denmark, on behalf of the Nordic States, welcomed draft article 19 [15] on the termination of assistance.[736] Pakistan underlined the primary role of the affected State in the decision to terminate external assistance.[737] According to India, the termination of relief operations had to be ultimately a matter for decision by the affected State.[738] Thailand suggested that a certain degree of discretion should be allowed for affected States to consider terminating external assistance, especially for reasons of national security or public interest. In a similar vein, affected States should be able to terminate assistance that had become irrelevant or had deviated from the original offer.[739] The Russian Federation[740] suggested that draft article 19 [15] could include

[734] A/C.6/69/SR.19, para. 129.

[735] A/C.6/69/SR.21, para. 74.

[736] A/C.6/67/SR.18, para. 54.

[737] A/C.6/67/SR.20, para. 33.

[738] *Ibid.*, para. 20.

[739] A/C.6/67/SR.19, para. 41.

[740] A/C.6/68/SR.25, para. 40.

the clarification made in the commentary that: "When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided".

348. Chile supported the inclusion of a precise reference to the right of the affected State to terminate assistance "at any time".[741] Israel suggested that reference to a right to terminate assistance "at any time" should be extended to decisions adopted by the assisting States or the affected State.[742] The United Kingdom reaffirmed its view that the assisting State retained the right to withdraw and that withdrawal could not be conditioned on consultation.[743] El Salvador found the wording insufficiently precise, inasmuch as the central idea, as found in other international treaties, should be that the State providing assistance could cease doing so, upon prior notification, at any time it deemed appropriate.[744]

349. The inclusion of procedural aspects in draft article 19 [15], such as notification of termination and consultation, was supported by Chile,[745] Malaysia[746] and Portugal.[747] Pakistan affirmed that consultation among the affected State, the assisting State and other assisting recognized humanitarian actors before the termination of external assistance would add legal certainty.[748] Austria indicated that it would be helpful to provide for consultations as soon as possible.[749] IFRC welcomed the provision, given that it addressed an operational problem, namely, that international response activities were often terminated too abruptly, and noted that a premature decision to terminate assistance could be a setback to recovery.[750] Conversely, the Russian Federation considered the language of draft article 19 [15] to be unusual, because it implied that consultations between the affected State and assisting entities were to be treated as being a legal obligation.[751]

350. Ireland,[752] Portugal,[753] Romania,[754] Slovenia[755] and the European Union[756] maintained that, in the consultations with the affected State on the termination of assistance, the needs of the affected persons had to also be adequately taken into account so that the termination of external assistance did not adversely impact persons affected by a disaster. Slovenia emphasized that the principle of the affected State not arbitrarily withholding consent, contained in draft article 14 [11], also applied when considering the termination of assistance.[757] Mexico suggested that procedures for the termination of assistance should be provided for by the affected State under its laws through mechanisms that were consistent with international law on the matter.[758]

351. Singapore[759] and Slovenia wondered what consequences would arise if the consultations between the parties concerned were unsuccessful. In such cases, according to Slovenia, the primary role of the affected State to direct, control, coordinate and supervise relief and assistance had to be respected, even if the termination of external assistance should not endanger the needs of disaster victims.[760]

352. Denmark, on behalf of the Nordic States, indicated that further elaboration of the draft article might be needed, including the possibility of expressly referring to the repatriation of goods and personnel.[761]

2. Comments and observations received in response to the request of the Commission

353. Australia expressed the concern that the provisions appeared to introduce limits on the prerogative of the affected State to freely withdraw its consent to the presence of external actors providing assistance in its territory.

354. Finland, on behalf of the Nordic States, reiterated the suggestion that further revision and elaboration of draft article 19 [15] should be undertaken. In its view, the term "termination" did not properly represent or reflect what was understood as quality and accountability with regard to humanitarian response. Furthermore, whereas the draft article addressed the legal implications of the termination of external assistance, it should not overlook the importance of early recovery measures and the linkages and transition between humanitarian and development assistance. The Nordic States recommended including a clause allowing for the assisting State, and as appropriate other assisting actors, to repatriate their goods and personnel upon the end of their humanitarian assistance mission in possible transition to development assistance.

355. IFRC reiterated its satisfaction with the attention devoted to promoting an orderly approach to the termination of aid.

3. Recommendation of the Special Rapporteur

356. The Special Rapporteur considers that further precision could be attained in the text of draft article 19 [15] by inserting an express reference to the right of the actors concerned to terminate external assistance at any time. He sees no need to make specific reference in the text to the repatriation of equipment and goods, however, given that this option is already envisaged in paragraph 1 (*b*) of draft article 17 [14] by the use of the expression "disposal thereof".

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[741] A/C.6/67/SR.19, para. 14.

[742] A/C.6/67/SR.20, para. 38.

[743] A/C.6/67/SR.19, para. 66.

[744] *Ibid.* para. 49.

[745] *Ibid.*, para. 14.

[746] *Ibid.*, para. 113.

[747] *Ibid.*, para. 62.

[748] A/C.6/67/SR.20, para. 33.

[749] A/C.6/67/SR.18, para. 87.

[750] A/C.6/67/SR.20, para. 64.

[751] Statement of 2 November 2012, 19th meeting of the Sixth Committee, sixty-seventh session of the General Assembly.

[752] A/C.6/68/SR.25, para. 118.

[753] A/C.6/67/SR.19, para. 62.

[754] A/C.6/68/SR.24, para. 82.

[755] A/C.6/67/SR.18, para. 128.

[756] *Ibid.*, para. 72.

[757] *Ibid.*, para. 128.

[758] A/C.6/67/SR.19, para. 19.

[759] A/C.6/68/SR.25, para. 110.

[760] A/C.6/67/SR.18, para. 128.

[761] *Ibid.*, para. 54.

357. The Special Rapporteur recommends that the first reading text of draft article 19, as amended, be referred to the Drafting Committee to read as follows:

"*Draft article 19. Termination of external assistance*

"The affected State and the assisting State, and as appropriate other assisting actors, shall, in the exercise of their right to terminate external assistance at any time, consult with respect to such termination and its modalities. The affected State, the assisting State or other assisting actor wishing to terminate shall provide appropriate notification."

U. Draft article 20: Relationship to special or other rules of international law

"The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters."

1. Comments and observations made prior to the adoption of the first reading draft

358. Draft article 20 was discussed in the Sixth Committee at the sixty-ninth session of the General Assembly.

359. The inclusion of draft article 20 in its present form was supported by Chile,[762] Malaysia,[763] the Netherlands,[764] Spain[765] and the European Union.[766]

360. Thailand requested clarification regarding the application of the draft articles and other rules of international law in the event of disasters and asked whether examples of the latter could be included in the commentary.[767] Greece expressed a preference for a "notwithstanding" clause instead of the current "without prejudice" formulation. In its view, it would better convey the understanding that the draft articles remain applicable, alongside more specific treaties dealing with disaster response and prevention, to fill possible legal gaps.[768]

361. IFRC, although not opposed to the formulation of draft article 20, lamented the lack of reference to regional agreements, which formed an important part of disaster law.[769]

362. Whereas the Islamic Republic of Iran considered that the inclusion of a provision concerning the relationship between the draft articles and the Charter of the United Nations would be useful, given that it would highlight the cardinal role of the principles of the sovereignty and territorial integrity of the affected State enshrined in the Charter.[770] Ireland considered such a provision to be unnecessary.[771]

[762] A/C.6/69/SR.24, para. 46.

[763] A/C.6/69/SR.21, para. 51.

[764] A/C.6/69/SR.20, para. 12.

[765] A/C.6/69/SR.21, para. 40.

[766] A/C.6/69/SR.19, para. 72.

[767] A/C.6/69/SR.20, para. 70.

[768] A/C.6/69/SR.21, para. 17.

[769] Statement of 29 October 2014, 21st meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

[770] A/C.6/69/SR.21, para. 27.

[771] Statement of 27 October 2014, 19th meeting of the Sixth Committee, sixty-ninth session of the General Assembly.

2. Comments and observations received in response to the request of the w Commission

363. IFRC was of the view that draft article 20 should explicitly refer to regional and bilateral arrangements in its text and not merely in the commentary thereto.

3. Recommendation of the Special Rapporteur

364. The Special Rapporteur finds it useful, as suggested, to include in the text of draft article 20 an express reference to regional and bilateral treaties. He therefore recommends that, with that amendment, the first reading text of draft article 20 be referred to the Drafting Committee, to read as follows:

"*Draft article 20. Relationship to special or other rules of international law*

"The present draft articles are without prejudice to regional and bilateral treaties and special or other rules of international law otherwise applicable in the event of disasters."

V. Draft article 21 [4]: Relationship to international humanitarian law

"The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable."

1. Comments and observations made prior to the adoption of the first reading draft

365. Draft article 21 [4] was discussed in the Sixth Committee at the sixty-fourth, sixty-fifth and sixty-ninth sessions of the General Assembly.

366. Austria,[772] Colombia,[773] Cuba,[774] Finland, on behalf of the Nordic States,[775] Greece,[776] India,[777] Israel,[778] Mongolia[779] the Netherlands,[780] Poland,[781] the Russian Federation,[782] Sri Lanka,[783] Spain,[784] Thailand[785] and the United States[786] supported the exclusion of situations of armed conflict from the scope of application of the topic.

367. Some States maintained that, although armed conflicts should be excluded from the definition of disasters, the draft articles could also apply should a disaster take place during a time of an armed conflict. Greece favoured

[772] A/C.6/64/SR.20, para. 13.

[773] A/C.6/65/SR.20, para. 74.

[774] A/C.6/65/SR.23, para. 94.

[775] A/C.6/64/SR.20, para. 8.

[776] A/C.6/64/SR.21, para. 46.

[777] A/C.6/65/SR.25, para. 34.

[778] A/C.6/64/SR.23, para. 40.

[779] A/C.6/69/SR.24, para. 96.

[780] A/C.6/64/SR.21, para. 91.

[781] *Ibid.*, para. 73.

[782] A/C.6/64/SR.20, para. 47.

[783] A/C.6/64/SR.21, para. 53.

[784] A/C.6/64/SR.20, para. 48.

[785] A/C.6/64/SR.21, para. 15.

[786] *Ibid.*, para. 102.

an approach according to which the draft articles and international humanitarian law would apply in parallel, where appropriate, even if the latter body of law took precedence in times of armed conflict.[787] France was of the view that the mere existence of an armed conflict did not necessarily preclude application of the draft articles, even though, under the relevant *lex specialis*, the protection of persons during armed conflicts would be governed first and foremost by the applicable rules of international humanitarian law.[788] Chile, recognizing that international humanitarian law should prevail over other rules, maintained that the Geneva Conventions of 1949 and the Additional Protocols thereto, did not cover some aspects of disaster response that could occur during or as a result of armed conflict, in particular in the post-disaster phase.[789] El Salvador indicated that the draft articles should be construed as permitting their application in situations of armed conflict, to the extent that existing rules of international humanitarian law did not apply.[790]

368. Support for a "without prejudice" clause, to emphasize that the draft articles were without prejudice to the preferential application of the rules pertaining to international humanitarian law in cases of armed conflict, was expressed by Chile,[791] Ghana,[792] Ireland,[793] the Netherlands,[794] Romania,[795] Slovenia[796] and Spain.[797] Reference to international humanitarian law as the *lex specialis* applicable in situations of armed conflict was reiterated by Finland, on behalf of the Nordic States,[798] and Israel.[799]

369. Austria interpreted draft article 21 [4] to mean that the draft articles did not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered.[800]

370. Austria recommended aligning the text of the draft article with its commentary in order to clarify that the draft articles should apply also to situations of armed conflict, but only insofar as they did not contradict the applicable rules of international humanitarian law.[801] Mongolia also noted the incongruity between the text of the draft article and that of its commentary with regard to the application of the draft articles to disasters connected with armed conflicts.[802] IFRC welcomed the evolution of draft article 21 [4], which, in its view, appropriately avoided the potential for contradiction by excluding from the scope of the draft articles situations to which international humanitarian law applied. IFRC expressed its concern, however, about the final sentence of paragraph (3) of the commentary and paragraph (7) of the commentary to draft article 8 [5], which together seemed to introduce confusion and could lead to misapprehensions about the scope of international humanitarian law.[803]

371. The possibility of benefiting from specific examples of different scenarios in which the draft articles would apply together with the rules of international humanitarian law was suggested by Malaysia.[804] Slovenia suggested exploring the potential relationship of the draft articles with the rules pertaining to internally displaced persons and refugees.[805]

2. Comments and observations received in response to the request of the Commission

372. Austria drew attention, once again, to the inconsistency between the formulation of the draft article and the corresponding commentary, which, in its view, did not allow for a clear understanding of what the Commission envisaged. In the view of Austria, the draft articles should apply also to situations of armed conflict, but only insofar as they do not contradict the applicable rules of international humanitarian law.

373. The Czech Republic concurred with the position taken in the commentary, which foresaw the applicability of the draft articles in complex emergency situations, including those of armed conflict, to the extent that international humanitarian law did not apply. It also pointed to the discrepancy between the text of the draft article and the commentary. It called upon the Commission to align the text of the draft article with the commentary; a further analysis of the relationship between the draft articles and rules of armed conflict would be desirable.

374. The Netherlands reiterated its preference to have the draft article recast with a standard "without prejudice" clause.

375. Switzerland noted that the exclusion of armed conflicts had been removed, thus giving rise to the question of how the draft articles covered situations of armed conflict in which disasters occur. It recalled the various references to the applicability of the draft articles in "complex emergencies" in the commentaries to draft articles 8 [5], 20 and 21 [4] and expressed the view that, together, those commentaries introduced more ambiguity than clarity on the relationship between the draft articles and international humanitarian law. In its view, the exclusion of situations covered by international humanitarian law had the advantage of clarity.

376. The European Union noted that the content of the draft article did not seem to match the commentary thereto. Notwithstanding such inconsistency, "complex emergencies" gave rise to the question of how best to address persons in need in such situations. It proposed

[787] A/C.6/69/SR.21, para. 18.
[788] A/C.6/64/SR.21, para. 23.
[789] A/C.6/64/SR.20, para. 29.
[790] A/C.6/65/SR.23, para. 64.
[791] A/C.6/64/SR.20, para. 29.
[792] A/C.6/64/SR.22, para. 12.
[793] *Ibid.*, para. 18.
[794] A/C.6/64/SR.21, para. 91.
[795] A/C.6/64/SR.22, para. 24.
[796] A/C.6/64/SR.21, para. 70.
[797] *Ibid.*, para. 41.
[798] A/C.6/64/SR.20, para. 8.
[799] A/C.6/64/SR.23, para. 40.
[800] A/C.6/69/SR.19, para. 123.
[801] *Ibid.*
[802] A/C.6/69/SR.24, para. 96.
[803] A/C.6/65/SR.25, para. 49.
[804] A/C.6/64/SR.21, para. 38.
[805] *Ibid.*, para. 70.

presenting the relationship between the draft articles and international humanitarian law in the form of a "without prejudice" clause in order to ensure the applicability of the draft articles in situations of complex emergencies and clarifying in the commentary that nothing in the draft articles could be read or interpreted as affecting international humanitarian law.

377. ICRC pointed to the discrepancy between the rule contained in draft article 21 [4] and its commentary. It recommended aligning the commentary with the text of the draft article to indicate that the draft articles would not apply in situations of armed conflict, including "complex emergencies" as defined by the Commission's commentary. ICRC took issue with the assumption, expressed in the commentary, of the possibility of gaps existing in international humanitarian law and of the potential inapplicability of certain rules of international humanitarian law. In its view, international humanitarian law applied in situations where armed conflict overlapped with a natural disaster, and there was a set of sufficiently detailed provisions to deal with the protection and assistance issues arising from "complex emergencies". As such, it was crucial that the draft articles and their commentaries did not contradict the rules of international humanitarian law. The only way of doing so would be to ensure that the draft articles and their commentaries unambiguously excluded situations of armed conflict from the scope of application of the draft articles.

378. IFRC was of the view that the draft articles should not apply in situations of armed conflict, given that the particular dynamics of conflict had not been adequately considered in their design. No guidance was provided as to when international humanitarian law would or would not apply, and indeed none could be expected, given that the draft articles would not be the appropriate instrument to fundamentally define the scope of the Geneva Conventions of 1949, and this invited confusion and contradiction without adding real value in operations.

379. The Office for the Coordination of Humanitarian Affairs expressed the concern that the draft article appeared to be inconsistent with the commentary and, accordingly, did not provide a clear understanding of the relationship between the draft articles and international humanitarian law. The Office considered that the draft articles should apply to so-called "complex disasters" that occur in the same territory in which an armed conflict is taking place, without prejudice to the parallel application of international humanitarian law and when the rules of international humanitarian law did not address the specific disaster-related issue.

3. Recommendation of the Special Rapporteur

380. The Special Rapporteur points out that the draft articles on the protection of persons in the event of disasters are not intended to constitute a restatement of international humanitarian law, something which, in any event, they could not be. On the contrary, the integrity of that body of law is carefully preserved throughout the present draft, in particular by means of the specific provision embodied in draft article 21 [4], even though it might have been adequately protected by draft article 20.

381. As explained in paragraph 4 above, questions regarding the drafting of the commentary to the draft articles would be addressed once a provisional final text of the draft articles has been adopted. The Special Rapporteur is of the view that a "without prejudice" clause would better convey the intended meaning of draft article 21 [4]. He therefore recommends that the following text for draft article 21 be referred to the Drafting Committee:

"*Draft article 21 [4]. Relationship to international humanitarian law*

"The present draft articles are without prejudice to the rules of international humanitarian law applicable in the event of disasters."

Chapter II

Draft preamble

A. Introduction

382. In the course of the first reading by the Commission, in 2014, of its draft articles on the protection of persons in the event of disasters, the suggestion was made that the draft needed to be supplemented by a preamble, to be prepared and considered during the second reading in 2016. Responding to that suggestion, the Special Rapporteur has deemed it appropriate to include in the present report his recommendation for the text of the corresponding preamble.

383. In the past, the Commission has submitted to the General Assembly final draft articles on various topics, containing a preamble. This has been the case for texts recommended to form the basis of a convention[806] or to be transformed later into a binding text,[807] as well as for instruments stating principles[808] in a specific area of international law.

384. The following draft preamble, recommended by the Special Rapporteur, aims at providing a conceptual framework for the draft articles, setting out the general

[806] Draft Convention on the Elimination of Future Statelessness and draft Convention on the Reduction of Future Statelessness, *Yearbook … 1954*, vol. II, document A/2693, p. 143; draft articles on nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, para. 47 (for the final text, see General Assembly resolution 55/153 of 12 December 2000, annex).

[807] Draft articles on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq.*, para. 53 (for the final text, see General Assembly resolution 63/124 of 11 December 2008, annex).

[808] Draft articles on prevention of transboundary harm from hazardous activities (see footnote 388 above); draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, para. 66 (for the final text, see General Assembly resolution 61/36 of 4 December 2006, annex).

context in which the topic of the protection of persons in the event of disasters has been elaborated and furnishing the essential rationale for the draft articles.

Recommendation of the Special Rapporteur

385. The following text of a draft preamble is proposed for the consideration of the Commission:

"*Draft preamble*

"*Bearing in mind* Article 13, paragraph 1 (*a*), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

"*Considering* the increasing frequency and severity of natural and human-made disasters and their subsequent short-term and long-term damaging impact,

"*Deeply concerned* about the suffering of the persons affected by disasters and conscious of the need to respect and protect their dignity and rights in such circumstances,

"*Mindful* of the importance of strengthening international cooperation in relation to all phases of a disaster,

"*Stressing* the fundamental principle of the sovereign equality of States and its corollary, the duty not to intervene in matters within the domestic jurisdiction of any State and, consequently, reaffirming the primary role of the affected State in the taking of action related to the provision of disaster relief and assistance,

"The … agree as follows:"

B. First paragraph

"*Bearing in mind* Article 13, paragraph 1 (*a*), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,"

386. This paragraph restates wording similar to that used by the Commission in recent final drafts containing a preamble.[809] It focuses on the mandate given to the General Assembly to codify and progressively develop international law and, implicitly, on the consequential, related role attributed to the Commission.

C. Second paragraph

"*Considering* the increasing frequency and severity of natural and human-made disasters and their subsequent short-term and long-term damaging impact,"

387. This paragraph highlights the phenomenon of disasters, which has raised the concern of the international community, leading to the development by the Commission of legal rules in that area. The reference is to the verifiable upward trend of natural and human-made disasters increasing in frequency and severity, in terms of widespread loss of life, great human suffering and distress, as well as displacement or large-scale material or environmental damage, as stated in draft article 3 [3] on the definition of "disaster". Such a reference is commonly included in preambles found in disaster law instruments.[810]

388. Express mention is made to "natural and human-made disasters" to emphasize a distinctive characteristic of the present draft compared with some other instruments in the area, which have a more restricted scope of application, being limited to natural disasters. On the contrary, draft article 3 [3] and its commentary underline the absence of limitations relating to the origin of the event, whether natural or human made. As has been demonstrated by experience, disasters often arise from complex sets of causes, and therefore an express reference to the all-encompassing definition of disaster adopted by the Commission is pertinent in order to bring forward the choice it has made. The present report does explain that the term "disasters" included in the draft preamble covers both sudden and slow-onset and small and large-scale disasters.

[809] See articles on prevention of transboundary harm from hazardous activities (footnote 388 above); and draft articles on the law of transboundary aquifers (footnote 807 above).

[810] See ASEAN Agreement ("Concerned by the increasing frequency and scale of disasters in the ASEAN region and their damaging impacts both short-term and long-term"); Decision No. 1313/2013/EU of the European Parliament and of the Council, of 17 December 2013, on a Union Civil Protection Mechanism (hereinafter "European Union Decision on a Union Mechanism") ("In view of the significant increase in the numbers and severity of natural and man-made disasters in recent years and in a situation where future disasters will be more extreme and more complex with far-reaching and longer-term consequences as a result, in particular, of climate change and the potential interaction between several natural and technological hazards, an integrated approach to disaster management is increasingly important … The protection to be ensured under the Union [Civil Protection] Mechanism shall cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters, including … environmental disasters, marine pollution and acute health emergencies, occurring inside or outside the Union"); Inter-American Convention to Facilitate Disaster Assistance ("Considering the frequency of disasters, catastrophes, and calamities that take and threaten the lives, safety, and property of the inhabitants of the American hemisphere"); SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters ("*Concerned* at the increasing frequency and scale of natural disasters in the South Asian region and their damaging impacts both short-term and long-term"); Framework Convention on Civil Defence Assistance ("Deeply concerned over the increase both in the number and the seriousness of disasters of all kinds throughout the world, whether from natural causes or man-made"); Tampere Convention ("Recognizing that the magnitude, complexity, frequency and impact of disasters are increasing at a dramatic rate, with particularly severe consequences in developing countries"); Memorandum of Understanding between the Argentine Republic and the Republic of Cuba in the field of humanitarian assistance and disaster reduction (Havana, 19 January 2009), United Nations, *Treaty Series*, vol. 2774, No. 48843 ("Considering the increase in the occurrence and seriousness of disasters, both natural disasters and those caused by human interaction with the environment"); and Thirty-first International Conference of the Red Cross and Red Crescent, 28 November to 1 December 2011, resolution 7 on strengthening normative frameworks and addressing regulatory barriers concerning disaster mitigation, response and recovery, *International Review of the Red Cross*, vol. 94 (2012), p. 487 ("*concerned* about the growing impacts of natural disasters on the lives, livelihoods and well-being of people around the world, and in particular the poorest and most vulnerable communities").

389. The reference to "short-term and long-term" impact, which appears in the preambles to some instruments in this area, such as the ASEAN Agreement on Disaster Management and Emergency Response and the South Asian Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters, is intended to show that the focus of the present draft is not just on the immediate effects of a disaster. It also implies a far-reaching approach, addressing activities devoted to the recovery phase, as clearly stated in the commentary to draft article 1 [1], as adopted on first reading, concerning the scope *ratione temporis*.

D. Third paragraph

"*Deeply concerned* about the suffering of the persons affected by disasters and conscious of the need to respect and protect their dignity and rights in such circumstances,"

390. The third and fourth preambular paragraphs address the main objectives of the present draft articles, namely, the protection of persons affected by a disaster and the activities to be carried out by various actors to facilitate an adequate and effective response to disasters.

391. The third preambular paragraph emphasizes the paramount goal of the draft articles, namely, the protection of persons whose lives, well-being and property have been affected by disasters. This has been recognized in draft article 1 [1] on the scope of the draft articles and in other substantive provisions, such as draft articles 5 [7], 6 [8] and 7 [6], as adopted on first reading. As a result, the third preambular paragraph utilizes the term "suffering", which also appears in other disaster law instruments,[811] given that it encompasses various forms of prejudice, whether moral or material, to which persons affected by a disaster are subjected.

392. The final phrase, concerning "the need to respect and protect their dignity and rights in such circumstances", makes reference to another basic tenet of the draft, as reflected in draft articles 2 [2], 5 [7] and 6 [8], as adopted on first reading.

E. Fourth paragraph

"Mindful of the importance of strengthening international cooperation in relation to all phases of a disaster,"

393. The fourth preambular paragraph accords particular relevance to the promotion of international cooperation in the event of a disaster by means of the present draft articles, as contained in other preambles adopted by the Commission in areas where cooperation also plays a significant role.[812]

394. Cooperation, being the practical realization of the principle of solidarity, is also one of the main tenets of the current draft articles. It is closely linked with several aspects of the relationship between the affected State and assisting States or other assisting actors, as addressed in particular in draft articles 8 [5] to 19 [15], as adopted on first reading.

395. Similarly, the preambles of several disaster law instruments emphasize the positive role played by cooperation among relevant stakeholders in preventing and reducing the risk of disasters.[813] Reference is implicitly

[811] See the Inter-American Convention to Facilitate Disaster Assistance ("Convinced that the human suffering caused by such disasters can be relieved more effectively and swiftly by means of an instrument to facilitate such assistance and to regulate international procedures for providing it in such cases); General Assembly resolution 45/100 of 14 December 1990 ("*Deeply concerned* about the suffering of the victims of natural disasters and similar emergency situations, the loss in human lives, the destruction of property and the mass displacement of populations that results from them … *Considering* that the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity"); and General Assembly resolution 46/182 of 19 December 1991 ("*Deeply concerned* about the suffering of the victims of disasters and emergency situations, the loss in human lives, the flow of refugees, the mass displacement of people and the material destruction"). See also European Union Decision on a Union Mechanism ("The protection to be ensured under the Union Mechanism … shall cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters, including … environmental disasters, marine pollution, and acute health emergencies, occurring inside or outside the Union"); and ICRC and IFRC, *Report of the 30th International Conference of the Red Cross and Red Crescent, 26 to 30 November 2007* (Geneva, 2007), resolution 4, on adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, p. 49 ("*reaffirming* that the fundamental concern of mankind and of the international community in disaster situations is the protection and welfare of the individual and the safeguarding of basic human rights, as stated in the Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, adopted by the 21st International Conference of the Red Cross in 1969").

[812] See articles on prevention of transboundary harm from hazardous activities (footnote 388 above) ("*Recognizing* the importance of promoting international cooperation"); and draft articles on the law of transboundary aquifers (footnote 807 above) ("*Recognizing* the necessity to promote international cooperation").

[813] See ASEAN Agreement ("Reaffirming also …the Declaration of ASEAN Concord II of 7 October 2003 where ASEAN shall, through the ASEAN Socio-Cultural Community, intensify co-operation in addressing problems associated with, *inter alia*, disaster management in the region to enable individual members to fully realise their development potentials to enhance the mutual ASEAN spirit…Recalling also the Hyogo Declaration and the Hyogo Framework for Action set out by the World Conference on Disaster Reduction in January 2005, which, among others, stress the need to strengthen and when necessary develop co-ordinated regional approaches, and create or upgrade regional policies, operational mechanisms, plans and communication systems to prepare for and ensure rapid and effective disaster response in situations that exceed national coping capacities"); European Union Decision on a Union Mechanism ("Prevention is of key importance for protection against disasters and requires further action as called for in the Council Conclusions of 30 November 2009 and in the European Parliament Resolution of 21 September 2010 on the Commission's Communication entitled a 'Community approach on the prevention of natural and man-made disasters'. The Union Mechanism should include a general policy framework for Union actions on disaster risk prevention"); Inter-American Convention to Facilitate Disaster Assistance ("Mindful of the selfless spirit of cooperation that prompts the states of this region to respond to events of this kind, which are inimical to the peoples of the American hemisphere"); Tampere Convention ("Noting the history of international cooperation and coordination in disaster mitigation and relief … Further desiring to facilitate international cooperation to mitigate the impact of disasters"); General Assembly resolution 46/182 of 19 December 1991 ("*Mindful of the need* to strengthen further and make more effective the collective efforts of the international community, in particular the United Nations system, in providing humanitarian assistance"); Thirtieth International Conference of the Red Cross and Red Crescent, resolution 4 on Adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (see footnote 811 above) ("*recognizing* the

made to closely linked substantive provisions of the draft articles to underline the multifaceted nature of the actors involved in cooperative action, namely, States, intergovernmental and non-governmental organizations and private actors, and the role of cooperation in the fulfilment of the basic principles of humanity, no harm, independence, neutrality, impartiality and non-discrimination.

396. The mention of "all phases of a disaster" recognizes the reach of the draft articles into each and every component phase of the entire disaster cycle, as appropriate. It thus removes the need for a specific reference in the preamble to the various phases, characterizing them as prevention and preparedness and relief and recovery, as is sometimes done in comparable texts. To follow the latter path would presuppose having provided a legal or factual definition of such terms in the draft, which was not done, considering the lack of a common terminology even among humanitarian actors.

F. Fifth paragraph

"*Stressing* the fundamental principle of the sovereign equality of States and its corollary, the duty not to intervene in matters within the domestic jurisdiction of any State and, consequently, reaffirming the primary role of the affected State in the taking of action related to the provision of disaster relief and assistance,"

397. Recalling the fundamental principles of sovereign equality and nonintervention and the "primary role of the affected State" in the taking of action related to the provision of disaster relief and assistance underpins the reference previously made to international cooperation. In fact, cooperation should not be interpreted as diminishing the sovereignty of affected States and their prerogatives within the limits of international law. The deliberate mention of the role of State authorities is thus in line with draft article 12 [9], which singles out their primary responsibility in the direction, control, coordination and supervision relating to the provision of disaster relief and assistance.[814]

G. Sixth paragraph

"The … agree as follows:"

398. Given that the Special Rapporteur proposes below that the Commission recommend that its final draft articles form the basis of a treaty, an additional preambular paragraph to that effect is needed. Pending the adoption by the Commission of its recommendation, however, the Special Rapporteur refrains from providing herewith a suggested precise text for such a paragraph. Its eventual wording would have to emphasize the binding nature of the proposed instrument, according to formulas commonly included in the final section of comparable preambles. Reference might be limited to "States" as potential parties to the future instrument or extend its scope of application beyond States, in view of the fact that, under the relevant provisions of the draft, it could also be ratified by international organizations.

H. Other possible paragraphs

399. As presently conceived, the draft preamble avoids making specific reference to, or an endorsement of, relevant documents emphasizing action by States, such as the recently adopted Sendai Framework or, in other respects, the seminal General Assembly resolution 46/182. Given that the preamble is intended to be an integral part of a future binding text, it would stand to reason that a prudent approach should be taken to avoid the risk of crystallizing in it documents that are to be subsequently modified by international practice; an example being the shift from the Hyogo Framework to the Sendai Framework in the short span of 10 years. Nonetheless, some such documents have already been mentioned in the present report and will also be referred to, as appropriate, in the corresponding commentaries to the relevant draft articles when finally adopted.

400. That solution should be carefully weighed, however; a possible alternative would be to mention the relevant international documents in order to reaffirm and endorse the basic principles of disaster law already expressed therein. Such a solution was chosen for some of the preambles adopted by the Commission on other

sovereign right of affected States to seek, accept, coordinate, regulate and monitor disaster relief and recovery assistance provided by assisting actors in their territory"); General Assembly resolution 67/231 of 21 December 2012 ("*Emphasizing* also that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters … *Reaffirming* the importance of international cooperation in support of the efforts of the affected States in dealing with natural disasters in all their phases, in particular in preparedness, response and the early recovery phase, and of strengthening the response capacity of countries affected by disaster"); and General Assembly resolution 68/102 of 13 December 2013 ("Expressing its deep concern about the increasing challenges faced by Member States and the United Nations humanitarian response system and their capacities as a result of the consequences of natural disasters, including those related to the continuing impact of climate change, and reaffirming the importance of implementing the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, *inter alia*, by providing adequate resources for disaster risk reduction, including investment in disaster preparedness and capacity-building, and by working towards building back better in all phases from relief to development").

[814] See also General Assembly resolution 45/100 of 14 December 1990 ("*Reaffirming* the sovereignty, territorial integrity and national unity of States, and recognizing that it is up to each State first and foremost to take care of the victims of natural disasters and similar emergency situations occurring on its territory"); General Assembly resolution 67/231 of 21 December 2012 ("*Emphasizing* also that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters … *Reaffirming* the importance of international cooperation in support of the efforts of the affected States in dealing with natural disasters in all their phases, in particular in preparedness, response and the early recovery phase, and of strengthening the response capacity of countries affected by disaster"); General Assembly resolution 70/107 of 10 December 2015 ("*Emphasizing* also that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters"); and Thirtieth International Conference of the Red Cross and Red Crescent, resolution 4 on adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (see footnote 811 above) ("*recognizing* the sovereign right of affected States to seek, accept, coordinate, regulate and monitor disaster relief and recovery assistance provided by assisting actors in their territory").

final drafts, such as the preamble to the draft articles on the law of transboundary aquifers, in which reference is made to the Rio Declaration on Environment and Development[815] and General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources. Seen from this perspective, additional preambular paragraphs could be drafted in terms of "*Recalling*…" or "*Reaffirming*…" the principles adopted by relevant documents in this area.

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

Chapter III

Final form of the draft articles

1. Comments and observations made prior to the adoption of the first reading draft

401. The question of the final form to be given to the draft articles was raised during the debate in the Sixth Committee at various sessions of the General Assembly. The Czech Republic,[816] India,[817] the Russian Federation,[818] Spain[819] and the United Kingdom[820] expressed a preference for their adoption in the form of non-binding guidelines. For the United Kingdom, the development of non-binding guidelines or a framework of principles for States and others engaged in disaster relief was considered more likely to be of practical value than other forms.[821] The Russian Federation also proposed adoption in the form of a guide to practice,[822] and Germany suggested a set of recommendations.[823] Whereas Mexico indicated that it was open to the possibility of developing a convention, it nonetheless considered it would be more useful if the draft articles were presented in the form of guiding principles.[824]

402. Poland saw merit in the adoption of a framework convention, setting out general principles, which could form a point of reference for the further elaboration of special bilateral or regional agreements.[825] IFRC was of the view that strengthening the global legal framework by the adoption of an international convention would increase the potential to further enhance the work that had been accomplished through non-binding instruments.[826]

2. Comments and observations received in response to the request of the Commission

403. Australia considered the existing body of international law sufficient for providing the legal underpinnings of disaster risk reduction and response efforts. Accordingly, it considered that the Commission's work would be most valuable in cases where it assisted States in understanding and implementing their existing obligations. Praising the Commission for its extensive work in taking into consideration existing treaty obligations, those elements which sought to develop or create new duties or obligations seemed, for the time being, to be more appropriately pursued as best practice principles or guidelines.

404. The Netherlands indicated that, whereas the draft articles could be seen as an authoritative reflection of contemporary international law or an attempt to progressively develop the law, they were not themselves legally binding.

405. The European Union reiterated that the draft articles were already an important contribution, regardless of the form they may take, in support of persons in the event of disasters.

406. IFRC maintained that there was little point in issuing the draft articles as nonbinding guidelines, which would risk significant confusion and overlap with existing "soft law" documents, such as the IFRC Guidelines, which had already been endorsed by States and which provided more detail on operational issues. In principle, a global treaty could add value by providing greater momentum for existing efforts to develop rules at the national level and by establishing clearer reciprocity of commitments between receiving States and international responders. Alternatively, the Commission's work could be taken up at the regional level, where there existed momentum in the development of new instruments. It remained concerned as to whether an effort aimed at the development of a treaty might distract from developments at the national level.

407. IOM looked forward to the adoption of the draft articles in whatever form that States would consider the most appropriate.

408. The Office for the Coordination of Humanitarian Affairs supported the inclusion in the commentary of a reference to the status of the draft articles, as well as further discussion on whether the draft articles should form the basis of a binding international treaty.

409. WFP welcomed the possibility that the draft articles could become a treaty in the area of disaster response, which would be particularly useful in countries where WFP had not concluded a host agreement or where it had not been able to address comprehensively the

[816] A/C.6/64/SR.20, para. 43.

[817] A/C.6/69/SR.21, para. 70.

[818] A/C.6/66/SR.24, para. 37; A/C.6/68/SR.25, para. 37; and A/C.6/69/SR.19, para. 96.

[819] A/C.6/67/SR.18, para. 118.

[820] A/C.6/64/SR.20, para. 40; A/C.6/65/SR.24, para. 64; A/C.6/66/SR.23, para. 45; and A/C.6/69/SR.19, para. 166.

[821] A/C.6/64/SR.20, para. 40.

[822] A/C.6/65/SR.23, para. 58.

[823] A/C.6/68/SR.24, para. 60.

[824] A/C.6/67/SR.19, para. 20.

[825] A/C.6/64/SR.21, para. 78.

[826] A/C.6/69/SR.21, para. 76.

aspects covered by the draft articles. It expressed the hope that negotiations with State actors would benefit from the existence of a legal framework for assistance, which would allow assisting actors to focus their negotiations with affected States more specifically on what was needed to reduce the risk of emergencies and respond to them.

3. Recommendation of the Special Rapporteur

410. The Special Rapporteur wishes to note that, pursuant to its Statute, it is for the Commission to submit to the General Assembly the result of its final work on a given topic, accompanied by a recommendation on the final form it should take. It is ultimately up to the States represented in the General Assembly, however, to make a decision thereon. The fact that the Commission's final work may have taken the form of draft articles in no way prejudges the Commission's recommendation or the General Assembly's decision. The draft articles are not, in themselves, binding. Their binding effect would result from their being embodied in an international convention or judicially proclaimed to be rules of customary international law.

411. For the Special Rapporteur, the surest and most timely manner by which the draft articles on the protection of persons in the event of disasters can serve their purpose and become truly effective in the face of the increasing frequency and intensity of disasters would be to use them as the basis for the adoption of a binding instrument, such as an international convention.

412. In support of his position, the Special Rapporteur firmly subscribes to the forceful and persuasive comments and observations made in this regard by IFRC, the international body with the longest historical experience regarding the humanitarian response to disasters. The greater value attached to a binding instrument was recognized, with explicit reference to the Commission's work on the present topic, in the outcome statement on governance and legislation on disaster risk reduction, adopted at the parliamentary meeting convened by the Inter-Parliamentary Union, the oldest of international organizations, on the occasion of the third United Nations World Conference on Disaster Risk Reduction.[827] Strong support has been recently voiced for the adoption of a binding instrument on a closely related topic, climate change, by the Heads of State of France and the United States, among others.

413. A recommendation in favour of the conclusion of an international convention would be in full conformity with the practice of the Commission with regard to several of its final draft articles on a number of topics, most recently on the responsibility of States for internationally wrongful acts, the prevention of transboundary harm from hazardous activities, diplomatic protection, the effects of armed conflicts on treaties, law of transboundary aquifers, the responsibility of international organizations and the expulsion of aliens.

414. In the light of the foregoing, the Special Rapporteur strongly recommends to the Commission the adoption of its own recommendation to the General Assembly in favour of an international convention, to be concluded on the basis of its final draft articles on the protection of persons in the event of disasters.

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[827] Held on 14–18 March 2015 in Sendai, Japan.

ANNEX

Preamble and text of the draft articles on the protection of persons in the event of disasters, as proposed by the Special Rapporteur in his eighth report

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Preamble

Bearing in mind Article 13, paragraph 1 (*a*), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Considering the increasing frequency and severity of natural and human-made disasters and their subsequent short-term and long-term damaging impact,

Deeply concerned about the suffering of the persons affected by disasters and conscious of the need to respect and protect their dignity and rights in such circumstances,

Mindful of the importance of strengthening international cooperation in relation to all phases of a disaster,

Stressing the fundamental principle of the sovereign equality of States and its corollary, the duty not to intervene in matters within the domestic jurisdiction of any State and, consequently, reaffirming the primary role of the affected State in the taking of action related to the provision of disaster relief and assistance,

The … agree as follows:

Article 1. Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2. Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3. Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, displacement, or large-scale material, economic or environmental damage, thereby seriously disrupting the functioning of society.

Article 4. Use of terms

For the purposes of the present draft articles:

(*a*) "affected State" means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(*b*) "assisting State" means a State providing assistance to an affected State at its request or with its consent;

(*c*) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(*d*) "external assistance" means relief personnel, equipment and goods and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance;

(*e*) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance; military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need;

(*f*) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment and other objects for disaster relief assistance.

Article 5. Human dignity

In responding to disasters, States and other assisting actors shall respect and protect the inherent dignity of the human person.

Article 6. Human rights

Persons affected by disasters are entitled to the respect, protection and fulfilment of their human rights.

Article 7. Principles of humanitarian response

Response to disasters shall take place in accordance with the principles of humanity, no harm, independence, neutrality and impartiality, in particular on the basis of non-discrimination, while taking into account the needs of the most vulnerable.

Article 8. Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, in particular its Emergency Relief Coordinator, with the components of the Red Cross and Red Crescent Movement and with other assisting actors.

Article 9. Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and

making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 10. Cooperation for disaster risk reduction

The duty to cooperate enshrined in draft article 8 shall extend to the taking of measures intended to reduce the risk of disasters.

Article 11. Reduction of risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent the creation of new risk and reduce existing risk and to mitigate and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information and the installation and operation of early warning systems.

Article 12. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 13. Duty of the affected State to seek external assistance

When an affected State determines that a disaster exceeds its national response capacity, it has the duty to seek assistance from among other States, the United Nations and other potential assisting actors, as appropriate.

Article 14. Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld or withdrawn arbitrarily.

3. When a good faith offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

Article 15. Conditions on the provision of external assistance

1. The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall reflect the identified needs of the persons affected by disasters and the quality of the assistance.

2. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 16. Offers of external assistance

In responding to disasters, States, the United Nations and other potential assisting actors may address an offer of assistance to the affected State.

Article 17. Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding in particular:

(*a*) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement;

(*b*) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 18. Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

Article 19. Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall, in the exercise of their right to terminate external assistance at any time, consult with respect to such termination and its modalities. The affected State, the assisting State or other assisting actor wishing to terminate shall provide appropriate notification.

Article 20. Relationship to special or other rules of international law

The present draft articles are without prejudice to regional and bilateral treaties and special or other rules of international law otherwise applicable in the event of disasters.

Article 21 [4]. Relationship to international humanitarian law

The present draft articles are without prejudice to the rules of international humanitarian law applicable in the event of disasters.

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 2]

DOCUMENT A/CN.4/696 and Add.1

Comments and observations received from Governments and international organizations

[*Original: English/French/Spanish*]
[*14 March 2016 and 28 April 2016*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid*., No. 973, pp. 287 *et seq*.
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.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid*., No. 17513, p. 609.
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.
Treaty Establishing the European Economic Community (Rome, 25 March 1957)	*Ibid*., vol. 298, No. 4300, p. 3. See also the consolidated version of the Treaty Establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid*., vol. 993, No. 14531, p. 3.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986)	*Ibid*., vol. 1457, No. 24643, p. 133.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	*Ibid.*, vol. 2220, No. 39481, p. 3.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)	*Ibid.*, vol. 2296, No. 40906, p. 5.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	*Ibid.*, vol. 2051, No. 35457, p. 363.
ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)	ASEAN, *Documents Series 2005*, p. 157.
Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005)	United Nations, *Treaty Series*, vol. 2689, No. 35457, p. 59.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	*Ibid*., vol. 2515, No. 44910, p. 3.

Works cited in the present document

Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds.

Customary International Humanitarian Law, Volume 1: Rules. Cambridge, ICRC and Cambridge University Press, 2005.

Internal Displacement Monitoring Centre

Global Estimates 2015—People Displaced by Disasters. Norwegian Refugee Council/Internal Displacement Monitoring Centre, 2015. Available from www.internal-displacement.org, *Resources*, *Publications*.

International Strategy for Disaster Reduction

2009 UNISDR Terminology on Disaster Risk Reduction. Geneva, 2009. Available from www.undrr.org/publication/2009-unisdr-terminology-disaster-risk-reduction.

Sphere Project

Humanitarian Charter and Minimum Standards in Disaster Response, rev. ed. Geneva, 2011.

United Nations Children's Fund (UNICEF)

Core Commitments for Children in Humanitarian Action. New York, 2010.

Introduction

1. At its sixty-sixth session, in 2014, the International Law Commission adopted, on first reading, the draft articles on the protection of persons in the event of disasters.[1] Moreover, in paragraph 53 of the report, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC), for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs and the Secretariat of the International Strategy for Disaster Reduction, by the same date. By paragraph 6 of its resolution 69/118 of 10 December 2014, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles by 1 January 2016. The Secretary-General circulated a note, dated 26 November 2014, transmitting the draft articles to Governments and inviting their comments in accordance with the request of the Commission. Notes containing the draft articles were also circulated to competent international organizations and entities in October 2014, with an invitation to provide comments.

2. As at 13 April 2016, written replies had been received from Australia (8 January 2016), Austria (12 January 2016), Cuba (2 February 2016), the Czech Republic (1 January 2016), Ecuador (11 February 2015), Finland (also on behalf of Denmark, Iceland, Norway and Sweden) (18 December 2015), Germany (29 May 2015), Mexico (24 March 2016), the Netherlands (30 December 2015), Qatar (12 March 2015), Switzerland (12 January 2016) and the United States of America (13 April 2016).

3. As at 29 February 2016, written comments had also been received from the following 11 international organizations and entities: Office for the Coordination of Humanitarian Affairs (23 December 2015); Secretariat of the International Strategy for Disaster Reduction (8 December 2015); World Food Programme (WFP) (21 January 2016); Food and Agriculture Organization of the United Nations (14 January 2016); World Bank (3 November 2014); International Organization for Migration (IOM) (18 January 2016); Association of Caribbean States (28 January 2016); Council of Europe (25 November 2014); European Union (17 December 2015); ICRC (19 January 2016); and IFRC (21 January 2016).

4. The comments and observations received from Governments, international organizations and entities are reproduced below, organized thematically as follows: general comments; comments on specific draft articles; and comments on the final form of the draft articles.

[1] *Yearbook … 2014*, vol. II (Part Two), p. 61, para. 51. The text of the draft articles and related commentaries appear in *ibid.*, pp. 61 *et seq.*, paras. 55–56.

A. General comments and observations received from Governments

Australia

1. Australia is hopeful that the work of the Commission in highlighting the complex array of challenges inherent in international disaster risk reduction and response, coupled with the adoption in March 2015 of the Sendai Framework for Disaster Risk Reduction 2015–2030 (hereinafter, "Sendai Framework")[1] will reinforce continued international cooperative efforts. Initiatives such as the Sendai Framework, aimed at encouraging collaboration and the development of relationships of trust, are central to the provision of quality, flexible and tailored assistance in both situations of large-scale disasters (as contemplated by draft article 3 [3] of the draft articles) and recurring small-scale and slow-onset disasters.

2. Insofar as the draft articles consolidate existing rules of international law, Australia considers that they will usefully serve as a guide for States in implementing their prevailing international obligations.

3. To the extent that the draft articles also seek to progressively develop the law relating to the protection of persons in the event of disasters, Australia would encourage further discussion as to whether the proposed creation of new duties for States or the novel application of principles drawn from other areas represent the most effective approach. Australia emphasizes the importance that the work of the Commission be received with the broadest possible consensus; progressive development of the law in this field pursued too rapidly may raise an impediment to achieving such consensus.

4. Australia would wish to see a careful balance struck between those elements of the draft articles that may encroach on the core international law principles of State sovereignty and non-intervention and the likelihood that their implementation will effectively assure tangible and practical benefits in terms of reducing the risk of, ameliorating the effects of or improving recovery from disasters.

[1] General Assembly resolution 69/283, annex II.

Czech Republic

The Czech Republic especially appreciates that the Commission struck a balance among the principles of non-intervention and sovereignty as expressed mainly in draft articles 12 [9], 14 [11] and 15 [13] and the humanitarian principles and human rights that guide the provision of assistance by the assisting actors to the affected State and that are a cornerstone of the draft articles.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

1. The draft articles present a coherent set of codified norms in an increasingly relevant area of public international law. The Nordic countries are strong supporters of further strengthening the international disaster

relief and humanitarian assistance system and the present draft articles are a valued contribution to that purpose.

2. The preparation of the draft articles has involved finding a balance between different interests, most notably, on the one hand, the aspects of State sovereignty and, on the other, the needs of international cooperation in protecting persons and providing humanitarian assistance in the event of disasters. As reaffirmed several times during the drafting process in the Sixth Committee, it is the primary responsibility of the affected State to ensure the protection of persons affected by a disaster, as well as the provision of disaster relief.

3. The draft articles set a clear duty for the State affected by a disaster to initiate, organize, coordinate and implement external assistance within its territory when necessary and, in the absence of sufficient national response capacity or will, to seek external assistance to ensure that the humanitarian needs of the affected persons are met in a timely manner. The Nordic countries salute the particular attention given to the needs of the individuals affected by disasters, with full respect for their rights. In this regard, it must be highlighted that some people may be particularly vulnerable to abuse and adverse discrimination due to their status (age, gender, race etc.) and may require special measures of protection and assistance.

4. The Nordic countries would also like to highlight the diverse roles of other actors, such as intergovernmental, regional and relevant non-governmental organizations or other entities, like ICRC and IFRC, as referred to in the draft articles. As the number of different actors has increased and continues to do so, their coordination and interoperability becomes critically important when providing external assistance.

Germany

In general, the draft articles provide good recommendations, supporting international practice and domestic legislation in establishing effective national systems of disaster prevention, mitigation, preparedness and response.

Netherlands

Given their overall quality, the draft articles are expected to play an important role in improving the protection of persons affected by disasters, in particular in situations where the scale of a disaster exceeds the response capacity of the affected State.

United States of America

1. Although the United States has some specific concerns regarding the draft articles described in more detail below, it strongly supports the efforts of the Commission to improve protection for persons affected by disasters.

2. First, the United States remains concerned that several of the draft articles (including as described in the commentary) appear to articulate new legal "rights" and "duties", or to represent inaccurately the existing obligations of States. In some cases, the draft articles and commentary appear to represent attempts to develop the law progressively without specifically acknowledging that intention. The United States emphasizes its view that the Commission could best contribute to improving protection for persons affected by disasters by providing practical legal guidance, based on existing international law, to countries in need of or providing disaster assistance. For example, countries may be interested in ways in which they can incorporate international legal principles into their domestic laws on disaster response, or bilateral or regional agreements or arrangements for humanitarian assistance in the event of disasters. Therefore, the United States recommends that the Commission consider converting these draft articles into a more appropriate form for this purpose, such as principles or guidelines. If they remain as draft articles, the United States recommends that the commentary acknowledge that certain of the draft articles reflect proposals for progressive development of the law and should not, as a whole, be relied upon as a codification of existing law.

3. Second, whether the content is framed as rules or guidelines, the United States is concerned that some of the draft articles, as currently drafted, could impede the effective provision of assistance to persons affected by disasters. As explained in more detail below, draft article 14 [11] requires the consent of the affected State as a condition for the provision of external assistance, and fails to consider the possibility that some assistance could be permissible even in the absence of consent in certain circumstances. It is also ambiguous as to whether external assistance may be provided when consent is arbitrarily withheld. Draft article 16 [12] creates an unhelpful and impractical distinction between States, the United Nations and "other competent intergovernmental organizations", which have the "right" to offer assistance, and "relevant non-governmental organizations", which "may" offer assistance. Furthermore, there are some draft articles, noted below, which could benefit from clarification in order to avoid confusion among actors responding to a crisis. The United States would encourage the Commission to reconsider specific draft articles, identified below, in the light of the stated purpose of the document.

4. Third, as described in detail below in connection with draft article 3 [3], the United States has questions and concerns about the definition of "disaster" and considers it to be overbroad. In particular, the definition of disaster should clearly exclude events that routinely occur in armed conflict. Moreover, with respect to armed conflict, the United States considers draft article 21 [4] and the commentary thereto to be an insufficient response to the discord between the draft articles and international humanitarian law. The United States would strongly prefer to define "disaster" in a way that does not include the consequences of armed conflict. The Commission could then explain, either in the commentary or in a subparagraph of the definition, that a disaster may coincide in time and space with events constituting part of an armed conflict, and that in such a case—the "complex disaster" with which the Commission appears to be concerned—the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of the armed conflict, including the protection of war victims and belligerent occupation.

B. General comments and observations received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs is in broad agreement with the substance of the draft articles. The Office is pleased that the focus of the draft articles is on persons in need, coupled with a rights-based approach, as set out in draft articles 1 [1] and 2 [2].

Secretariat of the International Strategy for Disaster Reduction

1. The work of the Commission on the topic constitutes a critical and timely contribution to the efforts of States and other stakeholders to manage disaster risk.

2. Overall, there is a strong alignment and complementarity, as well as a functional relation, between the draft articles and the Sendai Framework, in that the former articulate the duty to reduce the risk of disasters and to cooperate, and the latter articulates modalities and measures that States need to adopt to discharge such duty.

World Food Programme

1. WFP welcomes the draft articles as it shares their inherent objective—the protection of persons in the event of disasters. WFP especially welcomes the real progress that the draft articles could make in advancing the development of rules in this area, as well as in the field of disaster prevention and relief assistance. Of particular interest to WFP are the provisions concerning the prevention of disasters (draft articles 10 [5 *ter*] and 11 [16]); the responsibility of the affected State to seek assistance where its national response capacity is exceeded (draft art. 13 [10]); and the conditions on the provision of assistance (draft art. 15 [13]).

2. Other provisions, such as the duty to protect relief personnel, equipment and goods (draft article 18), the duty to cooperate (draft articles 8 [5], 9 [5 *bis*], 10 [5 *ter*] and 11 [16]), the facilitation of external assistance (draft article 17 [14]), and the question of termination of external assistance (draft article 19 [15]) are also relevant to WFP operations.

3. WFP would welcome further discussion with regard to the adoption of common international standards through either the development of additional technical annexes concerning detailed aspects of relief assistance or through the establishment of a specific technical body comprising experts of States parties or a secretariat whose responsibility is to perform additional tasks related to the development of technical standards.

International Organization for Migration

1. The text of the draft articles and the commentaries thereto, in its present drafting, does not reflect the importance of issues related to human mobility in the context of disasters. The only two mentions of this topic are a quote from the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and International Recovery Assistance, adopted by IFRC in 2007,[1] referring to displaced persons, among other vulnerable groups, in paragraph (7) of the commentary to draft article 7 [6]; and a mention of internally displaced children in paragraph (5) of the commentary to draft article 13 [10].

2. The second issue of concern for IOM is the specific plight of migrants in disaster situations. This is an issue that has attracted increased attention from States. In paragraph (2) of the commentary to draft article 1 [1], it is specified that the draft articles apply to all persons present on the territory of the affected State, irrespective of nationality. However, the subsequent draft articles do not fully reflect the importance of taking into account the specific vulnerability of those who do not have the nationality of the affected State in disaster situations. Furthermore, no reference is made to the need to ensure access of foreign States to their nationals, including for the purpose of evacuation when protection and assistance *in situ* cannot be guaranteed.

[1] IFRC, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and International Recovery Assistance, adopted at the 30th International Conference of the Red Cross and Red Crescent Societies, Geneva, 26 to 30 November 2007, resolution 4 (document 30IC/07/R4), annex. Available from www.ifrc.org.

Council of Europe

The Council of Europe expresses its satisfaction with this work of the Commission, which is just a first step in the direction of protecting the rights of people in emergency situations associated to disasters. It hopes that in future work more attention will be devoted to vulnerable groups (children, including orphans, persons with disabilities, migrants, asylum seekers and other people who are at greater risk because of their limited means or other reasons). It also hopes that appropriate attention will be given in the future to prevention, including education for risk and preparedness. Also the right of victims to receive aid for recovery of their lives after a disaster is, in the Council's view, important. It would be useful for the draft articles to consider the whole of the disaster cycle (preparation, emergency response and recovery).

European Union

1. The European Union welcomes the present draft set of articles as an important contribution to international disaster law. The topic is of special interest for the European Union, especially in view of its activities in the field of humanitarian action and civil protection.

2. A principal general comment is the need for the draft articles to allow sufficient room for the specificities of the European Union as a regional integration organization.

International Committee of the Red Cross

1. ICRC commends the Commission for the work on the draft articles and the commentaries thereto, on the understanding that the latter form an integral part of the former. Recent events have illustrated the importance of the subject and the necessity to consolidate the legal

framework governing the protection of persons in the event of disasters. In this regard, ICRC has no doubt that the draft articles will constitute an important contribution to contemporary international law in line with the leading role played by the Commission in its codification and progressive development.

2. The comments of ICRC have been made mainly with a view to preserving: (*a*) the integrity of international humanitarian law; and (*b*) the ability of humanitarian organizations such as ICRC to conduct, in times of armed conflict (be they international or non-international, even when occurring concomitantly with natural disasters), their humanitarian activities in accordance with a neutral, independent, impartial and humanitarian approach.

International Federation of Red Cross and Red Crescent Societies

1. IFRC feels that the draft articles have a number of strong elements, including their emphasis on human dignity, human rights, cooperation and respect for sovereignty, as well as on disaster risk reduction.

2. However, the text can also be strengthened in several respects. As currently drafted, the draft articles are not yet sufficiently operational to have a direct impact on the most common regulatory problem areas in international response. They are also overly cautious with regard to the issue of protection, notwithstanding their title. IFRC would also like to underline its concern about how the issue of armed conflict is addressed by the commentary to the draft articles, as it feels that the current text could inadvertently undermine the protection of international humanitarian law.

3. It is also very positive that the draft articles refer to non-State humanitarian actors in several draft articles. This is very important given the important contributions they make in disaster response and the need to also bring them within a regulatory framework (even if not precisely the same as that applicable to States).

4. IFRC feels that the text has missed some opportunities. Chief among these is the abbreviated approach taken to the "rules of the road" for international operations (see the comments below on draft articles 15 [13] and 17 [14]).

Chapter I

Specific comments on the draft articles

A. Draft article 1 [1]—Scope

1. Comments received from Governments

Qatar

Qatar proposes the following amendment to draft article 1 [1]: "The present draft articles apply to the protection of persons in the event of disasters *and other similar events*."

United States of America

1. With respect to paragraph (2) of the commentary, the United States reiterates its concern with the approach of articulating new "rights" and "duties" of States. In particular, it disagrees with the suggestion that such "duties" apply not just to persons within each State's territory but to all persons "under [each State's] jurisdiction or control". Although some specific provisions of treaties do impose obligations on States parties outside their territories, international law generally does not.

2. In addition, to the extent the draft articles address obligations on "international organizations and other entities", the draft articles should reflect that international organizations and other entities may be under different legal obligations, which may also differ from those of States.

2. Comments received from international organizations and entities

International Organization for Migration

1. With regard to the scope of application of the draft articles *ratione materiae*, it would be important to recall in the commentary that States have the obligation to protect all persons present on their territory, irrespective not only of nationality but also of legal status.

2. Furthermore, the choice of the commentary to expressly state that the focus of the draft articles is primarily on the rights and obligations of States in relation to one another, and to a lesser extent on the rights of individuals (para. (2) of the commentary), is hardly justifiable in the light of both the topic of the protection of persons in the event of disasters and the contemporary recognition of the importance of human rights in disaster situations. This importance is clearly demonstrated by the increased attention paid to this issue by United Nations human rights bodies, as well as regional international courts. The draft articles represent an important opportunity to clarify how the human rights framework applies in the context of disasters. Moreover, an approach based on human rights can help in finding the right balance between the individual and the general interests that are at stake in disaster situations.

3. Paragraph (4) of the commentary to draft article 1 [1] states that the draft articles focus primarily on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. Then it reads: "Nonetheless, the draft articles also, in draft articles 10 [5 *ter*] and 11 [16], where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation activities." In the present wording, it seems that obligations regarding the pre-disaster phase are only those addressed in draft articles 10 [5 *ter*] and 11 [16]. The reference to "where relevant" could be used to extend State obligations to the pre-disaster phase also with regard to other provisions such as draft article 6 [8], where obligations in the area of prevention are particularly relevant.

4. It is also suggested that "early" be added to "recovery phase", and this adjective would apply also to the following reference to the reconstruction phase. The end of the sentence would then read: "on the immediate post-disaster and early recovery phase, including the post-disaster reconstruction phase". This change would allow clarification that it is only reconstruction activities that start right after the disaster that are included. It is important to ensure that the scope of application of the draft articles, notably *ratione temporis*, is clearly determined, particularly because the pre-disaster (disaster risk reduction or management) and the post-disaster (recovery and reconstruction) phases can involve the intervention of completely different actors, not only humanitarian organizations, but also those dealing with development issues. The parameters of intervention of these various actors can be quite different; therefore, it is suggested that the more long-term recovery and reconstruction phase be excluded from the scope of application of the draft articles.

World Food Programme

WFP would submit for consideration whether the provisions concerning the scope and purpose of the draft articles could benefit from a clarifying reference to prevention and disaster risk reduction.

B. Draft article 2 [2]—Purpose

1. Comments received from Governments

Austria

1. The formulation of draft article 2 excludes the application of the draft articles to any activity relating to the avoidance or the reduction of disaster risk, an issue that is addressed, for instance, in draft articles 10 [5 *ter*] and 11 [16].

2. From a linguistic perspective it is pointed out that it is unknown to which noun the conjunction "that" relates; the text should be reformulated to make clear that the conjunction "that" relates to "response".

Qatar

Qatar proposes the following amendment to draft article 2 [2]: "The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full and unrestricted respect for their rights."

Switzerland

Switzerland notes that the exclusion of armed conflicts, which was initially contained in an earlier version of draft article 2 [2] of the draft articles, has been removed, thus giving rise to the question of how the draft articles cover situations of armed conflict in which disasters occur. See also the comment below on draft article 21.

United States of America

1. The United States strongly supports the purpose identified in draft article 2 [2]. However, as explained throughout these comments, it has concerns that certain draft articles, as currently drafted, may be inconsistent with that purpose.

2. Paragraph (9) of the commentary incorrectly asserts that "some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively". While the United States agrees that States parties to the International Covenant on Economic, Social and Cultural Rights are obligated to realize economic, social and cultural rights progressively, non-State parties do not have such an obligation. Furthermore, as a technical matter, the commentary misstates the obligation described in article 2, paragraph 1, of the Covenant. The United States suggests the following edit: "Some of the relevant rights are economic and social rights, which States Parties to the International Covenant on Economic, Social and Cultural Rights have an obligation to realize progressively."

3. Paragraph (10) of the commentary incorrectly refers to the right to life, and specifically to the International Covenant on Civil and Political Rights, article 6, paragraph 1, as an example of a human right applicable in the context of a disaster and in responding to such a disaster. That provision prohibits the arbitrary deprivation of life through State action and requires protection of that right by law. There is no basis for regarding this provision as the source of any international obligation of a State to address the threat or jeopardy to life caused by a disaster or calamitous event affecting that State. Any such responsibility derives from the sovereign responsibility of Governments *vis-à-vis* their population and citizenry. The United States urges deletion of the last sentence of paragraph (10) and any reference to the International Covenant on Civil and Political Rights, as inappropriate in this context.

2. Comments received from international organizations and entities

International Organization for Migration

1. It is suggested that a paragraph be added in the commentary to expressly acknowledge that those displaced by a disaster are also to be considered as being directly affected. Such express reference to this group can be justified in the light of the scale of displacement in relation to disasters and with a view to drawing States' and other stakeholders' attention to the issue. As is demonstrated in various reports and reiterated in the Sendai Framework, one of the main consequences of disasters is displacement, which in recent years has increased and is expected to increase further in the future.

2. The definition of "persons concerned" could also be influenced by the definition of "disaster". Understanding a disaster as a consequence of a hazard would allow including a broader range of affected persons, notably those displaced not only by the actual hazard, but also in the aftermath of the hazard owing to the general level of disruption in the functioning of the community; those for whom the disaster cannot be singled out as the only cause of displacement; and the host communities affected by the inflow of displaced persons. Any adopted measures which do not take into account these situations will always be partial and ineffective in providing protection to affected people.

3. The definition of affected persons adopted in the draft articles does not take fully into account the importance of the prevention phase, specifically for the protection of persons who risk being affected, which is included in the scope of application of the draft articles (as specified in paragraph (4) of the commentary to draft article 1 [1] and reiterated in paragraph (5) of the commentary to draft article 2 [2]). In addition to persons directly affected, it is suggested that the commentary also refer to persons likely to be affected. The problem is how to determine who is likely to be affected. In the context of disaster risk reduction, the determination of who are the persons at risk is based on an evaluation of the persons' exposure and vulnerability. However, in the light of the narrow definition of disaster of the draft articles and of the need to ensure legal certainty, the concept of exposure could be translated into a concept that is easier to define by referring, for example, to a geographical element (all those who live in a certain area). Alternatively, the task of defining who the persons at risk are could be left to the national legislator.

4. With regard to family members, one needs to take into account the specific situation of those who are not directly affected, but have lost a family member. Their plight may be even more dire than that of families affected by the disaster who have survived and are together. It could even be argued that family members who have lost a relative may be more vulnerable, from both a psychological and a material point of view. Therefore, it is suggested that the exclusion of family members who are indirectly affected be retained, except when those family members are somehow directly affected, for instance owing to the loss of one of their relatives, in which case their possibly heightened vulnerability should be acknowledged.

5. With regard to the exclusion from the scope of application of the draft articles of economic losses suffered by those who are elsewhere, attention is drawn to the justification of the distinction between those who are there when the disaster strikes and those who are elsewhere. Can it really be maintained that those who were not there when the disaster took place always have fewer protection needs than those who were there and were, for example, only slightly affected? Such a distinction is even more difficult to justify in the light of the broad scope of application of the draft articles, which also includes the recovery and reconstruction phase. Furthermore, it is hard to justify maintaining such a distinction in the light of the importance of the impact on persons of economic losses mentioned in paragraph (7) of the commentary to draft article 3 [3]. The impact on persons and not necessarily the physical presence of the person in the affected area should be the guiding criterion.

6. Paragraph (9) of the commentary recognizes the central role of economic and social rights in the context of disasters and the special characteristics of those rights that imply an obligation of progressive realization. It would be worth recalling that some minimum core obligations (in relation to the provision of essential foodstuffs, essential health care, basic shelter and housing and education for children) persist even in the context of a disaster. In addition, the needs of the most vulnerable, including migrants and displaced persons, but also trapped populations and host communities, have to be specifically taken into account. Furthermore, it would be important to specify that States' margin of appreciation refers to the choice of the measures to be adopted and not to the result to be achieved.

7. The Commission's choice, in paragraph (10) of the commentary, not to include a list of rights to avoid any *a contrario* interpretation, which would risk excluding other rights that are not mentioned, is well noted. However, for the work of international organizations and their advocacy role, it would be beneficial to have a non-exhaustive list of rights that are relevant in this context. International organizations and other humanitarian actors are constantly confronted with the need to back up their advocacy for the respect of some rights with references to the correspondent obligations set forth in legal instruments.

European Union

The European Union welcomes the reference in draft article 2 [2] to effectively meeting the essential needs of the persons affected by disasters, while being accompanied by a rights-based approach, which is also reflected in draft articles 5 [7] (Human dignity) and 6 [8] (Human rights). The focus on persons in need is an important point for the European Union. However, it agrees that the two approaches are not exclusive, but complementary.

C. Draft article 3 [3]—Definition of disaster

1. Comments received from Governments

Austria

1. Despite the explanation in the commentary, the wording of draft article 3 [3] does not indicate whether the qualifier "resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage" relates only to the series of events or also to one "calamitous event". If it is deemed to relate also to the latter, the qualifier "calamitous" is redundant or even confusing, since the effect of this event results from the second part of the sentence. However, if the term "calamitous event" stands on its own without further qualifier it is questionable whether the expression "calamitous" is to be understood in the sense of the second part of the sentence. Likewise, if the qualifier "calamitous" is deemed to relate to both the event and the series of events, it is also redundant in view of the second part of the sentence. The restriction to the event seems also to exclude situations resulting, for instance, from the outbreak of an infectious disease, such as an epidemic or pandemic, which cannot always be traced back to a given event.

2. Although the definition to a certain extent is based on the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (hereinafter, "Tampere Convention"), it may nevertheless be queried whether the element concerning the disruption of the functioning of society is appropriate. It cannot be excluded that a society may furnish the best proof of its functioning in the situation of a disaster if appropriate relief measures are taken in accordance with well-prepared emergency plans. This would mean that such a situation would not be covered by the

definition, because there is no dysfunction of society. It is doubtful whether an earthquake, an avalanche, a flood or a tsunami taken as such necessarily meets the threshold of a "serious disruption of society". If the present definition were taken literally, situations as frequent as those—and expected to fall within the envisaged ambit—would not always be classified as disasters for the purposes of the draft articles.

3. It would therefore be worthwhile to review the definition of disasters so as to include all disasters, even if they do not seriously disrupt the society of an entire State.

Cuba

The term "disaster" should be defined in accordance with the glossary of the International Strategy for Disaster Reduction,[1] which defines a "disaster" as "a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources".[2]

[1] International Strategy for Disaster Reduction, *2009 UNISDR Terminology on Disaster Risk Reduction*.

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

Czech Republic

Draft article 3 [3] contains a definition of "disaster" the aim of which is not to be very limiting, on the one hand, but also not far-reaching, on the other hand. In the opinion of the Czech Republic, the Commission has found the right balance between those two extremes and the Czech Republic supports the definition. It understands that there is a need to leave some space for discretion regarding the possible applicability of the draft articles, however, it would appreciate the Commission further elaborating in the commentary on the definition of "serious disruption of the functioning of society", for instance, by way of examples, since such a general definition poses difficulties in determining the threshold that would trigger the application of the present draft articles.

Ecuador

1. The risk management manual of the Risk Management Secretariat of Ecuador[1] defines a disaster as "a very grave disturbance or emergency whose occurrence or threat is associated with natural or man-made factors. Its management exceeds the capacity of the affected community or society to respond to the situation using its own resources." In the Hyogo Framework for Action,[2] it is stated that

> [t]he scope of this Framework for Action encompasses disasters caused by hazards of natural origin and related environmental and technological hazards and risks. It thus reflects a holistic and multi-hazard approach to disaster risk management and the relationship between them which can have a significant impact on social, economic, cultural and environmental systems, as stressed in the Yokohama Strategy.[3]

2. It seems appropriate to add to the definition of disaster the concept of an associated or causative factor, so that the definition takes a holistic approach to risk management.

[1] Ecuador, *Manual del Comité de Gestión de Riesgos*, (June 2014), annex 5, p. 49, item 13.

[2] "Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters", adopted at the World Conference on Disaster Reduction, Kobe, Hyogo, Japan, 18–22 January 2005 (report of the World Conference on Disaster Reduction, (A/CONF.206/6 and Corr.1, chap. I, resolution 2)).

[3] For the Yokohama strategy, see "Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation" and the Plan of Action of the World Conference on Natural Disaster Reduction, Yokohama, Japan, 23–27 May 1994 (report of the World Conference on Disaster Reduction, A/CONF.172/9, chap. I, resolution 1, annex I).

Germany

The definition of "disaster" should not only focus on fast-onset "events", but also on slow-onset processes such as droughts, which pose a huge threat to high-risk countries. Germany therefore proposes that "prolonged processes" be incorporated into the definition of a disaster in draft article 3 [3].

Mexico

In the definition of the term "disaster", no limitation is included concerning the origin of the event, that is, whether natural or anthropogenic. This is appropriate, since the text recognizes that there are disasters that may be anthropogenic.[1] However, it should be made clear that armed conflict is not included in this category, in accordance with draft article 21 [4].

[1] See *Öneryıldız v. Turkey* [GC], No. 48939/99, ECHR 2004-XII, paras. 9–43; see also *European Parliament v. Council of the European Communities* ("Chernobyl" case), case No. C-70/88, Judgment of 22 May 1990, Court of Justice of the European Communities, ECR 1990, p. I-02041.

Netherlands

The Netherlands would prefer to have draft articles 3 [3] and 4 merged into one draft article on the use of terms.

United States of America

1. The United States has significant concerns with the Commission's proposed definition of "disaster" in draft article 3 [3]. First, the United States questions the decision to define disaster in terms of an "event", rather than in terms of the consequences of an event combined with vulnerable social conditions. As the commentary notes, the majority of the non-binding instruments that specifically address disasters focus on the types of hazards and social conditions of vulnerability that disrupt the normal functioning of a community or society. Furthermore, since the first reading of these draft articles, States have adopted the non-binding Sendai Framework, which also focuses on hazards, vulnerability and risks, and the Commission should take into consideration that broadly negotiated framework. The commentary suggests that the Commission considered the definition of "disaster" in the draft articles to be more concise and precise than

those in non-binding frameworks, and the United States would appreciate a more detailed explanation of why the Commission takes this view. In addition, the United States suggests that the Commission consider how this definition relates to draft articles 10 [5 *ter*] and 11 [16], which are framed in terms of States' efforts to reduce the risks of disasters. Defining a disaster as an event could, in fact, obscure the importance of addressing exposure and vulnerability.

2. Second, regardless of whether the definition is stated in terms of risks or events, it should be clarified so that it clearly does not include events such as situations of armed conflict or other political and economic crises. Paragraph (1) of the commentary helpfully explains that the Commission did not intend to include "political and economic crises" within the definition of disaster. However, the text of draft article 3 [3] does not explicitly exclude political or economic crises, and many political and economic crises would seem to meet the definition of disaster in draft article 3 [3]. For example, a stock market crash, a deflationary crisis, or a crime wave could be "calamitous" and lead to "great human suffering and distress" that "seriously disrupt[ed] the functioning of society".

3. In particular, armed conflicts almost invariably produce a "calamitous … series of events resulting in widespread loss of life, great human suffering and distress, [and] large-scale material or environmental damage, thereby seriously disrupting the functioning of society". In response to the tragic consequences of armed conflict, international humanitarian law has, over centuries, been developed as a body of principles and rules to address the humanitarian consequences of armed conflict. International humanitarian law rules have been articulated primarily in negative terms, as a body of rules selectively limiting the means and methods by which one party may injure its adversary.

4. The present draft articles are laudable as an effort to address the humanitarian effects of natural disasters and certain other non-conflict-related anthropogenic disasters such as environmental accidents (e.g., chemical spills or failed dams). However, the proposed definition is so broad as to cover almost any significant disruptive event. In particular, the draft articles are deeply problematic as applied to situations of armed conflict, insofar as they have the potential to conflict with international humanitarian law.

5. Draft article 5 [7], for example, would create an obligation on the part of States (among other actors) not only to respect but to protect "the inherent dignity of the human person". As noted in paragraph (6) of the commentary to draft article 5 [7], this obligation, which in the view of the Commission flows from international human rights law, would entail "a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity". This rule may, in application, be in strong tension with the balance reflected in the rules of international humanitarian law. International humanitarian law affords certain protections to civilians, depending on the circumstances, but recognizes that civilians may be incidentally injured or killed (but not specifically targeted) in the course of fighting.

6. Likewise, the duty articulated in draft article 11 [16] to reduce the risk of "disasters", when applied to events constituting part of an armed conflict, could be viewed as imposing responsibilities on parties to a conflict beyond those contained in international humanitarian law (which requires, for example, that parties take feasible precautions in attack and in defence). The potential for this result is highlighted by the Commission's assertion in paragraph (9) of the commentary that what is set out in draft article 11 [16] is an "international legal obligation to act in the manner described".

7. The United States believes that the Commission should maintain draft article 21 [4], which makes clear the intent not to revise international humanitarian law rules, and remove the consequences of armed conflict from the scope of the definition of "disaster". The Commission could note, either in the commentaries or in a subparagraph of the definition, that a disaster may happen to coincide in time and space with events constituting part of an armed conflict, and that in such a case the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of armed conflict. The United States would urge the Commission to consider adopting this simplified approach, which would avoid the need for many assessments as to whether international humanitarian law was applicable. The United States recommends explicitly excluding, at a minimum, events that routinely occur during armed conflict from the definition of "disaster". The Commission also may want to consider a definition that expressly excludes political and economic crises.

See also the comments below under draft article 21 [4].

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

1. The proposed definition of disasters of draft article 3 [3] poses a rather high threshold, which leaves out disasters that are indeed considered in paragraph 15 of the Sendai Framework, namely small-scale disasters.

2. Research and experience indicate that small-scale disasters cause heavy losses, including in economic terms, thus negatively impacting people's resilience, exacerbating existing vulnerabilities and contributing to severe setbacks in human development. Small-scale disasters in their high frequency determine an ongoing erosion of development assets, such as houses, schools, health facilities, roads and local infrastructure. So far they have not received due attention and are often unaccounted for in statistics, thus leaving an incomplete picture concerning impact and consequences; indeed, once the direct losses associated with small-scale disasters are included in the calculation, the overall direct losses from disasters increase by at least 50 percent.

3. It would be critical to ensure that the draft articles also cover small-scale disasters, which by nature do not involve a "widespread loss of life", "great human suffering" or "large-scale material or environmental damage".

Against this background, it is suggested that the inclusion of the words "widespread", "great" and "large-scale" be reconsidered, and that the word "economic" be added after "environmental", with commensurate adjustments made in the commentary.

International Organization for Migration

1. One way of integrating displacement into the draft articles would be to acknowledge the impact that disasters can have on displacement in the definition of "disaster", in draft article 3 [3]. The definition adopted by the Commission acknowledges that large-scale material or environmental damages are normal consequences of disasters (para. (7) of the commentary); displacement should be treated in the same way.

2. The inclusion of a reference to displacement in the definition of disaster would serve two purposes. First, it would provide more visibility to the issue of human mobility, reminding States that in designing their policies, including in the area of disaster risk reduction, they need to acknowledge the risk of displacement and address its negative impacts. Second, by defining what a disaster is, draft article 3 [3] contributes to determining the scope of application of the draft articles. Therefore, a reference to displacement in draft article 3 [3] would imply that, in complying with the other obligations set forth in the draft articles, States should also always take into account the displacement dimension.

3. In the draft article, disaster is defined as the event and not as its consequences. However, as specified in paragraph (3) of the commentary, "calamitous" is used to establish a threshold, which is further defined by the consequences of such an event, namely "widespread loss of life, great human suffering and distress, or large-scale material or environmental damage", together with a serious disruption in the functioning of the society. This choice creates many levels of analysis that risk creating confusion in the application of the definition, which is key to interpreting the whole text of the draft articles. Is the threshold of calamitous defined *per se* or by such outcomes? In other words, must the event be both calamitous and cause disastrous consequences or is it only when it causes such consequences that it is considered as calamitous? The distinction is important because an event of a smaller scale could also cause disastrous consequences and one must wonder whether less extreme situations will be included in the scope of application of the draft articles. If the answer is that an event needs to be both calamitous *per se* and cause the named consequences, which is what is suggested in paragraph (3) of the commentary, then a definition of calamitous is required in the commentary, and it would be important that such a definition also include smaller events.

4. Furthermore, while the commentaries clarify that the definition is not meant to cover conflicts, it does not seem to be limited to environmental causes (not even in the commentaries). Calamitous events or series of events resulting in widespread loss of life, great human suffering and distress or large-scale material or environmental damage could include all of the following events: natural hazards; slow-onset processes of environmental degradation and change; and technological accidents and epidemics. This may be a deliberate choice by the Commission. However, its clear implications for the scope of the whole text should be carefully considered. Notably, draft article 10 [5 *ter*] (Cooperation for disaster risk reduction) which, while seemingly referring to disaster risk reduction as articulated in the Hyogo Framework for Action and the Sendai Framework, might be expanded if the definition of "disaster" were broader.

5. In paragraph (6) of the commentary, it is recognized that severe dislocation can cause "great human suffering and distress" even if there is no loss of life. It is unclear what it is meant by the term "dislocation". Does it include displacement of people? A new paragraph should be inserted, after paragraph (6), referring to displacement as a major consequence of disasters, in order to give to the issue the visibility that is required by the scale of displacement as a consequence of disaster situations.[1]

6. In paragraph (7) of the commentary, the Commission explains that damage to property and the environment have been included in recognition of the fact that they are standard outcomes of a disaster; so in the same line of reasoning, displacement ought to be treated in the same fashion. Therefore, it is suggested that displacement be included in the definition of disaster, together with the reference to human suffering and distress.

7. Such inclusion would be justified in the light of the scale of displacement increasingly caused by disasters and it would give the issue the needed visibility. The purpose would be to ensure that Governments take the risk of displacement of entire communities into account when complying with the various other obligations that are defined in the draft articles, notably in the context of disaster risk reduction and management, but also in addressing the consequence of disasters and ensuring effective protection of affected persons. Displacement puts people in a dire situation through loss of access to livelihoods, services and social capital.

[1] Internal Displacement Monitoring Centre, *Global Estimates 2015—People Displaced by Disasters*.

European Union

1. In the light of the terminology that the draft article establishes—such as "calamitous event" and "seriously disrupting the functioning of society"—it appears difficult to determine the threshold needed to trigger the application of the draft articles. This is especially problematic if the draft articles become a legally binding instrument.

2. The European Union notes that the draft article reflects to a certain extent the approach of the Tampere Convention by referring to an event or series of events. It is noted, however, that this does not necessarily correspond to other definitions under international law, such as article 3 of the decision of the Council of the European Union on the arrangements for the implementation by the Union of the solidarity clause,[1] and article 4 of the decision on a

[1] *Official Journal of the European Union* L 192, 1 July 2014, p. 53, containing rules and procedures for the implementation of article 222 of the Treaty on the Functioning of the European Union, known as the "solidarity clause".

Union Civil Protection Mechanism,[2] both of which define disaster as "any situation which has or may have a severe impact on people, the environment or property, including cultural heritage". The advantage of that definition is that it focuses immediately on the situation, notwithstanding the cause of it. In addition, the reference to "may have a severe impact" allows for the inclusion of potential threats of a disaster (e.g., spread of Ebola, a storm approaching the land), in order to make such instruments also applicable before a calamitous event actually occurs.

[2] Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *Official Journal of the European* Union, L 347, p. 924, 20 December 2013.

International Committee of the Red Cross

ICRC notes with concern that the definition of disaster for the purposes of the draft articles no longer expressly excludes situations of armed conflict as was the case in earlier versions of the draft articles. The new definition creates overlap and contradictions between rules of international humanitarian law and the draft articles, resulting in confusion and potential conflicts of norms (should the draft articles be converted into an internationally binding instrument).

International Federation of Red Cross and Red Crescent Societies

IFRC suggests that the commentary to draft article 3 [3] mention that the definition of disaster could equally apply to sudden-onset events (such as an earthquake or a tsunami) and to slow-onset events (such as drought or gradual flooding). In addition, paragraph (6) of the commentary could usefully point out that "great human suffering and distress" might also be occasioned by non-fatal injuries, disease or other health problems caused by a disaster (and not only by displacement).

D. Draft article 4—Use of terms

1. Comments received from Governments

Austria

1. Austria doubts that the definitions of "assisting State" and "other assisting actor" (in subparagraphs (*b*) and (*c*)) need the qualifier "at its request or with its consent". Such qualifier seems unnecessary since those particular conditions are the result of the substantive provisions of the draft articles and need not be included in the definitions. Likewise the definitions contained in the Tampere Convention do not include such qualification.

2. Furthermore, the commentary on subparagraph (*e*), on the definition of relief personnel, has to be reconciled with State practice, since military personnel remain under the full command of the assisting State irrespective of the operational control of the affected State. Accordingly, such relief operations remain attributable to the assisting State.

Cuba

It is proposed that subparagraph (*d*) be amended to read:

> "'external assistance' means relief personnel, equipment, goods and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction, at the request or with the consent of the affected State or as previously agreed through cooperation and/or collaboration."

It is also proposed that the draft article include the term "disaster risk reduction", which is mentioned in the draft articles and is also included in the glossary of the International Strategy for Disaster Reduction. Draft article 4 would therefore include a new subparagraph (*g*):

> "'disaster risk reduction' means the concept and practice of reducing disaster risk through systematic efforts to analyse and manage the causal factors of disasters, including through reduced exposure to hazards, lessened vulnerability of people and property, wise management of land and the environment, and improved preparedness for adverse events."

Czech Republic

1. In the commentary to draft article 4, subparagraph (*a*), the Commission admits that there are situations, although rare, when two States might be regarded as "affected States". Despite the fact that these situations might be exceptional, the Czech Republic finds it convenient to have a set of certain indications that may be of use in this respect. Hence, it suggests that the Commission consider putting forward criteria, at least in the commentary, which might be applicable in such situations.

2. The Czech Republic acknowledges that both civilian and military personnel, as defined in draft article 4, subparagraph (*e*), may be deployed in emergency situations, including disasters. It would like to draw the attention of the Commission to the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (hereinafter, "Oslo Guidelines")[1] and the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies (hereinafter, "MCDA Guidelines"),[2] both of which stress the primacy of the use of civilian personnel and limit the use of military personnel to situations where there is no comparable civilian personnel available. It proposes that the Commission address this matter in the text of the commentary.

[1] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

[2] United Nations, OCHA, "Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies", Revision I, January 2006.

Ecuador

1. It is recommended that the provision on use of terms be expanded through the inclusion of the following definition of "transit countries":

> "If humanitarian assistance must pass through a country which is not the final beneficiary and such assistance is in transit, the following factors shall be taken into account:

(*a*) the donor country shall send the necessary documentation for 'goods in transit' to the country that is not the final beneficiary;

(*b*) the donor country shall coordinate with the transit country regarding facilities for the management of the humanitarian assistance, for example temporary warehouses, security or the facilitation of formalities;

(*c*) the donor country shall inform the transit country and the country of final destination of the identity of the personnel accompanying the goods for immigration purposes;

(*d*) the logistical and other costs arising in the passage of humanitarian assistance through the transit country shall be borne by the donor country."[1]

[1] Ecuador, "Guía de operación para asistencia mutua frente a desastres de los países miembros de la Comunidad Andina", April 2013, p. 29. Available from www.preventionweb.net/files/GUIA%20ANDINA.pdf.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

See the comment below on draft article 7 [6].

Germany

1. Draft article 4, subparagraph (*e*), defines "relief personnel" as encompassing both civilian and military personnel and draft article 4, subparagraph (*d*), defines "external assistance" *inter alia* by referring to "relief personnel". In consequence, wherever one of those terms is applied, the recommendation might equally refer to civilian and military aid. However, Germany would like to draw attention to the fact that the Oslo Guidelines and the MCDA Guidelines specify that international military assets should be used only as a last resort, when civilian alternatives are exhausted.

2. Germany would therefore propose the following amendment to draft article 4, subparagraph (*e*):

"'relief personnel' means civilian or [in exceptional cases in which civilian assistance cannot sufficiently be provided,] military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction."

Mexico

The inclusion of draft articles 4, 14 [11], 17 [14], 18 and 19 [15] is welcome, since they reflect the concerns expressed by various delegations.

Netherlands

1. The Netherlands concurs with the decision of the Drafting Committee not to include definitions for "relevant non-governmental organization" and "risk of disasters".

2. The Netherlands also supports the inclusion of the phrase "or otherwise under the jurisdiction or control" in draft article 4, subparagraph (*a*), which broadens the meaning of the term "affected State". In this regard, the Netherlands concurs with the view expressed by the Drafting Committee that the issue of consent of the affected State in situations where there might be multiple affected States merits further attention.

3. Finally, in relation to the use of the term "relief personnel" in draft article 4, subparagraph (*e*), the Netherlands calls for coherence in the terminology used in other draft articles, in particular draft article 17 [14], paragraph 1 (*a*) ("civilian and military relief personnel") and draft article 18 ("relief personnel").

United States of America

1. With respect to draft article 4, subparagraph (*a*), the United States is concerned by the inclusion of "otherwise under [its] jurisdiction or control" in the definition of "affected State". The United States thinks this standard sets the bar for triggering the present draft articles too low and sows confusion with respect to the application of other draft articles. Under this definition, a State could become an "affected State" when "persons, property or the environment" under its mere "jurisdiction" or "control"—a form of influence falling well short of territorial sovereignty—are affected by a disaster. Such a State, as an affected State, would then have, *inter alia*, corresponding duties to seek external assistance (draft article 13 [10]), take "the primary role in the direction, control, coordination and supervision of [disaster] relief and assistance" (draft article 12 [9]), and facilitate external assistance through a variety of legal measures (draft article 17 [14]), and the right to require consent to the provision of any assistance (draft article 14 [11]).

2. All of the aforementioned duties and rights are in potential conflict with the prerogatives of the State with sovereignty over the territory in which the disaster occurs. This tension arises in the very phrasing of the draft article. Specifically, draft article 12 [9], paragraph 1, asserts that the affected State—even if that State is "affected" by virtue of mere "jurisdiction" or "control" over persons or property, and not by virtue of any degree of territorial sovereignty—has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory "by virtue of its sovereignty". Indeed, the Commission notes in the commentary to draft article 4 that under these definitions there could be multiple "affected States", and that, in the absence of any special agreement between them, the draft articles "d[o] not … provide a definitive solution as to which affected State's consent would be required"[1] under draft article 14 [11]. The United States considers this a most unsatisfactory situation. It creates the potential for confusion or disagreement among "affected States" that could delay an effective response.

3. Regarding draft article 4, subparagraphs (*b*) and (*c*), the United States would suggest deleting "at its request or with its consent". This aspect of the definition is not necessary, as requests for and consent to assistance are addressed in more detail in other draft articles.

[1] Para. (4) of the commentary to draft art. 4, subpara. (*a*), *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 66.

4. In draft article 4, subparagraph (*e*), the use of the term "sent by" in the definition of "relief personnel" could be read to preclude the local hires of the "assisting State or other assisting actor". The United States believes draft article 18 (Protection of relief personnel, equipment and goods) should apply to local relief workers, not just international workers. Therefore, the United States suggests changing the definitional language to "sent in or locally recruited by".

5. The commentary, in paragraph (12), states that domestic non-governmental organizations are not covered in the draft articles. The United States believes that such organizations should be held to the same standard as external assisting organizations and should receive similar consideration. Given the role that domestic organizations, such as National Red Cross and Red Crescent Societies, play in disaster preparation and response, the United States recommends considering their appropriate inclusion in these draft articles. For example, if the commentary were revised, States would be expected to cooperate with and seek assistance from relevant domestic non-governmental organizations (draft arts. 8 [5] and 13 [10]).

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

1. The Office for the Coordination of Humanitarian Affairs supports the definition of the term "affected State" in draft article 4, subparagraph (*a*), insofar as it emphasizes the primary role and responsibility of the State in whose territory the disaster occurs to protect persons, property and the environment from the effects of disaster. At the same time, the definition is broad enough to cover the situation where a State exercises *de facto* control over a territory other than its own, thus minimizing potential gaps in coverage in practice. In this regard, the Office considers the explanation in the corresponding commentary, as to the relationship between the definition and draft article 12 [9], paragraph 1, to be particularly useful.

2. The Office for the Coordination of Humanitarian Affairs notes, however, that the definition of "affected State" in draft article 4, subparagraph (*a*), may be too broad insofar as it could be construed as including a State that has jurisdiction or control over individual persons affected by a disaster outside the State's territory. Under public international law and particularly in human rights law, it is accepted that a State has jurisdiction over its nationals even when they are abroad. The definition in draft article 4, subparagraph (*a*), appears broad enough to cover States of nationality, since it includes "the State … under the jurisdiction … of which persons … are affected by a disaster". Given that the consent of the affected State is required for external assistance, an overly broad definition of "affected State" would be undesirable. Therefore, it might be useful to clarify in the commentary that the term "affected State" is not intended to include a State that has jurisdiction under international law over individual persons affected by a disaster outside the State's territory.

3. The Office for the Coordination of Humanitarian Affairs notes that the definition of "external assistance" in draft article 4, subparagraph (*d*), refers to "relief personnel, equipment and goods, and services". Whereas "relief personnel" and "equipment and goods" are defined in draft article 4, subparagraphs (*e*) and 4 (*f*) respectively, no definition of "services" is provided. It might be useful to include a definition of this term.

4. The Office for the Coordination of Humanitarian Affairs is concerned about the definition of "relief personnel" in draft article 4, subparagraph (*e*), which is understood to mean both civilian and military personnel but which makes no distinction between those two categories. The Oslo Guidelines specify that international military assets should be used as a last resort, "only where there is no comparable civilian alternative and only the use of military or civil defence assets can meet a critical humanitarian need". The Office would recommend that the definition of "relief personnel" in subparagraph (*e*) be brought into line with the existing consensus language contained in the Oslo Guidelines. At the very least, the commentary to subparagraph (*e*) should make it clear that international military assets should only be used as a last resort. Alternatively, or in addition, such a clarification could be placed in the commentaries to draft articles 9 [5 *bis*] or 15 [13], or in a separate, independent draft article.

Secretariat of the International Strategy for Disaster Reduction

1. Subparagraphs (*d*), (*e*) and (*f*) include definitions which, while appropriate in the context of disaster relief, and indeed those terms are included in the provisions referring to relief, may not be applicable for the purpose of disaster risk reduction. Therefore, it is suggested that the proposed definitions be retained, while deleting the references to "disaster risk reduction" on the basis of the following considerations.

2. The concept of external assistance put forward in draft article 4, subparagraph (*d*), and confirmed in draft articles 13 [10] to 17 [14] and 19 [15], seems to apply to a State affected by a disaster. The inclusion of "disaster risk reduction" implies that the term "affected" includes not only being affected by a disaster but also by a "risk". As such, it would be in contradiction with subparagraph (*a*), and it would also widen the concept of "affected" beyond the scope and spirit of the draft articles.

3. In the light of the proposed definition in subparagraph (*e*), "relief personnel" are concerned with relief operations. As also confirmed by the Sendai Framework, disaster risk management concerns measures that need to be taken to prevent the conditions for a disaster being created and a disaster materializing. Such measures need to be taken by all actors across all sectors during the normal course of affairs and, therefore, not by personnel engaged in relief.

4. Similarly, whereas the definition "equipment and goods", in subparagraph (*f*), per se seems appropriate, equipment and goods are referred to in draft

articles 9 [5 *bis*], 17 [14] and 18, which explicitly refer to, and concern, relief.

European Union

1. In order to adequately take into account the specificities of the European Union in an area in which the Union is among the most important international actors, the European Union would appreciate it if the Commission considered including a reference to "regional integration organizations" in draft article 4, subparagraph (*c*), dealing with "other assisting actors".

2. As an alternative, the European Union suggests that the commentary to draft article 4, subparagraph (*c*), should at least clarify that the term "intergovernmental organization" also includes regional integration organizations like the European Union.

3. Draft article 4, subparagraph (*e*), defines "relief personnel" as both "civilian" and "military personnel". Further references to relief personnel can be found in draft article 4, subparagraph (*d*), in the context of the definition of "external assistance" which refers to "relief personnel", in draft article 17 [14], paragraph 1 (*a*) ("civilian and military relief personnel") and draft article 18, which refers to "relief personnel" without distinction. Such lack of coherence should be addressed.

4. The reference to "civilian or military personnel" in draft article 4, subparagraph (*e*), is not qualified in any way, which is in contradiction to the Oslo Guidelines and the MCDA Guidelines, which specify that international military assets should be used as a last resort, when civilian alternatives are exhausted.

5. In the same vein, another soft law instrument at the European Union level, the European Consensus on Humanitarian Aid, which was adopted by the European Commission, the European Parliament, the Council of the European Union and its Member States,[1] links the use of foreign military assets to the fulfilment of the "last resort" principle as enshrined in the aforementioned guidelines and commits the European Union to promoting a common understanding of those guidelines.[2] It furthermore reaffirms military assets can only be used where there is no comparable civilian alternative and only the use of military assets that are unique in capability and availability can meet a critical humanitarian need. Overall a humanitarian operation making use of military assets must retain its civilian nature and character.[3] This limitation does not apply to civil protection measures within the Union.

6. As a consequence, the European Union suggests that a reference to the Oslo Guidelines and MCDA Guidelines be inserted in the commentary to draft article 4, subparagraph (*e*).

[1] European Consensus on Humanitarian Aid, Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission, *Official Journal of the European Union*, vol. 51, C 025/01 (2008), p. 1.

[2] *Ibid*., para. 57.

[3] *Ibid*., paras. 61–63.

International Federation of Red Cross and Red Crescent Societies

1. Consideration should be given to including "financial support" within the definition of "external assistance" in draft article 4, subparagraph (*d*).

2. While both humanitarian response and risk reduction activities are very important, and often the same actors may be involved in both kinds of activity at different times, a distinction between humanitarian crises and the preparation phase is important. In humanitarian crises, States should provide special facilities and protections to relief personnel (e.g., expedited visas, special security, etc.) that are not needed in times of calm.

3. In the draft articles, draft article 4 includes in the definition of "relief personnel" not only those who respond to a disaster but also those sent to promote risk reduction. As a consequence, States would be required to provide them special facilities as set out in draft article 17 [14], and even special security guarantees as set out in draft article 18. These should be reserved to situations of crisis in order to avoid unnecessary burdens on States' normal procedures and ensure their willingness to comply when needs are urgent.

4. IFRC feels that it would be worthwhile to include "telecommunications equipment" and "medicines" explicitly within the list of goods and equipment provided in draft article 4, subparagraph (*f*).

E. Draft article 5 [7]—Human dignity

1. Comments received from Governments

Austria

The broad wording imposes the relevant obligation on actors beyond those assisting in the case of a disaster.

Cuba

The following wording is proposed: "In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person, as well as the domestic laws of the affected State and its sovereign decisions with regard to the assistance offered."

United States of America

1. Although the United States agrees that respect for human dignity should be a key component of disaster preparation and response, it disagrees that States, international organizations and relevant non-governmental organizations have a general legal obligation to "respect and protect the inherent dignity of the human person". Paragraph (1) of the commentary asserts that this principle derives from international human rights instruments. Many of these instruments, such as the International Covenant on Civil and Political Rights, recognize the inherent dignity of the human person, and state that the rights identified in the instrument derive from it. However, they do not impose any special or distinct obligation to protect "dignity". To the extent this draft article is intended to

refer to the specific obligations of States parties to treaties to protect rights that derive from the principle of human dignity, protection of human rights is already addressed in draft article 6 [8]. Accordingly, the United States recommends changing "shall" to "should".

2. The United States disagrees, as a legal matter, with the statement in paragraph (6) of the commentary that "the duty to protect" requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity, even though this statement reflects a worthy policy objective. The commentary does not identify the source of this duty, and the sources in this paragraph are all non-binding guidelines and principles. To the extent this is an attempt to develop the law progressively, it should be clearly identified as such and state the legal support for this development.

3. See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs supports the inclusion of draft article 5 [7], which underscores the need to respect and protect the inherent dignity of the human person. The provision refers to "States, competent intergovernmental organizations and relevant non-governmental organizations" responding to disasters. As the formulation in draft article 5 [7] omits the term "any other entity or individual" (e.g. ICRC or IFRC, as explained in the commentary, as well as private actors) found in draft article 4, subparagraph (*c*), it might be useful to refer instead to "States and other assisting actors" as defined in draft article 4, subparagraph (*c*), to ensure that draft article 5 [7] encompasses all relevant actors providing "external assistance". The commentary notes that draft article 5 [7] has been formulated to maintain consistency with draft article 8 [5]. However, it is not immediately clear why the scope of draft article 5 [7] should be limited to that of draft article 8 [5], since the latter is based on a duty to cooperate under international law.

International Federation of Red Cross and Red Crescent Societies

The emphasis the draft articles place on human dignity in draft article 5 [7], and on humanitarian principles in draft article 6 [8], is a very positive aspect. Establishing a hard-law basis for the respect of humanitarian principles in disasters would be a very valuable addition to the current international normative framework.

F. Draft article 6 [8]—Human rights

1. Comments received from Governments

Australia

Australia welcomes the confirmation that existing human rights conventions continue to apply in disaster situations, as is sought to be captured in draft articles 2 [2], 5 [7] and 6 [8]. Australia notes that such conventions contain derogable and non-derogable rights, absolute rights and an obligation to take steps, including through international assistance and cooperation, to the maximum of a State's available resources to progressively realize economic, social and cultural rights.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

Draft article 6 [8] makes reference to the human rights of persons affected by disasters, which is an essential principle in any humanitarian response. People are at their most vulnerable in times of disasters, so preventing human rights violations and abuses and actively fulfilling human rights obligations are of utmost importance. From the perspective of the Nordic countries, however, such reference could be strengthened. While it is neither necessary nor advisable to employ very specific and restrictive language in such a document, some further elaboration of this obligation is nevertheless recommended. It would be beneficial to revise the language in the draft article in order to more clearly reflect the duty of States to ensure compliance with all relevant human rights obligations. The draft article could read as follows: "States must ensure that the rights of affected persons under international human rights law are respected, protected and fulfilled without discrimination."

Mexico

It would be appropriate to add a reference to the power of States, established in different international human rights instruments, to suspend certain rights in certain circumstances, for example, in situations in which State security is threatened,[1] which may happen in the event of a disaster in the context of these draft articles.[2] In that regard, Mexico appreciates the fact that, in the commentary to this draft article, the Commission recognizes the possibility of derogation; however, this possibility is not obvious from the current wording of the draft articles.

[1] International Covenant on Civil and Political Rights, art. 4; American Convention on Human Rights, art. 27; European Convention on Human Rights, art. 15.

[2] This was the case in Ecuador, where a state of emergency was declared following the explosion of the Cotopaxi volcano.

Qatar

Qatar proposes the following addition to draft article 6 [8]: "Persons affected by disasters are entitled to respect for their human rights, because disasters can occur in conflict situations or in a country that is under occupation. Accordingly, draft article 21 [4] does not apply because of the obligations of the occupying Power, and the characteristics of the locale must be preserved."

United States of America

1. The United States agrees that States should promote and protect the human rights of individuals in their territory, including those affected by disaster, in accordance with their obligations under international human rights law. The United States appreciates the explanation in the

commentary, paragraph (4), that different States have different legal obligations in this respect.

2. See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

2. Comments received from international organizations and entities

Food and Agriculture Organization of the United Nations

1. Recognition of the human rights of persons affected by disasters is of the utmost importance. While the draft article refers only to the obligation to "respect" their human rights, a number of international instruments recognize that States have a number of additional obligations, such as the obligation to "protect", "promote" and "fulfil (facilitate)" (different instruments use different formulations). But it is clear that States' duties are not restricted to avoiding interference with people's rights (respect); States should adopt a number of measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances.

2. Moreover, in the context of disaster relief and the enjoyment of the right to food, the recognition of an obligation to "provide" would also be appropriate. The obligation to provide entails that the State, as a last resort, must provide food "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal".[1]

3. The commentary to the draft article could include some of these important elements and the draft article itself could be modified to avoid giving the impression that State obligations are limited to "respecting" human rights.

[1] Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11 of the Covenant), *Official Records of the Economic and Social Council, 2000, Supplement No. 2* (E/2000/22-E/C.12/1999/11), annex V, para. 15.

International Organization for Migration

1. In paragraph (2) of the commentary to draft article 6 [8], it is pointed out that the reference to human rights encompasses also rights that are contained in non-binding instruments. As mentioned above in the comments on paragraph (10) of the commentary to draft article 2 [2], an express mention of the most important of these instruments, such as the Guiding Principles on Internal Displacement,[1] as well as the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,[2] would help in identifying the relevant standards. At the same time, it should also be acknowledged that most if not all of the rights that are stipulated in these instruments are already recognized in international conventions or customary law. The added value of these instruments is to explain how human rights apply in the specific context of disasters. Mentioning these standards in the draft articles would represent an important opportunity to fill the obligations deriving from human rights instruments with more specific content with regard to their application in disaster situations.

2. The term "respect" to qualify States' and other actors' obligations to implement rights appears too restrictive to capture the full array of obligations that States and other actors have. In the light of the importance of the positive obligations they have in this field, it is recommended, at least, to add a reference to "protection" of rights as well (see, for example and among many others, the European Court of Human Rights' case *Budayeva and Others v. Russia*).[3]

3. Although the Commission decided not to provide a list of rights, there are in fact references to a number of rights spread out across the text of the draft articles and commentaries. For example, paragraph (4) of the commentary to draft article 13 [10], on the duty to seek external assistance, refers to a number of rights that are relevant in the context of disasters, including the right to life, food, health and medical services, the right to water supply, to adequate housing, clothing and sanitation and the right to be free from discrimination. It is also reiterated that States have an obligation to protect the right to life. In addition, paragraph (3) of the commentary to draft article 11 [16], on the duty to reduce the risk of disasters, mentions the right to access risk information.

4. To streamline the relevant information and increase its accessibility, it is suggested that all these references be put under the draft article on human rights or, at the least, that a cross-reference to the relevant parts of the commentaries to other draft articles be added to the commentary.

5. Furthermore, in line with the Guiding Principles on Internal Displacement, one could consider adding a reference to the impact of human rights violations, committed through State acts or omissions in the pre- and post- disaster phases, on displacement. In that regard, the Guiding Principles stipulate that: "All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons."[4]

[1] Addendum to the Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, E/CN.4/1998/53/Add.2, annex.

[2] Addendum to the Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, A/HRC/16/43/Add.5, annex.

[3] *Budayeva and Others v. Russia*, No. 15339/02 and four others, ECHR 2008 (extracts).

[4] E/CN.4/1998/53/Add.2, annex, principle 5.

International Federation of Red Cross and Red Crescent Societies

1. This provision provides no guidance to States or other stakeholders as to how to protect persons in the event of disasters and is therefore not likely to have any impact on their behaviour in operations.

2. IFRC appreciates that it would be impossible to enunciate every right that could prove relevant in a disaster operation and is also conscious of the concern that specifically mentioning some examples might be misread to imply that rights not enunciated do not apply. However, there are certain rights issues that are of frequent concern in disaster settings and can usefully be underlined in the draft articles. Moreover, the latter concern could easily and completely be met by preceding any list in the text with language such as "including but not limited to" and providing clarification in the commentary.

3. IFRC recommends the following elements that might specifically be mentioned: the right to receive humanitarian assistance; the rights of particularly vulnerable groups (such as women, children, seniors and disabled persons) to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives; and the right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement.

G. Draft article 7 [6]—Humanitarian principles

1. Comments received from Governments

Ecuador

1. The protection principle of avoiding exposure of people affected by disaster to further harm and the principle of humanitarian independence should also be included.

2. The principle of independence was added to the principles of humanity, neutrality and impartiality in General Assembly resolution 58/114 of 17 December 2003:

> *Recognizing* that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance.

3. The protection principle of those involved in humanitarian response avoiding exposure of people to further harm as a result of their actions is the first of the four basic protection principles reflected in the Sphere Handbook.[1] It encompasses the following elements:

> – The form of humanitarian assistance and the environment in which it is provided do not further expose people to physical hazards, violence or other rights abuse.
>
> – Assistance and protection efforts do not undermine the affected population's capacity for self-protection.
>
> – Humanitarian agencies manage sensitive information in a way that does not jeopardize the security of the informants or those who may be identifiable from the information.[2]

4. Other sources also point to the importance of the "do no harm" principle, which implies that humanitarian action must avoid worsening disparities and discrimination between affected populations; refrain from creating or worsening damage to the environment; avoid creating or exacerbating conflict and insecurity for the affected populations; and take into account the special needs of the most vulnerable groups.[3]

[1] *Humanitarian Charter and Minimum Standards in Disaster Response*, p. 30.

[2] *Ibid.*, p. 33.

[3] See, for example, United Nations Children's Fund (UNICEF), *Core Commitments for Children in Humanitarian Action*.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

1. One area of concern for the Nordic countries is the issue of neutrality of humanitarian assistance. While draft article 7 [6] refers to neutrality as a humanitarian principle to be taken into account, it appears that this principle is not consistently respected in some of the other draft articles. More precisely, in draft article 4, subparagraph (*e*), on the definition of "relief personnel", and in draft article 17 [14], paragraph 1 (*a*), on the facilitation of external assistance, civilian and military relief personnel are referred to in one and the same context. Maintaining neutrality, impartiality and independence is the best way to protect humanitarian space and ensure access to aid for beneficiaries and the safety and security of humanitarian personnel. Therefore, it is pivotal that the relevant draft articles more clearly distinguish between military personnel and humanitarian response and emphasize the fundamentally civilian character of humanitarian assistance. It is key to reaffirm in the draft articles that, where military capability and assets are used as a last resort to support the implementation of humanitarian assistance, the evaluation of the need to use them is to be undertaken with the consent of the affected State and in conformity with international law, including international humanitarian law, as well as humanitarian principles. In this regard, the Nordic countries refer particularly to the guidance given by the Oslo Guidelines.

2. The protection of vulnerable groups in disasters is another area to be highlighted. The Nordic countries are pleased that the Commission has made explicit reference to the needs of the particularly vulnerable as an important humanitarian principle. Vulnerable individuals and groups are commonly those whose humanitarian situation may become most affected in the event of disasters and who in those circumstances deserve special attention. For this reason, some elaboration could add practical value to the draft article, which in its current form is not very specific or explicit. The draft article could draw from the definitions used in, for example, General Assembly resolution 69/135 of 12 December 2014, which refers to the need to take into account in all humanitarian response "the specific humanitarian needs and vulnerabilities of all components of the affected population, in particular girls, boys, women, older persons and persons with disabilities" (para. 32).

3. Another key aspect of humanitarian assistance is the importance of the "do no harm" principle. In the context of humanitarian response, assisting actors should avoid exposing people to further harm as a result of their action, ensure access to impartial assistance, protect persons from physical and psychological harm arising from violence and coercion, and assist persons in claiming their rights and accessing necessary remedies. An explicit reference to this essential principle appears to be missing from the current draft articles, and therefore the Nordic countries would suggest including the "do no harm" principle in draft article 7 [6].

United States of America

1. The United States greatly appreciates the inclusion in the draft articles of the humanitarian principles, which are incredibly important to humanitarian responses. However, it would suggest replacing "in accordance" with "consistent", which would be more accurate given the non-binding nature of the principles.

2. The United States also appreciates that draft article 7 [6] reflects the importance of non-discrimination during the response to and recovery from disasters. The United States suggests including disability explicitly within the second sentence of paragraph (6) of the commentary and adding a citation to the Convention on the Rights of Persons with Disabilities in the footnote. It would also suggest that, with respect to "the needs of the particularly vulnerable", the commentary highlight the need to minimize the risks of, and address the effects of, harm, exploitation and abuse for disaster-affected populations. For example, there is often an increased risk of exploitation and abuse in the aftermath of a disaster, particularly trafficking of children and adolescent girls.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

1. The Office for the Coordination of Humanitarian Affairs welcomes draft article 7 [6]. Indeed, humanitarian principles underpin humanitarian action. In addition, the Office would support the inclusion of a reference to the obligation for humanitarian organizations to respect the principle of independence, in accordance with General Assembly resolution 58/114:

> *Recognizing* that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance.

2. One essential element in considering the needs of the particularly vulnerable is community participation. This element is not explicit in the draft articles or commentaries. Affected communities, including vulnerable groups, should be consulted in the design, implementation, monitoring and evaluation and assistance provided in the event of a disaster. The Office for the Coordination of Humanitarian Affairs would support the inclusion in the commentary of a reference to possible ways of including and ensuring community participation.

International Organization for Migration

1. Although draft article 7 [6] refers to the response to a disaster, in the light of the broad scope of application of the draft articles specified in paragraph (4) of the commentary to draft article 1 [1] ("event of" disaster as including the post-disaster response and recovery, including reconstruction) and in the light of paragraph (5) of the commentary to draft article 2 [2], the phrase "response to disasters" needs to include pre-disaster risk reduction, where relevant. This should be recalled in the text of the commentary. The principle of non-discrimination, for example, is particularly relevant in the context of the prevention of disasters. In addition, specific attention to vulnerable groups, in terms of ensuring accessibility of information, participation in the decision-making process and preparedness to respond to their specific needs when the disaster strikes, should be a key consideration in the prevention of disasters or their consequences.

2. The reference to nationality among the grounds for non-discrimination in paragraph (6) is particularly welcome in light of the risk of stigmatization and exclusion of non-nationals in disaster response situations. In this respect, it is suggested that a reference to article 7 of the International Convention on the Rights of All Migrant Workers and of the Members of Their Families be added in a footnote, because the two covenants on international human rights only refer to the broader and less well-defined concept of "national origin" and not to "nationality" as a ground for discrimination. The Commission could also consider adding a reference to legal or social status as grounds for discrimination, in line with the list of grounds provided in principle 4, paragraph 1, of the Guiding Principles on Internal Displacement.

3. Paragraph (7) of the commentary specifies that the phrasing "particularly vulnerable" is drawn from the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance ("IFRC Guidelines"),[1] which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses". The express citation of the list contained in the IFRC Guidelines is welcome because it facilitates the identification of the categories of persons that should be considered vulnerable in the context of disasters. However, it would be important to single out also the plight of non-nationals in disaster situations. Migrants are often among the worst affected by disasters owing to various factors, including their lack of nationality of the country in which they find themselves, limited language proficiency, limited knowledge of local environmental conditions, including natural hazards, legal frameworks and institutions, limited social networks, lack of trust in authorities, restrictions on mobility and discrimination.[2] They often face difficulties in accessing information, resources and opportunities, which reduce their ability to prevent, mitigate, prepare for, cope with and recover from natural disasters. There is an increasing recognition of the specific vulnerability of non-nationals in disaster situations.

[1] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008. Available from www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/idrl-guidelines-en.pdf.

[2] L. Guadagno, "Reducing migrants' vulnerability to natural disasters through disaster risk reduction measures" (IOM), Migrants in Countries in Crisis Initiative, *Issue Brief*, October 2015.

European Union

1. The Commission might wish to consider the scope of the draft article, by extending its scope also to the prevention of disasters to ensure consistency with draft articles 10 [5 *ter*] and 11 [16], which include disaster risk

reduction in the overall scope of the set of draft articles. The application of the humanitarian principles in the prevention phase could be of importance, notably with respect to pre-emptive early response (e.g., drought) or longer-term risk reduction, which should not be assessed as a political priority, but needs-based.

2. The Commission could consider whether it would be appropriate to insert a reference to the principle of independence.

International Federation of Red Cross and Red Crescent Societies

Draft article 7 [6] refers to the principles of "impartiality" and "nondiscrimination" as if they were separate concepts. This might lead to confusion as to the meaning of "impartiality", which is fundamentally based on nondiscrimination. As the humanitarian principles form part of the fundamental principles of the International Red Cross and Red Crescent Movement, IFRC has a strong interest in guarding against this kind of confusion. Consequently, it is suggested that if the aim is to place additional emphasis on particular elements of the existing principles, that could be done without creating confusion or undermining the principle by adding the phrase "and in particular" after the word "impartiality".

H. Draft article 8 [5]—Duty to cooperate

1. Comments received from Governments

Austria

Austria emphasizes that draft article 8 [5] must not be interpreted as establishing a duty to cooperate with the affected State in disaster relief matters, including a duty of States to provide assistance when requested by the affected State. Austria takes the view that such a duty does not exist and should not be established. It would contradict the basic principle in the field of international disaster relief, namely the principle of voluntariness.

Switzerland

See the comment below on draft article 21 [4].

United States of America

1. The United States reiterates its general comments regarding the articulation of what appear to be new "rights" and "duties" of States. Although it recognizes the principles of cooperation among States reflected in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[1] it does not agree that they impose a specific legal obligation to cooperate with the broad range of organizations listed in this paragraph. Cooperation with external organizations is certainly desirable and may often be beneficial, but which organizations may be most helpful will depend on the particular circumstances of the affected State and the disaster. Thus, the United States recommends that "shall" be changed to "should".

2. In paragraph (2) of the commentary, the United States recognizes that international cooperation may take on special significance with respect to particular human rights obligations, but also believes the commentary should reflect that different States have assumed different obligations. It suggests the following clarifying edits: "Cooperation may take on special significance with regard to certain international human rights obligations undertaken by States parties to specific treaties."

3. In addition, paragraph (2) of the commentary should more closely track article 11 of the Convention on the Rights of Persons with Disabilities, which simply reaffirms existing international obligations. The United States therefore suggests the following addition, from article 11 of the Convention: "International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which provides that States parties " 'shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.' "

4. See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

1. The Office for the Coordination of Humanitarian Affairs welcomes the emphasis in draft article 8 [5] on cooperation between a range of different assisting actors. As mentioned in relation to draft article 5 [7], it would be useful to refer also to "any other entity or individual", as the Office understand that private actors also have an important role to play. Indeed, this recognizes that effective disaster response requires cooperation not only among States, but also with intergovernmental and nongovernmental organizations as well as other individuals and entities.

2. Also in relation to draft article 8 [5], the Office for the Coordination of Humanitarian Affairs has a special mandate to assist in the coordination of international assistance on the basis of General Assembly resolution 46/182 of 19 December 1991, which contained provisions to strengthen the United Nations response to both complex emergencies and natural disasters and created the high-level position of Emergency Relief Coordinator as the single United Nations focal point for complex emergencies as well as for natural disasters. The resolution provides that, if there is a need for externally coordinated emergency assistance, the Government of the affected State may inform the Emergency Relief Coordinator and the United Nations representative in the country. The Office for the Coordination of Humanitarian Affairs would support the inclusion in draft article 8 [5] of an explicit reference to the responsibility of the Emergency Relief Coordinator in accordance with resolution 46/182. This could be phrased

[1] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

as follows: "States shall, as appropriate, cooperate among themselves, and with the United Nations, in particular the Emergency Relief Coordinator, and other competent intergovernmental organizations …". In addition, the Office would support the inclusion in the commentary to draft article 8 [5] of a more detailed explanation of the role of the Emergency Relief Coordinator. For example, the Emergency Relief Coordinator processes requests from affected Member States for emergency assistance requiring a coordinated response, serves as a central focal point concerning United Nations emergency relief operations and provides consolidated information, including early warning on emergencies.

3. In connection with draft article 8 [5] and/or draft article 9 [5 *bis*], the Office for the Coordination of Humanitarian Affairs would suggest considering the insertion in the commentary of a "duty to inform" or a "duty to notify", analogous to the duty described in the Commission's articles on prevention of transboundary harm from hazardous activities, of 2001.[1] For instance, those articles state in draft article 17 that "[t]he State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information". Such a reference could capture a duty to inform/notify those actors that have a mandated role to gather information, provide early warning and coordinate assistance provided by the international community.

[1] General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 78 *et seq.*, paras. 97–98.

Food and Agriculture Organization of the United Nations

1. As indicated in the commentary, the duty to cooperate is well established as a principle of international law that takes on special significance with regard to international human rights law.

2. The early warning experience of the Food and Agriculture Organization has shown that the absence of "early listening" and "early response" may lead to unnecessary suffering. While it is acknowledged that the obligation to cooperate does not amount to a general duty to provide assistance, it could be construed as an obligation to consider early warning reports and requests for assistance, without there being a duty to accede to such requests.

3. The commentary to this draft article could go into more detail in this important matter.

World Bank

Concerning draft article 8 [5], the World Bank would like to know under which legal/regulatory framework the cooperation would be organized. It is also important to establish when and how the rules and logistics for coordination will be decided, and whether there is a default leadership role of one particular organization, or the latter would be decided *ad hoc*. These issues may significantly affect the speed of constituting and operationalizing cooperation. If cooperation is made a duty, there needs to be a clear set of rules and guidance to ensure that this duty becomes a facilitating and not a debilitating factor.

Association of Caribbean States

The draft article should refer to whatever legal instruments the affected State has to effect cooperation and not leave it merely to the remit of the instruments of international law, save and except where the country is signatory to and is bound by the same.

European Union

1. In view of the important role of the European Union in the field of civil protection and humanitarian aid, the fact that draft articles 4 and 8 [5] do not refer only to States in relation to the provision of external assistance, but encompass a broader notion of "assisting actors", is welcomed. It is also recognized in draft article 8 [5] that a key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with competent intergovernmental and non-governmental organizations.

2. Against this background, a further reference to "regional integration organizations" should be included, which would take into account the special characteristics of the European Union. The term "regional integration organization" is accepted at United Nations level and has been included in important international legal instruments, including, for example, the Convention on the Rights of Persons with Disabilities, of 2006.

3. Draft article 8 [5] acknowledges the importance of international cooperation to international disaster relief and assistance activities. The European Union would like to point out that this expression of good practice should extend to cover cooperation with respect to, *inter alia*, needs assessments, situation overview and delivery of assistance.

4. The way the draft article is structured at the moment could give the impression that the cooperation was confined to cooperation between States or between States and other international actors and would not comprise cooperation between those other international actors themselves.

5. The European Union suggests including precise language in the commentary to draft article 8 [5] to clarify that the duty to cooperate also extends to the cooperation between other assisting actors, including IFRC and ICRC.

International Federation of Red Cross and Red Crescent Societies

1. A second important gap relates to national Red Cross and Red Crescent societies. While IFRC is appreciative that it has been mentioned, it feels that there is an even stronger normative and practical basis to include national societies in this approach.

2. To address this issue without introducing additional complexity in the draft articles, IFRC recommends

replacing the reference to "the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross" with "the components of the International Red Cross and Red Crescent Movement".

I. Draft article 9 [5 *bis*]—Forms of cooperation

1. Comments received from Governments

Austria

Austria is not convinced of the need to retain this draft article. As the commentary itself states, this draft article does not contain any normative substance, but only an enumeration of possible forms of cooperation. Although Austria appreciates the presentation of the various measures taken by States, such an inventory would better remain in the commentary and need not be reflected in a normative provision. The forms of cooperation can hardly be defined in a general way, as they would depend on the particular type of disaster and the specific circumstances of the situation.

Cuba

The following wording is proposed: "For the purposes of the present draft articles, cooperation includes international assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources."

Mexico

Given the broad scope of the draft articles and bearing in mind the wide variety of phenomena covered by them, the wording of this draft article should not give the impression of being exhaustive and of consequently limiting the forms of cooperation that could be provided under the draft articles.

United States of America

See the comments below under draft article 10 [5 *ter*].

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

Draft article 9 defines "cooperation" as including, *inter alia*, "making available relief personnel, equipment and goods, and scientific, medical and technical resources". While this list is not exhaustive, it might be useful to include "services", given that this term is included in the definition of "external assistance" in draft article 4, subparagraph (*d*).

International Organization for Migration

1. Paragraph (4) of the commentary to draft article 9 [5 *bis*] explains that, although the draft article highlights specific forms of cooperation, the list is not exhaustive. It is suggested that a reference be added, in the draft article or in the commentary, to cooperation with the countries of origin of non-nationals who are present on the territory, in the form of bilateral coordination aiming to ensure access to nationals during the crisis, evacuation procedures, documentation facilitation, etc. This would be in line with the general purpose of the draft articles recalled in paragraph (3) of the commentary to the draft article, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights". The paragraph also recalls that the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in the draft article, is the protection of persons affected by disasters. Cooperation with the countries of origin of the nationals who are present in the area hit by the disaster is also essential to ensure that States of origin can alleviate the burden of the affected States in taking care of their nationals.

2. Alternatively, the issue of emergency consular assistance could be dealt with under draft article 15 [13] on conditions on the provision of external assistance.

International Federation of Red Cross and Red Crescent Societies

Under draft articles 9 [5 *bis*] and 10 [5 *ter*], cooperation appears to extend to relief and risk reduction, but not clearly to recovery. IFRC feels that recovery should also be included. Moreover, while non-exclusive, the enumeration of forms of cooperation contained in draft article 9 [5 *bis*] misses some important aspects, including financial support, training, information-sharing and joint simulation exercises and planning.

J. Draft article 10 [5 *ter*]—Cooperation for disaster risk reduction

1. Comments received from Governments

Austria

Draft article 10 [5 *ter*] refers to the duty to cooperate with a view to reducing the risk of disasters. Given the broad definition of disasters, the provision would oblige States to cooperate in reducing the risk of terrorist acts or civil strife below the level of a non-international armed conflict. Austria is of the opinion that the cooperation in these areas is, to a large extent, already covered by other regimes.

Netherlands

The Netherlands favours a clear focus of the draft articles on the phase of the actual disaster, with reference to the title of the study.

Qatar

Qatar proposes the following addition to draft article 10 [5 *ter*]: "Cooperation shall extend to the taking of measures intended to reduce the risk of disasters *and mitigate the consequences thereof*."

United States of America

1. The United States reiterates its general comments regarding the attempt to articulate new "rights" and "duties" in the draft articles, and its comments on draft article 11 [16].

2. Accordingly, the United States suggests changing "shall" to "should". It also questions whether it is necessary to include this language in a stand-alone article. It would recommend revising draft article 8 [5] to clarify that cooperation includes efforts to reduce the harms of disasters, or revising draft article 9 [5 *bis*] to include disaster risk reduction as one of the forms of cooperation. If it is to remain a stand-alone article, the United States recommends adding "as appropriate" at the end, which is consistent with the language on cooperation in draft article 8 [5]. As noted in existing non-binding frameworks on disaster risk reduction, each State has the primary responsibility to take measures to reduce the harms caused by disasters in its own territory. Other States may assist in these efforts, as appropriate.

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

1. Draft article 10 [5 *ter*] is very clear and its wording helps create a link with the measures envisaged not only in draft article 11 [16], but also in the Sendai Framework, especially in the parts concerning cooperation at "global and regional levels" of the four priority areas and section VI on international cooperation and global partnership.

2. In the light of the above, it may be helpful to include specific references to the Sendai Framework in paragraph (2) of the commentary, at the very end: "… risk, as well as the Sendai Framework's parts concerning cooperation at 'global and regional levels' of the four priority areas and section VI on international cooperation and global partnership".

3. Finally, should the draft article be incorporated in draft article 8 [5], it is suggested that it be done in the form of an independent paragraph and that its current formulation be preserved.

World Food Programme

WFP considers that the inclusion of universal international obligations in draft articles 10 [5 *ter*] and 11 [16] on the prevention of disasters, including disaster risk reduction, may facilitate the work of WFP insofar as it would prompt States to adopt domestic disaster prevention regulations, hence increasing the likelihood that robust systems will be already in place when disaster strikes. This, in turn, will strengthen the ability of assisting actors to respond effectively at the early onset of emergencies.

World Bank

See the comment above on draft article 8 [5].

Since draft article 10 [5 *ter*] refers to disaster prevention and post-disaster risk reduction (beyond immediate relief and recovery), it is unclear whether this would still be planned and financed under disaster relief instruments, and over which time horizon this would extend.

European Union

The European Union suggests that the Commission consider reflecting in draft article 10 [5 *ter*] (and also 11 [16]) the good practice recommended in the Sendai Framework.

International Federation of Red Cross and Red Crescent Societies

See the comment above on draft article 9 [5 *bis*].

K. Draft article 11 [16]—Duty to reduce the risk of disasters

1. Comments received from Governments

Australia

Australia submits that it would be of value to further consider the capacity of all States to fulfil the duties embodied, for example, in draft articles 11 [16], paragraph 1, 17 [14] and 18.

Cuba

It is proposed that paragraph 2 be amended to specify the different phases of "early warning". In that regard, the following wording is proposed: "Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, the preparation of the population at risk and the installation and operation of early warning systems, which include the following phases: (*a*) monitoring and alert; (*b*) risk assessment and decision-making; (*c*) warning (communication and dissemination); and (*d*) protection of persons and property at risk."

Ecuador

The Guayaquil Communiqué of the Fourth Session of the Regional Platform for Disaster Risk Reduction in the Americas[1] should be included in paragraph (5) of the commentary to draft article 11 [16].

[1] Adopted on 29 May 2014 at the Fourth Session of the Regional Platform for Disaster Risk Reduction, available from https://eird.org/pr14-eng/index.html.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

1. The Nordic countries would like to emphasize the importance of the well-established principle of international law, due diligence, as partly reflected in the duty of States to take preventive measures to reduce the risk of disasters, which is set forth in draft article 11 [16]. The key in disaster risk prevention is that domestic laws, regulations and public policies define roles and responsibilities and guide the public and private sectors to address disaster risk in publicly owned, managed or regulated services and infrastructures. They should also enhance transparency and public awareness of legal and administrative measures for disaster risk reduction to be undertaken by all relevant institutions from national to local

and community level. Disaster risk reduction should be a priority at the community level. While the commentary to draft article 11 [16] rightly describes the nature of preventive obligations, it would be beneficial to elaborate the aforesaid element of risk prevention further.

2. Moreover, the Nordic countries note that it is necessary to set a duty for States not only to take relevant domestic measures, but also to engage in international cooperation, as is mentioned in draft article 10 [5 *ter*]. In this respect, further reference could possibly be made in the commentary to the principles introduced in the Sendai Framework, including its paragraphs 8, 14, and 44, on the various types and modalities of cooperation.

Germany

The definition of disaster risk reduction should adhere to the international framework, reflected in the Sendai Framework, which clearly points to early warning systems and risk transfer mechanisms as part of a comprehensive understanding of disaster risk reduction. Draft article 11 [16], paragraph 2, should be amended as follows: "Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems, the installation and maintenance of appropriate infrastructure protection measures, the installation and maintenance of appropriate response surge capacity (personnel and material), and the installation of appropriate financial disaster risk transfer mechanisms."

United States of America

1. The United States recognizes the importance of each State taking measures to prevent, mitigate and prepare for disasters that could affect its people. However, as previously noted, the United States has concerns with the attempt to articulate new "rights" and "duties" in the draft articles. It disagrees with the assertion in paragraph (9) of the commentary that each State has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters.

2. Paragraph (4) of the commentary suggests that the Commission derived this very specific obligation from the general principles of State sovereignty and non-intervention, but does not provide any explanation of how it was derived, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The commentary further suggests that international human rights law supports the creation of a new obligation on States with respect to reducing the risk of disasters. The United States strongly disagrees with the assertion in the commentary that States have an affirmative obligation to take "necessary and appropriate measures" to prevent human rights violations "no matter the source of the threat". International human rights law applies to States and regulates their conduct with respect to the human rights of individuals in their territory. It does not impose a general obligation on States to protect individuals from private actors, or from the forces of nature. The right to life, as proclaimed in the article 3 of the Universal Declaration of Human Rights[1] and elaborated in article 6 of the International Covenant on Civil and Political Rights imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard.

3. The commentary suggests that State practice supports this new rule. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but the United States does not believe that such information establishes widespread State practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. Notably, the two most significant international frameworks on disaster risk reduction—the Hyogo Framework and the recently adopted Sendai Framework—are both non-binding. As such, there is no basis to conclude that this is a rule of customary international law.

4. In addition, as explained in the comments of the United States on draft article 3 [3], contemporary approaches to disaster risk reduction focus on minimizing the harm caused by disasters, and the definition of disaster in terms of "events" fails to adequately reflect this approach. If the current definition of disaster is retained, the United States would recommend revising the language of this draft article to focus on harm reduction. Consequently, it would recommend revising the title of this draft article to read: "Responsibility to reduce the risk of disasters", and paragraph 1 to read: "Each State should reduce its vulnerability to the risk of disasters …". Alternatively, to the extent this draft article reflects progressive development of the law regarding States' obligations, it ought to be identified as such in the commentary.

5. Paragraph (17) of the commentary states that the three types of measures noted in paragraph 2 of the draft article are not exhaustive. The United States believes the provision would be strengthened by including a reference to measures that not only identify and communicate risk, but also actually mitigate the risk of future loss of life from future events. To realize meaningful risk reduction, actions should actually be taken to address the assessed risk, such as updating building codes, retrofitting structures against wind and seismic hazards, or elevating or relocating homes out of the flood plain.

6. Lastly, the United States would emphasize that stating a legal obligation to reduce the risk of disasters is particularly problematic in the light of the broad definition of "disasters", as discussed in its general comments on draft article 3 [3]. If one considers "disasters" to include armed conflict or other serious political or economic crises, draft article 11 [16] would reflect legal requirements to take measures to reduce the risk of disasters that would reach well beyond steps that should be taken with respect to natural disasters or certain man-made disasters (e.g., chemical spills or failed dams). For example, it could raise questions as to whether States have an obligation to

[1] General Assembly resolution 217 A (III) of 10 December 1948.

engage in diplomatic steps that might reduce the likelihood of an outbreak of hostilities, or fiscal policy measures that might reduce the risk of an economic calamity, but the efficacy or appropriateness of such measures is hardly susceptible to objective assessment.

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

1. Draft article 11 [16] is very welcome as it represents a critical advancement for disaster risk reduction and accountability in disaster risk management.

2. The Sendai Framework recognizes, as a guiding principle, that "[e]ach State has the primary responsibility to prevent and reduce disaster risk" (para. 19 (*a*)); this is echoed in the goal of "[p]revent[ing] new and reduce existing disaster risk" (para. 17). Moreover, the expected outcomes include "[t]he substantial reduction of disaster risk" (para. 16).

3. At the same time, in the light of the Sendai Framework and the recognition in the commentary to the draft article that the emphasis and focus is on reducing disaster risk and not preventing disasters, some amendments may be considered in the text of paragraph 1. In particular, while the title of the draft article and paragraph 1 refer to disaster risk, the closing reference to "prevent, mitigate and prepare for disaster" still places emphasis on disasters.

4. The Sendai Framework goes beyond the focus on "disaster" and focuses on "risk", and not only existing risk, but also future risk created through actions and investments that increase exposure, vulnerability and hazardous conditions.

5. The following possible alternative for paragraph 1 is suggested: "Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent [the creation of new risk and reduce existing risk, mitigate, and prepare for disasters]".

6. The commentary to the draft article is very strong and provides important guidance—including on due diligence, the obligation to put legal frameworks into place—which is also confirmed by the Sendai Framework and the approach to disaster risk management enshrined therein.

7. At the same time, in the light of the rationale for the proposed amendments to paragraph 1 of draft article 11 [16], it may be necessary to adjust the commentary in paragraphs (11), (15) and (16). In particular, in paragraphs (11) and (15), the phrase "to prevent, mitigate and prepare for disasters" should be replaced with "to prevent the creation of new risk and reduce existing risk" and, as a consequence, paragraph (16) would be deleted.

8. Finally, the formulation of paragraph 2 is very clear and consistent with the Sendai Framework. It is suggested that the phrase "in the implementation of the Sendai Framework" be inserted in paragraph (17) of the commentary after the word "future".

Food and Agriculture Organization of the United Nations

1. The effect of a disaster depends on both the magnitude of the disaster and the existing vulnerabilities of persons affected. Resilience of local populations is therefore very important and should be worked on in both the pre- and post-disaster phases.

2. Enhancing resilience needs political will, investment, coordination, technical expertise capacities, innovation and shared responsibility for disaster risk reduction and crisis management by countries, local authorities, communities, civil society, the private sector and the international community.

3. In order to contribute to breaking the cycle of crises and humanitarian interventions that occur in many disasters, emergency programmes should aim at increasing resilience, i.e., the ability to prevent disasters and crises, to anticipate, absorb, accommodate or recover from them in a timely, efficient and sustainable manner and to adapt to new livelihood pathways in the face of crises. Responding to the long-standing call for synergy between emergency assistance and long-term development support, resilience-oriented emergency programming promotes people-centred approaches that respect the inherent rights of affected individuals or groups and builds the capacity to realize human rights, including the right to adequate food. Also relevant in this context is social protection work, which helps to build or rebuild livelihoods by providing basic necessities or minimum services to vulnerable people and contributes to long-term development by improving levels of health, education, nutrition and social integration.

4. The importance of human rights in resilience-building programmes lies in improving absorptive, adaptive and transformative capacities based on the recognition of the interests and rights of affected populations and the roles, duties and responsibilities of various actors in pre- and post-emergency situations.

5. The commentary to this draft article could benefit from an analysis of the relationship between reducing the risk of disasters and the concept of resilience.

World Bank

Draft article 11 [16], paragraph 1, should specify the standards and good practice references for legislation, regulations and measures for disaster prevention. Also, for many States this duty could theoretically develop into a multi-billion dollar liability; some countries have annually recurrent damage rates in the range of a percentage of their gross domestic product. Countries will need smart guidance to identify low-hanging fruit and develop intelligent prevention programmes, often focusing on low-cost regulatory efforts such as land management, including spatial planning. The spatial planning component is probably worth mentioning specifically in draft article 11 [16], paragraph 2.

International Organization for Migration

1. It would be important to add an express reference to the Sendai Framework as the new standard for disaster risk reduction efforts, and specifically to the key priorities that are identified in the Framework.

2. The examples of disaster risk reduction measures mentioned in paragraph 2 may be too narrow. It should be noted that neither the Hyogo Framework nor the Sendai Framework in fact link disaster risk reduction with humanitarian interventions *per se*. Reducing risk is a process mainly dependent on nonhumanitarian actors, in particular when one looks at its core elements, which are rooted in sustainable development and long-term local-level empowerment practices. This is the case both at national and international levels: of the whole spectrum of disaster risk reduction activities, emergency responders and humanitarian actors tend to engage only with the reduction of the risk of hazard as opposed to the consequences of the hazard. It would be important that this draft article acknowledge more strongly that key elements of disaster risk reduction are the interventions aimed at reducing vulnerability and building resilience.

Association of Caribbean States

The use of the word "dissemination" should be defined specifically as an activity under disaster risk reduction measures. This may add a burden to the affected State if the State is expected to develop a platform of collected data, and also introduces issues of accessibility, maintenance, sharing protocols, etc.

European Union

See the comment above on draft article 10 [5 *ter*].

International Federation of Red Cross and Red Crescent Societies

1. An important aspect of the draft articles is the assertion in draft article 11 [16] that States have a duty to take necessary and appropriate steps to reduce disaster risks. While the recently adopted Sendai Framework has set a clear global agenda, affirming this duty in a binding instrument would provide a helpful tool for champions of disaster risk reduction within Governments to make the case for greater attention to this critical activity.

2. While IFRC applauds the assertion of an obligation to reduce risks in draft article 11 [16], paragraph 1, it feels that the listing of "risk reduction measures" in paragraph 2 should not be limited to assessing risk, but should also extend to assessing and reducing vulnerability and increasing the resilience of communities faced with natural hazards.

L. Draft article 12 [9]—Role of the affected State

1. Comments received from Governments

Australia

Australia is mindful of creating duties that States may lack the capacity to fully implement. While Australia welcomes the reflection in draft article 12 [9] of the primary role of the affected State in preventing and responding to disasters, Australia would approach with care the assertion, in paragraph 1, of an unqualified duty on the part of the affected State to ensure the protection of persons and provision of disaster relief and assistance on its territory.

Austria

See the comment above on draft article 4.

Cuba

Concerning draft article 12 [9] on the role of the affected State, the following wording is proposed for paragraph 1: "The affected State, by virtue of its sovereignty and in accordance with its national legislation, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory."

Germany

The approach to the concept of sovereignty enshrined in draft articles 12 [9] to 15 [13] is highly pertinent. In particular, Germany shares the perception that sovereignty entails the duty of the affected State to ensure within its jurisdiction the protection of persons and the provision of disaster relief.

Mexico

Mexico recognizes that this draft article reflects the primary obligation of States to protect persons and provide humanitarian assistance in the event of disasters;[1] however, Mexico suggests adding the expression "within its capabilities", since in the hypothetical situation that an affected State lacked the capacity to comply with this rule, it would not be responsible for failing to do so, in accordance with the *ad impossibilia nemo tenetur* principle.

[1] See ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005), E/CN.4/1998/53/Add.2, annex.

Switzerland

Switzerland notes that certain draft articles, such as draft article 12 [9], paragraph 2, and draft article 16 [12], are more concerned with sovereignty and more intrusive regarding humanitarian action than international humanitarian law.

United States of America

As with draft article 11 [16], the commentary fails to explain how the very specific obligation in draft article 12 [9], paragraph 1, has been derived from the general principle of State sovereignty, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The United States recommends revising this paragraph to delete "by virtue of its sovereignty", and to replace "has the duty to" with "should". Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs supports the approach to the concept of sovereignty adopted in draft articles 12 [9] to 15 [13], in particular the notion that sovereignty entails the duty of the affected State to ensure within its territory the protection of persons and the provision of disaster relief.

World Bank

The combination of draft articles 12 [9], 13 [10] and 14 [11] seems to be confusing. The affected State has territorial sovereignty (draft article 12 [9]), but also the duty to seek assistance under specific conditions set in draft article 13 [10], and it has the right of consent (draft article 14 [11], paragraph 1), but it cannot withhold consent arbitrarily (draft article 14 [11], paragraph 2). Thus it is crucial to determine what in concrete terms happens if a State cannot cope with a disaster, but refuses international help. And if such a scenario were to occur, what leverage would the United Nations have? It is also vital to consider whether this legal framework would speed up disaster relief, or would introduce additional formal due diligence requirements and clearances that could create delays. In the World Bank's experience, if the legal and regulatory situation is not crystal clear at the onset of a disaster, each decision point will inevitably cause delays that in the face of extreme urgency are bound to be significantly negative in their impacts.

European Union

Draft articles 12 [9] to 14 [11] concern the duties of the affected State and are accordingly central to the whole set of draft articles. Overall, the European Union congratulates the Commission and the Special Rapporteur for having succeeded in striking a balance between the need to safeguard the national sovereignty of the affected State, on the one hand, and the duty to cooperate, on the other, as provided for by the interplay of draft articles 13 [10], 14 [11] and 16 [12].

International Committee of the Red Cross

As they stand, the draft articles contain provisions that appear to be at odds with international humanitarian law. For instance draft article 12 [9], paragraph 2, stipulates that "the affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance", but the commentary fails to define what these terms mean for purposes of the draft articles. In its current form, the draft article is potentially very intrusive for impartial humanitarian organizations such as ICRC. In addition, it could be read in conjunction with draft article 7 [6] on humanitarian principles, which does not refer to the principle of independence. No such requirements of direction, coordination and supervision can be found in the relevant rules of international humanitarian law. International humanitarian law only authorizes the concerned parties to armed conflict and States to verify the humanitarian nature of the assistance through a so-called "right of control". The draft articles do not seem to restrict the "affected State" to such limited right of control and are therefore much more sovereignty-oriented than the corresponding provisions of international humanitarian law governing humanitarian access.

M. Draft article 13 [10]—Duty of the affected State to seek external assistance

1. Comments received from Governments

Austria

1. Austria recognizes that all States are obliged to provide for an appropriate disaster relief system in order to protect their citizens. Such a relief system should encompass prevention, preparedness and response measures. Nevertheless, Austria is not convinced that the present formulation is striking the right balance between State sovereignty and the protection of individuals. In cases in which the national response capacity is exceeded in the event of a disaster, the State concerned should seek assistance to meet its responsibilities, but has no such duty. This approach would also correspond to guideline 3.2 of the IFRC Guidelines.[1]

2. In the view of Austria, the term "as appropriate" would indicate that a State should seek assistance that is commensurate to the actual scope of the disaster. At the same time, this draft provision must not be understood as excluding the right of a State to seek assistance in the case of disaster even if its response capacity is not yet exceeded.

3. Several further difficulties are connected with the approach pursued in this draft article. States are sometimes reluctant to receive foreign assistance and to admit a lack of response capacity. If a State denies that a disaster exceeds its response capacity, what would be the consequence? In no case could such a situation entitle another State to act without the consent of the affected State.

[1] "If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."

Cuba

Concerning draft article 13 [10] on the duty of the affected State to seek external assistance, the following wording is proposed: "To the extent that a disaster exceeds its national response capacity, the affected State has the right to seek bilateral or international assistance from other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate."

Ecuador

1. The draft articles referring to the duty of the affected State should be supplemented by including the recommendation for launching an international appeal, or something similar, within the request for humanitarian assistance.

2. The international cooperation modality in cases of emergency is referred to in the *Guide to International*

Humanitarian Assistance in Emergencies and Disasters[1] as follows: "Ecuador as an assisting State providing international cooperation in emergencies or disasters: so that this cooperation modality can be implemented, the Ecuadorian Ministry for Foreign Affairs must have received a request for international assistance coming from the Constitutional Government of the affected country, indicating the needs, characteristics and conditions of the appeal …".

3. Lastly, it is also recommended that the set of draft articles should include the topic of the protection of displaced persons in situations of disaster, and should determine generally the obligations of the competent international organizations and expand as far as possible the meaning and especially the scope of the concepts of assistance, mitigation, preparedness, prevention and recovery.

4. The absence of a draft article making reference to displacement of persons affected by disasters should be noted; therefore, inclusion of provisions recognizing the right to protection and security of displaced persons, both internally as well as cross-border, is recommended.

5. No draft article expressly refers to the obligations of the competent international organizations, IFRC, ICRC and relevant non-governmental organizations.

6. Being aware that the concepts of relief, humanitarian assistance, preparedness, response and recovery are evolving and that currently there is no clear consensus among authors and organizations on their scope, Ecuador would like to highlight the most recent tendency to consider the connectivity among the various actions that each process brings about. It thus suggests that this connectivity should be reflected in the set of draft articles and that an effort should be made to clarify their significance and scope.

7. Therefore, the Commission ought to consider aligning the draft articles with the terminology adopted by the International Strategy for Disaster Reduction in its glossary and IFRC in its Guidelines.

[1] Ecuador, *Manual para la Gestión de la Asistencia Humanitaria Internacional en Situaciones de Emergencia y Desastre* (2011).

Germany

See the comment above on draft article 12 [9].

Mexico

It is appropriate to establish the right of affected States to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and competent non-governmental organizations. However, in the interests of the principle of State sovereignty, which involves the exclusive right to display the activities of a State provided that the obligation to protect, within the territory, the rights of other States is fulfilled,[1] Mexico suggests that the term "has the duty to" be replaced by "may", so that States, in accordance with their primary obligation to protect persons and provide humanitarian assistance in the event of disasters,[2] can exercise the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance on their territory, in accordance with draft article 3 [3].

[1] *Island of Palmas* case (*Netherlands v. U.S.A.*), Award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.I), p. 829, at p. 839 (Max Huber).

[2] See ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, 26 July 2005; E/CN.4/1998/53/Add.2, annex.

United States of America

1. As with draft articles 11 [16] and 12 [9], the United States has concerns regarding the derivation of a specific "duty" to seek assistance from particular entities based on the general principle of sovereignty. To the extent that the commentary is intended to suggest that international human rights law establishes a general obligation to protect individuals from non-State actors and natural forces, the United States disagrees. It recommends revising this subsection to change "has the duty to" to "should". In this case, the United States supports clarifying in the commentary that a disaster does not relieve a State of the human rights obligations it has undertaken, which may include, in certain circumstances, asking for assistance in the event of a disaster that exceeds its national response capacity. Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

2. For the reasons that the United States stated with respect to draft article 2 [2] (and paragraph (10) of the commentary), paragraph (4) of the commentary incorrectly includes the right to life among the human rights directly implicated in the context of a disaster. The right to life, as proclaimed in article 3 of the Universal Declaration of Human Rights and elaborated in article 6 of the International Covenant on Civil and Political Rights, imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard. All references to right to life should be removed from this paragraph, including the sentence referring to that right as non-derogable under the Covenant. Indeed, the fact that the Human Rights Committee has advised, in its general comment No. 29 (2001) on derogation during a state of emergency,[1] that a "natural catastrophe" may in certain situations constitute a "public emergency which threatens the life of the nation" and, upon official proclamation, thereby justify certain State measures in derogation of some of that State's obligations under the Covenant (excluding its obligation not to deprive anyone of the right to life),[2] has no bearing on whether an affected State owes a duty to its population to address the effects of the disaster or to seek the assistance of other States in doing so.

3. Paragraph (4) of the commentary also imprecisely characterizes several of the economic, social and cultural

[1] 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.

[2] *Ibid.*, paras. 2 and 5.

rights described in the International Covenant on Economic, Social and Cultural Rights. The United States recommends that the commentary track the language from the Covenant and the international community's understanding of the right to safe drinking water and sanitation, as follows:

> "a number of human rights are directly implicated in the context of a disaster, including the right to an adequate standard of living, including adequate food, clothing and housing, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to safe drinking water, and sanitation …".

4. Later in the same paragraph, the following related edit should be made:

> "The Commission therefore notes that 'appropriate steps' to be taken by a State may include seeking international assistance where domestic conditions are such that the right to an adequate standard of living, including adequate food, cannot be progressively realized and the affected State has an international obligation to progressively realize such a right."

See also the comments above under draft article 4 concerning the definition of "affected State".

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs would support the insertion in the commentary to draft article 13 [10] of a reference to the role of the Emergency Relief Coordinator and the Resident Coordinator, in accordance with General Assembly resolution 46/182, and an explanation of the key procedures that the affected State should follow when requesting external assistance. For instance, the Office would welcome a reference to paragraph 35 (*a*) of the annex to resolution 46/182, which refers to the role of the Emergency Relief Coordinator, as supported by the Office for the Coordination of Humanitarian Affairs, in "processing requests from affected Member States for emergency assistance requiring a coordinated response", and to paragraph 39 on the role of the Resident Coordinator in country-level coordination of humanitarian assistance. In addition, humanitarian coordinators are responsible for leading and coordinating humanitarian action of relevant organizations (including United Nations, nongovernmental and civil society organizations) in a country with a view to ensuring that the action is principled, timely, effective and efficient, and contributes to longer-term recovery.

World Food Programme

WFP welcomes the inclusion of draft article 13 [10] concerning the responsibility of the affected State to seek assistance when its national response capacity is exceeded, which could create an international legal obligation for States.

European Union

1. With regard to the criterion "exceeds its national response capacity", the European Union proposes that the Commission include a reference to the terminology adopted by the International Strategy for Disaster Reduction in its glossary with respect to the capacity to cope: "a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources".

2. As a general remark in relation to draft article 13 [10] and draft article 14 [11], paragraph 2, the European Union notes that these draft articles comprise notions—"[t]o the extent that a disaster exceeds its national response capacity" and "consent to external assistance shall not be withheld arbitrarily"—which accord a certain discretional flexibility to the affected State without referring to objective criteria for determining when the respective requirement is fulfilled.

International Federation of Red Cross and Red Crescent Societies

While IFRC agrees with the assertion that States sometimes have a duty to seek external assistance, it does not believe that States necessarily must accept it from anyone who chooses to offer it (in particular from those mentioned in draft article 13 [10]). In particular, it may often be appropriate for States to choose among providers with the capacity and competence to provide assistance of appropriate quality. Draft article 13 [10] attempts to address this through the use of the term "as appropriate", but the commentary could be more explicit in explaining that the duty is to seek help, not to seek it from any one external actor.

N. Draft article 14 [11]—Consent of the affected State to external assistance

1. Comments received from Governments

Australia

The draft articles (quite properly) proceed on the basis that the consent of the affected State remains a condition precedent to the provision of external assistance. However, Australia has reservations about the inclusion in draft article 14 [10], paragraph 2, of a duty of the affected State not to "arbitrarily" withhold its consent. Such a duty does not exist in customary international law. Australia queries the standards against which and by whom any perceived "arbitrariness" would be measured, and also whether it would be beneficial in practice to place on States, which may be reluctant to seek or accept external assistance, a duty to do so. Failure to comply with any such duty would not give rise to any corresponding right of intervention by other States wishing to provide assistance.

Austria

1. Austria endorses the first principle in draft article 14 [11], which is reflected in many recent international

documents dealing with this topic and also in the solidarity clause of article 222 of the Treaty on the Functioning of the European Union. In the view of Austria, such consent must be valid consent in the sense of article 20 of the articles on the responsibility of States for internationally wrongful acts.[1] Although this qualification seems to be self-evident, it would nevertheless be useful to include it in the commentary.

2. Austria could also concur with the second paragraph, concerning the duty not to deny consent arbitrarily. The term "arbitrarily" gives rise to an obligation to accept assistance, if the response capacity is exceeded and no other serious reasons justify a denial of consent. Even if consent is denied arbitrarily, under existing international law, no other States would be entitled to substitute for the affected State and to act without its consent, irrespective of any international responsibility incurred by the affected State. Austria welcomes the duty of the affected State in paragraph 3 of draft article 14 [11] to publish its decision on any offer of assistance. Such a duty would certainly facilitate the invocation of a responsibility of the affected State in this regard.

[1] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

Draft article 14 [11] underlines the importance of consent of the affected State to external assistance. The Nordic countries note with satisfaction that draft article 14 [11], paragraph 2, underlines that consent to external assistance shall not be withheld arbitrarily. As it appears in the draft article, the term "arbitrarily" should be clearly defined in the commentary. It is indeed of utmost importance that the needs-based approach to humanitarian assistance of the affected population is respected and that the affected State does not withhold its consent to external assistance without legitimate grounds.

Germany

See the comment above on draft article 12 [9].

Germany concurs that, although the consent of the affected State shall not be withheld arbitrarily, consent is nevertheless an indispensable requirement for every provision of external assistance.

Mexico

See the comment above under draft article 4.

Qatar

Qatar proposes the following addition to draft article 14 [11]: "2. Consent to external assistance shall not be withheld arbitrarily *or in a manner that indicates it was so withheld*."

United States of America

1. The United States does not believe that draft article 14 [11] provides an accurate statement of the *lex lata*. In particular, the United States does not agree with the unqualified statement that "the provision of external assistance requires the consent of the affected State". It would be necessary to consider, based on all of the facts and circumstances, whether the provision of assistance for disaster relief or disaster risk reduction would otherwise violate the territorial integrity of the affected State or would violate the principle of non-intervention. For example, one could imagine a scenario involving a State in which the Government had completely collapsed and where it was not possible to find authorities who could provide consent. Another situation may be where a Security Council resolution applies.

2. The draft article reveals some of the limitations of framing the draft articles in terms of "rights" and "duties", particularly where such statements are not accurate reflections of existing international law. It could create confusion regarding the legally available options for States that seek to provide humanitarian assistance to persons affected by disasters. The United States suggests bringing the language of this draft article in line with General Assembly resolution 46/182, which states that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country". Similarly, and in line with the general comment that all of these draft articles should be framed as guidelines, the United States recommends changing "shall" to "should" in paragraphs 2 and 3 of the draft article. Again, for the reason stated with respect to draft article 2 [2] (para. (10) of the commentary) and draft article 13 [10] (para. (4) of the commentary), paragraph (4) of the commentary to draft article 14 [11] incorrectly bases a duty to consent to external assistance on the right to life, as set forth in article 6 of the International Covenant on Civil and Political Rights, and suggests that withholding consent for such assistance in the context of a disaster may constitute a violation of the right to life. As support for this assertion, the commentary relies solely on a non-binding proposition, advanced by the Human Rights Committee in 1982, in its general comment No. 6 (1982) on the right to life, that protection of "the inherent right to life" requires that States adopt positive measures and, by way of example, that the Committee considered "that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics".[1] As desirable as such measures and goals may be, and they are certainly aspirations the United States shares, it does not consider such positive measures to be obligatory under the Covenant. The United States strongly recommends deletion of any reliance on the right to life, including from paragraph (4) of the commentary to the draft article, as inapplicable to the context of disasters. Although reference to the General Assembly resolutions cited would not provide legal basis for recognizing a duty in this regard, the United States does not object to the factual statement expressed regarding the consequences for victims of natural disasters deprived of humanitarian assistance.

[1] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V.

3. Paragraph (7) of the commentary offers important guidance on the meaning of the term "arbitrary" that should at least be referenced in the draft article. The United States recommends modifying the language of draft article 14 [11], paragraph 2, to read:

> "In accordance with applicable rules of international law and the national law of the affected State, and consistent with the present draft articles, consent to external assistance should not be withheld arbitrarily."

4. The United States would also recommend exploring in the commentary the relationship between the paragraphs of draft article 14 [11]. For example, it is not clear whether the arbitrary withholding of consent under paragraph 2 of the draft article would affect the consent requirement in paragraph 1, or whether the extreme situations described in paragraph (10) of the commentary, under which a State might be excused from making known its decisions on offers of assistance under paragraph 3 of the draft article, could also be relevant to evaluating a State's consent or withholding of consent under paragraphs 1 and 2 of the draft article.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

1. It might be more logical to change the order of draft articles 14 [11] to 17 [14] and first speak of offers of external assistance, then consent, facilitation and conditions (i.e. draft articles 16 [12], 14 [11], 17 [14], and 15 [13]).

2. The Office for the Coordination of Humanitarian Affairs supports draft article 14 [11], paragraph 2. It notes that, in certain circumstances, an arbitrary withholding of consent may amount to a breach of international human rights law. For example, a State's denial of access to materials that are essential for survival may amount to a violation of the right to life, or it may prevent the satisfaction of the minimum core of relevant economic, cultural and social rights, such as the right to food and water and to health and medical services. Moreover, in the context of armed conflict, such denial may amount to a breach of international humanitarian law.

3. The Office would suggest that draft article 14 [11], paragraph 2, also include a reference to the withdrawal of consent, such that consent to external assistance shall not be withheld or withdrawn arbitrarily.

4. The Office would further suggest that draft article 14 [11], paragraph 3, include a requirement as to timeliness, such that the affected State shall, whenever possible, make known its decision regarding the offer within a reasonable time frame. The notion of timeliness is discussed in the commentary, which notes that the failure of an affected State to make known its decision within a reasonable time frame may be deemed arbitrary. The Office is of the view that this element of timeliness should be included in the text of draft article 14 [11], paragraph 3, itself.

World Food Programme

1. Together with draft article 13 [10] concerning the responsibility of the affected State to seek assistance, WFP welcomes the ongoing debate on whether an implicit request for, or an implicit acceptance of, international assistance by the affected State could be assumed in certain extreme cases and, if so, what conditions would need to be satisfied.

2. WFP notes that the order and sequence of draft articles 14 [11], 15 [13] and 16 [12] does not reflect the normal chronology of events when a disaster occurs. Specifically, the draft article concerning the right to offer assistance (draft article 16 [12]) is placed after that concerning consent to be provided by the affected State (draft article 14 [11]) and the draft article on conditions for the provision of external assistance (draft article 15 [13]). However, in a disaster scenario offers of assistance would frequently precede the affected State's consent to them. It may be advisable to consider changing the order of those draft articles to align them to the normal sequence of events. The significance of the aforementioned rearrangement goes beyond a mere question of form. The current order could be interpreted as implying that offers of assistance should be adapted to conditions set by the affected State, which could pose operational and other problems, for example, the conditions that an affected State may impose prior to receiving offers of assistance could fail to take into account the existing capabilities of the assisting actors or the level of support that these actors are able to provide. Accordingly, it would be advisable to place draft article 16 [12] before draft article 14 [11].

European Union

See the comment above on draft article 13 [10].

1. More specifically on the notion of "arbitrarily withholding of consent", it seems that a case-by-case approach has to be accepted, although it could be elaborated further in the commentary on what is meant by this term and what kind of motivation should be deemed acceptable, if an affected State refuses assistance.

2. In this respect, the European Union proposes that the commentary to draft article 14 [11] introduce a link to draft article 15 [13] concerning the formulation of conditions on the provision of external assistance. In fact, the formulation of conditions can contain the justification for refusing assistance or for the withholding of consent. In this respect, it appears to deliver an important element in order to further define when the consent is arbitrarily withheld.

International Federation of Red Cross and Red Crescent Societies

1. IFRC agrees with the Commission's assertion in draft article 14 [11] that, while States' consent is required prior to the provision of outside assistance, such consent should not be withheld arbitrarily. IFRC considers that this rule would set out a reasonable approach, leaving significant discretion with the sovereign power, but also affirming that this discretion should not be abused in the face of humanitarian need.

2. However, given that this draft article has already proven controversial in the Sixth Committee and may not be welcomed by a significant number of States, IFRC fears that its inclusion in the draft articles may jeopardize support for the project overall. Moreover, while there have been occasions on which States have refused all offers of international aid when it was clearly needed, the problem is relatively rare in disaster settings (as opposed to situations of conflict).

O. Draft article 15 [13]—Conditions on the provision of external assistance

1. Comments received from Governments

Austria

Austria reiterates that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected State; they should rather be the result of consultations between the affected State and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

Cuba

Concerning draft article 15 [13] on conditions on the provision of external assistance, it is proposed to add the following sentence at the end of that paragraph: "The provision of external assistance cannot be dependent on elements that undermine the sovereignty of the affected State."

Czech Republic

The Czech Republic agrees that the affected State may wish to place conditions on the provision of external assistance and, according to the current situation, indicate the scope and type of assistance sought. For enabling and speeding up the activities of the relief personnel, it suggests that the commentary to draft article 15 [13] also set forth that the affected State may indicate general conditions of such assistance including, *inter alia*, transport and security conditions, points of contact, etc.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

1. Draft article 15 [13] complements draft article 14 [11]. The key in draft article 15 [13] is the right to place conditions on assistance. As pointed out in the commentary,[1] it is the recognition of a right of the affected State to deny unwanted or unneeded assistance and determine the appropriateness of assistance. The Nordic countries would suggest elaborating this essential aspect of humanitarian assistance further in the commentary. What should be explicitly mentioned therein is that unsolicited or inappropriate assistance has been a problem in many affected countries, hampering the delivery of assistance that is actually needed and causing delays.

2. Some rewording would also add more practical value to draft article 15 [13]. Particular attention should be paid to the importance of the needs of individuals affected by disasters, which does not appear to be sufficient in the language used in the draft article. Therefore, it would be preferable to replace the expression "take into account" with a less vague expression, such as "verifiably reflect", to highlight this aspect.

Germany

See the comment above on draft article 12 [9].

United States of America

The United States reiterates its view that the draft articles would be most useful as non-binding principles or guidelines. Accordingly, it suggests revising the text of draft article 15 [13] as follows:

> "Such conditions shall be in accordance with applicable rules of international law and the national law of the affected State, and should be consistent with the present draft articles. Conditions should take into account the identified needs of the persons affected by disasters and the quality of the assistance."

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

See the comment above on draft article 14 [11].

World Food Programme

1. Regarding the conditions for the provision of assistance that are listed in draft articles 14 [11] and 15 [13], WFP appreciates their objective of achieving the protection of affected persons while respecting the sovereignty of the affected State.

2. WFP welcomes the debate on ways to make the conditions and limitations of draft article 15 [13] more operationally driven through references in the commentary to soft-law instruments. The reference to documents—such as the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters or the Sphere Handbook—that are widely recognized by humanitarian actors as constituting good practice could mitigate undesirable consequences that might otherwise follow adoption of domestic requirements that ignore these standards.

See the comment above on draft article 14 [11].

International Organization for Migration

1. Conditions on the provision of external assistance should take into account the needs of persons affected by a disaster, in line with draft article 2 [2]. According to paragraph (8) of the commentary, this entails that the special needs of vulnerable persons should also be considered. In the list of relevant vulnerable groups, it would be important to add a reference to displaced persons, because of their specific vulnerability in this context, but also to

[1] Para. (7) of the commentary to draft article 15 [13], *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 85.

migrants (in the sense of non-nationals) who are particularly reliant on the assistance that can be provided by their country of origin (external assistance) or by international organizations. Migrants may be less protected than the nationals of the country in the context of humanitarian emergencies and have troubles in accessing humanitarian assistance, particularly if they are in an irregular situation.

2. It would be important for the commentary to the draft article to expressly recognize that conditions imposed on the provision of external assistance should not disproportionally limit the right of foreign States to provide assistance to their nationals caught in the crisis situation. Such right of States is based on article 5 of the Vienna Convention on Consular Relations which recognizes that one of the principal consular functions is "helping and assisting nationals, both individuals and bodies corporate, of the sending State".[1]

3. Often the most effective solution in a situation in which protection and assistance *in situ* cannot be guaranteed is return or evacuation of migrants to their countries of origin. Consular authorities can play a key role in assisting their nationals caught in a disaster situation, notably by replacement of lost travel documents or provision of *laissez-passer* for migrants to be evacuated to their home countries. Evacuation of migrants can also have the positive effect of decreasing the pressure on the affected State by limiting the number of the persons in need of assistance.

[1] Article 5 (*e*).

European Union

1. The right to condition assistance is not unlimited. It must be exercised in accordance with the draft articles and applicable rules of international and national law. The draft article also indicates that the conditions are to be determined taking into account the identified needs of persons affected by disasters and the quality of assistance, and it requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

2. Draft article 15 [13] assumes a central place in the draft set of articles, both in relation to the draft articles concerning the duties of the affected State and the more operational provisions on the facilitation of assistance. In that sense, draft article 15 [13] ("may place conditions") not only furthers the principles laid down in draft article 12 [9], which acknowledges the primary role of the affected State—by virtue of its sovereignty—in the control, coordination and supervision of disaster relief on its territory, but also recognizes the right of the affected State to deny unwanted or unneeded assistance and to determine what and when assistance is necessary.

3. There is little guidance for the formulation of conditions. Draft article 15 [13] obliges the affected State, when formulating conditions, to "take into account" the identified needs of the persons affected by disasters and the quality of the assistance. Despite the fact that these two conditions are mentioned—needs and quality—the notion of conditions remains vague. The European Union suggests that the Commission should either consider using a stronger formulation than "take into account" or adding more explanations in the commentary.

4. Draft article 15 [13] also requires alignment with the national law of the affected State. In this respect, the European Union suggests that the relationship to draft article 17 [14] on the facilitation of external assistance be further clarified in the commentary. For instance, in emergency situations the affected State may be required to waive provisions of its law, including those relating to privileges and immunities, regulatory barriers, customs requirements or tariffs. Measures of this kind—that is, to facilitate the prompt and efficient provision of assistance—are specifically addressed in draft article 17 [14] on the facilitation of external assistance.

International Committee of the Red Cross

Under draft article 15 [13], "[w]hen formulating conditions [on the provision of external assistance], the affected State shall indicate the scope and type of assistance sought". This could result in conferring to the affected State an unfortunate pick-and-choose option in relation to the humanitarian activities to be carried out by humanitarian actors, while international humanitarian law foresees in article 81 of Additional Protocol I to the Geneva Conventions that "Parties to the conflict shall grant to the International Committee of the Red Cross all facilities … so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts".

International Federation of Red Cross and Red Crescent Societies

While the draft articles rightly assert humanitarian principles and human dignity as central, they leave it largely up to affected States to articulate any other "conditions" of assistance in draft article 15 [13]. This again provides little incentive for a harmonized approach as to the quality of relief and also fails to commit providers to minimum standards within the scope of this international instrument. IFRC recommends that the draft article be enhanced with greater detail.

P. Draft article 16 [12]—Offers of external assistance

1. Comments received from Governments

Austria

In the view of Austria, a problem might arise from the fact that international organizations, non-governmental organizations and States are treated identically in draft article 16 [12]. Some organizations may not have the relevant competence to offer assistance and this draft provision must not be understood as providing the organization with such a right. It may also be asked whether non-governmental organizations should be directly addressed by such an international instrument. Therefore, this draft provision would need some further clarification.

Cuba

Concerning draft article 16 [12] on offers of external assistance, the following wording is proposed:

> "In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State. In all cases, the affected State shall be the one that requests external assistance and the offer of such assistance may not be subject to conditions."

Czech Republic

The commentary to the draft article does not deal with possible offers of assistance by individuals, whereas, for instance, the ASEAN [Association of Southeast Asian Nations] Agreement on Disaster Management and Emergency Response and other sets of rules, including the Oslo Guidelines, recognize them as assisting actors.

Switzerland

See the comment above on draft article 12 [9].

United States of America

1. The United States appreciates the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist".[1] It also values the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature and should not be regarded as interference in the affected State's internal affairs.

2. The United States believes additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors. Draft article 16 [12] provides that States, the United Nations and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests that this different wording was used for reasons of emphasis, in order to emphasize that States, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. The United States suggests eliminating the distinction and providing instead that States, the United Nations, intergovernmental organizations and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. Although there is no doubt that States, the United Nations and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected State, in accordance with applicable law.

3. The United States also believes that non-governmental organizations should be encouraged—like States, the United Nations and competent intergovernmental organizations—to make offers of assistance to affected States, in accordance with applicable law. Furthermore, States and relevant intergovernmental organizations may choose to support humanitarian relief efforts in an affected State by making grants or contributions to relevant non-governmental organizations, and the United States would not want to inadvertently discourage such methods of support by suggesting that non-governmental organizations should be treated differently by affected States.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

See the comment above on draft article 14 [11].

World Food Programme

See the comment above on draft article 14 [11].

International Committee of the Red Cross

As an illustration of the contradictions existing between the draft articles and international humanitarian law, it should be noted that draft article 16 [12] confers the "right to offer" assistance to States and intergovernmental organizations, while non-governmental humanitarian agencies only "may offer" their services, which completely changes the perspective of—and in a way denies—the right of initiative to which impartial humanitarian organization such as ICRC are entitled under international humanitarian law and which places these organizations in a privileged position.

International Federation of Red Cross and Red Crescent Societies

1. Draft article 16 [12] refers to the "right" of States, the United Nations and other competent international organizations to offer assistance. IFRC considers it unnecessary to refer to a "right to offer" as such, as it addresses a problem that in practical terms does not exist. Assistance-related operational problems constitute a more important issue that any international instrument on this matter should address. However, if the Commission is to keep the reference to a "right to offer assistance" by third actors, additional wording qualifying or characterizing the assistance could be included, along the lines of article 3, paragraph 2, of Additional Protocol II to the 1949 Geneva Conventions, which states that assistance shall not be used as a justification for intervening, directly or indirectly, in the internal or external affairs of the affected State.

2. The second sentence of draft article 16 [12] and the commentary thereto are also problematic. The former states that "[r]elevant non-governmental organizations may also offer assistance to the affected State", and paragraph (5) of the commentary explains that the second sentence intends to recognize "the important role played by those non-governmental organizations which, because of their nature, location and expertise, are well placed to

[1] Para. (2) of the commentary to draft article 16 [12], *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 85.

provide assistance in response to a particular disaster". The commentary continues by making reference to provisions in the 1949 Geneva Conventions and Additional Protocol II dealing with the role of ICRC and national Red Cross and Red Crescent societies. However, this second part of draft article 16 [12] is misleading, as neither ICRC nor the national societies are non-governmental organizations.

3. Moreover, at the 32nd International Conference of the Red Cross and Red Crescent, in December 2015, the State parties to the Geneva Conventions endorsed the Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance (the latest iteration of a document first adopted by the International Conference in 1969).[1] This document sets out how IFRC and national societies cooperate with each other in international disaster operations. It makes clear that the IFRC and foreign national societies make their offers of aid to the national society of the affected State, rather than to the Government, because their support is designed to assist the latter in fulfilling its own mandate under international and national law. Of course, the national society of the affected country is expected to coordinate closely with the relevant authorities to ensure its consent to any aid provided in this connection. A sentence in the commentary could ensure that there is no misapprehension of an intention to impinge on this State-approved specificity of the Red Cross and Red Crescent practice with regard to offers and acceptance.

[1] Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance, adopted at the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015. Available from www.ifrc.org.

Q. Draft article 17 [14]—Facilitation of external assistance

1. Comments received from Governments

Australia

See the comment above on draft article 11 [16].

Austria

Draft article 17 [14] regarding the facilitation of external assistance requires the affected State to take the necessary legislative measures. However, practice shows that more issues have to be addressed by the legislation than only those mentioned in the draft article, such as confidentiality, liability issues, the reimbursement of costs, privileges and immunities, control and competent authorities. Articles 6 to 10 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency are illustrative in this regard. Similarly, paragraph VII (2) of the resolution of the Institute of International Law on humanitarian assistance[1] refers to the obligation to prepare the required legislation regarding overflight and landing rights, telecommunication facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, and the prompt granting of visas or other authorizations free of charge. In line with these provisions and in order to give clear guidance, Austria suggests that draft article 17 [14] be added to accordingly.

[1] Resolution by the Institute of International Law on "Humanitarian assistance" adopted on 2 September 2003, Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, p. 269; available from www.idi-iil.org, *Publications and Works, Resolutions*.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

See the comment above on draft article 7 [6] and the comment below on draft article 19 [15].

Mexico

See the comment above under draft article 4.

Netherlands

Given the need for enhanced attention to the protection of relief personnel, the Netherlands agrees with the decision of the Drafting Committee not to merge draft article 18 (Protection of relief personnel, equipment and goods) with draft article 17 [14] (Facilitation of external assistance).

United States of America

1. In line with its general comments, the United States believes the draft article would be more beneficial as a guiding principle, rather than framed as an obligation. Accordingly, it would recommend changing "shall" to "should" in both paragraphs of this draft article. If it remains framed as an obligation, it should be clearly identified as progressive development of the law.

2. Furthermore, to be consistent with other draft articles, the United States recommends revising the first clause of draft article 17 [14] to read: "the necessary and appropriate measures". Although certain measures within the affected State's national law may be necessary to facilitate the provision of assistance, those measures must also be appropriate given the unique circumstances of each disaster.

3. The United States appreciates the emphasis the draft article places on the importance of the affected State taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods and equipment—in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, because the United States agrees with the idea that it is generally beneficial for an affected State to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, it would suggest that paragraph (5) of the commentary recommend that States should waive them, rather than suggest that States could lessen them as an alternative. Along similar lines, the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance. The United States suggests adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other

assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

See the comment above on draft article 14 [11].

World Bank

The qualifier "within its national law" could be a major stumbling block and cause long delays in relief delivery, until legal issues are sorted out, unless the national law contains specific provisions allowing exceptions in case of emergencies. Here lies an important connector with draft article 11 [16], where it should be advocated that provisions for exceptional rules for immigration, work permits, import and duties be integrated into national law.

Association of Caribbean States

1. The use of the phrase "prompt and effective" could put undue burden on the affected State, which may very well be operating in crisis mode with legal suspension of national legislation (such as in a state of emergency). The phrasing needs to be reconsidered.

2. If during such time an affected State seeks to "protect" its citizens, the onus should be on providing support as opposed to focusing on facilitation. While the foregoing does not mean that a State should erect additional bureaucracy, care must be taken that it is not implied that this be obligatory.

3. Paragraph 2 makes an assumption about the capacity of the affected State. It may be onerous to consider that a State operating in crisis should be ensuring what is detailed in that paragraph. In the Association's opinion, the duty of care rests with the responding actors.

International Federation of Red Cross and Red Crescent Societies

1. Draft article 17 [14] addresses the facilitation of international assistance in two short paragraphs, simply stating that States should take "necessary measures" to facilitate prompt assistance "in fields such as" visas, customs requirements, taxation and transport. This provides little additional clarity as to what really is expected in the "fields" mentioned, leaving largely intact the existing uncertainty of approach from one State to another (and even from one operation to another in a single State). IFRC recommends that the draft article be enhanced with greater detail.

2. Draft articles 4, subparagraph (*e*), and 17 [14], paragraph 1 (*a*), treat civilian and military responses exactly the same in terms of facilitation. However, many States and the humanitarian community support the approach of the Oslo Guidelines, which call for military assets to be used only where civilian alternatives are inadequate and state that, when they are used, they should seek to avoid direct dissemination of aid, providing instead infrastructure, transport and other more indirect support. This is meant to emphasize the differences between humanitarian and military personnel, a key issue in the security of humanitarians around the world.

R. Draft article 18—Protection of relief personnel, equipment and goods

1. Comments received from Governments

Australia

See the comment above on draft article 11 [16].

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

With regard to draft article 18 concerning the protection of humanitarian personnel, equipment and goods, the language used is appropriate, but some fine-tuning could be considered in the relevant commentary. As noted in their statements during the drafting process, the Nordic countries agree with the expression "appropriate measures" and regard it as an obligation of conduct for the affected State rather than one of result, owing to the fact that several factors remain beyond the State's control in a disaster situation. It would add value to the draft article to highlight the duty of the affected State to take the best possible and reasonable measures available in the particular circumstances to protect humanitarian personnel, equipment and goods, while following the principle of due diligence.

Germany

Germany would also like to reiterate its support for draft article 18, given that sufficient protection of deployed personnel, their equipment and goods is crucial to allow States and other actors to provide humanitarian assistance efficiently.

Mexico

See the comment above under draft article 4.

Netherlands

See the comment above on draft article 17 [14].

Switzerland

Draft article 18 mentions the obligation to protect relief personnel, equipment and goods as an obligation of means, while under international humanitarian law it is an obligation of result.

United States of America

1. The United States strongly supports efforts to improve the safety and security of humanitarian personnel, as well as efforts to promote effective and timely delivery of humanitarian assistance. Furthermore, it agrees that States should afford at least the same protections to relief

personnel, equipment and goods as they would to all other persons and property that they have accepted within their territory, in accordance with their obligations under national and international law.

2. However, the United States is again concerned that this principle is framed as a legal obligation particular to relief personnel, equipment and goods, without a clear explanation as to the source of such an obligation under international law. Thus, it recommends changing "shall" to "should". If it is retained as a statement of legal obligation, it should be clearly labelled as progressive development of the law.

3. In addition, the United States suggests making the language of draft articles 17 [14] and 18 more consistent by including an express reference to national law in draft article 18: "the appropriate measures, within its national law, to ensure".

4. The United States is pleased that paragraph (8) of the commentary addresses the need to evaluate security concerns, having in mind effective delivery of assistance, although it would benefit from further explanation of what constitutes "unreasonable and disproportionate hurdles" for relief activities.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs welcomes the inclusion of draft article 18 on the protection of relief personnel, their equipment and goods. Sufficient protection of relief personnel, equipment and goods is an essential condition for any relief operation to be carried out effectively.

World Food Programme

The duty to protect relief personnel, equipment and goods included in draft article 18 is especially welcome and could provide significant protection additional to that set forth in the Convention on the Safety of United Nations and Associated Personnel.

World Bank

If from the onset of a disaster there is clarity that the affected State will not be able to protect relief goods, equipment and personnel, is there any thought of providing for remedies? Would, for example, the affected State have an obligation to allow security personnel onto the territory to provide the protection which the State cannot? It appears that there are precedents where such agreements on armed escorts have been negotiated and successfully implemented.

International Federation of Red Cross and Red Crescent Societies

Draft article 18 acknowledges the obligation of the affected State to take appropriate measures to ensure the protection of relief personnel in its territory. However, the draft article does not recognize any corresponding rights and obligations of actors providing external assistance. Draft article 18 may benefit from additional text to confirm the duties of external actors to consult and cooperate with the affected State on matters of protection and security.

S. Draft article 19 [15]—Termination of external assistance

1. Comments received from Governments

Australia

Australia is cautious as to the effect of draft article 19, which appears to introduce limits on the prerogative of the affected State to freely withdraw its consent to the presence of external actors providing assistance on its territory.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

1. The Nordic countries would like to suggest considering some further revision and elaboration of draft article 19 [15]. The term "termination" used in this draft article does not seem to properly represent or reflect what today is understood as quality and accountability in humanitarian response. Therefore, it would be advisable to reconsider the wording and content of this draft article in the light of these two principles. While the draft article deals with the legal implications of the termination of external assistance, it should not overlook the importance of early recovery measures and the linkages and transition between humanitarian and development assistance. The draft article should, at least in the commentary, take into account the role of the assisting State and other actors in contributing to a responsible transition and handover when ceasing their assistance operations.

2. Draft article 19 [15] also ignores the issue of repatriation of goods and personnel. For this reason, the Nordic countries would recommend including a clause allowing the assisting State and, as appropriate, other assisting actors, to repatriate their goods and personnel at the end of their humanitarian assistance mission. Alternatively, if deemed more appropriate, such language could be included in draft article 17 [14] as an actual obligation for the affected State to facilitate the repatriation.

Mexico

See the comment above under draft article 4.

United States of America

1. The United States appreciates that paragraph (5) of the commentary clarifies that "decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster". Ideally, the commentary would specifically recommend that actors consult with the affected populations on whether their needs have been met, rather than having the various actors and States make that determination.

2. In line with its comments on other draft articles that are currently phrased in terms of obligations, the United States suggests changing "shall" to "should" in both sentences of draft article 19 [15].

2. Comments received from international organizations and entities

International Federation of Red Cross and Red Crescent Societies

IFRC is pleased to see the attention devoted to promoting an orderly approach to the termination of aid by draft article 19 [15], as its research and consultations have indicated that the lack of communication (or an arbitrary approach to the issue) has often led to unnecessary negative consequences for communities recovering from a disaster.

T. Draft article 20—Relationship to special or other rules of international law

1. Comments received from Governments

Switzerland

See the comment below on draft article 21 [4].

United States of America

1. The United States would recommend converting these draft articles into a nonbinding statement of principles or guidelines. In that case, it supports the inclusion of this draft article to clarify that the principles do not prejudice States' existing rights and obligations under international law; however, the United States would recommend deleting "special or other".

2. If these draft articles remain in the present form, the United States would appreciate further clarification of the intent and language of this draft article. As noted in the commentary,[1] the doctrine of *lex specialis* already addresses the applicability of potentially overlapping bodies of law, and it is unclear what this draft article, as currently drafted, adds to that principle.

[1] Para. (2) of the commentary to draft article 20 [4], *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 90.

2. Comments received from international organizations and entities

International Federation of Red Cross and Red Crescent Societies

A gap in this draft article is the failure to explicitly acknowledge the role of regional and bilateral agreements and initiatives. Regional agreements in particular are playing a large and growing role around the world in promoting planning and preparedness for disasters among their member States, and any global treaty in this field should more clearly acknowledge this. Draft article 20 should explicitly refer to regional and bilateral arrangements in its text, and not only mention them in the commentaries thereto.

U. Draft article 21 [4]—Relationship to international humanitarian law

1. Comments received from Governments

Austria

1. Draft article 21 [4], concerning the relationship of the draft articles to international humanitarian law, deals with a major issue relating to the scope of application of the draft articles. According to draft article 1 [1], defining the scope of the draft articles in connection with draft article 3 [3] regarding the definition of disasters, the draft articles apply without distinction to all kinds of disasters, whether natural or human-made, which would include also armed conflicts. Draft article 21 [4] limits the scope insofar as it determines that the draft articles do not apply to situations to which the rules of international humanitarian law are applicable. According to this wording, the draft articles do not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered.

2. However, the commentary (in para. (3)) presents a different understanding insofar as it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply". According to the commentary, the draft articles would apply also to disasters connected with armed conflicts to the extent that the rules of international humanitarian law do not address this particular disaster situation. This difference between the draft articles and the commentary does not permit a clear understanding of what the Commission envisaged. In the view of Austria, the draft articles should apply also to situations of armed conflict, but only insofar as they are not contradicting the particular rules of international humanitarian law.

Czech Republic

The Czech Republic concurs with the commentary to draft article 21 [4], which foresees the applicability of the draft articles also in complex emergency situations, including those of armed conflict, to the extent that international humanitarian law does not apply. Having said that, it feels that the text of the draft article does not reflect the commentary thereto. Furthermore, in general terms, the text of other commentaries that touch upon the relationship of the present draft articles with international humanitarian law does not seem to be in accordance with draft article 21 [4]. Therefore, it suggests that the Commission clearly explain in the relevant commentaries to the draft articles its position regarding the applicability of the draft articles to armed conflict and the relationship with international humanitarian law, and that it consider reformulating the text of draft article 21 [4]. It believes that a further analysis of the relationship between the draft articles and rules of armed conflict would be desirable. It would be very helpful for practitioners if the commentary indicated situations in which international humanitarian law may prevail and thus negate the application of the draft articles, or clarified in which situations the draft articles may apply also in situations of armed conflict.

Mexico

1. Mexico considers it imperative to include this draft article, as it rules out the application of the draft articles in cases solely involving an armed conflict. However, a provision should be added to the draft article to cover cases in which an armed conflict exists at the same time as a disaster occurs.

2. Mexico suggests that, in accordance with the *lex specialis* principle,[1] the application of the draft articles in situations of armed conflict be permitted insofar as there are no rules applicable to the particular case that are derived from international humanitarian law or that do not run counter to its purposes or application.

[1] See art. 55 of the articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Netherlands

While underlining the need to carve out situations of armed conflict from the notion of "disaster", the Netherlands notes the potentially broad scope of the current wording of the draft article. In this respect, it could be advisable to rephrase this draft article as a standard "without prejudice" clause.

Switzerland

1. Switzerland notes that the exclusion of armed conflicts has been removed, thus giving rise to the question of how the draft articles cover situations of armed conflict in which disasters occur.

2. The paragraph (7) of commentary to draft article 8 [5] concerning the duty to cooperate explains that "a reference to the ICRC is included as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict".

3. Paragraph (4) of the commentary to draft article 20 on the relationship to special or other rules of international law states that:

> While it is accepted that in such situations the rules of international humanitarian law should be given precedence over those contained in the present draft articles, these would continue to apply to the extent that some legal issues raised by a disaster which occurred in the same area as an armed conflict would not be covered by the rules of international humanitarian law. In this manner the present draft articles will contribute to filling possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict.

The commentary to draft article 20 specifies neither what those legal gaps are nor how it could contribute to filling them.

4. Paragraph (3) of the commentary to draft article 21 [4], for its part, states that,

> while the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.

5. The commentaries to draft articles 8 [5], 20 and 21 [4] introduce more ambiguity than clarity regarding the relationship between the draft articles and international humanitarian law. What is the relationship between the draft articles and international humanitarian law when a disaster occurs in a situation of armed conflict where there are no hostilities or they have ended? When a disaster occurs in an occupation? This lack of clarity could offer the possibility to States affected simultaneously by a disaster and an armed conflict to choose to apply either the draft articles or international humanitarian law. The exclusion of situations covered by international humanitarian law, in an earlier version of the draft articles, had the advantage of clarity.

United States of America

See the comments above under draft article 3 [3].

1. The United States recognizes that the Commission has grappled with the interaction between the draft articles and the rules of international humanitarian law, and appreciates the inclusion of draft article 21 [4], which attempts to preserve the operation of international humanitarian law by declaring that the draft articles "do not apply to situations to which the rules of international humanitarian law are applicable". The United States believes, however, that relying solely on draft article 21 [4] does not sufficiently protect the integrity of international humanitarian law and would be impractical to implement. The phrasing of draft article 21 [4] is helpful insofar as it refers broadly to "situations" to which the rules of armed conflict apply—suggesting that when international humanitarian law is generally applicable to a situation (such as a "situation" of armed conflict) the draft articles do not come into play—but the commentary suggests a different approach, explaining that the draft articles "can … apply in situations of armed conflict to the extent that existing rules of … international humanitarian law … do not apply" (para. (3) of the commentary). The plain wording of draft article 21 [4] appears to contemplate that the draft articles would not be applicable in such situations.

2. Thus, to eliminate any confusion, the United States suggests the following revision of the last sentence of paragraph (3) of the commentary to draft article 21 [4]: "Although the draft articles do not regulate the consequences of armed conflict, they can nonetheless apply in relation to disasters that happen to coincide with situations of armed conflict to the extent that the activities are not governed by international humanitarian law."

3. In addition, the United States recommends modifying draft article 21 to eliminate its exclusive reference to "rules" of international humanitarian law. The current reference to "rules" could cause the draft article to be applied more broadly than intended. As noted by the International Court of Justice and by the Commission in the commentary, certain rules of international humanitarian law (such as the fundamental guarantees of humane treatment for detained persons stated in common article 3 of the 1949 Geneva Conventions) reflect "elementary considerations of humanity" that also may be applied outside the context

of armed conflict.[1] Because the application of a specific rule of international humanitarian law arguably would not necessarily mean that international humanitarian law was applicable, the reference to "rules of international humanitarian law" being applicable might be misinterpreted to suggest a broader exclusion than was intended.

4. The current reference to "rules of international humanitarian law" could also be misinterpreted to make draft article 21 [4] apply more narrowly than intended. As noted above, international humanitarian law is often viewed as a series of negative—that is, prohibitive or restrictive—rules, with the absence of a rule indicating that States may act. In such situations, although a specific "rule" of international humanitarian law would not apply, the principles of international humanitarian law form a general guide for conduct. In the view of the United States, the draft articles should not be applied to situations where international humanitarian law, including its principles, apply, but States have not accepted a restrictive or prohibitory rule, with a view to preserving their flexibility to conduct armed conflict as warranted by military necessity. In the light of the foregoing, the United States recommends modifying draft article 21 [4] to read:

> "The present draft articles do not apply to activities which are governed by international humanitarian law, including its principles and rules."

[1] Para. (3) of the commentary to draft article 7 [6], *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 70.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

1. The Office for the Coordination of Humanitarian Affairs is concerned that draft article 21 [4], which sets out the relationship between the draft articles and international humanitarian law, appears to be inconsistent with the commentary. In particular, draft article 21 [4] provides: "The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable." This appears to suggest that these draft articles do not apply at all to so-called "complex disasters" that occur on the same territory where an armed conflict is taking place—i.e. where international humanitarian law is applicable. Yet the commentary to draft article 21 [4] appears to contradict this when it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply" (para. (3) of the commentary). Moreover, this formulation can be read as mistakenly suggesting that there may be situations of armed conflict to which international humanitarian law does not apply. Finally, the commentary to draft article 4, subparagraph (*a*), refers to "the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called 'complex disasters', which occur on the same territory where an armed conflict is taking place" (para. (3)).

2. The Office for the Coordination of Humanitarian Affairs is concerned that the wording in draft article 21 [4] and the commentary do not offer a clear understanding of the relationship between the draft articles and international humanitarian law. The Office considers that the draft articles should apply to socalled "complex disasters" that occur on the same territory on which an armed conflict is taking place (*a*) without prejudice to the parallel application of international humanitarian law, and (*b*) where the rules of international humanitarian law do not address the specific disaster-related issue. This would appear to be the goal of both the draft article and the commentary and, if this is correct, should be more clearly stated.

European Union

1. As a first observation, the European Union notes that the content of the draft article does not seem to match the commentary thereto. In particular, paragraph (2) of the commentary states that a "categorical exclusion could be counterproductive, particularly in situations of 'complex emergencies' where a disaster occurs in an area where there is an armed conflict" or, where a disaster predated the armed conflict.

2. Notwithstanding this inconsistency, these "complex emergencies" pose the question of how best to address people's needs in such a situation.

3. The European Union therefore suggests that the relationship between the draft articles and international humanitarian law be constructed as a "without prejudice" clause, in order to ensure the applicability of the draft articles in situations of complex emergency, and that it be clarified in the commentary to draft article 21 [4] that nothing in the draft set of articles can be read or interpreted as affecting international humanitarian law.

International Committee of the Red Cross

1. In the light of the broad definition of disaster adopted by the Commission, draft article 21 [4], dealing with the relationship with international humanitarian law, becomes crucial in order to avoid overlaps and conflict of provisions between international humanitarian law and the draft articles.

2. In this regard, ICRC would like to flag the important discrepancy existing between the rule contained in draft article 21 [4] ("[t]he present draft articles do not apply to situations to which the rules of international humanitarian law are applicable") and the commentary thereto.

3. In its current form, draft article 21 [4] excludes entirely armed conflicts from the scope of the draft articles. However, the commentary to this draft article is much more nuanced when it affirms that the draft articles would apply in situations of "complex emergency", where a disaster occurs in an area where there is also an armed conflict. This contradiction between draft article 21 [4] and its commentary obscures the understanding of what the Commission has envisaged for the relationship between the draft articles and international humanitarian law.

4. Therefore, ICRC recommends aligning the commentary with the text of the draft article 21 [4] so that the draft articles do not apply in situations of armed conflict,

including in "complex emergencies" as defined by the Commission's commentaries.

5. ICRC understands that the rationale for applying the draft articles in situations of "complex emergency" is to maximize the protection of individuals and to avoid potential gaps in current international law. Indeed, the Commission maintains that excluding situations of armed conflict could be detrimental to the protection of persons, in particular when the onset of a disaster predates the armed conflict, because of potential gaps existing in international humanitarian law and the potential inapplicability of certain rules of international humanitarian law.[1]

6. However, the Commission does not clarify, in the commentary, what would be those potential gaps in international humanitarian law, what would be the exact adverse effects, in terms of protection, of applying only international humanitarian law, or how certain rules of international humanitarian law would not apply in situations where armed conflict and disaster occur concomitantly. In this regard, ICRC is of the position that there are no such gaps in international humanitarian law as perceived by the Commission and that the application of international humanitarian law in "complex emergencies" would have no adverse effect on the protection of individuals. On the contrary, the very object and purpose of international humanitarian law is to protect all those affected by armed conflict, including those affected by "complex emergencies". From this perspective, the rules of international humanitarian law upholding, *inter alia*, humane treatment and human dignity, and ensuring that the basic needs of the population affected by armed conflict are met (through the primary obligation incumbent upon the parties to the armed conflict to ensure the provision of supplies essential for the survival of the population, or to allow relief schemes if they are unable or unwilling to fulfil that primary obligation), will also benefit all those impacted by "complex emergencies".

7. International humanitarian law applies in situations of armed conflict, including in situations where armed conflict overlaps with a natural disaster and, in the view of ICRC, contains a set of sufficiently detailed provisions to deal with the protection and assistance issues arising from "complex emergencies". Indeed, this body of law is tailored to armed conflicts and sets out an important and effective protective framework for those affected by such situations and regulates humanitarian access through detailed provisions aimed at ensuring that the basic needs of the population concerned are met. In this regard, international humanitarian law imposes certain constraints on Governments' discretion to refuse and control outside humanitarian assistance that do not otherwise apply outside of a context of armed conflict. Moreover, armed conflict situations raise concerns different in type and degree concerning humanitarian independence, security and access.

8. In summary, from the ICRC perspective, it is crucial that the draft articles and their commentaries not contradict the rules of international humanitarian law. Taking into account the current content of the draft articles, the only way to reach that objective would be to ensure that the draft articles and their commentaries unambiguously exclude situations of armed conflict from the scope of application of the draft articles, as requested for several years by a critical mass of States while discussing the reports of the Commission in the Sixth Committee of the General Assembly. This could be done either by including such an exclusion in draft article 3 [3], defining the notion of disaster, or by ensuring that the commentary to draft article 21 [4] faithfully reflects the current black-letter rule contained in the corresponding draft article.

9. ICRC therefore favours a clear exclusion of situations of armed conflict, international or non-international, from the scope of the draft articles, because both the relevant international legal framework and the operational dynamics of humanitarian assistance operations are very different in "peacetime" disasters and situations of armed conflict.

10. As they stand, the draft articles and their commentaries elevate the risk of conflict of norms with international humanitarian law, adversely impact the integrity of this body of law and may undermine the ability of impartial humanitarian organizations such as ICRC to carry out their humanitarian activities in a principled manner and in accordance with the mandate assigned to them by States.

[1] See para. (4) of the commentary to draft article 20 [4], *Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 90, and paras. (2) and (3) of the commentary to draft article 21 [4], *ibid.*, at p. 90.

International Federation of Red Cross and Red Crescent Societies

1. Draft article 21 [4] states that the draft articles will not apply in situations where international humanitarian law applies. However, according to the commentaries to draft articles 4, 8 [5] and 21 [4], the Commission is of the view that there can be situations of armed conflict to which international humanitarian law does not apply and it is the Commission's intention that the draft articles should apply in situations of mixed conflict and disaster. In this vein, the commentary to draft article 8 [5] notes that ICRC has been specifically named in the draft articles because they may apply in "complex emergencies involving armed conflict".

2. IFRC believes that the draft articles should not apply in situations of armed conflict. The particular dynamics of conflict have not been adequately considered in their design. These include, among others, the frequent impulse of the parties to limit humanitarian assistance out of concern that the opposing side will benefit from it, even indirectly. For this reason, the approach to humanitarian assistance of Geneva Convention IV (particularly articles 59 and 62) and of customary international humanitarian law, as articulated by the ICRC study of 2005[1] (particularly rules 55 and 56), differs markedly from that found in instruments focused on non-conflict disasters, in particular by much more strongly circumscribing States' authority to regulate aid efforts. No such distinction has been made here, and no guidance is provided as to when international humanitarian law would or would not apply (as, indeed, none could be expected, as this is not the

[1] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*.

appropriate instrument to fundamentally define the scope of the Geneva Conventions). This invites confusion and contradiction without adding real value in operations.

3. Ideally, the draft articles would exclude armed conflict from their definition of "disaster" in order to avoid this problem. This was the approach strongly favoured by States when the IFRC Guidelines were negotiated in 2007. However, the solution proposed in draft article 21 [4] would be acceptable if the contradictory comments in the commentaries were removed and no impression were given that there could be "mixed situations" of conflict and disaster where international humanitarian law does not apply.

Chapter II

Comments on the final form of the draft articles

A. Comments received from Governments

Australia

Australia observes that there is an existing body of international law sufficient to provide the legal underpinnings of disaster risk reduction and response efforts. This is in turn complemented by a broad range of domestic legal and policy decisions, which more properly fall within the sovereign competence of States. Accordingly, Australia considers that the Commission's work will be most valuable where it helps States to understand and implement their prevailing obligations. In that regard, Australia compliments the Commission on its extensive consideration of existing obligations and presentation of the draft articles, which consolidate those obligations. On the other hand, those elements of the draft articles that seek to develop or create new duties or obligations would, for the time being, seem to be more appropriately pursued as best practice principles or guidelines.

Netherlands

The Netherlands wishes to underscore that the draft articles can be seen as an authoritative reflection of contemporary international law or as an attempt to progressively develop the law. However, it should be clear that the draft articles themselves are not legally binding.

B. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs would support the inclusion in the commentary of a reference to the status of the draft articles (e.g. as binding or non-binding, serving as a reference tool, etc.). The Office would support further discussion on whether the draft articles should form the basis for a binding international treaty.

World Food Programme

WFP welcomes the possibility that the draft articles may become a treaty in the area of disaster response. The existence of a treaty in this area would be particularly useful in countries where WFP has not concluded a host agreement or where it has not been able to address comprehensively the aspects covered by the draft articles. WFP takes note of draft article 20, which clarifies that the draft articles do not derogate from the application of bilateral host agreements concluded between United Nations organizations and an affected State. Also in this context, WFP is hopeful that negotiations with State actors will benefit from the existence of a legal framework for assistance and that this will allow "assisting actors", as defined in the draft articles, to focus negotiations with affected States more specifically on what is needed to reduce the risk of emergencies and respond to them.

International Organization for Migration

IOM looks forward to the adoption of the draft articles in the form that States will consider the most appropriate.

European Union

1. In the first place, it is the European Union's view that the outstanding work of the Special Rapporteur and the Commission has already contributed significantly to the reflection on how best to codify and progressively develop the area of international disaster response law, which will steer the international community in its assistance to persons affected by human-made and natural disasters.

2. As the text stands at present, the European Union wishes to reiterate that the draft articles are already now an important contribution—whatever the form they may take—in support of persons in the event of disasters.

International Federation of Red Cross and Red Crescent Societies

1. If the draft articles were adopted in the form of a framework treaty, they could have a positive impact on accelerating the development of more detailed national laws and procedures about international disaster cooperation.

2. As already expressed in previous statements before the Sixth Committee of the General Assembly, IFRC feels that there is little point in issuing the draft articles as non-binding guidelines. This would risk significant confusion and overlap with existing "soft-law" documents, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which have already been endorsed by States and provide a great deal more detail about how to handle operational issues. On the other hand, in principle, a global treaty could add value, first by providing greater momentum for current efforts to develop rules at the domestic level, which remain very slow and arduous despite repeated emphasis

at the International Conference of the Red Cross and Red Crescent in non-binding resolutions, and, second, by establishing clearer reciprocity of commitments between receiving States and international responders. Alternatively, it is possible that the Commission's effort may be taken up at the regional level, where there is a great deal of momentum in the development of new instruments.

3. However, some members of IFRC have questioned whether States will have the appetite to take up such a project and have expressed concern about whether it might distract from developments at the national level. Even if there is willingness for a treaty, concerns have been raised whether it would be more conservative in its vision of how assistance is managed than current practice.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 3]

DOCUMENT A/CN.4/701

Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur*

[*Original: Spanish*]
[*14 June 2016*]

CONTENTS

* The Special Rapporteur wishes to thank the following members of the team working on the research project "La protección de los valores de la comunidad internacional: inmunidad, justicia e impunidad en el derecho internacional contemporáneo" ("Protecting the values of the international community: immunity, justice and impunity in contemporary international law") (DER2013-45790-P): Professors Fanny Castro-Rial Garrone, Carmen Quesada Alcalá, Fernando Val Garijo, and Teresa Marcos Martín (Universidad Nacional de Educación a Distancia); Rosario Ojinaga Ruiz, Yael Cacho Sánchez and José Antonio Valles Cavia (Universidad de Cantabria), and Joana Abrisketa Uriarte (Universidad de Deusto). She would also like to thank Professor Silvia Morgades Gil (Universidad Pompeu Fabra) and Ms. Raquel Saavedra, a student at the Geneva Academy of International Humanitarian Law and Human Rights.

Multilateral instruments cited in the present report

	Source
Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter) (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949): Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); Geneva Convention relative to the Treatment of Prisoners of War (Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)	*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq*.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977); and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (Geneva, 8 December 2005)	*Ibid*., vol. 1125, Nos. 17512 and 17513, pp. 3 and 609, and *ibid*., vol. 2404, No. 43425, p. 261, respectively.
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.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Vienna Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
European Convention on State Immunity (Basel, 16 May 1972)	*Ibid.*, vol. 1495, No. 25699, p. 181.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	*Ibid*., vol. 1015, No. 14861, p. 243.
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.

	Source
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid*., vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985)	OAS *Treaty Series*, No. 67.
Inter-American Convention on Forced Disappearance of Persons (Belém, 9 June 1994)	ILM, vol. 33, No. 6 (1994), p. 1534.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	E/1996/99, annex. See also ILM, vol. 35, No. 3 (1996), p. 727.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations *Treaty Series*, vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	*Ibid.*, vol. 2216, No. 39391, p. 225.
African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003)	ILM, vol. 43 (2004), p. 5.
United Nations Convention against Corruption (New York, 31 October 2003)	United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.
United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49). vol. I, resolution 59/38, annex.
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.
Charter of Fundamental Rights of the European Union (Strasbourg, 12 December 2007)	*Official Journal of the European Union*, No. C 83, 30 March 2010, p. 389.
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014)	Available from the website of the African Union: www.au.int/en/treaties.

Works cited in the present report

Abrisketa Uriarte, Joana

"Al Bashir: ¿Excepción a la inmunidad del jefe de Estado de Sudán y cooperación con la Corte Penal Internacional?", *Revista Española de Derecho Internacional*, vol. 68 (2016), pp. 19–47.

Akande, Dapo

"International law immunities and the International Criminal Court", AJIL, vol. 98 (2004), pp. 407–433.

Akande, Dapo, and Sangeeta Shah

"Immunities of State officials, international crimes and foreign domestic courts", EJIL, vol. 21 (2011), pp. 815–852.

American Society of International Law

Proceedings of the 107th Annual Meeting. April 3–6, 2013, Panel on "Anti-corruption Initiatives in a Multipolar World".

Bakircioglu, Onder

"*Germany v Italy*: The triumph of sovereign immunity over human rights law", *International Human Rights Law Review*, vol. 1 (2012), pp. 93–109.

Barker, J. Craig

"International Court of Justice: *Jurisdictional Immunities of the State* (*Germany v. Italy*) Judgment of 3 February 2012", *International and Comparative Law Quarterly*, vol. 62 (July 2013), pp. 741–752.

Bellal, Annyssa

Immunités et violations graves des droits humains: vers une évolution structurelle de l'ordre juridique international?, Brussels, Bruylant, 2011.

Bellinger, John B., II

"The dog that caught the car: observations on the past, present, and future approaches of the Office of the Legal Adviser to official acts immunities", *Vanderbilt Journal of Transnational Law*, vol. 44 (2011), pp. 819–836.

Bianchi, Andrea

"Gazing at the crystal ball (again): State immunity and *jus cogens* beyond *Germany v. Italy*", *Journal of International Dispute Settlement*, vol. 4 (2013), pp. 457–475.

"Serious violations of human rights and foreign states' accountability before municipal courts", *in* Lal Chand Vohrah *et al*., eds., *Man's inhumanity to man: essays on international law in honour of Antonio Cassese* (The Hague, Kluwer, 2003), pp. 149–182.

Boersma, Martine

Corruption: a Violation of Human Rights and a Crime under International Law? Cambridge, Intersentia, 2012.

Bonucci, Nicola

"The fight against foreign bribery and international law: an exception or a way forward?", American Society of International Law, *Proceedings of the 107th Annual Meeting. April 3–6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World", pp. 247–252.

Borghi, Alvaro

L'immunité des dirigeants politiques en droit international. Brussels, Bruylant, 2003.

Bröhmer, Jürgen

State immunity and the violation of human rights. The Hague, Martinus Nijhoff, 1997.

Boudreault, François

"Identifying conflicts of norms: The ICJ approach in the case of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*", *Leiden Journal of International Law*, vol. 25 (2012), pp. 1003–1012.

Canadas-Blanc, Sophie

La responsabilité pénale des élus locaux. Paris, Johanet, 1999.

Craig, Paul

"Accountability", *in* Damian Chalmers and Anthony Arnull, eds., *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, pp. 431–453.

Cruz, Luis M.

"El derecho de reparación a las víctimas en el derecho internacional. Un estudio comparativo entre el derecho internacional de responsabilidad estatal y los principios básicos de reparación de víctimas de derechos humanos", *Revista de Derecho Político*, No. 77 (2010), pp. 185–209.

d'Argent, Pierre

"Immunity of State officials and the obligation to prosecute", *in* Anne Peters et al., eds., *Immunities in the Age of Global Constitutionalism*, Leiden, Brill/Nijhoff, 2015, pp. 244–266.

De la Cuesta Arazmendi, José Luis

"Iniciativas internacionales contra la corrupción", *Eguzkilore*, No. 17 (2003), pp. 5–26.

De Sena, Pasquale

"The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law", *Questions of International Law (QIL), Zoom out II* (2014), pp. 17–31.

Dodge, William S.

"Foreign official immunity in the International Law Commission: The meaning of "official capacity", Symposium on the Immunity of State Officials of the American Society of International Law, *AJIL Unbound*, vol. 109 (2015), pp. 161–166.

Dubois, Pascale Hélène

"Remarks", American Society of International Law, *Proceedings of the 107th Annual Meeting. April 3–6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World", pp. 255–259.

Escobar Hernández, Concepción

"El principio de complementariedad", *in* Juan Yáñez-Barnuevo, ed., *La Justicia Penal Internacional: una perspectiva iberoamericana, Encuentro Iberoamericano sobre Justicia Penal Internacional*, Madrid, Casa de América, 2001, pp. 78–100.

"La progresiva institucionalización de la jurisdicción penal internacional", *in* Mercedes García Arán *et al.*, eds., *Crimen internacional y jurisdicción universal. El caso Pinochet*, Valencia, Tirant lo blanch, 2000, pp. 213–257.

Ferrer Lloret, Jaume

"La insoportable levedad del derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia: el caso de las inmunidades jurisdiccionales del Estado", *Revista Electrónica de Estudios Internacionales*, vol. 24 (2012), pp. 1–36.

Foakes, Joanne

The position of heads of State and senior officials in international law. Oxford, Oxford University Press, 2014.

Fox, Hazel, and Philippa Webb

The Law of State Immunity, revised and new third edition. Oxford, Oxford University Press, 2013.

Frulli, Micaela

Inmunità e crimini internazionali. L'esercizio della giuridizione penale e civile nei confronti degli organi statali sospetati di gravi crimini internazionali. Turin, Giappichelli, 2007.

Gaeta, Paola

"*Extraordinary renditions* e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar", *Rivista di diritto internazionale*, vol. 89 (2006), pp. 126–130.

Humes-Schulz, Stacy

"Limiting sovereign immunity in the age of human rights", *Harvard Human Rights Journal*, vol. 21 (2008), pp. 105–142.

Ivory, Radha

Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys. Cambridge, Cambridge University Press, 2014.

Jiménez García, Francisco

La prevención y lucha contra el blanqueo de capitales y la corrupción. Interacciones evolutivas en un derecho internacional global. Albolote, Granada, Comares, 2015.

Kamto, Maurice

" 'L'Affaire Al Bashir' et les relations de l'Afrique avec la Cour pénale internationale", *in* Maurice Kamga and Makane Moïse Mbengue (eds.), *L'Afrique et le droit international: variations sur l'organisation internationale*. Liber amicorum *Raymond Ranjeva*, Paris, Pedone, 2013, pp. 147–170.

Keitner, Chimène I.

"The common law of foreign official immunity", *Green Bag*, vol. 14 2D, (Autumn 2010), pp. 61–75.

"Annotated brief of Professors of Public International Law and Comparative Law as *amici curiae* in support of respondents in *Samantar v. Yousuf*", *Lewis & Clark Law Review*, vol. 15 (2011), pp. 609–632.

"*Germany v. Italy* and the limitations of horizontal enforcement: Some reflections from a United States perspective", *Journal of International Criminal Justice*, vol. 11 (2013), pp. 167–183.

"Horizontal enforcement and the ILC's proposed draft articles on the immunity of State officials from foreign criminal jurisdiction", *AJIL Unbound*, vol. 109 (2015), pp. 161–166.

Kelly, Michael J.

Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein. New York, Peter Lang, 2005.

Kofele-Kale, Ndiva

"*Sed quis custodiet ipsos custodies?* (But who will guard the guardians?): the case for elevating official corruption to the status of a crime in positive international law", *Annual Survey of International and Comparative Law*, vol. XIX (2013), pp. 1–16.

Koh, Harold Hongju

"Foreign official immunity after *Samantar*: a United States Government perspective", *Vanderbilt Journal of Transnational Law*, vol. 44 (2011), pp. 1141–1162.

Kolb, Robert

"The relationship between the international and the municipal legal order: reflections on the decision No. 238/2014 of the Italian Constitutional Court", *Questions of International Law (QIL), Zoom out II*, vol. I (2014), pp. 5–16.

Kress, Claus

"The International Criminal Court and immunities under international law for States not party to the Court's Statute", *in* Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law*, Beijing, Torkel Opsahl Academic EPublisher, 2012, pp. 223–265.

McGregor, Lorna

"State immunity and human rights: Is there a future after *Germany v. Italy*?", *Journal of International Criminal Justice*, vol. 11 (2013), pp. 125–145.

O'Keefe, Roger

"An 'international crime' exception to immunity of State officials from foreign criminal jurisdiction: Not currently, not likely", *in* Symposium on the Immunity of State Officials of the American Society of International Law, *AJIL Unbound*, vol. 109 (2015), pp. 167–172.

Olaniyan, Kolawole

Corruption and Human Rights Law in Africa. Oxford, Hart Publishing, 2014.

Olivares Tramón, José Miguel

"Democracia, buena gobernanza y lucha contra la corrupción en el derecho internacional", *in* Juan José Romero Guzmán and others (eds.), *Buen gobierno y corrupción: algunas perspectivas*, Santiago, Eds. Derecho UC, 2009, pp. 319–339.

Orakhelashvili, Alexander

"*Jurisdictional Immunities of the State*, ICJ, Feb. 3 2012", AJIL, vol. 106 (2012), pp. 609–616.

Otshudi Okondjo Wonyangondo, Leon

L'immunité de juridiction pénale des dirigeants étrangers accusés des crimes contre l'humanité. Paris, Publibook, 2009.

Palchetti, Paolo

"Judgment 238/2014 of the Italian Constitutional Court: In search of a way out", *Questions of International Law (QIL), Zoom Out II*, vol. 1 (2014), pp. 44–47.

Pedretti, Ramona

Immunity of Heads of State and State Officials for International Crimes. Leiden, Brill/Nijhoff, 2015.

Pinelli, Cesare

"Decision No. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles", *Questions of International Law (QIL), Zoom Out II*, vol. 1 (2014), pp. 33–41.

Quesada Alcalá, Carmen

La Corte Penal Internacional y la soberanía estatal. Valencia, Tirant lo blanch, 2005.

Rose-Ackerman, Susan

"International anti-corruption policies and the U.S. national interest", American Society of International Law, *Proceedings of the 107th Annual Meeting. April 3–6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World", pp. 252–255.

Simbeye, Yitiha

Immunity and International Criminal Law. Aldershot, Ashgate, 2004.

Smith, Erica E.

"Immunity games: How the State Department has provided courts with a post-*Samantar* framework for determining foreign official immunity", *Vanderbilt Law Review*, vol. 67 (2014), pp. 569–608.

Ssenyonjo, Manisuli, and Saidad Nakitto

"The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting impunity for African Union Heads of State and senior State officials?", *International Criminal Law Review*, vol. 16 (2016), pp. 71–102.

Stephens, Beth

"Abusing the authority of the State: Denying foreign official immunity for egregious human rights abuses", *Vanderbilt Journal of Transnational Law*, vol. 44 (2011), pp. 1163–1183.

Stigen, Jo

"Which immunity for human rights atrocities?", *in* Chile Eboe-Osuji, ed., *Protecting Humanity. Essays in International Law and Policy in Honour of Navanethem Pillay*, Leiden, Martinus Nijhoff, 2010, pp. 749–788.

Tehindrazanarivelo, Djacoba Liva

"The African Union principle on the fight against impunity and the arrest warrants for Omar Hassan El-Bashir", *in* Marcelo Kohen *et al.* (eds.), *Perspectives of international law in the 21st century*. Liber amicorum *Professor Christian Dominicé in honour of his 80th birthday*, Leiden, Martinus Nijhoff, 2012, pp. 397–442.

Thakur, Ramesh, and Peter Malcontent, eds.

From Sovereign Impunity to International Accountability: the Search for Justice in a World of States. Tokyo, United Nations University Press, 2004.

Tladi, Dire

"Immunity in the era of 'criminalisation': The African Union, the ICC, and international law", *Japanese Yearbook of International Law*, vol. 58 (2015), pp. 17–44.

"The immunity provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff", *Journal of International Criminal Justice*, vol. 13 (2015), pp. 3–17.

"The duty on South Africa to arrest and surrender Al-Bashir under South African and international law: Attempting to make a collage from an incoherent framework", University of Pretoria, 2015 (to be published in *Journal of International Criminal Justice*). The Special Rapporteur had access to this text courtesy of the author.

Triffterer, Otto

" 'Irrelevance of official capacity'—Article 27 Rome Statute undermined by obligations under international law or by agreement (article 98)?", *in* Isabelle Buffard *et al.*, eds., *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Martinus Nijhoff, 2008, pp. 571–602.

Val Garijo, Fernando

Las víctimas de graves violaciones de los derechos humanos y del derecho internacional humanitario en el derecho internacional penal. Madrid, UNED, 2007 (thesis).

Van Alebeek, Rosanne

The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law. Oxford, Oxford University Press, 2008.

Van Ness, Daniel W.

"Accountability", *in* Jennifer J. Llewellyn and Daniel Philpott, eds., *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford, Oxford University Press, 2014, pp. 118–137.

Verhoeven, Joe, ed.

Le droit international des immunités: contestation ou consolidation? Brussels, Larcier, 2004.

Vidmar, Jure

"Rethinking *jus cogens* after *Germany v. Italy*: Back to article 53?", *Netherlands International Law Review*, vol. 60 (2013), pp. 1–25.

Williams, Sarah

Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues. Oxford, Hart Publishing, 2012.

Wuerth, Ingrid

"*Pinochet*'s legacy reassessed", AJIL, vol. 106 (2012), pp. 731–768.

Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session, in 2006, on the basis of the proposal in the report of the Commission on the work of that session.[1] At its fifty-ninth session, in 2007, the Commission decided to include this topic in its current programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The Special Rapporteur, Mr. Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5]

4. At the same session, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction.[6] That report helped to clarify the terms of the debate up to that point, identified the principal points of contention which remained, the topics to be considered and the methodology to be followed, and set out a workplan for consideration of the topic over the present quinquennium. The Commission examined the preliminary report at its sixty-fourth session, in 2012,[7] and the Sixth Committee examined it at its sixty-seventh session.[8] In both cases, the Special Rapporteur's proposals were approved.

5. At the Commission's sixty-fifth session, in 2013, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction.[9] The report examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*, proposing six draft articles. The Commission considered the second report of the Special Rapporteur[10] and provisionally adopted three draft articles, dealing respectively with the scope of the draft articles (draft art. 1) and the normative elements of immunity *ratione personae* (draft arts. 3 and 4)[11] together with the commentaries thereto. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[12] The Sixth Committee examined the Special Rapporteur's second report at its sixty-eighth session, held in 2013, welcoming the report and the progress made by the Commission.[13]

6. At the sixty-sixth session of the Commission, in 2014, the Special Rapporteur submitted the third report on the immunity of State officials from foreign criminal jurisdiction.[14] She commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on the general concept of "State official" in the subjective context of immunity *ratione materiae* (persons enjoying immunity), analysed the terminology to be used in referring to State officials and proposed two draft articles. The Commission considered the third report of the Special Rapporteur at its 3217th to 3222nd meetings[15] and provisionally adopted the draft articles dealing with the general concept of "State official"(draft article 2 (*e*)) and "Persons enjoying immunity *ratione materiae*" (draft article 5),[16] together with the commentaries thereto.[17] At

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[1] See *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 and p. 191, annex I.

[2] See *Yearbook … 2007*, vol. II (Part Two), p. 98, para. 376.

[3] See *ibid.*, p. 101, para. 386. For the memorandum by the Secretariat, see document A/CN.4/596 and Corr.1 (available from the website of the Commission, documents of the sixtieth session; the final text will be published as an addendum to *Yearbook … 2008*, vol. II (Part One)).

[4] The reports of the Special Rapporteur Mr. Kolodkin are contained in *Yearbook … 2008*, vol. II (Part One), p. 157, document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[5] See *Yearbook … 2012*, vol. II (Part Two), p. 59, para. 84.

[6] *Yearbook … 2012*, vol. II (Part One), p. 41, document A/CN.4/654.

[7] For a summary of the debate, see *Yearbook … 2012*, vol. II (Part Two), pp. 60–66, paras. 89–139. See also the summary records of the Commission contained in *Yearbook … 2012*, vol. I, 3143rd to 3147th meetings, pp. 94 *et seq*.

[8] The Sixth Committee considered the topic of immunity of State officials from foreign criminal jurisdiction at the sixty-seventh session of the General Assembly, in 2012 (A/C.6/67/SR.20 to A/C.6/67/SR.23. In addition, two States referred to the topic at another meeting (A/C.6/67/SR.19). See also the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657, paras. 26–38).

[9] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, p. 35.

[10] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *Yearbook … 2013*, vol. I, 3164th to 3168th and 3170th meetings, pp. 18–36, and 40–45.

[11] See annex I to the present report for the text of these draft articles.

[12] For the consideration of the topic by the Commission at its sixty-fifth session, see *Yearbook … 2013*, vol. II (Part Two), pp. 38–50, paras. 40–49. See, in particular, the draft articles with the commentaries thereto, contained in para. 49. For the Commission's discussions on the commentaries to the draft articles, see *ibid.*, vol. I, 3193rd to 3196th meetings, pp. 143–157. For the presentation of the report of the Drafting Committee, see *ibid.*, 3174th meeting, pp. 50–53.

[13] See A/C.6/68/SR.17 to A/C.6/68/SR.19. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-eighth session (A/CN.4/666) and in particular sect. B.

[14] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 81.

[15] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *Yearbook … 2014*, vol. I, 3217th to 3222th meetings, pp. 83 *et seq*.

[16] For the texts of the draft articles, see annex I to the present report.

[17] For the consideration of the topic by the Commission at its sixty-sixth session, see *Yearbook … 2014*, vol. II (Part Two), pp. 142–146, paras. 123–132. See, in particular, the draft articles with the commentaries thereto, contained in para. 132. For the Commission's discussions on the commentaries to the draft articles, see *Yearbook … 2014*, vol. I, 3240th to 3242nd meetings, pp. 205 *et seq*. For the report of the Drafting Committee and its presentation in plenary, see document A/CN.4/L.850 (available from the website of the Commission, documents of the sixty-sixth session) and *Yearbook … 2014*, vol. I, 3231st meeting, pp. 160–161. The statement by the Chair of the Drafting Committee can be consulted on the website of the Commission.

its sixty-ninth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States welcomed the third report of the Special Rapporteur and the two new draft articles provisionally adopted by the Commission, highlighting the significant progress made on the topic.[18]

7. At the sixty-seventh session of the Commission, in 2015, the Special Rapporteur submitted the fourth report on the immunity of State officials from foreign criminal jurisdiction,[19] which continued the analysis of the normative elements of immunity *ratione materiae*, addressing the substantive and temporal aspects in detail, and proposed two draft articles. The Commission examined the Special Rapporteur's fourth report at its 3271st to 3278th meetings[20] and decided to refer the two draft articles to the Drafting Committee. The Drafting Committee provisionally adopted draft articles 2 (*f*) (definition of "act performed in an official capacity") and 6 (scope of immunity *ratione materiae*).[21] The Commission took note of these draft articles and decided that the commentaries thereto would be considered at that session.[22] At its seventieth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States again welcomed the Special Rapporteur's fourth report and the two new draft articles provisionally adopted by the Drafting Committee and highlighted the progress made on the topic by the Commission.[23]

8. Starting in 2013, the Commission has addressed various questions to States on issues of interest to the topic of immunity of State officials from foreign criminal jurisdiction. In 2014, ten States submitted comments: Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[24] In 2015, the following States submitted contributions: Austria, Czech Republic, Cuba, Finland, France, Germany, Netherlands, Peru, Poland, Spain, United Kingdom and Switzerland.[25] In 2016, at the time when the present report was finalized, written replies had been received from the following States: Australia, Austria, Netherlands, Paraguay, Peru, Spain and Switzerland.[26] In addition, several States referred in their statements in the Sixth Committee to the issues raised in the Commission's requests. The Special Rapporteur wishes to thank those States for their comments, which are invaluable to the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments received, as well as the observations contained in the oral statements by delegations in the Sixth Committee, were duly taken into account in the preparation of the present report.

9. As already announced in 2015, the present report analyses the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It deals successively with the Commission's consideration of this issue over the two quinquenniums during which it has been dealing with the topic (chap. I), the analysis of relevant practice (chap. II), some methodological and conceptual questions relating to limitations and exceptions (chap. III), and instances in which the immunity of State officials from foreign criminal jurisdiction does not apply (chap. IV). On the basis of this study, a draft article is proposed. The report also contains a reference to the future workplan (chap. V). Lastly, in order to facilitate the Commission's consideration of the present report, it has three annexes containing draft articles provisionally adopted by the Commission (annex I), draft articles provisionally adopted by the Drafting Committee and of which the Commission has taken note (annex II) and a draft article proposed in the present report (annex III).

[18] See A/C.6/69/SR.21 to A/C.6/69/SR.26. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-ninth session (A/CN.4/678), sect. D, paras. 37–51.

[19] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 3.

[20] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *ibid.*, vol. I, 3271st to 3278th meetings, pp. 208 *et seq.*

[21] See A/CN.4/L.865 (available from the Comission's website, documents of the sixty-seventh session) and *Yearbook … 2015*, vol. I, 3284th meeting, pp. 302–304. The statement by the Chair of the Drafting Committee can be consulted on the website of the Commission. The text of the draft articles provisionally adopted by the Drafting Committee is included in annex II to the present report.

[22] For the consideration of the topic by the Commission at its sixty-seventh session, see *Yearbook … 2015*, vol. II (Part Two), A/70/10, pp. 71–79, paras. 174–243.

[23] See A/C.6/69/SR.20 and A/C.6/69/SR.22 to A/C.6/69/SR.25. See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its seventieth session (A/CN.4/689), sect. F, paras. 68–76.

[24] *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 25. The Commission requested States to provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction.

[25] *Yearbook … 2014*, vol. II (Part Two), p. 19, para. 28. The Commission requested States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (*a*) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction; and (*b*) any exceptions to immunity of State officials from foreign criminal jurisdiction.

[26] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 29. The Commission stated that it would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, relating to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Chapter I

Limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction: introduction

A. General considerations

10. As already pointed out by the Special Rapporteur, the issue of limitations and exceptions to immunity should be addressed once the analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae* has been completed. This is for the obvious reason that only after examining the basic elements that define the general

regime applicable in abstract terms to immunity from foreign criminal jurisdiction is it possible to address the complex question of whether that general regime may be subject to limitations and exceptions. In addition, it has been pointed out that the issue of limitations and exceptions to immunity must be analysed both comprehensively and with reference to the two types of immunity referred to above.

11. The issue of limitations and exceptions to immunity has traditionally been considered from the perspective of the acts that can be covered by immunity. Consequently, some publicists and States have focused on the relationship between immunity from foreign criminal jurisdiction and *jus cogens*, serious and systematic violations of human rights, international crimes and efforts to combat impunity. Other publicists and States have concentrated on attribution of the official's act to the State, emphasizing the characterization of the official's immunity as the State's immunity. In addition, the question of limitations and exceptions to immunity has been considered from a different angle, essentially concerning the representative character of persons enjoying immunity *ratione personae*. Nevertheless, also in relation to this category of immunity, the existence or non-existence of limitations and exceptions thereto has been linked in some way to the nature of the act performed by these State officials.

12. The wealth of recent publications on the immunity of the State and its officials has demonstrated that the issue of limitations and exceptions constitutes one of the major concerns of the international legal community.[27] The same concern is reflected in the series of resolutions that have been adopted to date by the Institute of International Law and which contain references to limitations and exceptions to immunity.[28] The same can be said of other indirect contributions to the literature on the present topic, including the Princeton Principles on Universal Jurisdiction.[29]

13. However, this focus on limitations and exceptions to immunity is not only theoretical or doctrinal. On the contrary, the discussion concerning the judgments of the European Court of Human Rights, especially in the *Al-Adsani* and *Jones* cases,[30] demonstrates that the issue of limitations and exceptions to sovereign immunity has a very important practical dimension. In addition, the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State*,[31] has placed the close relationship between immunity and several key concepts of contemporary international law, especially *jus cogens*, at the forefront of the debate. Moreover, it should not be forgotten that domestic courts have also ruled on the question of limitations and exceptions to the immunity from criminal jurisdiction of the officials of a foreign State in the regular exercise of their judicial functions, some of which have had an important social and media impact and been extensively covered in legal discussions and writings. The *Pinochet* case, in which Spanish and British courts were involved, can no doubt be considered as having prompted the current discussion on the immunities of State officials and exceptions thereto. Two recent judgments by domestic courts have also complicated the problem. The first is the 22 October 2014 judgment of the Italian Constitutional Tribunal concerning the application in Italy of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*.[32] The second is the judgment issued in February this year by the Supreme Court of Appeal of South Africa in the case of the request for the arrest of President Al Bashir following the warrant issued by the International Criminal Court.[33] Lastly, it should be remembered that the question of limitations and exceptions to immunity is the crux of the more recent developments concerning international criminal jurisdiction, as exemplified by various decisions of the African Union, particularly the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which created an International Criminal Law Section in that Court.[34]

14. Consequently, any work of the Commission on the immunity of State officials from foreign criminal

[27] See, in particular: Bellal, *Immunités et violations graves des droits humains: vers une évolution structurelle de l'ordre juridique international?*; Borghi, *L'immunité des dirigeants politiques en droit international*; Bröhmer, *State immunity and the violation of human rights*; Canadas-Blanc, *La responsabilité pénale des élus locaux*; Frulli, *Inmunità e crimini internazionali. L'esercizio della giuridizione penale e civile nei confronti degli organi statali sospetati di gravi crimini internazionali*; Kelly, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein*; Otshudi Okondjo Wonyangondo, *L'immunité de juridiction pénale des dirigeants étrangers accusés des crimes contre l'humanité*; Pedretti, *Immunity of Heads of State and State Officials for International Crimes*; Simbeye, *Immunity and International Criminal Law*; Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; Verhoeven (ed.), *Le droit international des immunités: contestation ou consolidation?*. Among the general works devoted to the immunity of the State and of State officials which have dealt with the question of limitations and exceptions, see Foakes, *The position of heads of State and senior officials in international law*; Fox and Webb, *The Law of State Immunity*.

[28] See the following resolutions: Immunities from jurisdiction and execution of Heads of State and of Government in international law, Vancouver session, 2001 (art. 11, paras. 1.b and 3; 13, para. 2) (Institute of International Law, *Yearbook*, vol. 69, Session of Vancouver, 2001, Paris, Pedone, 2001, p. 743); Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow session, 2005 (art. 6) (Institute of International Law, *Yearbook*, vol. 71-II, Session of Krakow, 2005, Second Part, Paris, Pedone, 2005, p. 297); Immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, Naples session, 2009 (arts. II. 2 and 3, and III.1) (Institute of International Law, *Yearbook*, vol. 73- I and II, Session of Naples, 2009, First and Second Parts, Paris, Pedone, 2009, p. 226); and Universal civil jurisdiction with regard to reparation for international crimes, Tallinn session, 2015 (art. 5) (Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn, 2015, Paris, Pedone, 2015, p. 263).

[29] See, in particular, principle 5, entitled "Immunities", Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, Princeton, New Jersey, Program in Law and Public Affairs, 2001.

[30] *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, ECHR 2001-XI; *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014. See also paras. 87–95 below.

[31] *Jurisdictional immunities of the State* (*Germany v. Italy, (Greece intervening)*), Judgment, *I.C.J. Reports 2012*, p. 99. See also paras. 61–86 below.

[32] Judgment No. 238/2014.

[33] See the judgment in the case *The Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre and Others* (867/15) [2016] ZASCA 17 (15 March 2016). The judgment was in response to the appeal lodged by the Government of South Africa against the judgment issued by the High Court of South Africa (Gauteng Division, Pretoria) on 23 June 2015 in case 27740/2015 (*Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*).

[34] The Malabo Protocol was adopted at the twenty-third regular session of the Assembly of the African Union. It has not yet entered into force.

jurisdiction would be incomplete without consideration of the limitations and exceptions to such immunity. However, such analysis should not be limited to the relationship between international crimes and immunity of State officials from foreign criminal jurisdiction, even though that issue certainly constitutes the central and most controversial aspect of the question. Indeed, there are other examples in practice that should also be analysed from the perspective of limitations and exceptions to immunity. Moreover, the present report must also take into consideration a series of questions of general import without which the consideration of limitations and exceptions to immunity would be incomplete. The main goal of the report is therefore to consider in detail the issue of limitations and exceptions to immunity, starting with an introductory analysis of prior work by the Commission over the two most recent quinquenniums.

B. Prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction

15. The limitations and exceptions to immunity are undoubtedly one of the central issues to be considered by the Commission in its work on this topic, and is also a highly politically sensitive issue. It therefore comes as no surprise that the issue of limitations and exceptions has been covered in the various reports submitted for the Commission's consideration and has been the subject of an ongoing debate within the Commission, to the point where some of its members consider the issue to be the very purpose, and even the only purpose, of the present topic. The importance attached to this issue is also reflected in the statements made by delegations in the Sixth Committee, which have repeatedly referred to the limitations and exceptions to immunity during the consideration of the annual report of the Commission, as well as in the written contributions provided by States in response to questions posed by the Commission.

16. It will be recalled that the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction was analysed in detail in the memorandum by the Secretariat,[35] as well as in the second report of the former Special Rapporteur, Mr. Kolodkin, one section of which was devoted to a case study of exceptions to immunity.[36] On the basis of that study, Mr. Kolodkin concluded that there is in contemporary international law no customary norm (or trend toward the establishment of such a norm) making it possible to assert that there are exceptions to immunity, apart from the exception concerning harm caused directly in the forum State when that State did not consent to the performance of the act or to the presence of the foreign official in its territory.[37] He added that further restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations; he also questioned their effect on efforts to combat impunity.[38]

17. In her preliminary report, the present Special Rapporteur highlighted the lack of consensus within the Commission on the issue of limitations and exceptions to immunity, while drawing attention to the need to analyse the topic during the present quinquennium, in order to identify what place could be given to exceptions to immunity, particularly in the case of international crimes, in the definition of the legal regime applicable both to immunity *ratione personae* and to immunity *ratione materiae*. In addition, emphasis was placed on the need to approach the question in the light of the values and legal principles that are affected by immunity, from the perspective both of the values protected by immunity (sovereign equality of the State, stability of international relations) and of other values and legal principles that could be affected by the existence of immunity of State officials from foreign criminal jurisdiction. Lastly, the preliminary report also referred to the need to approach the issue of immunity—including the question of exceptions—from the perspective of both *lex ferenda* and *lex lata*, thus fulfilling the Commission's dual mandate encompassing both the codification and the progressive development of international law.[39]

18. In her following reports, the Special Rapporteur did not deal directly with the question of limitations and exceptions to immunity, although in the three reports submitted for the Commission's consideration in 2013, 2014 and 2015 she expressed a reservation regarding subsequent consideration of this question. Accordingly, none of the analyses contained in those reports and none of the draft articles included therein should be understood as a pronouncement on the existence or otherwise of exceptions to immunity.[40] In addition, it will be recalled that the fourth report contained an indirect analysis of the issue of limitations and exceptions to immunity in connection with the study of the concept of "acts performed in an official capacity" and already mentioned some of the elements that are developed in detail in the present report.[41]

19. All this prior work shows the context within which the Commission's discussion to date on limitations and exceptions to immunity has taken place. Although the question will again be discussed, this time in the form of a case study, during the consideration of the present report at the current session, it is useful to reiterate the issues and arguments concerning this question that have been raised by Commission members to date. These arguments can be summarized as follows:

(*a*) although some Commission members have maintained that there are no exceptions to immunity, they are in the minority.[42] Indeed, a number of members have

[35] See document A/CN.4/596 and Corr.1 (footnote 3 above), paras. 67–87, 141–153 and 180–212.

[36] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, pp. 411–425, paras. 54–93.

[37] *Ibid.*, p. 425, para. 90.

[38] *Ibid.*, paras. 91 and 92.

[39] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, pp. 41 *et seq.*, paras. 68 and 72. See also paras. 21, 34 and 45.

[40] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, pp. 35 *et seq.*, paras. 18, 55 and 73; *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 85, para. 15; and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 8 and 33, paras. 20 and 133.

[41] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 31–32 and 34, paras. 121–126, 137 and 138.

[42] See *Yearbook … 2012*, vol. I, 3145th meeting. The reference is to summary records of the Commission dealing with the topics mentioned in the text. The same system has been used in subsequent footnotes.

admitted that there are instances in which the application of immunity is not possible, although their positions are not identical in all respects;[43]

(*b*) the commission of international crimes is considered to be the main instance in which immunity would not be applicable. In addition, other examples of exceptions or limitations have been mentioned by Commission members, including *ultra vires* acts, *acta jure gestionis*, performance of functions that are ostensibly connected with official status but are in fact for the exclusive benefit of the State official (especially acts of corruption and misappropriation of State funds), and instances in which the official's act causes harm to persons or property in the territory of the forum State, usually referred to as the "territorial tort exception";[44]

(*c*) some Commission members have argued that conduct characterized as being contrary to *jus cogens* is a basis for limitations and exceptions to immunity. However, this argument has been put forward not as an autonomous and absolute criterion but in relation to efforts to combat impunity for international crimes, to serious human rights violations and to protection of the fundamental values of contemporary international law;[45]

(*d*) international crimes have been identified mainly as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[46] One Commission member has referred simply to crimes listed in the Rome Statute of the International Criminal Court as a means of identifying crimes generally viewed as such by the international community;[47]

(*e*) international crimes have been mentioned by some Commission members as exceptions to immunity,[48] while others have seen them as conduct that can never be part of State functions and which therefore cannot even be considered as acts performed in an official capacity.[49] In both cases, however, when Commission members have advanced these arguments, they have done so with the aim of precluding application of the rules concerning immunity of State officials from foreign criminal jurisdiction;

(*f*) with a few exceptions, most of the Commission members who have expressed an opinion on the matter have stated that exceptions to immunity do not apply to persons enjoying immunity *ratione personae* (Head of State, Head of Government and Minister for Foreign Affairs) during their term in office. They would, however, apply after that term has ended;[50]

(*g*) a large number of Commission members have maintained that immunity *ratione materiae* is indeed covered by the above-mentioned exceptions and limitations;[51]

(*h*) some Commission members have stated that there is no norm of international law concerning exceptions to immunity and that international practice is limited and inconsistent. Thus the Commission either cannot take exceptions into account or must deal with them prudently and cautiously;[52]

(*i*) however, those who have been in favour of exceptions and limitations consider that either it is possible to point to the existence of norms allowing exceptions or, even if is debatable whether they exist at the customary level, it is possible to identify a clear and growing trend toward exceptions to immunity, particularly in the case of international crimes.[53] They have also noted that the inconsistent and inconclusive nature of practice cannot be construed to mean solely that there are no exceptions to immunity. Consequently, the Commission can consider them in the exercise of its mandate, which includes both the codification and the progressive development of international law. In this connection, some Commission members have drawn attention to the fact that it is precisely the lack of consistent and conclusive practice that allows the Commission to opt for inclusion of exceptions, particularly in order to ensure consistency of the draft articles with other legal norms and principles enshrined in contemporary international law, which must be viewed as a normative whole;[54]

(*j*) Commission members generally have acknowledged the need to preserve the progress made over the last few decades in international criminal law, especially regarding the consolidation of efforts to combat impunity as a goal of the international community. However, Commission members have drawn varying conclusions from this affirmation. For example, some have emphasized that impunity and immunity are different concepts and that immunity is exclusively procedural and not substantive in nature, concluding that the

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[43] See *Yearbook … 2008*, vol. I, 2983rd to 2985th and 2987th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3113th to 3115th meetings; *Yearbook … 2012*, vol. I, 3143rd to 3145th meetings; *Yearbook … 2013*, vol. I, 3164th to 3168th meetings; *Yearbook … 2014*, vol. I, 3217th, 3219th and 3220th meetings, and *Yearbook … 2015*, vol. I, 3273rd and 3275th meetings.

[44] See *Yearbook … 2008*, vol. I, 2983rd to 2985th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3115th meetings; *Yearbook …2012*, vol. I, 3144th and 3145th meetings; *Yearbook … 2013*, vol. I, 3167th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[45] See *Yearbook … 2011*, vol. I, 3086th to 3088th meetings and *Yearbook …2012*, vol. I, 3145th meeting.

[46] See *Yearbook … 2008*, vol. I, 2984th meeting; see also *Yearbook … 2011*, vol. I, 3087th and 3088th meetings; *Yearbook …2012*, vol. I, 3145th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[47] See *Yearbook … 2011*, vol. I, 3087th meeting; *Yearbook …2012*, vol. I, 3145th meeting and *Yearbook … 2013*, vol. I, 3164th meeting.

[48] See *Yearbook … 2008*, vol. I, 2983rd and 2984th meetings; see also *Yearbook … 2011*, vol. I, 3086th to 3088th and 3115th meetings, and *Yearbook …2012*, vol. I, 3144th to 3145th meetings.

[49] See *Yearbook … 2008*, vol. I, 2985th meeting; see also *Yearbook … 2015*, vol. I, 3274th and 3275th meetings.

[50] See *Yearbook … 2008*, vol. I, 2983rd and 2984th meetings; see also *Yearbook … 2011*, vol. I, 3087th, 3088th and 3113th meetings, and *Yearbook …2012*, vol. I, 3143rd to 3145th meetings.

[51] See *Yearbook … 2011*, vol. I, 3086th to 3088th meetings; *Yearbook …2012*, vol. I, 3144th to 3145th meetings; *Yearbook … 2013*, vol. I, 3167th meeting; *Yearbook … 2014*, vol. I, 3219th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[52] See *Yearbook … 2011*, vol. I, 3086th meeting; *Yearbook …2012*, vol. I, 3143rd and 3144th meetings; and *Yearbook … 2013*, vol. I, 3167th meeting.

[53] See *Yearbook … 2011*, vol. I, 3086th and 3087th meetings; *Yearbook …2012*, vol. I, 3143rd to 3145th meetings; *Yearbook … 2013*, vol. I, 3165th meeting and *Yearbook … 2015*, vol. I, 3274th meeting.

[54] See *Yearbook … 2008*, vol. I, 2984th meeting; see also *Yearbook … 2011*, vol. I, 3087th, 3088th and 3115th meetings and *Yearbook … 2013*, vol. I, 3167th meeting.

non-existence of exceptions in no way affects efforts to combat impunity. Others, on the contrary, have pointed out that in certain circumstances immunity may have substantive connotations or consequences that would preclude effective individual criminal responsibility. In this context, it is essential to define exceptions or limitations to immunity in order to ensure that immunity does not become a form of impunity;[55]

(*k*) lastly, it should be noted that some Commission members who support the existence of exceptions have mentioned the need for such exceptions to be accompanied by recognition of procedural safeguards to prevent them from being misused.[56]

20. Together with this discussion within the Commission, attention should be drawn to the fact that, when analysing the Commission's work on this subject, States have referred at length to the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, both in the discussions held in the Sixth Committee and in the written contributions provided in response to questions posed by the Commission. An analysis of the positions maintained by States leads to the following conclusions:

(*a*) States attach considerable importance to questions related to exceptions and limitations to immunity, to which they have referred repeatedly since the first debate on immunity of State officials from foreign criminal jurisdiction was held in 2008.[57] In addition, a number of States have drawn attention to the need to approach the question cautiously,[58] with some delegations emphasizing the need to consider first existing law (*lex lata*) and then proposals for progressive development (*lex ferenda*). However, it is also noteworthy that there is no clear consensus among States as to which questions concerning exceptions would be included in each of the two categories;[59]

(*b*) exceptions to immunity have been viewed by States from two different perspectives: their effect on the goal sought by immunities, on the one hand, and their relationship to efforts to combat immunity for the most serious international crimes, on the other;[60]

(*c*) the proponents of the first perspective have warned of the damage that recognition of any type of exception might do to the exercise of the State's own functions, the risk of submission of politically motivated requests and the harm that limitation of immunity might do to the stability of inter-State relations;[61]

(*d*) from the second perspective, other States have drawn attention to the need to take into account the developments that have occurred in international criminal law in recent decades, as well as the need for the Commission to consider the question of immunities in general, and exceptions in particular, in a manner consistent with the rest of the norms and principles in force in contemporary international law. Those States have mentioned, in particular, the fact that the treatment given to exceptions should not undermine the progress achieved in international criminal law, including the progress that has occurred in the process of creating and establishing international criminal tribunals.[62] Those States believe that international crimes should be considered, *prima facie*, as exceptions to immunity;[63]

(*e*) with one exception, States have supported full or absolute immunity *ratione personae* for the Head of State, the Head of Government and the Minister for

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[55] See *Yearbook … 2008*, vol. I, 2984th, 2985th and 2987th meetings; see also *Yearbook … 2012*, vol. I, 3145th meeting; *Yearbook … 2013*, vol. I, 3165th meeting; *Yearbook … 2014*, vol. I, 3217th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[56] See *Yearbook … 2013*, vol. I, 3168th meeting and *Yearbook … 2015*, vol. I, 3275th meeting.

[57] Algeria (A/C.6/67/SR.24); Austria (A/C.6/68/SR.17, A/C.6/63/SR.23, A/C.6/66/SR.26, A/C.6/67/SR.20 and A/C.6/70/SR.24); Belarus (A/C.6/66/SR.27, A/C.6/67/SR.21 and A/C.6/68/SR.18); Belgium (A/C.6/66/SR.26); Canada (A/C.6/67/SR.20); Chile (A/C.6/67/SR.20 and A/C.6/68/SR.18); China (A/C.6/63/SR.23, A/C.6/66/SR.27, A/C.6/67/SR.21, A/C.6/68/SR.19 and A/C.6/69/SR.23); Croatia (A/C.6/70/SR.24); Czech Republic (A/C.6/63/SR.24 and A/C.6/68/SR.18); Denmark (A/C.6/69/SR.22); Ethiopia (A/C.6/69/SR.12); France (A/C.6/66/SR.20 and A/C.6/68/SR.17); Germany (A/C.6/68/SR.18, A/C.6/70/SR.24 and A/C.6/66/SR.24); Greece (A/C.6/68/SR.18 and A/C.6/70/SR.24); Hungary (A/C.6/66/SR.19); India (A/C.6/66/SR.27 and A/C.6/68/SR.19); Indonesia (A/C.6/66/SR.24 and A/C.6/68/SR.19); Iran (Islamic Republic of) (A/C.6/68/SR.19, A/C.6/69/SR.12, A/C.6/69/SR.24 and A/C.6/70/SR.25); Ireland (A/C.6/67/SR.21 and A/C.6/68/SR.18); Israel (A/C.6/68/SR.19); Italy (A/C.6/66/SR.26, A/C.6/67/SR.22 and A/C.6/68/SR.19); Japan (A/C.6/63/SR.23 and A/C.6/70/SR.25); Malaysia (A/C.6/67/SR.22 and A/C.6/68/SR.19); Mexico (A/C.6/66/SR.18); Norway (A/C.6/63/SR.23, A/C.6/66/SR.26, A/C.6/67/SR.20 and A/C.6/70/SR.23); New Zealand (A/C.6/63/SR.24, A/C.6/66/SR.27 and A/C.6/67/SR.22); Netherlands (A/C.6/63/SR.22, A/C.6/67/SR.21, A/C.6/68/SR.18 and A/C.6/69/SR.23); Peru (A/C.6/66/SR.26 and A/C.6/67/SR.21); Poland (A/C.6/66/SR.26 and A/C.6/69/SR.23); Portugal (A/C.6/66/SR.27, A/C.6/67/SR.21, A/C.6/68/SR.17 and A/C.6/69/SR.24); Republic of Korea (A/C.6/67/SR.21 and A/C.6/68/SR.18); Republic of the Congo (A/C.6/67/SR.21); Russian Federation (A/C.6/63/SR.25, A/C.6/66/SR.27 and A/C.6/67/SR.22); Singapore (A/C.6/68/SR.17); Slovenia (A/C.6/67/SR.22 and A/C.6/70/SR.24); Sri Lanka (A/C.6/66/SR.27); South Africa (A/C.6/67/SR.21 and A/C.6/68/SR.18); Spain (A/C.6/66/SR.27, A/C.6/67/SR.22 and A/C.6/68/SR.17); Sudan (A/C.6/63/SR.25); Switzerland (A/C.6/63/SR.24, A/C.6/66/SR.26 and A/C.6/67/SR.21); Thailand (A/C.6/69/SR.24), United States (A/C.6/69/SR.24 and A/C.6/70/SR.25); United Kingdom (A/C.6/63/SR.23, A/C.6/68/SR.18, A/C.6/69/SR.23, and A/C.6/70/SR.24); Viet Nam (A/C.6/70/SR.25).

[58] China (A/C.6/63/SR.23, A/C.6/68/SR.19 and A/C.6/69/SR.23); Cuba (A/C.6/67/SR.22, A/C.6/68/SR.19, A/C.6/69/SR.23 and A/C.6/70/SR.24); El Salvador (A/C.6/63/SR.23); Israel (A/C.6/70/SR.25); Peru (A/C.6/66/SR.26); Republic of Korea (A/C.6/67/SR.21); Romania (A/C.6/70/SR.24); Russian Federation (A/C.6/66/SR.27); Viet Nam (A/C.6/69/SR.25).

[59] Austria (A/C.6/66/SR.26), Belarus (A/C.6/66/SR.27); France (A/C.6/66/SR.20); Iran (Islamic Republic of) (A/C.6/66/SR.27); Mexico (A/C.6/66/SR.18); Russian Federation (A/C.6/66/SR.27 and A/C.6/67/SR.22).

[60] Chile (A/C.6/67/SR.20 and A/C.6/69/SR.24); Denmark (on behalf of the Nordic countries) (A/C.6/69/SR.22); Indonesia (A/C.6/66/SR.24); Jamaica (A/C.6/63/SR.24); Japan (A/C.6/63/SR.23); Mexico (A/C.6/66/SR.18); New Zealand (A/C.6/63/SR.24 and A/C.6/66/SR.27); Norway (A/C.6/63/SR.23, A/C.6/67/SR.20, A/C.6/68/SR.17 and A/C.6/70/SR.23); Portugal (A/C.6/66/SR.27); Republic of Korea (A/C.6/67/SR.21 and A/C.6/68/SR.18); South Africa (A/C.6/68/SR.18); Thailand (A/C.6/68/SR.19).

[61] Algeria (A/C.6/67/SR.22); China (A/C.6/63/SR.23 and A/C.6/66/SR.27); Cuba (A/C.6/66/SR.27); New Zealand (A/C.6/66/SR.27).

[62] Slovenia (A/C.6/70/SR.24), Norway (on behalf of the Nordic countries) (A/C.6/66/SR.26 and A/C.6/67/SR.20).

[63] Republic of Korea (A/C.6/68/SR.18); Canada (A/C.6/67/SR.20); Japan (A/C.6/69/SR.23); Netherlands (A/C.6/67/SR.21 and A/C.6/69/SR.23); Norway (on behalf of the Nordic countries) (A/C.6/66/SR.26); Poland (A/C.6/69/SR.23); Republic of the Congo (A/C.6/67/SR.21).

Foreign Affairs, with no exception, even for international crimes, during their term of office;[64]

(*f*) however, a large number of States have supported the existence of various exceptions to immunity *ratione materiae*, the main one being the commission of the most serious crimes of concern to the international community as a whole,[65] although some States have referred to other exceptions to immunity, such as acts of sabotage, espionage or other harm done by the official of the foreign State in the territory of the forum State;[66]

(*g*) in referring to international crimes, States have made special mention of the crime of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law, torture and enforced disappearance;[67]

(*h*) the commission of international crimes has been considered by some States to be an exception that is already enshrined in contemporary international law, while others have maintained that it reflects a growing trend that could not be ignored by the Commission in its work;[68]

(*i*) lastly, it is worth noting that most States refer to "exceptions to immunity", using the term "limits" or "limitations" residually.

21. In preparing the present report, the Special Rapporteur has taken into account the past history of consideration of the question of limitations and exceptions to immunity of State officials from foreign criminal jurisdiction.

[64] Austria (A/C.6/67/SR.20 and A/C.6/68/SR.17); Belarus (A/C.6/67/SR.21 and A/C.6/66/SR.27); Chile (A/C.6/67/SR.20); China (A/C.6/66/SR.27); Czech Republic (A/C.6/63/SR.24); Germany (A/C.6/68/SR.18); Greece (A/C.6/68/SR.18); Hungary (A/C.6/66/SR.19); Indonesia (A/C.6/66/SR.24); Ireland (A/C.6/67/SR.21 and A/C.6/68/SR.18); Jamaica (A/C.6/63/SR.24 and A/C.6/67/SR.22); Malaysia (A/C.6/68/SR.19); Netherlands (A/C.6/67/SR.21 and A/C.6/68/SR.18); Peru (A/C.6/67/SR.21); Republic of Korea (A/C.6/68/SR.18 and A/C.6/69/SR.25); Republic of the Congo (A/C.6/67/SR.21); Slovenia (A/C.6/67/SR.22); Spain (A/C.6/68/SR.17); Sri Lanka (A/C.6/66/SR.27); Switzerland (A/C.6/63/SR.24); United States (A/C.6/69/SR.24). Opposition to the absolute character of immunity *ratione personae* seemed to be expressed by: Portugal (A/C.6/63/SR.25, A/C.6/67/SR.21 and A/C.6/66/SR.27); Italy (A/C.6/66/SR.26), and Mexico (A/C.6/66/SR.18).

[65] Austria (A/C.6/67/SR.20); Canada (A/C.6/67/SR.20); Chile (A/C.6/67/SR.20); Croatia (A/C.6/70/SR.24); Czech Republic (A/C.6/63/SR.24); Denmark (on behalf of the Nordic countries) (A/C.6/69/SR.22); Greece (A/C.6/68/SR.18); New Zealand (A/C.6/66/SR.27 and A/C.6/67/SR.22); Netherlands (A/C.6/67/SR.21 and A/C.6/69/SR.23); Norway (on behalf of the Nordic countries) (A/C.6/67/SR.27 and A/C.6/70/SR.23); Peru (A/C.6/67/SR.21); Poland (A/C.6/69/SR.23); Republic of the Congo (A/C.6/67/SR.21); Slovenia (A/C.6/67/SR.22). Opposed to consideration of international crimes as exceptions: China (A/C.6/67/SR.21).

[66] Austria (A/C.6/63/SR.23); Iran (Islamic Republic of) (A/C.6/70/SR.25).

[67] China (A/C.6/69/SR.23); Czech Republic (A/C.6/69/SR.23); Denmark (on behalf of the Nordic countries)(A/C.6/69/SR.22); Greece (A/C.6/68/SR.18); Portugal (A/C.6/68/SR.17); Republic of Korea (A/C.6/63/SR.23); South Africa (A/C.6/68/SR.18); United Kingdom (A/C.6/69/SR.23 and A/C.6/70/SR.24).

[68] Canada (A/C.6/67/SR.20); Greece (A/C.6/67/SR.20); Portugal (A/C.6/67/SR.21).

Chapter II

Study of practice

22. As already mentioned in earlier reports submitted by the Special Rapporteur, the study of practice is an essential foundation of this work. Accordingly, the following pages contain an analysis of treaty practice (sect. A), national legislative practice (sect. B), international judicial practice (sect. C), national judicial practice (sect. D) and prior work of the Commission that is of relevance to the present report (sect. E).

A. Treaty practice

23. The various conventions analysed in earlier reports also include provisions that may be germane to the question of limitations and exceptions. However, as a general observation, it should be noted that none of them use this terminology. In fact, they adopt a more general and pragmatic approach to the question, referring to instances in which the convention, or one of its provisions, does not apply.

24. Starting with the conventions that directly or indirectly govern immunity, it is noteworthy that the ones which regulate the exercise of the diplomatic function do not contain provisions contemplating any form of exception or limitation to immunity as regards criminal jurisdiction. On the contrary, they recognize the immunity from criminal jurisdiction of persons enjoying immunity in absolute terms during the person's term in office. This is established in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations, in article 31, paragraph 1, of the Convention on Special Missions and in articles 30, paragraph 1, and 60, paragraph 1, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. It is also noteworthy that the provisions mentioned mainly describe a model of immunity *ratione personae* and that immunity therefore covers both acts performed in an official capacity and acts performed in a private capacity. In the case of the first two conventions, however, the forum State has an alternative mechanism that it can use to deal with instances in which an individual enjoying immunity has committed or is committing a crime: designation of the person concerned as "persona *non grata*" or "not acceptable", in which case the person must leave the national territory.[69] In any case, it should be remembered that such immunity is of limited duration and that, after the functions have ended, it is no longer absolute, since it applies solely to acts performed in an official capacity.[70] However, these conventions do not define exceptions applicable to this residual immunity *ratione materiae* as regards criminal jurisdiction.

[69] See Vienna Convention on Diplomatic Relations, art. 9, para. 1; and Convention on Special Missions, art. 12.

[70] See Vienna Convention on Diplomatic Relations, art. 39, para. 2; Convention on Special Missions, art. 43, para. 2; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, art. 38. para. 2.

25. The Vienna Convention on Consular Relations, for its part, adopts a different approach, since the system of immunities follows a model of immunity *ratione materiae* linked to acts specific to the consular function and also applies in the case of criminal jurisdiction,[71] where the consular official and the other staff of the consular office enjoy not absolute immunity but immunity limited to acts performed in an official capacity.[72] Lastly, it should be noted that article 43, paragraph 2 (*b*), of the Convention establishes a sort of "territorial tort exception".

26. In concluding this study of the conventions governing immunity, it should be noted that, for the purposes of the present report, the United Nations Convention on Jurisdictional Immunities of States and Their Property is in principle less relevant than the other conventions, since it refers to immunity from jurisdiction of the State and not to immunity from jurisdiction of State officials. Furthermore, it does not apply to immunity from criminal jurisdiction. However, it is of interest for other reasons. Firstly, as regards methodology, it is worth noting that the Convention does not distinguish between limitations and exceptions to immunity, addressing them under the same heading: "Proceedings in which State immunity cannot be invoked".[73] Secondly, it includes the "territorial tort exception" among those instances. Lastly, it does not recognize any exception or limitation based on violation of *jus cogens* norms.

27. Article 12 of the Convention (Personal injuries and damage to property) states that:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

28. This precept follows the precedent of the Vienna Convention on Consular Relations[74] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[75] It was also contemplated in the European Convention on State Immunity, which provides in its article 11 that:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

29. Article 12 of the Convention on the Jurisdictional Immunities of States and Their Property reproduces almost *verbatim* the draft article adopted at the time by the Commission.[76] In the opinion of the Commission, the above-mentioned rule constitutes an exception to State immunity from jurisdiction,[77] justified by application of the jurisdictional principle of *lex loci delicti commissi* and the preponderance of the role played in this case by the territorial element.[78] In addition, the exception satisfies the requirement that the individuals concerned must be guaranteed access to recourse, which would probably not be the case if there were to be immunity.[79] Lastly, although the "territorial tort exception" established in the Convention is designed to apply to civil jurisdiction, the Commission noted in its commentaries that it could also be used in relation to claims relating to "intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination".[80] If, in addition, one considers the fact that the Commission understood the words "author of the act" to mean agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person",[81] then an exception of this kind can conceivably play some role in the context of immunity from criminal jurisdiction.

30. The idea of incorporating in the United Nations Convention on the Jurisdictional Immunities of States and Their Property an exception connected with violation of *jus cogens* norms was broached at a late stage, at the end of the negotiation process on the Convention, when the General Assembly requested that the Commission review some questions still pending from that process, as well as to consider new elements that had emerged in practice after its draft articles were adopted in 1991. The Commission set up a Working Group for this purpose, which in an annex to its report drew the attention of the General Assembly to:

> the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture.[82]

31. The Commission based its commentary on judicial practice followed in earlier years, especially in relation to the *Pinochet* case, concluding that these facts "are a recent development relating to immunity which should not be ignored".[83] Although the question was discussed in the Working Group of the Sixth Committee conducting the final negotiations on the future Convention, the exception was not incorporated in the text because it was considered

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[71] See Vienna Convention on Consular Relations, arts. 43 and 53, para. 4.

[72] Regarding the exercise of criminal jurisdiction, see arts. 41, 42 and 63 of the Convention.

[73] See Part III of the Convention, arts. 10–17. The instances mentioned in that Part fit into both the category of limitations and the category of exceptions to immunity.

[74] Art. 43, para. 2 (*b*), of the Convention establishes an exception to immunity from civil jurisdiction when the action is brought "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft".

[75] Art. 60, para. 4, concerning members of delegations to international conferences, states: "Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft, used or owned by the persons in question, where those damages are not recoverable from insurance".

[76] See *Yearbook … 1991*, vol. II (Part Two), p. 44.

[77] *Ibid.*, para. (1) of the commentary.

[78] *Ibid.*, pp. 44 and 45, paras. (2), (6) and (8) of the commentary.

[79] *Ibid.*, paras. (3) and (9) of the commentary, pp. 43 and 44. The Commission actually stated that in this case "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity" (para. (3)).

[80] *Ibid.*, p. 45, para. (4) of the commentary.

[81] *Ibid.*, p. 46, para. (10) of the commentary.

[82] *Yearbook … 1999*, vol. II (Part Two), p. 172; para. 3 of the annex to the report of the Working Group.

[83] *Ibid.*, p. 172, para. 13.

that the issue, "although of current interest, did not really fit into the [draft Convention]" and that "[f]urthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it".[84] Nevertheless, some States made declarations upon ratifying the Convention, in order to safeguard international protection of human rights in that connection.[85] In any case, the discussion on this exception is ongoing, having picked up steam since the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State*.

32. In addition to these conventions referring directly to immunity, there is also an interesting group of treaties falling within the scope of international human rights law and international criminal law with provisions concerning individual criminal responsibility that are relevant to the purposes of the present report. This group includes the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons.

33. The Convention on the Prevention and Punishment of the Crime of Genocide indirectly postulates the irrelevance of official status by stating in its article IV that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". The International Convention on the Suppression and Punishment of the Crime of Apartheid, for its part, states that "[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State" (art. III). On the other hand, the remaining Conventions do not contain similar provisions: the International Convention for the Protection of All Persons from Enforced Disappearance simply refers to "any person" in its enumeration of those who will be held responsible for that crime (art. 6, para. 1 (*a*)). However, both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance include "agents of the State" when defining the crime,[86] indicating that they may be held criminally responsible for such acts even when they acted in an official capacity. Consequently, it appears at first sight—and subject to comments to be made below—that the cited conventions provide grounds for concluding that commission of a crime of genocide, apartheid, torture or enforced disappearance may constitute *prima facie* an exception to immunity from criminal jurisdiction.

34. However, this conclusion will be tenable on the basis of the cited conventions only when the State party is expressly obliged to exercise its criminal jurisdiction in order to prosecute persons presumed to have committed the crimes in question, regardless of their nationality. In this connection, it should be noted that all these conventions, with the exception of the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention for the Suppression and Punishment of the Crime of Apartheid,[87] include provisions requiring States parties to establish jurisdiction when the crimes are committed in any territory under their jurisdiction[88] and when the presumed perpetrator is located in any territory under their jurisdiction, unless the criminal is extradited or surrendered to another State or to a competent international criminal jurisdiction.[89]

35. Lastly, it should be noted that the crimes of genocide,[90] enforced disappearance,[91] and apartheid[92] have been declared to be international crimes or crimes under international law by the conventions analysed above. Torture has also been declared to be "an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations", as well as a violation of

[84] See A/C.6/54/L.12, para. 47.

[85] In this connection, it is the understanding of Finland, Liechtenstein, Norway, Sweden and Switzerland that the current regulation provided by the Convention is "without prejudice to any future international legal development concerning the protection of human rights" (the wording varies slightly in each case). Italy, for its part, declared that the Convention should be interpreted "in accordance … with the principles concerning the protection of human rights from serious violations" (United Nations, *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. III, 13).

[86] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2. For a more detailed analysis of this question, see *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, pp. 96–97, paras. 79–84.

[87] The Convention on the Prevention and Punishment of the Crime of Genocide states in its article VI that persons charged with that crime "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". Similarly, article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid establishes that persons charged with that crime "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction".

[88] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 1 (*a*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 1 (*a*); Inter-American Convention on Forced Disappearance of Persons, article IV, first para., subpara. (*a*).; Inter-American Convention to Prevent and Punish Torture, art. 12, second para.

[89] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons, art. IV, first para., subpara. (*a*); Inter-American Convention to Prevent and Punish Torture, art. 12, first para., subpara. (*a*).

[90] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. 1 and first preambular para.

[91] Art. 5 of the International Convention for the Protection of All Persons from Enforced Disappearance states: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law". See, in a similar vein, the sixth preambular paragraph of the Inter-American Convention on Forced Disappearance of Persons.

[92] International Convention for the Suppression and Punishment of the Crime of Apartheid, art. I, para. 1.

"the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights".[93] This is important in order to determine what should be understood to be international crimes for the purposes of the exceptions referred to in the present report.

36. A parallel example is the Rome Statute of the International Criminal Court, which expressly recognizes the irrelevance of official capacity in determining individual criminal responsibility (art. 27, para. 1), the inapplicability to the Court of immunities under national or international law (art. 27, para. 2), as well as the general principle of the irrelevance of compliance with orders of a Government or of a superior in determining individual criminal responsibility (art. 33). The rules cited are designed to avoid instances in which the responsibility of the individual can be evaded as a consequence of the individual's special relationship with the State, in order to eliminate loopholes that would otherwise allow the most serious crimes that concern the international community as a whole to be committed with impunity. This emphasis placed by the Rome Statute on the absolute character of international crimes in order to define the individual criminal responsibility of any person and the consequent declaration of the nonapplicability of immunities cannot be ignored in the present report. However, the cited provisions and their effect on exceptions to the immunity of State officials from foreign criminal jurisdiction will be analysed in greater detail chapter III, section B, below.

37. Lastly, it is noteworthy that the conventions on corruption cover the possibility of acts of corruption being committed by officials of a foreign State,[94] which undoubtedly could give rise to a claim of immunity from foreign criminal jurisdiction when a State's courts attempt to exercise jurisdiction over the officials. However, the cited conventions do not contain general provisions referring to such immunity, the only exceptions being certain provisions included in the Council of Europe Criminal Law Convention on Corruption, in the United Nations Convention against Corruption and in the African Union Convention on Preventing and Combating Corruption, which all contain provisions referring to immunity albeit with clearly different approaches and effects as regards limitations and exceptions.

38. The Council of Europe Criminal Law Convention on Corruption states in its article 16 (Immunity):"The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity."

Despite the unclear wording, the Explanatory Report to the Convention states that "[t]he Convention recognizes the obligation of each of the institutions concerned to give effect to the provisions governing privilege and immunities", and that "customary international law is not excluded in this field".[95]

39. The United Nations Convention against Corruption, for its part, states in its article 30, paragraph 2, that:

> Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

Although the Convention refers to immunities under national law protecting national officials, it uses the concept of "appropriate balance", which may also be relevant for the purpose of defining the system of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

40. A similar focus, but with a stronger wording, is to be found in the African Union Convention on Preventing and Combating Corruption, which refers to immunities in the following terms (art. 7, para. 5):"Subject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials."

41. Lastly, attention should be drawn to the fact that the Malabo Protocol, establishing an International Criminal Law Section in the Court, includes corruption and money-laundering among the crimes covered by that Section.[96]

B. National legislative practice

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 and, when they did address the issue, the courts have usually done so by applying what they consider to be rules of international law referred to in their judgments and other decisions. Various legal grounds have been invoked for this application of the rules of international law: reference to the general principles of law governing the relationship between international law and national law; application of the intrinsic principles of common law;[97] or application of provisions of a general nature determining the powers of domestic judicial organs and

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[93] Inter-American Convention to Prevent and Punish Torture, second preambular para. A reference to the prohibition of torture in the Universal Declaration of Human Rights is contained in the preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[94] See, for example, the United Nation Convention against Corruption, arts. 16 and 17; the Criminal Law Convention on Corruption, arts. 5 and 6; and the Inter-American Convention against Corruption, art. VIII. All these provisions make express reference to the participation in an act of corruption of an official of the foreign State. The African Union Convention on Preventing and Combating Corruption does not refer specifically to foreign officials. However, the broad definition of "public official" given in article 1, together with the provisions of article 13 on the establishment of national jurisdiction over acts of corruption, indicates that the Convention can also be applied to foreign officials and that therefore the question of immunity can also be raised before the courts of States parties.

[95] *Explanatory Report*, para. 77, p. 16.

[96] See art. 28A, para. 1 (8) and (9), of the Statute of the African Court as amended by the Malabo Protocol.

[97] This is the case, in particular, in the United States on the basis of the *Samantar* judgment, which established the inapplicability of the Foreign Sovereign Immunities Act to State officials considered individually and stated that their immunity is subject to the rules of common law. See Keitner: "The common law of foreign official immunity".

referring to applicable international law to settle instances in which immunity may be an issue.[98]

43. The present report does not analyse the national norms that simply refer to applicable international law, since they do nothing to shed light on the nature of the limitations and exceptions to immunity, which will necessarily be those established in the international order. There will, however, be an analysis of the practice of the domestic courts responsible for applying those norms, since their decisions show what they understand by "applicable international law". The present section analyses the national laws expressly governing immunity and those other laws which, in regulating the jurisdiction of the State as regards international crimes, refer to immunity.

44. Starting with the first category, attention should first be drawn to the fact that national laws regulating jurisdictional immunity are very few in number and, in addition, usually refer basically to immunities of the State. However, some laws contain provisions allowing them to be applied to certain State officials, especially the Head of State. These include legislation of Argentina (Jurisdictional Immunity of Foreign States in Argentine Courts Act, 1995),[99] Australia (Foreign States Immunities Act, 1985),[100] Canada (State Immunity Act, 1985),[101] Japan (Civil Jurisdiction of Japan with respect to a Foreign State Act, 2009),[102] Pakistan (State Immunity Ordinance, 1981),[103] Singapore (State Immunity Act, 1979), South Africa (Foreign States Immunities Act, 1981), Spain (Privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain Organic Act, 2015),[104] the United Kingdom (State Immunity Act, 1978),[105] and the United States (Foreign Sovereign Immunities Act, 1976).[106]

45. Most of these laws refer to exceptions and limitations to immunities of the State in two different ways: (*a*) a "territorial tort exception" in the case of damage to persons or property occurring in the forum State;[107] and *(b*) exceptions to certain categories of proceedings concerning claims connected with rights and obligations that may be classified in the category of *jus gestionis* acts, anticipating or applying the provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[108] On the other hand, it is noteworthy that, although all the laws mentioned apply generically to the State, only some of them refer to State officials, mentioning only the Head of State or the representatives of the State acting "in their public capacity"[109] and thus limiting their applicability to such officials *ratione materiae*. Only the Spanish Act of 2015 deals with the immunity of certain officials (Head of State, Head of Government and Minister for Foreign Affairs) from the perspective of both immunity *ratione personae* and immunity *ratione materiae*.[110] Lastly, it should be noted that, because of their content, the cited laws generally regulate exceptions in such a way that they are only indirectly relevant to criminal jurisdictions. In addition, some of the laws in question expressly bar their application to criminal proceedings.[111]

46. Only three laws on immunity contain provisions referring to another type of exception more germane to the subject under consideration. These are the Canadian State Immunity Act, the Spanish Organic Act 16/2015 and the United States Foreign Sovereign Immunities

[98] Among these norms providing for general reference to international law, mention may be made of the following examples: Belgium: Repression of Serious Violations of International Humanitarian Law Act, amended by Act of 23 April 2003, art. 4.3; Germany, Courts Constitution Act, art. 20.2; Kyrgyzstan: Criminal Procedure Code, 1999, art. 16.2; Montenegro, Criminal Procedure Code, 2010, art. 252.1; Netherlands: Penal Code, art. 8; Philippines: Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity Act, No. 9851, of 27 July 2009, sect. 9 (*b*); Russian Federation: Penal Code, 13 July 1996, art. 11.4; Spain: Organic Act 6/1985 on the Judiciary, amended by Organic Act 16/2015, art. 23.4; Uzbekistan: Criminal Procedure Code art. 4. This reference to the applicable norms of international law has created quite a few problems for domestic courts in cases concerning immunity, which is why some States have enacted domestic laws on the subject. For example, after following a system of reference to international law for over 30 years, Spain opted to supplement that system in 2015 with the Immunities Act.

[99] Act 24.488 of 31 May 1995. Approved on 31 May 1995, it was partially promulgated on 22 June that year (www.infoleg.gob.ar).

[100] The Australian legislation was amended in 1987, 2009 and 2010.

[101] See Revised Statutes of Canada, 1985, c. S-18 (updated on 28 April 2016). The Canadian legislation was amended on 13 March 2012 to include an exception in the case of terrorism.

[102] Act No. 24 of 24 April 2009.

[103] Ordinance VI of 1981, dated 12 March 1981.

[104] Organic Act 16/2015, of 27 October 2015 (*Official Gazette*, No. 258, of 28 October 2015).

[105] The United Kingdom legislation was adopted on 20 July 1978 and has not been amended since that date.

[106] The United States legislation was amended in 1991 by the Torture Victim Protection Act of 1991. See sects. 1605 and 1605A of the United States Code.

[107] See the following laws: Argentina, art. 2 (*e*); Australia, sects. 13 and 42 (2); Canada, sect. 6; Japan, art. 10; Singapore, sect. 7; South Africa, sect. 6; Spain, art. 11; United Kingdom, sect. 5; United States, sect. 1605 (*a*) (5) (for convenience, the laws are cited by reference to the adopting State).

[108] These exceptions refer to the following acts: commercial transactions, labour contracts, rights concerning ownership and possession of assets, intellectual and industrial property, membership and participation in legal entities and corporate bodies, submission to commercial arbitration, acts and rights relating to State-owned vessels used for commercial purposes, obligations concerning payment of taxes and charges, rights and obligations derived from shares. See the following laws: Argentina, art. 2 (*c*), (*d*), (*f*), (*g*) and (*h*); Australia, sects. 11, 12, 14, 15, 16, 17, 18, 19 and 20; Canada, sects. 5, 7 and 8; Spain, arts. 9, 10 and 12–16; United States, sect. 1605 (*a*) (2)–(4) and (6) (*b*) and (*d*); Japan, arts. 8, 9 and 11–16; Pakistan, sects. 5–12; United Kingdom, sections 3, 4 and 6–11; Singapore, sects. 5 and 6–13; and South Africa, sects. 4, 5 and 7–12.

[109] The following laws refer in a general way to the Head of State: Australia, sects. 3.1, 3.3 (*a*) and 36; Canada, sect. 2 (*a*); Pakistan, sect. 15; Singapore, sect. 16 (1) (*a*); South Africa, sect. 1 (2) (*a*); and United Kingdom, sect. 14 (*a*). There are references to "representatives of the State when acting in that capacity" in the laws of Spain, art. 2 (*c*) (iv), and Japan, art. 2 (iv). United States courts originally considered that State officials acting in an official capacity were covered by the Foreign Sovereign Immunities Act. However, since the judgment in the *Samantar* case, such immunity is exclusively governed by the norms of common law. On this question, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 155, para. 106.

[110] Organic Act 16/2015 applies both to immunities of "foreign States and their property" (art. 1 (*a*)) and to immunities of "Heads of State and Government and Ministers for Foreign Affairs during the exercise and upon the completion of their functions" (art. 1 (*b*)). Title II of Organic Act 16/2015 is devoted entirely to "privileges and immunities of the Head of State, the Head of Government and the Minister for Foreign Affairs of the foreign State". See also art. 22, para. 2.

[111] See the following laws: Canada, sect. 18; Japan, art. 1; Singapore, sect. 19 (2) (*b*); and South Africa, sect. 2 (3). The United States law also is not applicable to criminal jurisdiction.

Act. The Argentine Act 24.488 should also be considered, although it does not expressly mention any exception related to criminal issues.

47. Although the United States Foreign Sovereign Immunities Act originally used the general version of exceptions described above, it was amended by the Torture Victim Protection Act, which added a section 1605A, entitled "Terrorism exception to the jurisdictional immunity of a foreign State", which provides as follows:

> A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency;[112]

providing that the following conditions are met:[113]

(*a*) the foreign State was designated by the Secretary of State as a "State sponsor of terrorism";

(*b*) the claimant or the victim was a national of the United States, a member of its Armed Forces or an employee of the Government;

(*c*) in a case in which the act occurred in the territory of the State against which the claim has been brought, the claimant has afforded the foreign State a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.

48. This exception allowed United States courts to deny a foreign State immunity from jurisdiction in a number of cases that have been confirmed in civil jurisdiction[114] in relation to acts that are unmistakably international crimes. However, it should also be noted that the exception in question is not general in scope and applies only in relation to acts performed by States formally designated by the Secretary of State as sponsors of terrorism, thus making the exception a matter of political discretion.

49. The Canadian State Immunity Act was amended in 2012 to add an exception entitled "Support of terrorism", which is included in the section on damage and injury. Under the Act, a State included on the terrorism support list will not be immune from the jurisdiction of Canadian courts as regards proceedings brought against it for support for terrorism or for terrorist activities.[115] The presentation of this exception is very similar to that of United States law, so that the observations in the preceding paragraph also apply to it.

50. Organic Act 16/2015, recently adopted in Spain, has introduced a somewhat different version of the regime applicable to exceptions. As already noted above, this Act distinguishes between the regime applicable to immunity of the State and the regime applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs, both as regards immunity *ratione personae*[116] and as regards immunity *ratione materiae*.[117] In the latter case, it introduces an exception based on international crimes, establishing that even for "acts performed during a term in office in exercise of official functions … crimes of genocide, forced disappearance, war and crimes against humanity will be excluded from immunity".[118] This is a general exception that does not impose any additional conditions, but it is applicable exclusively in the framework of immunity *ratione materiae*.

51. This exception is supplemented by a provision of general scope, under the heading "International crimes", which establishes the following:"The provisions of this Title shall not affect the international obligations assumed by Spain regarding the prosecution of international crimes, or its commitments to the International Criminal Court."[119] This provision has a different significance from the exception previously mentioned, since it applies both to immunity *ratione materiae* and to immunity *ratione personae*. However, its scope is more limited, since it concerns only instances in which Spain is required by an international norm to prosecute a person for the commission of international crimes and measures to be taken by Spanish courts to respond to a request for cooperation from the International Criminal Court.[120]

52. Lastly, Act 24.488 adopted by the Congress of Argentina contained the following article 3:

> If a complaint is made to Argentine courts against a foreign State, claiming a violation of international human rights law, the court concerned shall simply indicate to the complainant which organ of international protection in the regional or universal sphere would be competent to hear the complaint, if appropriate. In addition, it shall transmit a copy of the complaint to the Ministry of Foreign Affairs, International Trade and Worship so that it can be informed of the request and can take any appropriate measures in the international order.

53. However, this article was deleted ("observed") when the Act was promulgated by Decree 849/95 and is therefore not part of it.[121] The argument put forward in the Decree concerning the deletion of article 3 is of interest in connection with the analysis of exceptions, for two main reasons: (*a*) it states that violations of human rights generally constitute acts performed in the exercise of authority

[112] Sect. 1605 A, (*a*) (1).

[113] Sect. 1605 A, (2) (A).

[114] See sect. D below.

[115] See sect. 6.1 (1) and (11). Regarding the procedure for inclusion of a State on the terrorism support list, see sect. 6.1 (2), (3)–(10), sect. 11 (3) and sect. 13 (2).

[116] See art. 22.

[117] See arts. 23–25.

[118] Art. 23, para. 1, *in fine*.

[119] Art. 29.

[120] This exception was included at the request of the General Council of the Judiciary and the Public Prosecutor's Council (the organs responsible for judges and prosecutors) in order to ensure that, despite recognizing the relevant immunities, Spain can fulfil its international obligations derived from norms of international criminal law and especially that it can comply with requests for cooperation addressed to it by international criminal tribunals. It is important to realize that this provision must be read in the light of the sixth final provision of the Organic Act to the effect that "in the event of a normative conflict between the present Organic Act and the provisions of an international treaty to which the Kingdom of Spain is a party, preference shall be given to the international treaty".

[121] See art. 1 of the above-mentioned Decree. Decree 849/95 of 22 June 1995, adopted by the Council of Government, available from www.infoleg.gob.ar.

(*acta jure imperii*);[122] and (*b*) it notes that the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which have constitutional status in Argentina) refer to "crimes that may give rise to civil liability" and that it "seems inappropriate to deny access to justice in order to require compliance with that requirement".[123] Consequently, although Act 24.488 does not contain an explicit exception concerning international crimes, its interpretation in the light of Decree No. 849/95, ordering its partial promulgation, leads to the conclusion that Argentine courts will be competent to hear complaints against a foreign State for violation of international human rights law.

54. Among the domestic laws regulating international crimes, mention should first be made of the Repression of Serious Violations of International Humanitarian Law Act, adopted in Belgium in 1993 and amended in 1999 and 2003. The Act had an interesting history, largely relating to the *Arrest Warrant case of 11 April 2000*.[124] The 1999 version stated that "immunity connected with the official status of a person shall not prevent the application of the … law", but following the 2003 amendment that statement was modified by the phrase "within the limitations established by international law".[125] Moreover, article 13 of the Act, amending the Criminal Code, circumscribes this rule still further by stating that:

> In accordance with international law, exercise of jurisdiction is excluded in relation to: (i) Heads of State, Heads of Government and Ministers for Foreign Affairs, during the period when they are performing their functions, as well as to other persons with immunity recognized in international law; (ii) persons enjoying total or partial immunity under a treaty binding on Belgium.

Consequently, Belgian law recognizes absolute immunity *ratione personae* but does not address immunity *ratione materiae* and this has been interpreted as implicit recognition of the possibility of applying exceptions to it in connection with crimes against humanity, war and genocide.

55. In the Netherlands, the 2003 International Crimes Act uses a similar wording, establishing in its section 16 that

> [c]riminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (*a*) foreign Heads of State, Heads of Government and Ministers for Foreign Affairs, as long as they are in office, and other persons insofar as their immunity is recognized under customary international law; (*b*) persons who have immunity under any convention applicable within the Kingdom of the Netherlands.

Consequently, the Netherlands legislation recognizes the immunity of the "troika" members when they are in office, including with regard to international crimes. However, after their term in office has ended, immunity would apply to them only in respect of acts performed in an official capacity and this, according to information provided by the Government of the Netherlands, would not cover international crimes.[126]

56. The opposite approach is followed in the Penal Code of the Republic of the Niger, amended in 2003, which explicitly states that "immunity linked to the official status of a person does not exempt him or her from [criminal] prosecution for war crimes or crimes against humanity".[127]

57. Lastly, the question of immunity has been regulated in various laws designed to incorporate and develop in domestic legislation the provisions contained in the Rome Statute, both from a substantive viewpoint and from the viewpoint of competence and procedure. These are what are referred to as "implementing laws", which are undeniably of interest for the purposes of the present report. These "implementing laws" have addressed the question of limitations and exceptions to immunity from two different perspectives: (*a*) definition of a general system of exclusion from immunity; and (*b*) definition of a system of exclusion from immunity solely in relation to the general obligation of States parties to cooperate with the International Criminal Court.

58. The first approach is typified by the laws adopted in Burkina Faso, the Comoros, Ireland, Mauritius and South Africa.[128] Under these laws, domestic law recognizes that in general no immunity can be invoked against to the exercise of national criminal jurisdiction regarding crimes within the competence of the International Criminal Court, especially crimes of genocide, crimes against humanity and war crimes.

59. The second approach circumscribes the question of application of immunity to those cases in which national

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[122] See the second preambular paragraph of the Decree.

[123] See the fourth preambular paragraph of the Decree.

[124] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002*, p. 3, at p. 46. See also *ICJ Summaries 1997–2002*, p. 153.

[125] See Act amending the Repression of Serious Violations of International Humanitarian Law Act of 16 June 1993 and art. 144 *ter* of the Judicial Code. The text quoted above is from art. 5.3 of the Repression of Serious Violations of International Humanitarian Law Act.

[126] Comments by the Netherlands in reply to questions from the Commission (20 April 2016).

[127] Art. 208.7. This article should be read in conjunction with art. 208.2, second paragraph, which establishes a universal jurisdiction so that the courts of the Niger will be competent even if the crimes were committed abroad.

[128] See Burkina Faso, Act No. 52 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the courts of Burkina Faso may exercise jurisdiction with respect to persons who have committed a crime within the competence of the court, even in cases where it was committed abroad, provided that the suspect is in their territory; in addition, official status will not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022/AU 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, Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, art. 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 presumed perpetrator is in South Africa and that any official status claimed by the accused is irrelevant: this exemption from immunity is, in addition, effective "despite any other law to the contrary, including customary and conventional international law" (the Supreme Court of South Africa ruled on this question on 15 March 2016 in connection with the unsuccessful arrest warrant for President Al Bashir).

criminal jurisdiction must be exercised in order to ensure some form of cooperation with the Court, especially as regards arrest and surrender of persons to the Court. This second approach is illustrated by laws adopted in Canada, France, Germany, Kenya, New Zealand, Norway, Switzerland and Uganda, which do not take into consideration immunity or relevance of official status as grounds for non-compliance with the order to surrender.[129] The laws adopted in Iceland, Ireland, Malta, Samoa and the United Kingdom deal only with the irrelevance of immunity and of official status in relation to nationals of States parties to the Rome Statute, establishing a system of consultations with the Court in the case of nationals of States not parties.[130] Lastly, the laws adopted in Argentina, Australia, Austria and Liechtenstein do not provide for non-applicability of immunity in all cases, using systems of consultation with the Court in order to resolve any dispute that may arise as a result of the combined application of articles 27 and 98, paragraph 1, of the Rome Statute.[131] In any case, the non-applicability of immunity for the purpose of ensuring cooperation with the Court is also mentioned in some of the implementing laws following the first approach, as in the case of Burkina Faso and South Africa.[132]

C. International judicial practice

60. The question of limitations and exceptions to immunity from foreign criminal jurisdiction has been considered in various judgments of the International Court of Justice, the European Court of Human Rights, the International Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court.

1. International Court of Justice

61. In the *Arrest Warrant* case, the International Court of Justice was categorical as to the full nature of the immunity from foreign criminal jurisdiction enjoyed by the Minister for Foreign Affairs of the Democratic Republic of the Congo: "Throughout the duration of his or her office, [the Minister for Foreign Affairs] when abroad enjoys full immunity from criminal jurisdiction and inviolability."[133] Such immunity is based on the functions performed by the Minister for Foreign Affairs in international relations. To protect those functions, the immunity covers all acts performed by the Minister, both in an official capacity and in a private capacity.[134] The Court also concluded that it was unable to determine the existence of an exception to such immunity in contemporary international law, not even in cases where the acts in question constitute war crimes or crimes against humanity. According to the Court, such exception cannot be deduced from State practice[135] or from the instruments creating international criminal courts or tribunals.[136]

62. Nonetheless, the Court attempted to safeguard the principle of individual criminal responsibility enshrined in contemporary international law, which, in its view, is not affected by immunity from criminal jurisdiction. The Court used two complementary arguments to that end, namely the distinction between immunity and jurisdiction, on the one hand, and the distinction between immunity and impunity, on the other.

63. With regard to the first argument, the Court said that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction", and that even in cases where certain conventions have imposed on States the obligation to prosecute or extradite a person for international crimes, such extension of jurisdiction "in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs", which "remain opposable before the courts of a foreign State".[137]

64. The argument concerning the distinction between immunity and impunity is of greater interest for the purposes of the present report. In that connection, the Court noted 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. 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 al1 criminal responsibility.[138]

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[129] See 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; Kenya: Act No. 16 of 2008 on International Crimes, art. 27; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian law, art. 2; Switzerland, Act on cooperation with the International Criminal Court, art. 6; Uganda, Act No. 18 of 2006 on the International Criminal Court, art. 25 1 (*a*) and (*b*).

[130] See Iceland, 2003 Act on the International Criminal Court, art. 20.1; Ireland, 2006 International Criminal Court Act No. 30, art. 6.1; Malta, Extradition Act, art. 26S; Samoa, Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41.

[131] See Argentina, Act 26200 Implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 26 January 2001, arts. 40 and 41; Australia, International Criminal Court Act No. 41 of 13 August 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; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (*b*) and (*c*). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) notes the decision to settle questions on executive immunity without defining a specific system for consultations.

[132] See Burkina Faso, Act No. 52 of 2009, art. 39.2; South Africa, Act No. 27 of 2002, arts. 10.5 and 10.9.

[133] See *Arrest Warrant* (footnote 124 above), p. 22, para. 54.

[134] *Ibid.* For a description of said functions, see *ibid*., pp. 21–22, para. 53. The Court was especially clear in describing the functional dimension of that immunity: "[f]urthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions" (*ibid*., p. 22, para. 55).

[135] After examining the relevant national laws and a few decisions of national higher courts, the Court stated that it had been unable to deduce "that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity" (*ibid*., p. 24, para. 58, first subpara.).

[136] *Ibid*., second and third subparas.

[137] *Ibid*., pp. 24–25, para. 59.

[138] *Ibid*., p. 25, para. 60.

65. To reinforce the argument, the Court pointed to the existence of an alternative model for deducing an individual's criminal responsibility, which it described as follows:

> First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
>
> Thirdly, 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.
>
> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[139]

66. With these arguments, the Court set out a model of immunity from foreign criminal jurisdiction of Ministers for Foreign Affairs that has become the benchmark, revolving around four basic ideas:

(*a*) all acts performed by the Minister for Foreign Affairs during his or her time in office are covered by absolute immunity;

(*b*) there are no exceptions to such immunity;

(*c*) immunity is a "procedural bar" to the exercise of jurisdiction and not a substantive bar to the deduction of international criminal responsibility, including for acts which might constitute international crimes;

(*d*) individual criminal responsibility is safeguarded by recourse to other means of redress distinct from the exercise of foreign criminal jurisdiction.

67. In any event, it should be noted that even though the judgment in the *Arrest Warrant* case is usually cited as a benchmark for the regime of immunity from foreign criminal jurisdiction for all State officials, the Court's conclusions on this matter have limited scope. For instance, as the Court itself noted in the judgment that, "[f]or the purposes of [the said] case, … it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider",[140] but did not go any further. The Court's response therefore falls within the scope of immunity *ratione personae*, since it is not possible to conclude that said model should apply automatically to other State officials, who the Court seems to admit fall under a different legal regime. In any event, the Court's view on the topic under consideration is conclusive: there are no exceptions to immunity from international criminal jurisdiction for a Minister for Foreign Affairs (and, by extension, to immunity *ratione personae*), not even in respect of such grave crimes as war crimes and crimes against humanity.

68. Although the judgment was approved by a large majority, it must be remembered that various judges took a more nuanced view of the limitations and exceptions to immunity, and even dissented from the judgment. In that connection, although Judges Higgins, Kooijmans and Buergenthal supported the Court's position that there are no exceptions that could apply to immunity in the case under consideration, they drew attention to the increasing claim in the literature "that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform".[141] They also pointed to the need for a balanced interpretation of immunity that takes into account the need to protect the principle of sovereign equality and the requirements of international relations, on the one hand, and the need to ensure that said principle does not impede the combating of impunity, on the other. In that regard, they noted the increasing recognition that the notion 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".[142] For the three judges, immunity is never substantive; it "[h]as given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office".[143] It should be noted that the three judges also expressed doubts as to the viability of the alternative means of redress to which the Court referred in its judgment.[144]

69. The position taken by Judge Al-Khasawneh in his dissenting opinion is more convincing. In his view, the immunity from international criminal jurisdiction of the Minister for Foreign Affairs must remain limited to acts performed in an official capacity and, even more importantly for the purposes of the present report, can under no circumstances apply to war crimes, crimes against humanity and genocide. For him, it does not appear reasonable to admit that State immunity has been gradually restricted to exclude acts that are of a commercial or *jure gestiones* nature. Nonetheless, the immunity of the Minister for Foreign Affairs should be maintained where he or she commits an international crime, especially at a time when the combating of grave crimes has assumed a *jus cogens* character.[145]

70. Lastly, Judge *ad hoc* Van den Wyngaert not only denied that Ministers for Foreign Affairs enjoy immunity *ratione personae*, but also introduced new elements in her argument, which could be summarized as follows: (*a*) extending immunity *ratione personae* to the Minister for Foreign Affairs "would dramatically increase the number of persons enjoying international immunity from jurisdiction. There would be a potential for abuse. *Male fide* Governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States",[146] and

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[139] *Ibid*., p. 25, para. 61.

[140] *Ibid*., p. 21, para. 51, *in fine*.

[141] See joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, p. 88, para. 85.

[142] *Ibid*., p. 85, para. 74.

[143] *Ibid*. See also para. 75.

[144] *Ibid*., p. 86, para. 78.

[145] See dissenting opinion of Judge Al-Khasawneh, in particular p. 98, para. 7.

[146] See dissenting opinion of Judge *ad hoc* Van den Wyngaert, p. 150, para. 21, *in fine*.

"[v]ictims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction … and may even lead to conflict with international human rights rules";[147] (*b*) there is a "general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique, but also in the field of criminal law, when there are allegations of serious international crimes";[148] and (*c*) the alternative model which, according to the judgment, would help to reduce the individual criminal responsibility of a Minister for Foreign Affairs for international crimes, is not consonant with the reality of the Court's international practice nor with the limited nature of the jurisdictions of international criminal courts.[149]

71. In *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice also made reference to the limitations and exceptions to immunity, reiterating what it had said in the *Arrest Warrant* case: "A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties."[150] In any event, that assertion was made solely in relation to the immunity *ratione personae* that would be enjoyed by the President of Djibouti. Conversely, by not addressing the immunity claimed by the State Prosecutor (Procureur de la République) and the Head of National Security, the judgment failed to provide conclusive reference as to the limitations and exceptions that could have been alleged in both cases.

72. Lastly, in *Questions Relating to the Obligation to Prosecute or Extradite*, the Court also did not pronounce on the question of immunities, since Chad had communicated to the Court that it had waived the immunity of Mr. Hissène Habré.[151] However, for the purposes of the present report, it is worth noting that the Court stressed in its judgment that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[152] It is also important to note that, for the Court, 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".[153] The Court thus introduced the argument that combating impunity is one of the objectives pursued by the international community.[154]

73. While in the judgments analysed above the Court addressed the basis on which a State could claim to exercise jurisdiction against an individual (State official), the issue raised in *Jurisdictional Immunities of the State* is different. In that case, what was before the Court was not the immunity of a high-ranking official, but the immunity of the State in a narrow sense. Nonetheless, some of the issues addressed in that case are of considerable interest for the institution of immunity, in abstract terms, especially the procedural nature of immunity, the relationship between immunity and the exercise of jurisdiction, and the relationship between immunity and responsibility. The Court did address two possible exceptions to immunity, however: the "territorial tort exception" and the exception based on the violation of *jus cogens* norms, both in close reference to war crimes and crimes against humanity committed by the Nazi occupying forces in Italian and Greek territories during the Second World War.

74. Given its complex content, it is not surprising that the judgment has given rise to a fascinating academic debate.[155] It should be borne in mind that, owing to that same content, the judgment has also been cited as a reference in identifying the rules pertaining to the regime of immunity in a broad sense. For the purposes of the present report, an analysis of the judgment in *Jurisdictional Immunities of the State* would therefore be useful, in particular with regard to the following aspects: the nature of immunity and its relationship with jurisdiction and the regime of the international responsibility of the State; the effects of *jus cogens* norms on immunity; the scope of the "territorial tort exception", and the question concerning the existence of alternative means of redress.

75. In that judgment, the Court, in line with its previous rulings, put emphasis on the clearly procedural nature of immunity, which does not affect the definition of State responsibility, but only the possibility of such responsibility deriving from the exercise of foreign jurisdiction. In that connection, it stated expressly that: "The law of immunity is essentially procedural in nature … It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[156]

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[147] *Ibid*., p. 150, para. 22.

[148] *Ibid*., p. 151, para. 23.

[149] *Ibid*., pp. 153–159, paras. 34–38; Judges Higgins, Kooijmans and Buergenthal expressed a similar opinion in their joint separate opinion, *ibid*., p. 86, para. 78.

[150] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 236, para. 170.

[151] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422. Only Judge *ad hoc* Sur referred to the topic of immunity, stating in his dissenting opinion that "unlike the Rome Statute for example, the Convention [against Torture] does not state that the immunity of public authorities is unenforceable in proceedings instituted before domestic courts" (*ibid*., p. 620, para. 54). However, that topic was not before the Court.

[152] *Ibid*., p. 457, para. 99. Some of the judges maintained that stance on the prohibition of torture in their separate or dissenting opinions. In her dissenting opinion, for example, Judge Xue expressly identified "the prohibition of torture as *jus cogens*" (*ibid*., p. 575, para. 17), by concluding that "*jus cogens*, by its very nature, does not automatically trump the applicability of these procedural rules" (*ibid*.).

[153] *Ibid*., p. 461, para. 120.

[154] In their separate or dissenting opinions, some of the judges also referred to the fight against impunity and the role that the Convention against Torture plays to that end. In that connection, see the opinions of Judges Cançado Trindade (*ibid*., p. 519, para. 83 and p. 527, para. 103) and Donoghue (*ibid*., p. 584, para. 2).

[155] See, *inter alia*, Ferrer Lloret, "La insoportable levedad del derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia …"; Keitner, "*Germany v. Italy* and the limitations of horizontal enforcement: Some reflections from a United States perspective"; McGregor, "State immunity and human rights: Is there a future after *Germany v. Italy*?".

[156] *Jurisdictional Immunities of the State*, Judgment, *I.C.J. Reports 2012*, p. 124, para. 58. See also the separate opinion of Judge Koroma, p. 157, para. 3.

76. The basis for immunity, according to that view, is the principle of the sovereign equality of States. However, that principle does not operate autonomously; the Court stated that said principle "has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory".[157]

77. The Court therefore recognizes the need to balance competing principles, having stated that: "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[158]

78. The Court also used the argument that immunity is a procedural bar to conclude that it does not conflict with the rules of *jus cogens*:

> Assuming … that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful … For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[159]

The Court later added:

> A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[160]

79. The third relevant topic addressed by the Court in that case is the question of whether there is any rule of customary international law that implies the existence of an exception to State immunity based on a serious violation of human rights or international humanitarian law. The Court's answer is that there is not. It stated that "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".[161]

80. Still with regard to exceptions, the Court also rejected the argument that the "territorial tort principle" is applicable to the case at hand. However, it should be noted that the Court's response concerning that exception is more nuanced than its comments on a potential exception based on the violation of *jus cogens* rules. It did not deny the existence of that exception or of a certain amount of practice in that respect, but simply stated that it was not applicable to the case at hand because the acts imputable to Germany, despite their gravity, constitute *acta jure imperii* and, as such, are covered by the jurisdictional immunities of the State.[162]

81. In the same judgment, the Court also ruled on the contention by Italy that the exercise of jurisdiction is a "last resort" in view of the impossibility of satisfying the claims of the victims for redress for the harm suffered. The Court concluded that immunity is not dependent upon whether or not there exists a right to redress or alternative means of securing redress.[163]

82. In summary, in that judgment the Court, in line with its previous rulings, maintained its view of immunity as a merely procedural institution. However, it went a step further in strengthening State immunity by concluding that its existence is not in conflict with the rules of *jus cogens*, that no exceptions to such immunity based on a serious violation of human rights, international humanitarian law or other rules of *jus cogens* can be identified, and that the "territorial tort exception" does not apply in the case of State immunity for *acta jure imperii*. Lastly, the Court could also be considered to be moving away from the model of alternative means of redress as a way of preventing impunity that it established in its judgment in *Arrest Warrant*.

83. On first reading, the Court's position could, *a priori*, appear to have a bearing on the immunity of State officials from foreign criminal jurisdiction. The inverted parallelism that the Court itself seems to establish between the *Jurisdictional Immunities of the State* and *Arrest Warrant* cases has no doubt contributed to such an understanding:

> In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf … [T]he same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.[164]

84. The fact that the Court brought national case law, which at times pertains more to State officials than to the State itself, into its argument may also have contributed to such a reading. It is therefore unsurprising that this judgment is sometimes used to argue that there are no limitations or exceptions to the immunity of State officials from foreign criminal jurisdiction based on the violation of human rights or international humanitarian law or the commission of international crimes.[165]

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[157] *Ibid.*, pp. 123–124, para. 57.

[158] *Ibid.*

[159] *Ibid.*, p. 140, para. 93. See, in general, paras. 92–97.

[160] *Ibid.*, p. 141, para. 95.

[161] *Ibid.*, p. 137, para. 84. *Sed contra*, see the dissenting opinion of Judge Cançado Trindade and the separate opinion of Judge Bennouna.

[162] *Ibid.*, pp.136–137, paras. 83–84. *Sed contra*, see the dissenting opinion of Judge *ad hoc* Gaja.

[163] *Ibid.*, pp. 141–143, paras. 99–101. *Sed contra*, see the dissenting opinions of Judge Cançado Trindade and Judge Yusuf and the separate opinion of Judge Bennouna.

[164] *Ibid.*, p. 141, para. 95.

[165] For example, see in the present section how the European Court of Human Rights cited this judgment as an authority in *Jones* (see footnote 30 above).

85. However, it should be noted that the Court itself clearly set out the scope of the judgment: State immunity *stricto sensu*. Suffice it to note that the Court stated that *Pinochet* is not relevant to *Jurisdictional Immunities of the State* because *Pinochet* relates to the immunity of an individual rather than that of the State, and immunity from criminal jurisdiction rather than immunity from civil jurisdiction.[166] The Court thus seems to establish a clear distinction between State immunity and the immunity of State officials from foreign criminal jurisdiction. That conclusion is even more evident in the following unambiguous statement by the Court:

> The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.[167]

86. It is not the purpose of the present report to analyse the Court's reasoning in its judgment in *Jurisdictional Immunities of the State*. However, while some of the Court's arguments in that judgment may have an abstract value to contribute to the definition of the immunities regime under international law, it should be noted that the conclusions reached in that case cannot automatically be transposed to the regime of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

2. European Court of Human Rights

87. The European Court of Human Rights pronounced on questions that are relevant for the consideration of limitations and exceptions to immunity in its judgments in the cases of *Al-Adsani*,[168] *McElhinney v. Ireland*,[169] *Kalogeropoulou and Others v. Greece and Germany*,[170] and *Jones*.[171]

88. In all those cases, the Court concluded that the application of State immunity in civil court did not *per se* constitute a violation of the right of access to a court as embodied in article 6, paragraph 1 of the European Convention on Human Rights. According to the Court, restrictions on the right of access to a court may be permissible, provided they meet the following requirements: (*a*) that they are provided for in law; (*b*) that there is a relationship of proportionality between the interests to be protected by the restriction and limitations to the right that may arise therefrom; and (*c*) that the restriction does not in fact imply an absolute loss of the right of access to a court.[172] In the Court's view, the rule relating to State immunity will satisfy the three requirements, in that it is a recognized norm of customary international law that pursues a legitimate aim, namely to protect the principle of sovereign equality and maintain stable, conflict-free relations between States, and does not entail the complete loss of the right of access to a court, given that alternative means of redress are available to applicants, including judicial action (action before the courts of another State), diplomatic action and international negotiation through the victim's State of nationality.[173]

89. It must be borne in mind that this declaration of compatibility between immunity from jurisdiction and the right of access to a court is defined by the Court in relation to State immunity from civil jurisdiction, with the sole exception being the case of *Jones*, where it pronounced on the immunity from civil jurisdiction of State officials, applying the same conclusions it had formulated previously in respect of State immunity.[174]

90. The Court has also pronounced on possible exceptions to the rule of immunity, in particular with respect to torture and *jus cogens* norms, on the one hand, and the "territorial tort exception", on the other.

91. With regard to torture and *jus cogens* norms, the Court has concluded that, despite the inherent gravity of any conduct that constitutes a violation of a peremptory norm, and in particular the prohibition of torture, it is not possible to find in existing international law any norm that provides an exception to State immunity from civil jurisdiction based on a violation of a *jus cogens* norm.[175] It should also be noted that in *Kalogeropoulou*, the Court followed *Al-Adsani* in its conclusions without presenting any new arguments, adding that the applicant had alternative means of securing redress.[176] Lastly, with respect to *Jones*, it should be noted that, even though the Court refused to modify its previous position, it used the uncertainty that exists in international law as to the regime of exceptions to justify its decision, to a certain extent. It referred, *inter alia*, to the fact that the Commission is working on the topic without having taken a decision in that regard, and the fact that international practice is constantly changing and reflects divergent positions on a possible exception based on torture.[177] It is also worth noting that the Court cited the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* as precedent.[178] Nonetheless, the Court expressly acknowledged that there seems to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials", and that, "in light

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[166] See *Jurisdictional Immunities of the State*, Judgment, *I.C.J. Reports 2012*, pp. 137–138, para. 87.

[167] *Ibid*., p. 139, para. 91.

[168] *Al-Adsani* (see footnote 30 above).

[169] *McElhinney v. Ireland* [GC], No. 31253/96, ECHR 2001-XI (extracts).

[170] *Kalogeropoulou and Others v. Greece and Germany* (dec.), No. 59021/00, ECHR 2002-X.

[171] *Jones* (see footnote 30 above).

[172] See *Al-Adsani* (footnote 30 above), para. 53; *Kalogeropoulou* (footnote 170 above); *McElhinney* (footnote 169 above), para. 34; and *Jones* (footnote 30 above), paras. 186–187.

[173] See *Al-Adsani* (footnote 30 above), paras. 54–56; *Kalogeropoulou* (footnote 170 above); *McElhinney* (footnote 169 above), paras. 35–40; and *Jones* (footnote 30 above), paras. 188–189.

[174] See *Jones* (footnote 30 above), paras. 204–206.

[175] See *Al-Adsani* (footnote 30 above), paras. 58, 61 and 63; and *Jones* (footnote 30 above), para. 215.

[176] See *Kalogeropoulou* (footnote 170 above).

[177] See *Jones* (footnote 30 above), paras. 95–154 and 193–195. Conversely, in his dissenting opinion, Judge Kalaydjieva maintained the need to review the case law of the European Court of Human Rights in *Al-Adsani* (see footnote 30 above). See also the concurring opinion of Judge Bianku, albeit to a different end.

[178] See *Jones* (footnote 30 above), para. 198.

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".[179]

92. It should be borne in mind that a non-negligible number of members of the Court have disagreed with the assertion that such an exception does not exist, issuing dissenting opinions in *Al-Adsani*, *Kalogeropoulou* and *Jones*, in which they emphasized that, as a *jus cogens* norm, the prohibition of torture trumps any other norm of international law that does not fall into said category, including norms of international law governing immunity from civil jurisdiction. Such opinions carried considerable weight in *Al-Adsani*, considering the narrow majority (nine to eight) of the ruling.[180]

93. The Court addressed the "territorial tort exception" in *McElhinney*, where it concluded that there is no territorial tort exception in respect of the acts under dispute, namely the assault of an Irish national by a member of the Armed Forces of the United Kingdom in the territory of Ireland during incidents that occurred at the border between Northern Ireland and the Republic of Ireland. The Court applied a narrow interpretation of the territorial tort exception in reaching that conclusion, indicating that such exception applied only to "insurable injury" related to activities *jure gestionis*. Conversely, it maintained that the impugned acts were unequivocally acts performed in an official capacity—acts *jus imperii*—for which the United Kingdom was responsible, hence the deduction that it was the immunity from civil jurisdiction of the United Kingdom that was at issue.[181] However, the Court seems to have accorded great importance in its reasoning to the fact that the applicant had other means of redress, including by bringing an action in a court of the United Kingdom.[182]

94. Special attention should be drawn to the fact that, despite refusing to recognize the existence of an exception, the European Court concluded unequivocally that the prohibition of torture was a *jus cogens* norm and that said prohibition was of an absolute nature, permitting no exception to the obligation arising therefrom in the event of a violation of the prohibition against torture and not of any other right that might be related incidentally to the prohibition considered *per se*.[183] It should be noted, therefore, that in *Al-Adsani*, the Court did not define immunity from civil jurisdiction as an institution that prevents the exercise of jurisdiction by British courts to punish perpetrators of acts of torture, but as an institution that can be used to bar British courts from seeking compensation from a foreign State for torture carried out by British officials.[184] This argument undoubtedly deserves to be reaffirmed in the present report.

95. In any event, in the light of the concrete pronouncements of the Court in respect of exceptions to State immunity from civil jurisdiction in the cases analysed, it is possible to identify a number of elements that are relevant for the purpose of the present report:

(*a*) State immunity from civil jurisdiction is considered an exception to or limitation on the right of access to courts, and therefore an exception to the exercise of jurisdiction by the forum State;

(*b*) such restriction, although compatible with the right of access to justice, cannot give rise to a total loss of the right itself, the Court having introduced the formulation "other means of redress", which the International Court of Justice had used in the *Arrest Warrant* case;

(*c*) prohibition against torture is defined *per se* as a *jus cogens* norm; it is an absolute prohibition that does not permit any derogation whatsoever.

In addition, given that the European Court of Human Rights circumscribes, directly or implicitly, its pronouncements on State immunity from civil jurisdiction,[185] it does not seem possible to conclude that the judgments in question constitute a sufficient basis for confirming that the immunity of State officials from foreign criminal jurisdiction is of an absolute nature, or that there are no exceptions to such immunity.

3. International criminal courts or tribunals

96. Various international criminal courts or tribunals have addressed the immunity of State officials from jurisdiction in the performance of their duties. Although the decisions of those tribunals are taken in the context of international criminal jurisdiction, some of the arguments contained therein are relevant for the purposes of the present report, given that they address very broad questions or the manner in which the immunity of State officials from criminal jurisdiction operates in national criminal courts or tribunals.

97. The International Military Tribunal at Nürnberg had already indicated that the official duties of an accused or the fact that the accused was acting on orders could not be used to exempt the accused from responsibility, and that the crimes under its jurisdiction reflected legal obligations that international law imposed directly on individuals, who could not be exonerated from such responsibility or from legal proceedings on the basis of their connection with the State. The Commission took into account both the statute and the judgments of that Tribunal in the development of the Principles of International Law

[179] See *Jones* (footnote 30 above), paras. 213–215.

[180] See the joint dissenting opinion of Judges Rozakis and Caflisch, with Judges Wildhaber, Costa, Cabral Barreto and Vajić concurring. See also the dissenting opinion of Judge Loucaides in *McElhinney* (footnote 169 above).

[181] See *McElhinney* (footnote 169 above), in particular para. 38. By contrast, see dissenting opinion of Judge Rozakis, the joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[182] See para. 39. Some of the judges disputed that affirmation or considered that its existence was not relevant in the case under consideration, given that the acts were committed against an Irish national, in Ireland, which meant that the national should first seek redress in Irish territorial jurisdiction. See the dissenting opinion of Judge Rozakis, joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[183] See *Al-Adsani* (footnote 30 above), para. 59.

[184] *Ibid*., paras. 40–41.

[185] On this topic, see the third report of the Special Rapporteur, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, p. 90, para. 43, and the fourth report of the Special Rapporteur, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, p. 12, paras. 45–46 and the first footnote in para. 46.

Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), which are analysed below and which the Commission refers to constantly in its work on other topics, including the draft Code of Crimes against the Peace and Security of Mankind.[186] It is also worth remembering that the contributions of the Nürnberg Tribunal to the definition of the principle of individual criminal responsibility also mark a starting point in modern international criminal law. The decisions of international criminal courts or tribunals that have been performing the functions of that Tribunal since the end of the twentieth century are analysed below.

98. The International Tribunal for the Former Yugoslavia has pronounced on the relationship between the immunity enjoyed by State officials and international crimes, asserting that there is an exception to the norms governing immunity *ratione materiae* before both international criminal courts or tribunals and national courts. In the *Blaškić* case, for instance, it stated that the exception:

> arise[s] from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[187]

99. The Tribunal has maintained the same position in other cases, including in relation to immunity *ratione personae*. It is worth noting, however, that in those cases the Tribunal seems to limit the exception to the exercise of its jurisdiction, without extending it to cases brought before domestic courts.[188] In addition, relying on the Statute of the Nürnberg Tribunal, the International Tribunal for the Former Yugoslavia formulated that exception in broad terms, indicating that: "it would be incorrect to suggest that such an immunity exists in international criminal courts".[189]

100. The Special Court for Sierra Leone has also held that immunity *ratione personae* cannot be invoked, as it did in the case of *Taylor*, which concerned charges for serious violations of international humanitarian law. In that decision, the Court did not base its assertion on the type of crime committed, but on the very nature of the Special Court, which is considered an international criminal court. In response to the claim that immunity *ratione personae* protected Mr. Taylor, the Appeals Chamber stated that immunity: "derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community".[190] It therefore concluded that: "the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".[191]

101. The question of the immunity of State officials, in particular but not limited to immunity *ratione personae*, was also raised before the International Criminal Court in relation to the situations in Darfur-Sudan, Kenya and Libya. Many of the accused invoked their official status, and hence their immunity, but were not present (or were not present on a continuous basis) at trial. In other cases, especially in the case of *Al Bashir*,[192] the topic of immunity was raised in relation to the obligation to cooperate with the Court, as provided for in Part IX of the Rome Statute.

102. Although the disputes in all those cases stemmed from the execution of arrest warrants or subpoenas issued by the Court, they ultimately led to the issue of the scope of the Court's jurisdiction and whether or not the exercise of said jurisdiction could be subject to a "procedural bar". In all those cases, the Court concluded that neither immunity *ratione personae* nor immunity *ratione materiae* could be invoked.

103. With regard to the Darfur-Sudan situation, the International Criminal Court held that immunity could not be invoked in the cases of *Al Bashir* (*ratione personae*) and *Abdel Hussein*[193] (*ratione materiae*). In both cases, in issuing its arrest warrant, the Pre-Trial Chamber determined that the immunity of the accused State officials could not be invoked, based on article 27 of the Rome Statute and on the powers of the Security Council to refer a case to the Court pursuant to article 13 (*b*) of the Statute. In a joint interpretation of both provisions, the Court concluded that the irrelevance of official duties and the inability to invoke national and international immunities applied fully in the cases of Darfur, whether said State was a party to the Rome Statute or not. The Court said that:

> by referring the Darfur situation to the Court, pursuant to article 13 (*b*) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[194]

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[186] See section E below.

[187] *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14, Judgment, 29 October 1997, International Tribunal for the Former Yugoslavia, Appeals Chamber, *Judicial Reports 1997*, p. 1057, at para. 41.

[188] See the following cases: *Prosecutor v. Radovan Karadžić and Ratko Mladić*, case No. IT-95-5, formal request for deferral of jurisdiction addressed to the Republic of Bosnia and Herzegovina, decision, Trial Chamber, 16 May 1995, *Judicial Reports 1994–1995*, vol. II, p. 851, at para. 24; *Prosecutor v. Slobodan Milošević*, case No. IT-02-54, preliminary motions, decision, Trial Chamber, 8 November 2001, para. 31; *Prosecutor v. Anto Furundžija*, case No. IT-95-17/1-T, judgment, Trial Chamber II, 10 December 1998, *Judicial Reports 1998*, p. 466, at p. 561, para. 140; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, cases Nos. IT-96-23-T and IT-96-23/1-T, judgment, Trial Chamber I, 22 February 2001, para. 494.

[189] See *Prosecutor v. Radislav Krstic*, case No. IT-98-33-A, decision on application for subpoenas, Appeals Chamber, 1 July 2003, para. 26.

[190] *Prosecutor v. Taylor*, case No. SCSL 2003-01-I, Appeals Chamber, decision on immunity from jurisdiction, 31 May 2004, ILR, vol. 128, p. 239, at p. 264, para. 51.

[191] *Ibid*., para. 52.

[192] *Prosecutor v. Omar Hasan Ahmad Al Bashir*, case No. ICC-02/05-01/09, International Criminal Court. For decisions in the case, see www.icc-cpi.int/darfur/albashir.

[193] *Prosecutor v. Abdel Raheem Muhammad Hussein*, case No. ICC-02/05-01/12, International Criminal Court. For decisions in the case, see www.icc-cpi.int/darfur/hussein.

[194] See *ibid*., decision on the prosecution's application for a warrant of arrest, 4 March 2009, Pre-Trial Chamber I, para. 45. It is worth noting that the Court had previously declared that it was competent to hear the case of a person who is not a national of a State party but who had allegedly committed crimes under the Court's jurisdiction in the territory of a State not party to the Statute, on the basis of the decision taken by the Security Council pursuant to article 13 (*b*) of the Statute (*ibid*., paras. 41–43). For a similar approach, see *Prosecutor v. Abdel Raheem Muhammad Hussein*, case No. ICC-02/05-01/12, decision on the prosecution's application under article 58, 1 March 2012, Pre-Trial Chamber, para. 8.

104. The Court also confirmed its jurisdiction in purposive terms, relating it to the key goal of combating impunity and ensuring that persons accused of committing serious crimes of concern to the international community as a whole are brought to justice.

105. The Court applied the same reasoning when it ruled on the obligation of the Democratic Republic of the Congo to cooperate by arresting and surrendering President Al Bashir, concluding that Mr. Al Bashir did not enjoy immunity under international law, because that immunity had been implicitly waived by the Security Council, which had also imposed on the Sudan a general obligation to cooperate with the Court.[195] The Court employed a similar argument in the cases of *Muammar Gaddafi, Saif Al-Islam Gaddafi and Al-Senussi* on the Libya situation.[196]

106. By contrast, in the cases of *Kenyatta* and *Ruto*, on the Kenya situation, the Court did not refer expressly to said argument. In both cases, in response to a defence petition for excusal from trial of the accused, to allow them to adequately fulfil their duties as President and Vice-President of Kenya, the Court said that it could not take those circumstances into consideration because, as a consequence of the Second World War: "the norm of immunity was revised in favour of jurisdiction of international courts to try Heads of State and other senior public officials, for violation of international criminal law".[197] In the view of the Court, the chief object of article 27 of the Rome Statute is the incorporation of that principle.[198]

107. A similar approach to the one taken in the cases of *Kenyatta* and *Ruto* can be found in cases which the Court had considered previously concerning the failure by Malawi and Chad to cooperate in the arrest of President Al Bashir. The Court had noted in those cases that: "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes".[199]

108. In short, the decisions analysed above lead to the conclusion that international criminal courts or tribunals, including the International Criminal Court, have unequivocally rejected the possibility of the immunity of State officials, both *ratione personae* and *ratione materiae*, being invoked in said courts. Moreover, some of the courts have also extended said affirmation to domestic courts, on an exceptional basis. It should be noted that the decisions of international criminal courts or tribunals on this topic have brought into play the special issue of cooperation of domestic courts with international courts and the possible incidence of such cooperation on the immunity of State officials from foreign criminal jurisdiction. That issue will be analysed later in the present report.[200]

D. National judicial practice

109. National judicial practice with regard to persons who enjoy immunity and acts that are covered by immunity was analysed in the third and fourth reports of the Special Rapporteur.[201] The present section will look to analyse the decisions of national courts that have pronounced on the applicability or non-applicability of immunity to specific circumstances and that contain rulings that are relevant for the study of the limitations and exemptions to immunity. For the sake of clarity, those judicial decisions will be analysed as they relate to immunity *ratione personae* and to immunity *ratione materiae*. Although the analysis will focus mainly on the decisions of criminal courts or tribunals, the decisions of civil courts will also be taken into account if they are considered useful, as was the case in previous reports.

110. With regard to the decisions concerning immunity *ratione personae*, it should be noted that almost all national criminal courts or tribunals have held that Heads of State (and in some cases other high-ranking officials) enjoy immunity from foreign criminal jurisdiction during their time in office. The courts have admitted the full applicability of immunity to a variety of offences,[202] including international crimes.[203] This assertion is based on

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[195] See *Prosecutor v. Omar Hassam Ahmad Al Bashir*, case No. ICC-02/05-01/09, Pre-Trial Chamber II, decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, 9 April 2014, para. 29.

[196] See *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case No. ICC-01/11, decision on the prosecution's petition pursuant to article 58, 27 June 2011, Pre-Trial Chamber, para. 9.

[197] See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, case No. ICC-01/09-01/11-777, decision on Mr Ruto's request for excusal from continuous presence at trial, 18 June 2013, Trial Chamber V (A), para. 67. It should be borne in mind that the Trial Chamber drew on precedents of the Nürnberg Tribunal, other international criminal courts or tribunals, the Charter of the United Nations and the work of the Commission for its decision (see paras. 66–70).

[198] *Ibid*., para. 69. See also *Prosecutor v. Uhuru Muigal Kenyatta*, case No. ICC-01/09-02/11-830, decision on defence motion for excusal from continuous presence at trial, 18 October 2013, Trial Chamber V (B), separate concurring opinion of Judge Eboe-Osuji, para. 32.

[199] See *Prosecutor v. Al Bashir*, case No. ICC-02/05-01/09, decision pursuant to article 87 (7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, Pre-Trial Chamber I, para. 43. The same argument was applied in *ibid.*, Decision pursuant to article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, Pre-Trial Chamber I, para. 13, *in fine*.

[200] See chap. III, sect. B.

[201] See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, pp. 87–89, paras 29–38, and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 13–17, paras. 49–60.

[202] See the following cases: Federal Republic of Germany, *Re Honecker*, Federal Supreme Court, judgment of 14 December 1984, ILR, vol. 80, p. 366 (a criminal case against the then President of the Council of State of the Federal Democratic Republic of Germany—the equivalent of the Head of State—for illegal detention); Germany, *In re Hussein*, Regional Superior Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, paras. 10–15, cited in Pedretti, *Immunity of Heads of State* …, p. 151 (a case brought against the Head of State of Iraq, Saddam Hussein, for hostage-taking and use of hostages to defend his objectives during the second Gulf war; the court considered that his actions were not crimes under international law); France, *In re Bouteflika*, Court of Cassation, Criminal Chamber No. 01-83440, judgment of 13 November 2001 (a case of defamation and public insults).

[203] See the following cases: Spain, *Teodoro Obiang Nguema and Hassan II*, National High Court, decision of Central Investigation Court No. 5, 23 December 1998; Spain, *Fidel Castro*, National High Court, Criminal Chamber, decision 1999/2723, 4 March 1999 (also the decisions of Central Investigation Court No. 2 of Spain, National High Court, of 19 November 1998 and 4 November 1999); Spain, *Milosevic*, National High Court, decision of Central Investigating Court No. 1, of 25 October 1999; Spain, *Alan García Pérez and Alberto Fujimori*, National High Court, decision of 15 June 2001; Spain, *Silvio Berlusconi*, National High Court, decision No. 262/97, of 27 May 2002; Belgium, *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*,

the existence of principles or norms of customary international law. In some cases, the pronouncement in favour of immunity *ratione personae* has also been in the form of an *obiter dictum* in cases concerning immunity *ratione materiae*.[204] In other cases, that declaration stemmed from the exercise of discretionary powers available to the Attorney General of a State or to other organs when their intervention is necessary for criminal proceedings to be initiated.[205] Lastly, it is worth noting that, while national courts have usually pronounced on immunity in cases brought against State officials, in an exceptional situation, a tribunal made its pronouncement in a case in which an advisory opinion was sought.[206]

111. In some cases, the courts have concluded that only immunity *ratione personae* may cease to apply if an international treaty establishes clearly that it has been waived or lifted, or cannot be invoked, or if the treaty establishes an exception in that regard.[207] Exceptionally, one court has ruled in favour of an exception to immunity *ratione personae* in the case of crimes under international law,[208] or referred to the existence of exceptions to said category of immunity that did not subsequently materialize, save for a generic mention in "specific provisions … that oblige the parties concerned".[209] Lastly, it should be noted that a French court has declared that an incumbent Head of State does not enjoy immunity from criminal jurisdiction for acts of corruption and other similar acts.[210]

112. Civil courts have also declared that immunity *ratione personae* is applicable in cases where the claim against a Head of State was for the commission of serious crimes.[211] That declaration was also formulated in the form of an *obiter dictum* in some civil cases.[212] However, exceptionally, one court has circumscribed the immunity *ratione personae* of an incumbent Head of State for official acts, excluding private acts.[213]

113. The judgments of South African courts concerning the argument that the South African authorities should arrest President Al Bashir pursuant to the arrest warrant issued by the International Criminal Court deserve particular consideration. Both the High Court of South Africa and the Supreme Court of Appeal of South Africa ruled that the immunity *ratione personae* of an incumbent

Court of Cassation, 12 February 2003, ILR, vol. 127, p. 123 (the crimes allegedly committed by the accused were genocide, war crimes and serious violations of the Geneva Conventions and the Additional Protocols thereto); Spain, *Hugo Chávez*, National High Court, Central Investigation Court No. 4, 24 March 2003; United Kingdom, *Re Mofaz*, Bow St. Magistrates' Court, judgment of 12 February 2004, ILR, vol. 128, p. 712 (involving a request for an arrest warrant against the Israeli Minister of Defence, who was accused of serious violations of the Geneva Conventions); United Kingdom, *Tatchell v. Mugabe*, Bow St. Magistrates' Court, judgment of 14 January 2004, ILR, vol. 136, p. 573 (request for an arrest warrant against the Head of State of Zimbabwe, who was accused of acts of torture); Netherlands, *The Hague City Party v. Netherlands*, The Hague District Court, judgment, 4 May 2005, LJN AT5152, KG 05/432, para. 3.6 (a curious case in which the President of the United States, George Bush, was accused for the powers granted to him under the American Service-Member's Protection Act of 2001, which allow him to order the use of force, in specific circumstances, in relation to persons under the custody of the International Criminal Court); United Kingdom, *Re Bo Xilai*, Bow St. Magistrates' Court, judgment of 8 November 2005, ILR, vol. 128, p. 714 (request for an arrest warrant against the Chinese Minister of Trade, who was accused of torture); Spain, *Rwanda (Kagame)*, National High Court, decision of case No. 3/2008, of 6 February 2008, *Oxford Reports on International Law in Domestic Courts* (ILDC), 1198 (ES 2008), para. 4 (the National High Court of Spain ruled that President Kagame could not be brought to trial for genocide, war crimes, crimes against humanity and acts of terrorism, whereas it allowed the trial of other persons who qualified as State officials; in so doing, the court implicitly denied them immunity *ratione materiae*).

[204] See Belgium, *Re Pinochet*, Brussels Court of First Instance, judgment, 6 November 1998, ILR, vol. 119, p. 345, at pp. 345–349.

[205] See the following cases: Australia, *In re Rajapaksa*, decision of the Attorney General of Australia, of 25 October 2011, cited in Pedretti, *Immunity of Heads of State* …, p. 139 (case brought against the Head of State of Sri Lanka for war crimes and crimes against humanity); Germany, *In re Jiang*, Chief Prosecutor, Federal Supreme Court, decision, 24 June 2005, 3 ARP 654/03-2, para. 1 (case against the former Head of State of China, Jiang Zemin, accused of genocide, crimes against humanity and torture; the Federal Chief Prosecutor ruled on both immunity *ratione materiae* and immunity *ratione personae*); *Laurent Kabila*, in response to a complaint against the Head of State of the Democratic Republic of the Congo, the Attorney General decided to withdraw the case based on an application for immunity (cited in Pedretti, *Immunity of Heads of State* …, p. 152).

[206] See also Sierra Leone, *Sesay (Issa) and ors v. President of the Special Court for Sierra Leone and ors*, Supreme Court, judgment, 14 October 2005, SC 1/2003, ILDC 199 (SL 2005), para. 52 (the Court concluded that the immunity of a Head of State before the courts of a foreign State is applicable, whether it can be invoked in international courts or not).

[207] See also the following cases: Belgium, *Re Sharon and Yaron* (footnote 203 above), pp. 123–124 (the Belgian Court of Cassation considered that the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute and the Geneva Conventions and the Protocols thereto all did not meet those requirements); Netherlands, *The Hague City Party v. Netherlands* (footnote 203 above), para. 3.6 (in that case, the Court considered that the only exception to immunity for Heads of State was provided by article 27 of the Rome Statute).

[208] See Germany, *In re Hussein* (footnote 202 above) (even though the Court considered that the President of Iraq enjoyed immunity *ratione personae*, it stated that said immunity could be bypassed upon the commission of crimes under international law, although it found that no such crime had been committed in that case).

[209] See France, *Gaddafi*, Court of Cassation, judgment, 13 March 2001, Criminal Chamber No. 1414, ILR, vol. 125, p. 509. In its judgment, the Court of Cassation stated, in relation to crimes of terrorism such as those with which the Head of State of Libya was charged, that "in the current state of international law, the alleged crimes, although serious, do not constitute an exception to the principle of immunity from jurisdiction of an incumbent foreign Head of State". The judgment does not indicate what those exceptions would be; it merely affirms that "international custom protects incumbent Heads of State from foreign criminal jurisdiction, in the absence of specific binding provisions to the contrary for the parties concerned". In any event, the Court declared that Mr. Gaddafi enjoyed immunity *ratione personae*. With regard to that case, it is worth noting that the Court of Appeal of Paris had rejected the immunity, alleging that there is "a generally accepted practice in law in all States, including France, whereby immunity from prosecution covers only government or administrative acts carried out by the Head of State, and those acts could not possibly include international crimes" (Court of Appeal of Paris, judgment of 20 October 2000, ILR, vol. 125, p. 498).

[210] See France, *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, Judgment, 13 June 2013, and Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, application for annulment of judgment, 16 April 2015.

[211] See Belgium, *Mobutu v. SA Cotoni*, Civil Court of Brussels, judgment, 29 December 1988, ILR, vol. 91, p. 260 (case against President Mobutu, Head of State of Zaire).

[212] See Greece, *Margellos v. Federal Republic of Germany*, Special Supreme Court, judgment, 17 September 2002, ILR, vol. 129, p. 525, at p. 532 (application for damages and prejudice against Germany for acts committed during the Second World War; the court held that despite developments in international law, high-ranking officials of a foreign State continued to enjoy immunity, including when they are accused of war crimes and crimes against humanity).

[213] See France, *Mobutu and Republic of Zaire v. Société Logrine*, Court of Appeal of Paris, judgment, 31 May 1994, ILR, vol. 113, p. 481, at p. 484.

foreign Head of State was not applicable.[214] However, those rulings were based on the obligation to cooperate with the International Criminal Court and on South African legislation, which expressly provides that no foreign State official who has committed the crime of genocide, crimes against humanity or war crimes may be granted immunity. An appeal against the judgment of the Supreme Court of Appeal has been filed with the Constitutional Court of South Africa; the case was pending determination when the present report was finalized.

114. The immunity *ratione materiae* of foreign State officials has given rise to a greater number of judgments by national criminal courts. The positions adopted by States in those judgments are less uniform, although it can be concluded that domestic courts, in a certain number of cases, have accepted the existence of limitations and exceptions to immunity in circumstances relating to the commission of international crimes,[215] crimes of corruption or related crimes,[216] and other crimes of international concern, such as terrorism, sabotage, or causing the destruction of property and the death and injury of persons in relation to such crimes.[217] Furthermore, it should be borne in mind that national courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity.[218]

115. However, national courts have used various arguments to conclude that immunity *ratione materiae* is not applicable. For example, while some courts have held that immunity should not apply owing to the gravity of the acts committed by the State official,[219] in other cases, the denial of immunity has been based on the violation of *jus cogens* norms,[220] or even on the consideration that the acts in question cannot be regarded as acts performed in an official capacity since the commission of such crimes

[214] See *Southern Africa Litigation Centre* (see footnote 33 above), sect. 28.

[215] See the following cases: United Kingdom, *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, House of Lords (UKHL) 17, [2000] 1 A.C. 147; Belgium, *Re Pinochet* (footnote 204 above), p. 349; Germany, *In re Hussein* (footnote 202 above), para. 11 (it makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); Netherlands, *Bouterse*, Court of Appeal of Amsterdam, judgment, 20 November 2000 (although the Supreme Court subsequently set aside the judgment, it did not do so in connection with immunity but on the grounds of a violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001); Belgium, *Re Sharon and Yaron* (footnote 203 above) (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); Chile, *Fujimori*, case No. 5646-05, Supreme Court, judge of first instance, judgment, 11 July 2007, paras. 15–17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); Netherlands, *H. v. Public Prosecutor*, Supreme Court, judgment, 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; Italy, *Lozano v. Italy*, Court of Cassation, judgment, 24 July 2008, ILDC 1085 (IT 2008), para. 6; Switzerland, *A. v. Office of the Public Prosecutor of the Confederation*, Federal Criminal Court, judgment, 25 July 2012, BB.2011.140; United Kingdom, *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment, 7 October 2014 [2014] EWHC 3419 (Admin.) (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 also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (Italy, *Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, 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 (United Kingdom, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (Kingdom of Saudi Arabia)*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). 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)).

[216] See the following cases: Switzerland, *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal, judgment, 22 December 2005, *Decisions of the Federal Tribunal* 132 II (this is a case of misappropriation of public funds); Chile, *Fujimori* (previous footnote), paras. 15–17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and application for annulment, judgment of 16 April 2015 (footnote 210 above).

[217] See the following cases: France, *DC 10 UTA*, Special Court of Assizes of Paris, judgment, 10 March 1999 (six Libyan officials of various ranks were sentenced *in absentia* to life imprisonment as the perpetrators of the 1989 attack against a UTA DC 10 aircraft, which caused the plane to crash in the Ténéré desert, killing 170 people); New Zealand, *R. v. Mafart and Prieur* (*Rainbow Warrior* case), High Court, Auckland Registry, judgment, 22 November 1985 (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); France, *Association des familles des victimes du Joola* case, case No. 09-84818, Court of Cassation, judgment, 19 January 2010 (this confirmed the arrest warrant against the Transport Minister, the Chief of Staff of the Armed Forces and the Navy Chief of Staff in connection with the events that caused the vessel *Joola* to sink).

[218] This occurred, for example, in the *Barbie* case before the French courts: France, *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Previously, the District Court of Jerusalem had found Eichmann guilty of crimes against humanity, war crimes and crimes against the Jewish people, rejecting the accused's argument that, in his capacity as Head of the Gestapo Department for Jewish Affairs, he should be considered to have been performing "acts of State" (Israel, *Attorney General v. Eichmann*, Supreme Court, judgment, 29 May 1962, ILR, vol. 36, pp. 309–310). Meanwhile, the National High Court of Spain has tried various foreign officials for 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 Hu Jintao; however, following the end of Hu Jintao'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".

[219] Israel, *Eichmann* (see previous footnote). In the *Ferrini* case, the Italian courts based their ruling both on the gravity of the crimes committed and the fact that the conduct in question is contrary to *jus cogens* (*Ferrini* (footnote 215 above)).

[220] 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* (footnote 215 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition concerning the commission of international crimes that the Swiss legislator considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct while continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (Switzerland, *A. v. Office of the Public Prosecutor of the Confederation* (see footnote 215 above)).

cannot, under any circumstances, be considered an ordinary function of the State or of a State official.[221]

116. Meanwhile, civil courts have also been holding immunity to be non-applicable in the same scenarios as those mentioned in the previous paragraph, basing their decisions mainly on the *jus cogens* nature of the international norms violated (essentially human rights norms and the prohibition of certain types of conduct such as torture) and the categorization of the acts giving rise to the civil suit as *ultra vires* acts of the official that cannot be described as official acts or that are outside the ordinary scope of a State function.[222]

117. Lastly, it should be noted that national courts, both civil and criminal, have denied immunity in cases involving acts performed by State officials that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign, or in corruption-related cases.[223]

118. In any event, national courts have granted immunity *ratione materiae* even in relation to the aforementioned crimes in a small number of cases;[224] contradictory positions have sometimes been evident in the case law of a given State's courts. However, in some of those cases, the differences in position are attributable to differences in the treatment of immunity in relation to the same facts, depending on whether the case is before the criminal or civil courts.[225]

119. Separate analysis is warranted regarding the practice of the United States courts, which have ruled on the immunity *ratione materiae* of State officials both through application of the Foreign Sovereign Immunities Act (in relation only to civil jurisdiction) and through application of the common law doctrine (in relation to both civil and criminal jurisdiction), although the second formula has generally been applied only since the judgment in the *Samantar* case, in which the Supreme Court held that the Foreign Sovereign Immunities Act applies only when the suit is brought against the State *stricto sensu* and not against one of its individual officials.[226] Under the first formula (Foreign Sovereign Immunities Act), the courts have exclusive responsibility for determining the question of immunity, while under the second formula (common law) the executive has the power to state whether an individual may enjoy immunity or not, through a "suggestion of immunity" that the courts must respect; they are able to decide the matter themselves only if the State Department does not issue a suggestion of immunity.[227]

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[221] See the following cases: Belgium, *Re Pinochet* (footnote 204 above), p. 349; Germany, *In re Hussein* (footnote 202 above), para. 11 (it made this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). Lastly, it should be pointed out that, in some cases, German courts have concluded that immunity is not applicable based on the fact that the State of the official no longer exists and that, therefore, the accused no longer has the status of official. Among the cases referring to former officials of the German Democratic Republic are: *Border Guards*, Federal Criminal Court, judgment, 3 November 1992, ILR, vol. 100, p. 373; *Stoph*, Federal Constitutional Court, judgment, 21 February 1992, 2BvR 1661/91, para. 4; *Mauerschützen*, Federal Constitutional Court, judgment of 24 October 1996, 2 BvR 1851/94, 2 BvR 1853/94, 2 BvR 1875/94, 2 BvR 1852/94, para. 127.

[222] In that regard, a Greek court found that crimes committed by armed forces are acts attributable to the State for the purposes of international responsibility but cannot be regarded as sovereign acts for the purposes of State immunity (*Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia, judgment, 30 October 1997).

[223] United States, *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment, 7 July 1997; United States, *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment, 20 September 1996; France, *Melleiro v. Isabelle de Bourbon, ex-Reine d'Espagne* case; France, *Seyyid Ali Ben Hammoud, Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgment, 25 July 1916; France, *Ex-roi d'Egypte Farouk v. S.A.R.L. Christian Dior* case, Court of Appeal of Paris, judgment, 11 April 1957; France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment, 28 April 1961; United States, *Trajano v. Marcos*, 978 F.2d 493 (Ninth Circuit, 1992), ILR, vol. 103, p. 521; United States, *Doe v. Zedillo Ponce de León*, United States Court of Appeals, Second Circuit, No. 13-3122, 16 August 2013; United States, *Jiménez v. Aristeguieta*, 311 F.2d 547, United States Court of Appeals, Fifth Circuit, 1962 ILR, vol. 32, p. 353; *JeanJuste v. Duvalier* (1988), No. 86-0459 Civ, United States District Court, SD Fla; Switzerland, *Adamov* (see footnote 216 above); United States, *Republic of the Philippines v. Marcos et al.* (1986), ILR, vol. 81, p. 581; United States, *Republic of the Philippines v. Marcos et al. (No. 2)* (1987, 1988), ILR, vol. 81, p. 609; United Kingdom, *Republic of Haiti v. Duvalier* [1990] 1 QB 2002; United States, *Islamic Republic of Iran v. Pahlavi* (1984), ILR, vol. 81, p. 557: in this case, it was the United States Government that informed the Court that the claim should not be barred either by application of the sovereign immunity principle or by the act of State doctrine; France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and judgment of 16 April 2015 (footnote 210 above).

[224] See Switzerland, *Marcos and Marcos v. Federal Office of Police*, Federal Tribunal, judgment, 2 November 1989, Decisions of the Federal Tribunal 115 Ib 496. See also *Revue suisse de droit international et européen* (1991), p. 535, and ILR, vol. 102, p. 201 (this case related to financial activities undertaken by Ferdinand Marcos and his wife when he was President of the Philippines); Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment, 4 July 2000, and Court of Cassation, judgment, 20 March 2001, ILR vol. 125, pp. 571–577 (acts of torture and crimes against humanity); Germany, *In re Jiang Zemin* (see footnote 205 above) (the Prosecutor General accorded the former Chinese Head of State the same treatment as an incumbent Head of State, based on the need to guarantee the exercise of the functions of a high-ranking State official); United Kingdom, *Jones v. the Kingdom of Saudi Arabia* (footnote 215 above).

[225] There have been particular differences in the treatment of immunity *ratione materiae* by civil and criminal courts in the United Kingdom: see *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* (footnote 215 above); *Jones v. Kingdom of Saudi Arabia* (footnote 215 above), and *Prince Nasser* case (footnote 215 above). Regarding this difference in practice, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, para. 56. In *Bouzari v. Islamic Republic of Iran*, the Court of Appeal for Ontario granted immunity from civil jurisdiction for the Islamic Republic of Iran in a case of torture, although it referred in that regard to the doctrine established by the House of Lords in the *Pinochet* case for the purpose of distinguishing between immunity from civil jurisdiction and immunity from criminal jurisdiction (2004 CarswellOnt 2681, 243 D.I.R. (4th) 406, 71 O.R. (3d) 675, 122 C.R.R. (2d) 26, 220 O.A.C. 1, para. 91). Similarly, in *Fang v. Jiang Zemin*, the High Court of New Zealand expressly declared that immunity from criminal jurisdiction would not apply in the case of acts of torture (judgment, 21 December 2006, ILR, vol. 141, p. 717). In a radically different approach, the Italian Court of Cassation stated that the fact that the immunity *ratione materiae* of State officials from criminal jurisdiction was not applicable in cases concerning the commission of war crimes and crimes against humanity should be interpreted to mean that State immunity was also not applicable when a civil suit was brought against the State for the same acts (*Ferrini* (footnote 215 above)).

[226] United States, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). In relation to the position previously held by the said courts, see United States, *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (Ninth Circuit, 1990), ILR, vol. 92, p. 480.

[227] Regarding the changes in the way in which the United States courts treat the immunity of State officials, see, *inter alia*, Bellinger, "The dog that caught the car: observations on the past, present, and future approaches of the Office of the Legal Adviser to official acts immunities"; Koh, "Foreign official immunity after *Samantar*: a United States Government perspective"; Keitner, "Annotated brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in support of respondents in *Samantar v. Yousuf*".

120. However, in many cases analysed in accordance with the Foreign Sovereign Immunities Act, the United States courts have ruled that immunity from jurisdiction is not applicable in cases concerning international crimes and human rights violations, which are generally regarded as *ultra vires* acts that are performed for the exclusive benefit of the official, do not form part of the regular functions of the State and violate *jus cogens* norms.[228] Nonetheless, this has not prevented the United States courts from granting immunity *ratione materiae* in some cases, even when the acts in respect of which immunity has been claimed constitute international crimes or serious human rights violations.[229] Immunity *ratione materiae* has been granted with greater frequency in cases where courts have had to make a decision based solely on common law rules, owing essentially to the considerable weight that the Executive's opinion, reflected in the "suggestion of immunity", carries in the common law system.[230] That said, there are also some cases where a suggestion of immunity has been issued and the courts have subsequently denied immunity, either in line with the suggestion or because the court, despite the suggestion, has examined the merits of the claim and found the contested acts to be *ultra vires* or contrary to peremptory norms of international law.[231]

121. In short, the above analysis demonstrates that national courts almost unanimously acknowledge that no limitations or exceptions are applicable to immunity *ratione personae*. However, with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations on and exceptions to such immunity, either in view of the gravity of the crimes, because they violate peremptory norms or undermine values of the international community as a whole, or because the crimes in question cannot be regarded as acts performed in an official capacity since they go beyond or do not correspond to the ordinary functions of the State.

122. To conclude this analysis of domestic case law, reference must be made to the judgment of the Italian Constitutional Court of 22 October 2014, the significance of which was mentioned in the Special Rapporteur's fourth report.[232] That judgment refers to the questions arising from the incorporation into the Italian legal system of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* and, consequently, contains arguments pertaining to the jurisdictional immunity of the State *stricto sensu*. However, the Constitutional Court focuses its arguments to a major extent on jurisdictional immunity and its relationship with the right of access to justice and to effective judicial protection of fundamental rights.[233] Such arguments may be of interest for the present report and are therefore summarized as follows:

(*a*) the right of access to justice and to effective judicial protection of inviolable human rights is "is one of the greatest principles of legal culture in democratic systems of our times", which can be limited only under specific circumstances;

(*b*) the jurisdictional immunity of the State may "justify … the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the [Italian] Constitution" but only when it "is connected—substantially and not just formally—to the sovereign functions of the foreign State, i.e. to the exercise of its governmental powers";

(*c*) some acts "such as deportation, forced labour and massacres, recognized to be crimes against humanity [cannot] justify the absolute sacrifice in the domestic legal order of the judicial protection of inviolable rights of the victims of those crimes". "State actions [that] can be considered war crimes and crimes against humanity, [or as] violations of inviolable human rights, … [as such] are excluded from the lawful exercise of governmental powers";

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[228] See United States, *Letelier v. Chile*, 748 F.2d 790 (Second Circuit 1984), ILR, vol. 79, p. 561; *Jiménez v. Aristeguieta* (see footnote 223 above); *United States v. Noriega* (footnote 223 above); *Hilao and others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994 (in the court's opinion, the acts of torture, execution and disappearance were acts performed by Marcos that did not come within any official mandate and could not be considered acts of an agency or instrumentality of a foreign State); *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, Northern District of California (C 02-0672 CW, C 02-0695 CW); *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York, judgment of 31 October 1988; *Chuidian v. Philippine National Bank* (see footnote 226 above); *Maximo Hilao, et. al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgment, 16 June 1994; *Teresa Xuncax, Juan Diego-Francisco, J. Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgment, 12 April 1995; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgment, 18 April 1996.

[229] See United States, *Saltany v. Reagan and others*, United States District Court, District of Columbia, judgment, 23 December 1988; *Saudi Arabia v. Nelson*, United States Supreme Court, ILR, vol. 100, p. 544; *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgment, 27 January 1995; *A, B, C, D, E, F v. Jiang Zemin*, October 2002: this case is significant because, once Jiang Zemin's term as President ended in 2003, a group of Democratic members of the United States Congress attempted to reopen the case, though without success, as the State Department maintained its suggestion of immunity; *Ye v. [Jiang] Zemin*, 383 F.3d 620 (Seventh Circuit, 2004); *Matar v. Dichter*, 563 F. 3d 9 (Second Circuit, 2009).

[230] On the State Department's practice in relation to the suggestion of immunity, see Smith, "Immunity games: How the State Department has provided courts with a post-*Samantar* framework for determining foreign official immunity".

[231] See United States, *Enahoro v. Abubakar*, 408 F. 3d 877 (Seventh Circuit, 2005); *Yousuf v. Samantar*, 699 F, 3d 763 (Fourth Circuit, 2012) (although in this case the State Department had opposed immunity, the court held that the suggestion was not binding and considered the merits of the case, concluding that there is a growing trend in current international law not to grant immunity to a State official for acts that violate *jus cogens* norms, regardless of whether the act may also be attributed to the State).

[232] The interest generated by this judgment goes far beyond the topic of State immunities and has implications for issues of great relevance, especially those concerning the relationship between international and national law. As an example of such interest, see the in-depth analysis of decision No. 238/2014 in Kolb, "The relationship between the international and the municipal legal order: reflections on the decision No. 238/2014 of the Italian Constitutional Court"; De Sena, "The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law"; Pinelli, "Decision No. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles"; Palchetti, "Judgment 238/2014 of the Italian Constitutional Court: In search of a way out", .

[233] See, in particular, section 3.4 of the judgment.

(*d*) consequently, immunity "does not protect behaviours that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are violations of inviolable rights";

(*e*) immunity cannot be regarded as an acceptable reason to sacrifice the aforementioned rights when, as in the case in question, there is no other effective recourse for gaining access to the courts and obtaining effective judicial protection.

E. Other work of the Commission

123. The Commission has in the past taken up a number of topics of relevance to the present report, in particular the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Each of these instruments contains provisions that are pertinent for determining the scope of the limitations and exceptions to immunity, which are analysed below. The Commission also dealt with issues related to limitations and exceptions to immunity in the draft statute for an international criminal court[234] and the draft articles on jurisdictional immunities of States and their property.[235] These last two instruments, however, are discussed elsewhere in this report.[236]

124. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal were adopted by the Commission in 1950[237] in response to an express mandate from the General Assembly,[238] which took note of the Principles in its resolution 488 (V) of 12 December 1950. As is well known, these Principles served as a foundation for the Commission's subsequent work on crimes against the peace and security of mankind and on the development of a draft statute for an international criminal court.

125. The Principles adopted by the Commission includes three basic principles that are relevant for the purposes of the present report: (*a*) the principle of individual criminal responsibility, which derives from international law regardless of the provisions of national laws;[239] (*b*) the principle that official position is irrelevant to the determination of responsibility;[240] and (*c*) the principle that orders received cannot be invoked as a ground for exemption from responsibility.[241] These three principles are closely interrelated and are intended to ensure that perpetrators of international crimes do not go unpunished. Under these principles, any individual who has committed an international crime is responsible therefor, without regard to his or her official position or to whether he or she has acted *proprio motu* or pursuant to an order received from the Government of a State or from a superior.

126. The above-mentioned principles encompass a series of elements of particular interest, which were highlighted by the Commission in its commentaries thereto. These elements can be summed up as follows:

(*a*) international law may impose duties and liabilities on individuals directly, without the need for intermediation, just as it does in respect of States; as noted in the fourth report, the Commission thus confirmed the dual responsibility of the State and the individual for the commission of international crimes, recalling in that regard the well-known finding of the Nürnberg Tribunal that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced";[242]

(*b*) international law has supremacy over domestic law, given that, as noted by the Nürnberg Tribunal, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State";[243]

(*c*) the fact of having acted in an official capacity or pursuant to orders cannot be used to preclude the establishment of individual responsibility for the commission of crimes under international law.[244]

127. Lastly, it should be noted that the Nürnberg Principles, as formulated by the Commission, are essentially substantive in nature and that the adopted text thus does not expressly refer to immunity as a procedural bar to the exercise of jurisdiction by either a national or an international court. This substantive dimension of the Principles should nonetheless be understood in the light of their connection to the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, in which the Tribunal is assumed to have jurisdiction and the invocation of official capacity or the duty of obedience is seen essentially as a form of substantive defence whose validity is ruled out in the Charter and the Judgment of the Tribunal. This does not mean that the Tribunal never referred, directly or indirectly, to immunity in its Judgment, as shown by the following statements quoted by the Commission in its commentary to Principle III:[245]

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[234] *Yearbook … 1994*, vol. II (Part Two), p. 26, para. 91.

[235] *Yearbook … 1991*, vol. II (Part Two), p. 13, para. 28.

[236] See chap. II, sect. A, above.

[237] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto (*Yearbook … 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127, in particular paras. 103–104. Text reproduced in *Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45.

[238] Resolution 177 (II) of 21 November 1947.

[239] Principle I reads as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". Principle II establishes that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" (*Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45).

[240] Principle III establishes that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law" (*ibid.*).

[241] Principle IV provides that "[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him" (*ibid.*).

[242] See the commentary to principle I, *Yearbook … 1950*, vol. II (footnote 237 above), p. 374, para. 99.

[243] *Ibid.*, p. 375, para. 102.

[244] See the commentaries to principles III and IV, especially paras. 103–105, *ibid.*

[245] *Ibid.*, para. 103.

> The principle of international law which, under certain circumstances, protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.

128. In a similar vein, the Commission took up the aforementioned issues in both the draft Code of Offences against the Peace and Security of Mankind, adopted in 1954,[246] and the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996,[247] although the analysis below refers chiefly to the latter Code. In that text, the Commission again reiterates the principles of individual criminal responsibility,[248] irrelevance of official position[249] and the inability to invoke orders received from a Government or a superior.[250]

129. Like the 1950 formulation, the text adopted by the Commission defines these principles in essentially substantive terms and does not expressly refer to immunity in the procedural sense. It should nevertheless be pointed out that the Commission's commentaries to the draft Code go into more detail with respect to immunity in relation to crimes against the peace and security of mankind, which it rejects in both substantive and procedural terms. For example, in the commentary to article 7, on the irrelevance of official position, the Commission affirms as follows:

> A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[251]

130. In the commentary to this same article it concludes that State officials can invoke neither substantive nor procedural immunity, arguing as follows:

> Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[252]

131. These statements in the commentaries are also of particular interest in relation to the topic of the present report, given that the Commission views the rule on the irrelevance of official position as applying to both national and international courts. While it is true that the Commission indicated that "[j]udicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment",[253] it is also true that it expects the draft Code to have a particular bearing on domestic laws and courts. Thus, it not only makes the general statement that "national courts are expected to play an important role in the implementation of the Code",[254] but also includes the following remark in its commentary to article 8, on the establishment of jurisdiction over the crimes in question: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court."[255] It goes on to say that "the provision and indeed the Code do not apply to those [international] tribunals which are governed by their respective statutes".[256]

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[246] *Yearbook … 1954*, vol. II, document A/2693, p. 151.

[247] *Yearbook … 1996*, vol. II (Part Two), p. 17, para. 50.

[248] Under article 2, para. 1, of the 1996 draft Code, "[a] crime against the peace and security of mankind entails individual responsibility" (*ibid*., p. 18), which, under article 3, shall result in "punishment" that "shall be commensurate with the character and gravity of the crime" (*ibid*., p. 2). In a similar vein, see article 1 of the 1954 draft Code, which establishes that "[o]ffences 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, p. 151).

[249] Under article 7 of the 1996 draft Code, "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment" (*Yearbook … 1996*, vol. II (Part Two), p. 26). The 1954 draft Code, meanwhile, establishes in its article 3 that "[t]he fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code" (*Yearbook … 1954*, vol. II, p. 152).

[250] The 1996 draft Code enshrines this principle in article 5, which stipulates that "[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires" (*Yearbook … 1996*, vol. II (Part Two), p. 23). The 1954 draft Code reflected this principle in article 4, which provides that "[t]he fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order" (*Yearbook … 1954*, vol. II, p. 152).

[251] *Yearbook … 1996*, vol. II (Part Two), pp. 26–27, para. (1) of the commentary to article 7. In para. (3) of the commentary, the Commission recalls that "the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity" (*ibid*., p. 27).

[252] *Ibid*., p. 27, para. (6) of the commentary to article 7. In the commentary to article 9, concerning the *aut dedere aut judicare* principle, in referring to potential grounds for granting immunity to an alleged offender in exchange for cooperation with the justice system, the Commission also stated that "[i]t would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide" (*ibid*., p. 31, para. (4) of the commentary).

[253] *Ibid*., p. 27, footnote 69.

[254] *Ibid*., p. 18, para. (13) of the commentary to article 1, para. 2.

[255] *Ibid*., p. 28, para. (5) of the commentary to article 8.

[256] *Ibid*., pp. 29–30, para. (11) *in fine* of the commentary to article 8.

132. It may therefore be concluded that, in the Commission's view, the provisions of the draft Code are intended in particular for national courts.[257] In setting out the requirement that the State "enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction",[258] it also includes the obligation to adopt provisions that rule out the applicability of immunity under the terms defined by the Commission in its commentaries to the draft Code.

133. Lastly, it should be borne in mind that both the Nürnberg Principles and the draft Code of Crimes against the Peace and Security of Mankind list a series of crimes under international law. The Nürnberg Principles include what are termed crimes against peace, war crimes and crimes against humanity.[259] The draft Code characterizes the crime of aggression, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[260] The Commission may wish to take this list of crimes, which was developed by the Commission itself, into account in identifying acts which, in principle, could be classified as international crimes for the purpose of determining limitations or exceptions to immunity.

134. While the articles on responsibility of States for internationally wrongful acts[261] do not, for obvious reasons, deal with possible limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, they do contain a number of concepts that may be useful for the purposes of the present report, as they are closely related to certain arguments that have been put forward and debated in the literature and in practice as grounds for such limitations or exceptions. Additionally, in its commentaries to the articles, the Commission contributes elements that could be useful for this study, insofar as they help to situate crimes under international law more appropriately in the international legal system. These elements essentially consist of the following:

(*a*) the establishment of the primacy of peremptory norms;

(*b*) the affirmation of the existence of obligations to the international community as a whole;

(*c*) the definition of a specific model for responding to cases involving a serious breach of an obligation arising under a peremptory norm; and

(*d*) the identification of the most serious crimes under international law as breaches of peremptory norms.

135. The Commission deals with the first of these issues in its commentary to article 26 (Compliance with peremptory norms), which seeks to preserve the primacy of such norms, even in cases involving "circumstances precluding wrongfulness".[262] In this context, the Commission addresses the relationship between a peremptory norm and a non-peremptory norm, concluding that the former must prevail. In the Commission's view, this primacy is evident when there is a conflict between two primary norms, but it also holds true when the conflict is between primary and secondary norms, with the result that—in the Commission's words—the application of secondary rules (in respect of rules precluding wrongfulness) does "not authorize or excuse any derogation from a peremptory norm of general international law".[263] The example given by the Commission in this connection is telling: "a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide".[264]

136. In its reasoning, the Commission also includes another element of considerable interest in relation to the primacy of peremptory norms, noting that sometimes a conflict between primary norms need not be resolved by means of the secondary rules concerning responsibility. On the contrary, "[w]here 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 prevail. The processes of interpretation and application should resolve such questions", given that "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[265] This type of "conforming interpretation" could therefore be of particular importance in relation to the topic of the present report, for the purpose of finding an appropriate balance among various primary norms.

137. It should be noted that, in its commentary to Part Two, chapter III, of the articles (Serious breaches of obligations under peremptory norms of general international law), the Commission refers to the existence of "a qualitative distinction … between different breaches of international law"[266] and to the existence of "the notion of obligations to the international community as a whole",[267] both of which are categories dealt with in the case law of the International Court of Justice. The Commission does not take a position as to whether or not "peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea", but concludes that "there is at the very least substantial overlap between them", as shown by the fact that the examples which the Court has given of obligations towards the international community as a whole "all concern obligations which, it is generally accepted, arise under peremptory norms of general international law".[268]

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[257] In its commentaries, the Commission also conducts an interesting analysis of the relationship between international criminal courts and national courts, which will be examined in more detail in chap. III, sect. B, below.

[258] *Ibid*., p. 29, para. (10) of the commentary to article 8.

[259] See principle VI (*Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45).

[260] *Yearbook … 1996*, vol. II (Part Two), pp. 42 *et seq.*, arts. 16–20. See also article 2 of the 1954 draft Code (*Yearbook … 1954*, vol. II, pp. 151–152).

[261] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[262] This article provides that "[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law" (*ibid*., p. 84).

[263] *Ibid*., p. 85, para. (4) of the commentary to article 26.

[264] *Ibid.*

[265] *Ibid*., para. (3) of the commentary to article 26.

[266] *Ibid*., p. 110, para. (2) of the commentary to chap. III.

[267] *Ibid*., p. 111, para. (3) of the commentary to chap. III.

[268] *Ibid*., pp. 111–112, para. (7) of the commentary to chap. III.

In any event, the Commission takes the view that "[t]he obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[269]

138. Also of note is the fact that the Commission mentions, in its commentaries, the existence of a purposive difference between the concepts of *jus cogens* and obligations to the international community as a whole, which is worth repeating here:

> While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance – i.e. … in being entitled to invoke the responsibility of any State in breach.[270]

139. The consideration of the special nature of obligations towards the international community as a whole that arise under peremptory norms leads the Commission to discern a different regime with respect to the legal action to be taken in response to serious breaches of obligations under peremptory norms of international law, which can be summed up as follows: (*a*) "[these] breaches … can attract additional consequences, not only for the responsible State but for all other States" (art. 41); and (*b*) "all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole" (art. 48).[271] This third strand of the Commission's thinking is also of relevance to the present report, especially as it refers to the possibility of establishing a different legal regime for the immunity of State officials from foreign criminal jurisdiction when such immunity is invoked with respect to acts that can be characterized as breaches of obligations towards the international community as a whole that arise under peremptory norms of international law.

140. Lastly, in relation to these articles, the Commission describes as "peremptory norms that are clearly accepted and recognized" several types of prohibited conduct that correspond to acts in respect of which the immunity of State officials from foreign criminal jurisdiction has been invoked,[272] namely: "the prohibitions of … genocide, slavery, racial discrimination, crimes against humanity and torture",[273] together with the basic rules of international humanitarian law applicable in armed conflict[274] and the "principles and rules concerning the basic rights of the human person".[275] The Commission can take this list of crimes, which was developed by the Commission itself in 2001, into account in identifying crimes that could be classified as international crimes for the purpose of determining exceptions to immunity.

[269] *Ibid*., p. 112, para. (3) of the commentary to article 40.

[270] *Ibid*., p. 112, para. (7) of the commentary to chap. III. The Commission does not define the concept of "international community as a whole", but the mere fact of its use is of considerable interest, given that it stresses the collective dimension of the values and interests to be protected. The Commission moreover points out that this phrase is frequently used in treaties and other international instruments (*ibid*., p. 84, para. (18) of the commentary to article 25), and the list of treaties cited by the Commission as using this expression is significant: "third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism" (*ibid*., p. 84, footnote 404).

[271] *Ibid*., p. 112 para. (7) of the commentary to chap. III.

[272] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 13–17, paras. 49–60; also *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26.

[273] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26.

[274] *Ibid*., p. 113, para. (5) of the commentary to art. 40.

[275] *Ibid*., p. 127, para. (9) of the commentary to art. 48.

Chapter III

Limitations and exceptions within the general legal context of immunity from foreign criminal jurisdiction: methodological and conceptual issues

141. After the analysis of practice and before the analysis of factors that could determine the inapplicability of immunity in a particular case, it is necessary at this point to consider some methodological and conceptual elements that will enable us to better define the context in which the draft articles contained in the present report are to be understood. To that end, the following general issues are analysed below: (*a*) the legal nature of immunity and its relationship to jurisdiction and criminal responsibility; (*b*) the treatment of immunity in national courts and international criminal courts and its impact on limitations and exceptions to immunity; and (*c*) the concept of limitations and exceptions.

142. These elements are considered on the basis of a view of international law as a normative system that includes, as one of its parts or components, the institution of immunity of State officials from foreign criminal jurisdiction. This approach requires that immunity be analysed not in isolation, but in connection with the rest of the norms and institutions that make up the system. From this standpoint, the immunity of State officials is a useful and necessary institution for ensuring that certain values and legal principles of the international legal order, in particular the principle of sovereign equality, are respected. But at the same time, the immunity of State officials from foreign criminal jurisdiction, as a component of this system, should be interpreted in a systemic fashion to ensure that this institution does not produce negative effects on, or nullify, other components of the contemporary system of international law understood as a whole.[276] This systemic approach requires that

[276] The need to ensure a balance among the various values and norms of the system was clearly expressed in the joint separate opinion

other institutions that are also related to the principle of sovereignty, especially the right to exercise jurisdiction, be taken into account, together with other sectors of the international legal order that reflect and embody other values and principles of the international community as a whole, in particular international human rights law and international criminal law. As international law is a genuine normative system, the Commission's development of a set of draft articles meant to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community cannot (and should not) have the effect of introducing imbalances in significant sectors of the international legal order that have developed over recent decades and that are now among its defining characteristics.

A. Legal nature of immunity

143. One of the threads that emerge from an analysis of the Commission's debates thus far is the constant presence of three elements that are related to the very nature of immunity and have a bearing on the question of limitations and exceptions: (*a*) the understanding of immunity as a stand-alone right or as an exception to the exercise of the forum State's right to exercise jurisdiction; (*b*) the characterization of immunity as an exclusively procedural institution that does not affect the individual criminal responsibility of State officials; and (*c*) the idea that immunity from foreign criminal jurisdiction is separate from other forms of sovereign immunity, especially State immunity. While some of these issues have been discussed in the Special Rapporteur's previous reports, it is necessary at this point to revert to them in order to analyse briefly, as an aid to understanding and exclusively in connection with the topic of limitations and exceptions, the relationship between three pairs of concepts: (*a*) immunity and jurisdiction; (*b*) immunity and responsibility; and (*c*) immunity of the State and immunity of State officials.

1. Relationship between immunity and jurisdiction

144. The relationship between immunity and jurisdiction has been discussed previously in the course of the Commission's work. In her second report, the Special Rapporteur drew attention to the interaction between these two elements, especially the fact that immunity does not exist in a vacuum and cannot be invoked except in relation to an existing jurisdiction.[277] This echoes the reasoning of the International Court of Justice in *Arrest Warrant*.

145. The existence of jurisdiction is thus the point of departure on which immunity is founded; neither practice nor doctrine has refuted this observation. It suffices to recall that, as a rule, when national courts have taken decisions on claims of immunity, they have not found that they lack jurisdiction in abstract terms, but rather that they are unable to exercise it in respect of an official of a third State who enjoys immunity. There have thus been cases in which, once the circumstance that gave rise to immunity no longer exists, national courts have exercised jurisdiction over the same acts and the same individuals, and no difficulties have arisen with regard to competence.

146. The prior existence of jurisdiction is a logical requirement that does not detract from the importance of immunity as a necessary and useful instrument for protecting certain values and legal principles of the international community, especially the principle of the sovereign equality of States and the maintenance of stable international relations; nor, conversely, can it be understood to mean that the right to exercise jurisdiction has absolute primacy, in all circumstances, over immunity. On the contrary, the purpose of immunity is precisely to freeze or block the exercise of jurisdiction in certain conditions, sometimes on an exclusively temporary basis. Thus, in practice, immunity can prevail over jurisdiction in a particular case.

147. Nonetheless, the view of jurisdiction as a pre-existing power of the State, a prius that necessarily precedes immunity, inevitably has certain consequences of considerable importance at the methodological level. These consequences can be summed up as follows:

(*a*) immunity is understood *ab initio* as a restriction of the exercise of jurisdiction; it is thus in itself a limitation or exception to the adjudicatory jurisdiction of the forum State;

(*b*) like any limitation or restriction of a sovereign power of the State, it should be understood in purposive terms: immunity is recognized in order to safeguard values, interests and principles of the international community which, in this case, are embodied in the principle of sovereign equality, the proper exercise of State functions without undue interference by a third party and the stability of international relations;

(*c*) given that immunity constitutes a restriction of a pre-existing sovereign power, the determination of its scope and its interpretation must remain within the limits defined by the ends sought. In particular, it can be invoked only in the interest of the State whose sovereign equality it claims to preserve, and only for the purpose of safeguarding legitimate rights and interests of the State that are protected under international law;

(*d*) the relationship between the exercise of jurisdiction and immunity must, then, be interpreted in dialectical terms, in order to find an appropriate balance between the rights and interests of the forum State and the rights and interests of the State of the official. Whether the exercise of jurisdiction or immunity prevails in each particular case will depend on the rights and interests at stake and on the set of norms, values and legal principles on which those rights and interests are based.

2. Relationship between immunity and responsibility

148. The analysis of immunity from foreign criminal jurisdiction has traditionally been based on the premise that it is a procedural rather than a substantive instrument, the application of which does not imply that the

of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant* (see footnote 124 above), particularly in paras. 71–79.

[277] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, pp. 41–42, paras. 35–42.

responsibility, in this case criminal responsibility, that can arise from unlawful conduct disappears. This view of immunity is closely related to the way in which immunity operates in practice, with the primary goal of blocking and preventing the exercise of criminal jurisdiction in a particular case by the courts of the forum State when they seek to take action against an official of a third State. In strictly theoretical terms, this general description of immunity cannot be denied and must be accepted as the point of departure for any analysis that purports to contribute to the effort to define the legal nature of immunity.

149. This view of immunity as a mere procedural bar has been echoed in the literature and in case law, especially at the international level, as reflected by the foregoing analysis of practice. From this standpoint, immunity and responsibility cannot be confused with each other, and immunity cannot be assumed to give rise to impunity. On the contrary, as the International Court of Justice has made clear, it is possible, in spite of immunity, for individual criminal responsibility to be determined by means other than the exercise of jurisdiction by the courts of the forum State. Consequently, it appears that immunity from jurisdiction has the sole effect of preventing the determination of responsibility by means of a specific legal channel, leaving open the possibility that such responsibility may be established through other procedural mechanisms better suited to the purpose.

150. Nevertheless, this description of immunity as a mere procedural bar and the fundamental distinction between immunity and responsibility are difficult to support in absolute terms, especially in the field of criminal law. The analysis of practice and the necessary teleological interpretation of immunity lead to more nuanced conclusions. One example that comes to mind is the fine line that separates the invocation of official position as a substantive defence to avoid responsibility from its invocation as a procedural defence to avoid the exercise of jurisdiction. It suffices to recall how the Nürnberg Tribunal used the term in both senses and how the polysemic use of the irrelevance of official position has found its way into both case law and quite a few of the international instruments analysed in the present report.

151. The acknowledgement of this issue even prompted the International Court of Justice to offer an alternative model for establishing responsibility that respects immunity and avoids impunity. However, the Court's efforts to overcome the confusion between immunity and impunity are not fully convincing for the purpose of inferring a fundamental separation between immunity and responsibility. This distinction raises no issues whatsoever in cases where there are genuine and accessible means of redress for establishing the criminal responsibility of a particular State official when such responsibility cannot be established before a particular court because immunity has been invoked. Conversely, when such alternative means of redress do not exist or are not effective in achieving this purpose, the distinction between immunity and exemption from criminal responsibility, and even between immunity and impunity, will inevitably become less clear-cut.

152. Thus, the strictly procedural nature of the immunity of State officials from foreign criminal jurisdiction, even when taken as a point of departure, presents certain limitations in practice that must be duly taken into account in analysing the question of limitations and exceptions. This idea is especially relevant in the case of immunity *ratione materiae*, which is closely related to acts that can give rise to the criminal responsibility of an official and which continues even after the State official finishes his or her term of office or loses his or her status as an official. The permanent nature of this type of immunity should also be considered, as it can in some circumstances have additional consequences with respect to the distinction between immunity and impunity.

3. Relationship between immunity of the State and immunity of State officials

153. The final element to be considered at this stage is the distinction between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu*. This question was analysed in detail in the Special Rapporteur's fourth report, particularly as it relates to the "single act, dual responsibility" approach and the criminal nature of the jurisdiction from which the immunity of State officials can be invoked.[278]

154. Although both elements have a bearing on the question of limitations and exceptions to immunity, it is unnecessary to revert to that topic at this point. For the purposes of the present report, it suffices to reiterate below the main conclusions set forth in the 2015 report:

(*a*) the attribution of an act to the State is the point of departure for determining whether an act has been performed in an official capacity; this attribution is not sufficient in itself, however, to conclude that a State official enjoys immunity in respect of the act.

(*b*) a single act can give rise to two different types of responsibility: international in the case of the State and criminal in the case of the individual; the existence of two types of responsibility translates into two types of immunity (of the State and of its official).

(*c*) while both categories of immunity have the common purpose of protecting State interests, it cannot be concluded that they are subject to identical conditions or to the same legal regime.

155. Accordingly, the regime for limitations and exceptions to immunity may also differ depending on whether the immunity in question is the immunity of the State or the immunity of State officials from foreign criminal jurisdiction, without the possibility of mimetically transposing the first into the second or *vice versa*.[279]

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[278] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 26–30, paras. 96–117.

[279] See, in this regard, article IV of the resolution of the Institute of International Law on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted in 2009 at the session held in Naples: "The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an

B. National and international criminal courts or tribunals

156. A second general element to be considered in addressing the issue of limitations and exceptions to immunity is the existence of international criminal courts mandated to try cases involving crimes with the greatest international impact. Although these courts have been outside the scope of the present topic, they have a clear relationship with national criminal courts, and this relationship has practical consequences for the invocation of immunity. Thus, for the purpose of defining the limitations and exceptions applicable to immunity from foreign criminal jurisdiction, it is useful to analyse the impact that international criminal courts can have on the institution of immunity.

157. This question may be approached from two opposite viewpoints. The first assumes that the establishment of international criminal courts and the impossibility of invoking immunity before them have no bearing on the regime applicable to the immunity of State officials from foreign criminal jurisdiction. According to this view, the different natures of the two types of courts translate into two different immunity regimes. This means that, even though immunity from jurisdiction cannot be invoked before international courts, it remains fully valid and can be invoked in national courts. The second approach, in contrast, is based on the unity of the objectives and principles applicable to the prosecution of international crimes, regardless of whether their perpetrators are tried before an international criminal court or a domestic court. As both jurisdictions serve the purpose of determining individual criminal responsibility and preventing impunity for the most serious international crimes, the rules concerning immunity must be applied in accordance with the same parameters. Thus, the mere existence of international criminal courts and the impossibility of invoking any type of immunity before them should imply that it is impossible for anyone, including State officials, to invoke immunity from criminal jurisdiction before the courts of a State.

158. These two approaches focus on two different elements: the procedural nature of immunity, in the first case, and the substantive nature of individual criminal responsibility for the commission of international crimes, in the second. Moreover, complementary arguments are often adduced in support of each of these views, especially the difference between national and international courts in terms of their relationship to the principle of sovereignty, and the question of whether or not criminal responsibility can be determined by alternative means. As noted above, all these arguments have even been reflected in decisions adopted by international courts, including the International Court of Justice, the European Court of Human Rights and the Special Court for Sierra Leone.

159. The two approaches described above are highly theoretical, however, and overlook some very important elements that characterize the interconnection between national and international courts. Chief among these elements are the identical nature of the criminal offences or prohibited conduct dealt with by the two types of courts, the definition of a system for the division of competences among competing jurisdictions and the establishment of mechanisms for two-way cooperation and judicial assistance between the two categories of criminal courts.

160. The relevance of this model of interconnection is not theoretical; the model has significant practical consequences in the area of cooperation between courts, as illustrated recently in relation to the attempted arrest of President Al Bashir in South Africa in execution of a warrant issued by the International Criminal Court. But this example, albeit the most high-profile in terms of media coverage, is not unique. It is also important to bear in mind the phenomenon of hybrid and internationalized criminal court or tribunals, the difficulty of categorizing them as either domestic or international tribunals and the consequences that this has for the institution of the immunity of State officials from jurisdiction.[280] It should also be recalled that the exercise of immunity before domestic courts can have an impact on the system for the division of competences in the case of competing jurisdictions, especially under the complementarity principle laid down in the Rome Statute.

161. Given these elements, the relationship between national criminal courts and international criminal courts needs to be considered in a more nuanced and balanced manner that takes into account the distinction between national jurisdiction and international jurisdiction, while also bearing in mind the connections referred to above. This relationship will also need to be taken into account in the present report, albeit without altering the scope of the topic approved by the Commission.

162. To that end, it is useful to analyse, first, the immunity regime applicable before international criminal courts or tribunals, especially the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo panels, the Special Panels for Serious Crimes in East Timor, the Extraordinary African Chambers within the Senegalese judicial system and the War Crimes Chamber of the State Court of Bosnia and Herzegovina. As all of these tribunals have specialized jurisdiction for the prosecution of international crimes, the way in which immunity is applied before them can shed light on a possible limitation or exception for crimes under international law in the context of the present topic.

163. As noted previously, the International Criminal Court, the International Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone have ruled that the immunity of State officials from criminal jurisdiction is not applicable before them.[281] Nevertheless, only the Rome Statute includes an express reference to the question of immunity, in its article 27;[282] this model was subsequently followed by the Special Panels for Serious

agent of the former State" (*Yearbook of the Institute of International Law*, vol. 73- I and II (see footnote 28 above), p. 230).

[280] In this regard, see Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, pp. 326–348.

[281] See chap. II, sect. C, above.

[282] See chap. II, sect. A, above.

Crimes in East Timor.[283] Meanwhile, the statutes of the *ad hoc* Tribunals contain only a general provision on the irrelevance of official position or orders from a superior as grounds for exemption from or limitation of the scope of individual criminal responsibility;[284] this wording was also followed by the Special Court for Sierra Leone,[285] the Extraordinary Chambers in the Courts of Cambodia,[286] the War Crimes Chamber of the State Court of Bosnia and Herzegovina[287] and the Extraordinary African Chambers within the Senegalese judicial system.[288] The rules governing the special war crimes panels in Kosovo[289] and the Special Tribunal for Lebanon[290] do not contain any provisions on official capacity; they only state that orders from commanders or superiors may not be invoked. This difference in the applicable rules is explained to some extent by the greater or lesser likelihood that officials of the foreign State will be brought before these tribunals, except in the case of the *ad hoc* Tribunals, where, by definition, this was a real possibility, yet they do not refer to immunity (which did not prevent them from considering that it cannot be invoked). In any event, even in the rules governing the International Criminal Court and the Special Panels for East Timor, the ruling-out of immunity is established in close connection with the clause on the irrelevance of official position.

164. It should be borne in mind that the interpretation of the rule that immunities cannot be invoked before international criminal courts is not without controversy. Although this rule is, in theory, a characteristic feature of these jurisdictions, it is useful to recall, in this regard, the debate on the interpretation of article 98, paragraph 1, of the Rome Statute and its relationship to article 27,[291] which took on special importance in connection with Al Bashir as a result of a number of noncooperation decisions taken by some African countries and the International Criminal Court decisions on non-cooperation analysed above in the overview of international judicial practice.[292] In any event, it should be noted that, strictly speaking, article 98, paragraph 1, only limits the obligation to cooperate with the Court in respect of the surrender of a person who enjoys immunity under international law, and this limitation, moreover, applies only to a request for the surrender of a national of a State that is not a party to the Statute.[293] From this standpoint, the limitation introduced by article 98, paragraph 1, does not, strictly speaking, affect the non-inability to invoke immunity from the Court's jurisdiction, but rather the ability to invoke such immunity in respect of measures that must be taken by national courts in order to fulfil the obligation to cooperate with the Court. Furthermore, practice shows that controversy has arisen exclusively in relation to Heads of State (Presidents Al Bashir and Kenyatta), meaning that the issue relates essentially to the topic of immunity *ratione personae*. This, in short, was the issue raised before the South African courts in relation to the arrest of President Al Bashir,[294] revealing the close relationship between the exercise of immunity before national courts and before international courts and the need for a systemic interpretation of both situations.[295]

165. This topic was further complicated by the African Union's adoption, in 2015, of the Malabo Protocol establishing the International Criminal Law Section of the African Court of Justice and Human Rights. The Protocol was intended to resolve, at the regional level, the problems caused by the disputed interpretation of article 98, paragraph 1, of the Rome Statute in relation to two serving African Heads of State by including the following article in the Statute of the African Court:

> No charges shall be commenced or continued before the Court against any serving [African Union] Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office.[296]

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[283] See sect. 15.2 of United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15).

[284] See Statute of the International Tribunal for the Former Yugoslavia, document S/25704 and Add.1, annex, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, art. 7, paras. 2 and 4; and Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (2004), annex, art. 6, paras. 2 and 4.

[285] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137 (Statute of the Special Court for Sierra Leone), at art. 6, paras. 2 and 4.

[286] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29, available from www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended.

[287] Bosnia and Herzegovina, Criminal Code, art. 180.

[288] Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between Senegal and the African Union of 22 August 2012, ILM, vol. 52 (2013), p. 1024, and of 30 January 2013, *ibid*., p. 1028, art. 10.3 of the Statute annexed thereto.

[289] See United Nations Interim Administration Mission in Kosovo, Regulation No. 2003/25 of 6 July 2003 (UNMIK/REG/2003/25) on the Provisional Criminal Code of Kosovo, annex, art. 10.

[290] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007, and New York, 6 February 2007), United Nations, *Treaty Series*, vol. 2461, No. 44232, p. 257, and, annexed to Security Council resolution 1757 (2007) of 30 May 2007, art. 3.3.

[291] Under article 98, paragraph 1, of the Rome Statute, "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

[292] On the scope of the controversy between the African Union and the International Criminal Court, see Kamto, " 'L'Affaire *Al Bashir*' et les relations de l'Afrique avec la Cour pénale internationale"; and Tehindrazanarivelo, "The African Union principle on the fight against impunity and the arrest warrants for Omar Hassan El-Bashir"; Tladi, "Immunity in the era of 'criminalisation': The African Union, the ICC, and international law"; Abrisketa Uriarte, "Al Bashir: ¿Excepción a la inmunidad del jefe de Estado de Sudán y cooperación con la Corte Penal Internacional?".

[293] See Escobar Hernández, "La progresiva institucionalización de la jurisdicción penal internacional"; Akande, "International law immunities and the International Criminal Court"; Triffterer, "'Irrelevance of official capacity'—Article 27 Rome Statute undermined by obligations under international law or by agreement (Article 98)?"; Kress, "The International Criminal Court and immunities under international law for States not party to the Court's Statute".

[294] See chap. II, sect. D, above.

[295] See Tladi, "The duty on South Africa to arrest and surrender Al-Bashir under South African and international law: Attempting to make a collage from an incoherent framework".

[296] Malabo Protocol, article 46A *bis*. Article 46B sets out the principle of the irrelevance of official position, subject to the special

166. This initiative created a model of regional criminal jurisdiction that breaks, albeit only partially, with the rule that State officials cannot invoke immunity from the exercise of jurisdiction by international criminal courts. While it is not necessary to analyse that provision for the purpose of the present report,[297] the mere fact of its adoption shows how the exercise of international criminal jurisdiction may, in practice, encounter problems related to the immunity of State officials from jurisdiction. It thus appears that the amendment of the Statute of the African Court may represent a turning point in the conception of international criminal jurisdiction as an alternative to the exercise of national criminal jurisdiction with regard to international crimes.

167. In any case, this was not the only attempt to seek an African solution to the question of the prosecution of Heads of State or former Heads of State for war crimes or crimes against humanity. On the contrary, the establishment of the Extraordinary African Chambers within the Senegalese judicial system offers another example that is more comparable to the cases of the *ad hoc* tribunals and internationalized tribunals. This arrangement, under which a court within the Senegalese judicial system was able to try a former Head of State for the commission, *inter alia*, of crimes against humanity and war crimes, confirmed that immunity cannot be invoked in cases involving such crimes. This is demonstrated by the fact that the judgment against Hissène Habré, whereby he was found guilty of these crimes and sentenced to life imprisonment, made no reference to immunity.[298]

168. The paragraph of the preamble to the Rome Statute recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[299] takes on special significance in this context. That statement lays the foundation for the principle of complementarity laid down in the Rome Statute as an instrument for determining the division of competences between the International Criminal Court and national courts. In line with this principle, the role of national courts should be neither underestimated nor sidelined.[300] On the contrary, strengthening the capacity of national courts to try cases involving international crimes is now an essential element of the new model of international criminal justice and has even given rise to the concept of "positive complementarity".[301]

169. Against this backdrop, the recognition of the key role of domestic courts in combating international crimes and the need to ensure the effectiveness of their judicial proceedings are two factors that cannot be overlooked by the Commission. The Commission may therefore find it useful to take this factor into account in its deliberations on the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.[302]

C. Concept of limitations and exceptions to immunity

170. Throughout this fifth report, the expression "limitations and exceptions to immunity" has used as if it represents a single category, in reference to cases where the immunity of a State official does not operate before the courts of another State. However, as indicated in the fourth report, the words "limitations" and "exceptions" each represent a separate concept. A "limitation" refers to any element that marks the boundaries of an institution; it must therefore be situated within those boundaries, because it is related to the elements that make up such an institution. An "exception", on the other hand, lies outside the institution; although the institution still retains its boundaries, it may in certain circumstances not apply, owing to existence of elements outside the institution.

171. If we apply this distinction to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, the limitations to immunity are necessarily related to the normative elements that define each category of immunity, whereas exceptions are defined by external elements that may derive from other components of the international legal order and in respect of which normative elements play a secondary role. From that perspective, the beneficiaries of immunity, the concept of acts performed in an official capacity and the temporal dimension of immunity should be considered as categories around which the limitations to immunity are established. By contrast, compliance with the values and legal principles of international law as a whole and the need to ensure that immunity does not generate undesired effects on other areas of international law (such as international criminal law, international humanitarian law or international human rights law) would constitute the starting point for the definition of exceptions to immunity.

172. This theoretical distinction is, however, not so neatly reflected in practice. As indicated in chapter II of the present report, the words "limitation" and "exception" are not used systematically by international tribunals, or in the comments and statements of States, or in judicial, legislative or treaty practice. In the majority of cases, the States and legal operators dealing with the phenomenon of immunity have not always used the same words, and sometimes have not even asserted that there is a limitation or exception to immunity; they merely affirm that immunity does not apply or that it cannot be invoked

regime established in article 46A *bis*. The Protocol has not entered into force.

[297] For commentary on this provision, see Ssenyonjo and Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting impunity for African Union Heads of State and senior State officials?"; and Tladi, "The immunity provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff".

[298] Extraordinary African Chambers, *Ministère Public v. Hissein Habré*, Judgment, 30 May 2016, available from the website of the Extraordinary African Chambers: www.chambresafricaines.org.

[299] Preamble, sixth para.

[300] On the principle of complementarity, see, among others, Quesada Alcalá, *La Corte Penal Internacional y la soberanía estatal*; Escobar Hernández, "El principio de complementariedad".

[301] Put forward by the Assembly of States Parties to the Rome Statute of the International Criminal Court, this concept was discussed at the Kampala Review Conference and led to a number of follow-up initiatives within the Assembly itself.

[302] Keitner mentions this idea in a number of papers emphasizing what she calls horizontal enforcement: "*Germany v. Italy* and the Limits of Horizontal Enforcement …". The same approach can be found in her recent contribution to the Symposium on the Immunity of State Officials of the American Society of International Law: "Horizontal enforcement and the ILC's proposed draft articles on the immunity of State officials from foreign criminal jurisdiction".

in national courts. Nevertheless, it should be noted that the use of both words in respect of the same act has not been consistent or conclusive, including when legal operators have referred clearly to the distinction between limitations and exceptions. In this connection, the case of torture or international crimes in general, is significant: while for some legal operators such crimes constitute a limitation, for others they are an exception. However, in all those cases, the ultimate goal is the same: to declare that immunity of State officials from foreign criminal jurisdiction cannot be invoked in relation to a given type of conduct. To put it differently, both cases involve the "non-applicability" of the immunity regime, leaving the jurisdiction of the forum State intact.

173. However, this issue is not new or even exclusive to the present topic. In this connection, it suffices to recall past practice as reflected in some conventions dealing with immunity, which were developed from draft articles that had previously been adopted by the Commission. The Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character—to name only those that are most closely related to the present topic—do not establish any distinction between limitations and exceptions. They merely list cases in which some of the immunities regulated in those instruments do not apply. The most significant example is still the United Nations Convention on Jurisdictional Immunities of States and Their Property, which does not make any distinction between limitations and exceptions, and which treats under the same heading (Part III of the Convention) causes of nonapplicability based not only on the acts of the State but also on the consequences of said acts, on the property over which jurisdiction is being sought, or the existence of special dispute-settlement mechanisms agreed between the parties.

174. For the purposes of the present topic, a categorical distinction between limitations and exceptions does not appear necessary. In addition, as noted in the fourth report, deciding between the concepts of limitations and exceptions in relation to specific cases may have consequences far beyond the regime of immunity, especially in the case of international crimes and the consequences that the characterization of such crimes as a limitation or exception might have on the regime of international State responsibility.[303] Consequently, in the view of the Special Rapporteur, it is more sensible (and more reflective of practice) to consider the topic from the general perspective of immunity that cannot be invoked in specific circumstances, most prominently in the case of crimes under international law. This will be the focus of draft article 7, which is included in the present report.

175. In any event, it should be noted that limitations and exceptions are not treated as separate elements in the present report, solely to ensure that the draft articles proposed could cover both concepts. Nonetheless, the distinction between limitations and exceptions is of methodological interest, especially in the light of the criteria for interpretation that must be used to determine the existence of a limitation or exception to immunity. For example, the criteria for identifying limitations must be intricately linked to the normative elements of immunity, in particular acts that may be covered by immunity, and must be interpreted essentially in the light of the existing relationship between immunity and jurisdiction. In the case of exceptions, however, the normative elements of immunity are not the only basis on which the nonapplicability of immunity can be established; the non-applicability can be based on other elements outside that institution which, as has been noted above, derive from the international legal order as a whole. While the non-applicability of immunity must be established following an inductive method in the first case, it may be established following a deductive method in the second. Both methods must be duly taken into consideration in the present report.

176. The methodological considerations mentioned above must be considered in addressing the bases of limitations and exceptions, which are analysed on the chapter below.

[303] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686, pp. 31–32, paras. 122–126. *Sed contra*, see Dodge, "Foreign official immunity in the International Law Commission: The meaning of "official capacity".

Chapter IV

Instances in which the immunity of State officials from foreign criminal jurisdiction does not apply

177. In the light of the analysis presented above, the present chapter is intended to identify the scope of the limitations or exceptions to immunity from two perspectives: (*a*) determining the concrete areas in which such exceptions might operate; and (*b*) determining whether such exceptions can be invoked in general to both immunity *ratione personae* and immunity *ratione materiae* or only to the latter (sect. D). On the first point, the following scenarios will be examined in turn: international crimes (sect. A); harm caused in the territory of the forum State (sect. B); corruption (sect. C); and draft article 7 (sect. E), which deals with situations in which immunity is not applicable.

A. International crimes

178. As indicated earlier in the present report, the commission of international crimes has been central to the debate on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, owing undoubtedly to two factors: the connection between international crimes and *jus cogens*, on the one hand, and the inevitable comparison between immunity and the fight against impunity, on the other. The importance of international crimes in the debate on exceptions to immunity is also related to and influenced by the process of institutionalization of international criminal law that has been

taking place since the end of the twentieth century, as reflected mainly in the establishment of international criminal courts or tribunals.

179. The practice analysed above shows how national courts have in some way addressed international crimes in the context of immunity. Although varied, the practice reveals a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction, either because such crimes are not considered official acts, or because they are considered an exception to immunity, owing to their gravity or to the fact that they undermine values and principles recognized by the international community as a whole. On the other hand, although national courts have sometimes recognized immunity from foreign criminal jurisdiction for international crimes, it must be remembered that they always did so in the context of immunity *ratione personae*, and only in exceptional circumstances did they do so with regard to immunity *ratione materiae*. In any event, it is worth noting that international criminal courts or tribunals have never recognized the immunity of State officials from foreign criminal jurisdiction in the exercise of their own jurisdiction.

180. Consequently, it may be possible to conclude *prima facie* that contemporary international law recognizes a limitation or exception to the immunity of State officials from foreign criminal jurisdiction in situations where the State official is suspected of committing an international crime, even though some publicists take the opposite view.[304] There are also a few practical examples where national courts have recognized the immunity of officials from criminal jurisdiction, including in cases where they were suspected of committing international crimes. In the sub-section below, the connection between international crimes and the immunity of State officials from foreign criminal jurisdiction is analysed from two separate perspectives: (*a*) the existence of an international custom marking the contours of such limitation or exception; and (*b*) the systematic recognition of international crimes as a limitation or exception to immunity. Although both scenarios are closely related, they are treated separately in the present report for the sake of clarity. This subsection will conclude with a review of the international crimes that might constitute a limitation or exception to the exercise of immunity.

1. Limitation or exception based on the commission of international crimes as a customary norm

181. Although the analysis of practice in chapter II above, which focuses on but is not limited to national legislative and judicial practice, shows that international crimes tend to be considered a limitation or exception to the exercise of foreign criminal jurisdiction, there are doubts as to whether such practice is sufficiently consistent and uniform to constitute a material element of an international custom. Some have also wondered whether such practice is accompanied by a sense of legal obligation that might constitute *opinio juris*. Others have pointed out that there is consistent international jurisprudence indicating that such an exception does not exist, and that international jurisprudence takes precedence over national jurisprudence in the identification of a custom whereby the commission of international crimes is considered a limitation or exception to immunity. In short, what is being called into question is the existence of a customary norm whereby international crimes are considered an exception or limitation to the immunity of State officials from foreign criminal jurisdiction.[305]

182. Determining whether or not such a custom exists is no easy task, and the debate around that issue cannot be ignored. The analysis of the issue in the present report is necessary and useful, to the extent that it can affect the Commission's decision whether or not to include such a limitation or exception in the draft articles that it is currently developing. That decision is undoubtedly one of the most sensitive and difficult aspects of our work, yet it is also of the greatest interest to States and the international community as a whole.

183. It is useful to conduct this analysis in the light of the ongoing work of the Commission on the identification of custom, and especially in the light of the draft conclusions provisionally adopted by the Drafting Committee,[306] which the Commission took note of on first reading during the first part of the current session. The following elements that are relevant for the purposes of the present report may be deduced from the draft conclusions:

(*a*) to determine the existence of an international custom, it is necessary to ascertain whether there is a "general practice that is accepted as law (*opinio juris*)";[307]

(*b*) relevant practice "is primarily the practice of States",[308] which "consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions";[309]

(*c*) practice "may take a wide range of forms" and may, "under certain circumstances, include inaction";[310] the following forms are worth noting for our purposes: "diplomatic acts …; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; …; legislative and administrative acts; and decisions of national courts";[311]

(*d*) account is to be taken of all available practice of a particular State, which is to be assessed as a whole,[312] considering that "there is no predetermined hierarchy among the various forms of practice";[313]

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[304] See Ingrid Wuerth, "*Pinochet*'s legacy reassessed"; O'Keefe, "An 'international crime' exception to immunity of State officials from foreign criminal jurisdiction: Not currently, not likely".

[305] O'Keefe, "An 'international crime' …". On the other hand, Pedretti, *Immunity of Heads of State* …, pp. 57–98, conducted an interesting study that led her to conclude that such a custom exists.

[306] See A/CN.4/L.872 (available from the website of the Commission, documents of the sixty-eighth session).

[307] *Ibid.*, draft conclusion 2.

[308] *Ibid.*, draft conclusion 4, para. 1.

[309] *Ibid.*, draft conclusion 5.

[310] *Ibid.*, draft conclusion 6, para. 1.

[311] *Ibid.*, draft conclusion 6, para. 2.

[312] *Ibid.*, draft conclusion 7, para. 1.

[313] *Ibid.*, draft conclusion 6, para. 3.

(*e*) in any case, practice "must be general, meaning that it must be sufficiently widespread and representative, as well as consistent";[314]

(*f*) for practice to constitute international custom, it "must be undertaken with a sense of legal right or obligation";[315]

(*g*) in assessing practice and *opinio juris*, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which […] each of the [two] constituent elements"[316] used to that end;

(*h*) "decisions of international courts and tribunals, in particular of the International Court of Justice … are a subsidiary means for the determination" of customary norms,[317] but they do not constitute practice for the formulation of an international custom.[318]

184. In the light of these guidelines from the Commission, the Special Rapporteur considers that there are sufficient elements pointing to the existence of a customary norm that recognizes international crimes as a limitation or exception to immunity, for the following reasons:

(*a*) Despite the diversity of positions taken by national courts in the cases analysedabove, it is possible to identify a trend in favour of the exception, in particular but not limited to positions taken by national courts in the context of criminal jurisdiction;

(*b*) In cases where national courts have applied any form of limitation or exception based on the commission of international crimes, they have always done so in reference to the incompatibility of such crimes with existing norms or principles of contemporary international law; it is therefore possible to affirm that the decisions of national courts are based on the conviction that they are acting pursuant to international law and not in exercise of an absolute discretion, something that would hardly be compatible with the fulfilment of the judicial function. This conclusion is even more important for decisions taken by judicial bodies in countries which, at the time of the decision, did not have specific norms referring to the exercise of immunity, or in which, even when such norms existed, they did not refer expressly to a possible exception for international crimes. The conclusion is also important for cases where national courts exercised their jurisdiction without any reference to immunity in respect of specific State officials when they should have done so if they had considered it applicable, either because they referred to immunity in respect of other State officials (thereby recognizing such immunity), in the judgment in question, or because they had referred to said immunity in relation to international crimes allegedly committed by State officials in other judgments;

(*c*) The non-applicability of the immunity of State officials from foreign criminal jurisdiction in cases involving the commission of international crimes is reflected not only in judicial practice, but also in national laws adopted over the last two decades, which have gradually expressly incorporated such limitation or exception into domestic laws;

(*d*) State practice outside the judicial and legislative arenas, in particular within international organizations, also shows that most take the position that international crimes constitute a limitation or exception to immunity, as reflected in particular in statements delivered by States in the Sixth Committee in connection with this topic and in the written contributions of States in response to questions from the Commission under the present topic;

(*e*) The existence of a limitation or exception to immunity based on the commission of international crimes has also been recognized in writings by publicists, which must be considered a "subsidiary means" of identification of custom. In this connection, the Institute of International Law deserves special commendation, having referred to the existence of such exception in many of its resolutions since the beginning of the current century.

185. It should be noted, however, that some publicists and States have adduced critical arguments against the conclusions set out above, including (*a*) that there is equally significant practice against the application of a limitation or exception to immunity based on the commission of international crimes; (*b*) that international jurisprudence, in particular the decisions of the International Court of Justice and the European Court of Human Rights, has not recognized the existence of a limitation or exception to immunity based on the commission of international crimes; and (*c*) that State practice which supposedly serves as the basis of a customary norm does not fit in the category of general practice, and is also not sufficiently consistent or representative. Although the importance of these arguments cannot be ignored or minimized, the Special Rapporteur feels that they should be assessed in a nuanced manner.

186. It should be noted that the first objection mentioned above is based on general practice, which refers not only to the immunity of State officials, but also, and more importantly, to the immunity of the State. It is doubtful that such arguments might be considered relevant for the purposes of the current discussion because it is unlikely that they take into account the "overall context, the nature of the rule, and the particular circumstances"[319] of the means for determination mentioned above.

187. Second, even though the decisions of the International Court of Justice and the European Court of Human Rights are of great importance in the international legal order, they can only be considered "subsidiary means" of determination of the existence of a practice accompanied by *opinio juris* that is relevant as evidence of a customary norm and can never replace national courts in the process of formation of custom. Furthermore, the role of national courts is especially important for the topic under consideration, because

[314] *Ibid*., draft conclusion 8, para. 1.

[315] *Ibid*., draft conclusion 9, para. 1.

[316] *Ibid*., draft conclusion 3, para. 1.

[317] *Ibid*., draft conclusion 13, para. 1.

[318] In this connection, see the manner in which draft conclusion 6, para. 2, draft conclusion 10, para. 2, and draft conclusion 13, para. 2 refer to the role of the decisions of national courts and the limited manner in which draft conclusion 13, para. 1 refers to the decisions of international courts and tribunals (*ibid.*).

[319] *Ibid.*, draft conclusion 3.1.

immunity is always invoked before national courts and their decisions are an irrevocable element in ascertaining what a given State considers to be international law. As indicated above, the decisions of the International Court of Justice and the European Court of Human Rights, which are usually cited as authorities, refer directly to State immunity and, when they refer to the immunity of State officials from foreign criminal jurisdiction, they have limited scope (especially those of the International Court of Justice), since they concern immunity *ratione personae* exclusively.

188. Of greater value are the arguments relating to the non-general nature of the practice used to substantiate the existence of a limitation or exception to immunity. In that connection, it is the case that the decisions of national courts, domestic norms and other types of statements by States are limited in number and their content is sometimes not fully consistent or uniform. However, as the Commission itself has just recognized in its work on the identification of customary international law, the relevance of the volume of practice must be assessed in the light of the area in which it is found.[320] In the case at hand, that area is, of necessity, limited by the very nature of the acts to which it refers (international crimes), because, despite their gravity, these acts are carried out exclusively in international society. In addition, the limited number of national orders that allow proceedings to be brought for such crimes when committed on foreign soil or by foreign nationals also limits the volume of practice. It should be noted, however, that the coexistence of judgments that apply a form of limitation or exception alongside judgments that apply immunity even in the presence of international crimes is not entirely unrelated to the process of formation of international custom. Owing to its informal and spontaneous nature, that process allows for the coexistence of divergent practices, at least during the initial stages of formation of the norm, without jeopardizing the emergence thereof. Lastly, with regard to the non-representative nature of practice, it should be noted that manifestations of practice can be identified in various regional areas, and that calling into question the relationship between immunity and international crimes in a given regional area does not affect the applicability of the limitation or exception to any form of immunity, except for immunity from jurisdiction *ratione personae*. The debate that has been taking place in Africa over the past few years and mentioned above[321] is a good example thereof. In any event, even in a situation where there might be doubts as to the existence of a relevant general practice to give rise to an international custom, it does not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom.

189. Consequently, in the view of the Special Rapporteur, the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.

[320] On the "general" nature of practice, see the second report on identification of customary international law, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672, p. 163, especially pp. 185–188, paras. 52–57.

[321] See chapter III, sect. B.

2. Systemic foundation of international crimes as an exception to immunity

190. Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm.

(a) *Protection of the values of the international community as a whole:* jus cogens *and the fight against impunity*

191. As stated previously, national judicial practice provides examples in which international crimes are treated as limitations or exceptions to immunity. In the first type of case, the commission of international crimes is not covered by immunity, since the acts in question cannot be characterized as acts performed in an official capacity. In the second type of case, the commission of international crimes would constitute an exception to immunity even where those crimes have been committed as part of a State policy or in connection with the performance of State activities and may therefore be deemed to be acts performed in an official capacity. At any rate, both types of case have the same outcome: the immunity of State officials from foreign criminal jurisdiction cannot apply in the case of international crimes.

192. The reasons adduced in both cases are of a substantive nature and are linked to the characterization of international crimes as acts contrary to fundamental values, norms and legal principles of the international community. Ultimately, they are also linked to the assertion that such crimes violate *jus cogens* norms from which there can be no derogation. In both cases, the characterization of international crimes as constituting a limitation or exception to immunity is also connected with the obligations arising from the fact that the international community as a whole has identified impunity for the most serious international crimes as an undesirable phenomenon and therefore cooperates to eliminate it.

193. It is incontrovertible that international crimes are contrary to the fundamental values, norms and legal principles of the international community; this is admitted even by those who consider that immunity from foreign criminal jurisdiction can be applied in the case of international crimes. At any rate, this assertion constitutes the premise for the fight against impunity as one of the values and objectives of society and international law today. However, although this is evident and has not been called into question, the legal status of both assertions has been questioned, and the conclusion has been drawn that both represent mere values and trends that are not embodied in norms of international law. However, this questioning of their legal status is not supported by a systemic analysis of the phenomenon in the context of contemporary international law.

194. Although the concepts of impunity and the fight against impunity have an undeniable sociological dimension, it cannot be denied that both have also become legal concepts as a result of the development of international

law since the Second World War. The fact that both concepts have taken on a legal dimension is a result of the consolidation of two major areas of contemporary international law: international human rights law and international criminal law.[322]

195. The concept of "impunity" has acquired a legal dimension because social values have taken on the character of legal norms. For the current purposes, this legal dimension has been added essentially through the proclamation under international human rights law and international humanitarian law of a set of obligations relating to rights that are inherent in human dignity both in times of war and in times of peace and which, if not respected, have legal effects both on the State and on individuals. Their effects can be felt first through the rules pertaining to the international responsibility that States may incur by violating human rights and the norms of international humanitarian law, and second through the definition of international crimes for which the perpetrators may incur individual criminal responsibility. Both cases are expressions of the generic concept of responsibility, which, in the field of human rights, international humanitarian law and international criminal law, is conveyed by the term "accountability". The concept of impunity, understood in negative terms as an expression of "unaccountability", stands in opposition to the legal concept of accountability and, like accountability, has a legal dimension.[323] Furthermore, the elements to which "accountability" is applied and which are left unprotected as a result of "impunity" are also legal values: internationally recognized human rights, the essential norms for the protection of victims in situations of armed conflict and the prohibition of certain means and methods of combat. No one today would doubt that these values constitute norms of international law.

196. Furthermore, the concept of "the fight against impunity" has also taken on a legal dimension, in particular through the launch of mechanisms for international cooperation whose purpose initially was to determine the State's responsibility for the violation of the aforementioned norms and more recently has been to determine individual criminal responsibility. These mechanisms operate at the international level through the establishment of bodies of various kinds, including judicial bodies, for international human rights protection, and through the establishment of international criminal courts.

197. However, international cooperation is not limited to the establishment of international bodies and procedures. On the contrary, it should be noted that almost all the international treaties that institute systems for the protection of human rights impose on States the obligation to establish appropriate remedies for that purpose under their domestic law.[324] This is even clearer in the case of cooperation for the punishment of international crimes: under the standard model prior to the establishment of the international criminal courts or tribunals, it was left exclusively to States (and their courts) to punish international crimes through their domestic law and institutions. This model persists to a large extent today through the inclusion in international treaties relating to international crimes of an obligation on States to establish, under domestic law, the jurisdiction of their national courts to punish such crimes.[325]

198. Therefore, both the concept of impunity and the concept of the fight against impunity have an unequivocal legal dimension under both international law and States' domestic law. The fact that both terms are polysemous and have a clear sociological meaning does not deprive them of their legal dimension or limit them to being merely non-legal or metalegal concepts.

199. The legal nature of these concepts is also reflected in the link between them and *jus cogens* norms. Suffice

[322] It is not surprising, therefore, that the relationship between immunity and international crimes, under both international criminal law and international human rights law, has been analysed in studies published in the past 20 years. In this connection, see Van Alebeek, *The Immunity of States and Their Officials* ... On the human rights component of the debate, see Humes-Schulz, "Limiting sovereign immunity in the age of human rights"; Stigen, "Which immunity for human rights atrocities?"; Stephens, "Abusing the authority of the State: Denying foreign official immunity for egregious human rights abuses". It should also be borne in mind that the report prepared by Lady Fox for the Institute of International Law, which served as the basis for the adoption of the Naples resolution (2009) (see footnote 28 above), was entitled "The fundamental rights of the person and the immunity from jurisdiction in international law" (Institute of International Law, *Yearbook*, vol. 73-I and 73-II, Session of Naples, 2009, First and Second Parts, Paris, Pedone, 2009, p. 3).

[323] On accountability and impunity, see Van Ness, "Accountability"; Craig, "Accountability" (who has stated that accountability may have political, legal and financial elements); Thakur and Malcontent, eds., *From Sovereign Impunity to International Accountability: the Search for Justice in a World of States*; Bianchi, "Serious violations of human rights and foreign States' accountability before municipal courts". The important role of accountability in the rule of law has 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, and for this purpose … encourage States to strengthen national judicial systems and institutions" (General Assembly resolution 67/1 of 24 September 2012, para. 22) and "stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. In this respect, [they] underline that truth-seeking processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes" (*ibid.*, para. 21).

[324] At the international level, see the International Covenant on Civil and Political Rights, arts. 2, para. 3 (*a*), and 14 (see also general comment No. 32, adopted in 2007) [report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI]; and the Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (*c*). At the regional level, see the European Convention on Human Rights, arts. 6 and 13; the Charter of Fundamental Rights of the European Union, art. 47; the American Convention on Human Rights, arts. 8 and 25; and the African Charter on Human and Peoples' Rights, art. 7. For its part, the Human Rights Council has affirmed the need to "ensure accountability, serve justice [and] provide remedies to victims": Human Rights Council resolution 27/3 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

[325] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. V; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5 and 6; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 6; and the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV.

it to say that it is generally accepted that many of these norms recognizing human rights or prohibiting certain conduct are unequivocally peremptory norms. For the current purposes, this applies particularly to the crime of genocide, crimes against humanity, the most serious war crimes and torture, which are commonly referred to as violations of peremptory norms. It should also be borne in mind that the Commission itself has characterized them as such in its previous work on the law of treaties, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Since international crimes constitute violations of peremptory norms of international law, it is not surprising that some national courts have held that this fact is sufficient to conclude that the immunity of State officials from foreign criminal jurisdiction does not apply in cases in which international crimes have been committed. This explains why article 27 of the Rome Statute states that official capacity and national and international immunities cannot be invoked before the International Criminal Court and therefore cannot be used as a mechanism of procedural defence to bar the Court from exercising its jurisdiction.

200. This understanding of *jus cogens* as the basis for waiving immunity has been accepted by many national courts and a considerable number of States, as shown in the analysis of practice set out in chapter II above. However, it should be remembered that it was expressly rejected by the International Court of Justice in the *Jurisdictional Immunities of the State* case on the grounds that *jus cogens* norms and the norms governing State immunity are distinct sets of rules. Moreover, the European Court of Human Rights has used similar arguments to conclude that the State's immunity from civil jurisdiction is not waived in the case of acts of torture, which are nonetheless expressly recognized as violations of peremptory norms of international law.

201. With regard to the assessment of that judgment in terms of its impact on the definition of *jus cogens* norms—something that does not need to be addressed in the present context—[326] it should be noted that, in the judgment, the Court did not address the interpretative effect of this type of norm, a point of particular interest to which the Commission itself has drawn attention in the past. As the Commission has already stated, the conflict between primary norms, as in the case currently under consideration, should not necessarily be resolved by determining responsibility; it should be borne in mind that all *jus cogens* norms have an interpretative effect that allows possible contradictions to be resolved without the need to consider the issue in relation to the rules of responsibility.

202. This interpretative effect should be borne in mind when addressing the relationship between the immunity of State officials from foreign criminal jurisdiction and international crimes. Thus, insofar as an international crime is a violation of a *jus cogens* norm, as is indisputably the case with regard to torture, this circumstance should be borne in mind by legal professionals in order to arrive at an interpretation that reconciles both norms. Such interpretations will have to be made on a case-by-case basis but, in principle, it would be possible to waive immunity from criminal jurisdiction either on the grounds that such crimes cannot be acts performed in an official capacity or on the grounds that immunity must be waived in certain particularly serious circumstances in which fundamental legal values of the international community are undermined.

203. Furthermore, it should be borne in mind that the conclusion of the International Court of Justice with regard to State immunity cannot be applied automatically and in all respects to the relationship between the immunity of State officials from foreign criminal jurisdiction and *jus cogens* norms. As the Court stated in its 2012 judgment, there is no conflict between immunity and *jus cogens* because immunity is a procedural matter and *jus cogens* is substantive in nature. Therefore, the mere establishment of a bar to the exercise of jurisdiction does not prevent a State from incurring responsibility through another channel and, therefore, does not result in a derogation from the *jus cogens* norm; thus one of the essential characteristics of peremptory norms—namely the impossibility of derogating from them under any norm of international law apart from another *jus cogens* norm—is preserved.

204. Bearing in mind that the Court is referring to immunity from civil jurisdiction, a State's responsibility and, above all, the legal consequences thereof (restitution of a right, payment of compensation, payment of damages, etc.) may be determined through another channel, either domestic (the courts of the State that is alleged to bear civil responsibility) or international (international courts, where possible; exercise of diplomatic protection; arbitration; or negotiation, *inter alia*). Therefore, the Court's assertion that immunity is an exclusively procedural institution cannot be challenged in strictly legal terms.

205. However, this conclusion cannot be applied absolutely to the type of immunity referred to in the present report. The immunity of State officials from foreign criminal jurisdiction has two specific characteristics that must be borne in mind: (*a*) it is exercised before the criminal courts; and (*b*) it has the effect of blocking any legal action whose purpose is to determine individual criminal responsibility for a certain type of crime. Beginning with the second of these characteristics, it cannot be denied that the only way to determine such criminal responsibility and to produce the necessary outcomes (declaration of innocence or guilt and, where appropriate, imposition of a penalty) is through criminal proceedings, which cannot be replaced by any of the alternative mechanisms referred to in the previous paragraph, in particular arbitration, diplomatic protection or inter-State negotiation. Therefore, immunity will fully meet the criteria to be considered a "procedural bar" only where recourse can be had to a criminal law mechanism other than the courts of the forum State in order to determine the possible criminal

[326] With regard to this issue, see, *inter alia*, Bakircioglu, "*Germany v Italy*: The triumph of sovereign immunity over human rights law"; Barker, "International Court of Justice: *Jurisdictional Immunities of the State (Germany v. Italy)* Judgment of 3 February 2012"; Bianchi, "Gazing at the crystal ball (again): State immunity and *jus cogens* beyond *Germany v. Italy*"; Boudreault, "Identifying conflicts of norms: The ICJ approach in the case of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*"; Orakhelashvili, "Jurisdictional Immunities of the State, ICJ, Feb. 3 2012"; Vidmar, "Rethinking *jus cogens* after *Germany v. Italy*: Back to article 53?".

responsibility of a State official, whether that mechanism be the criminal courts of the State of the official, a competent international criminal court or another national court that, through the application of special rules, is competent to try the State official without the possibility of immunity being claimed before that court. However, it cannot be absolutely guaranteed that proceedings may be brought before one of these alternative courts, since this will depend on many circumstances, such as the existence of special norms in the State of the official that prevent him or her from being tried, the absence of jurisdiction of the international court or the existence of treaty norms that unequivocally allow for the intervention of a third State. If none of these alternative courts can try the international crimes, the phenomenon that has already been analysed in chapter III, section A, abovearises: immunity from foreign criminal jurisdiction loses its exclusively procedural nature and acquires a substantive component, so that it becomes both a "procedural bar" and a "substantive bar". The judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case did not contemplate that possibility and, therefore, it is not possible to conclude that the Court's assertion that there is no conflict between immunity and *jus cogens* norms applies in the case of immunity of State officials from foreign criminal jurisdiction in relation to the commission of international crimes.

(b) *Access to justice and the right of victims to reparation*

206. Closely related to the arguments set out in the preceding paragraphs is the assertion that applying immunity from jurisdiction in relation to international crimes constitutes a denial of victims' right of access to justice and to obtain reparation for the crimes they have endured.

207. Denial of the right of access to justice has traditionally been one of the arguments used to limit the scope of any form of immunity.[327] This right has, without doubt, the benefit of being a basic right without which the right to effective judicial protection and to a fair trial is meaningless.[328] However, as the European Court of Human Rights has stated,[329] the right of access to justice is subject to limitations and, in the case of the relationship between that right and immunity, requires a purposive approach, taking into account the fact that—by definition—immunity serves to "block" judicial proceedings and that it therefore necessarily entails a limitation on the right of access to justice.

208. Moreover, in the case of the immunity of State officials from foreign criminal jurisdiction, the right of access to justice has some specific characteristics that should be duly taken into account. First, criminal proceedings will not necessarily be brought by those who were the victims of the crime and, the initiation of proceedings against officials of a third State for international crimes may be subject to certain limits established by national laws that allow the organs of the State to control the exercise of jurisdiction on the grounds, in principle, of defence of the State's public interests. Second, proceedings are not initiated solely in defence of the individual interests and rights of the victims, but also for the benefit of national and international public order, so as to ensure compliance with norms that are considered essential by the international community as a whole. Lastly, the purpose of the proceedings is precisely to determine individual criminal responsibility for the commission of international crimes, which can be achieved only through judicial channels, whether that be the courts of the forum State, the courts of the State of the official or an international criminal court. In this context, it is no simple matter to determine what is meant by the right of access to justice and in what circumstances the right is not guaranteed because immunity from criminal jurisdiction applies, even in cases where international crimes have been committed.

209. It is clear that an individual's right of access to the courts in order to file a complaint or accusation regarding the commission of an international crime will be limited by the application of immunity. However, this right will also be compromised if criminal proceedings are initiated by the competent authorities of the State and those proceedings are stalled by the application of immunity. In order for this limitation to make immunity incompatible with the right of access to justice, it must, as stated by the European Court of Human Rights, amount to a loss of the right itself. In other words, there must be no other means of securing a court decision on whether or not an international crime has been committed and whether, if such a crime has been committed, the State official is criminally responsible for the crime. If no such remedy is available, immunity will not only have the effect of denying the right of access to justice but will also allow the perpetuation of a situation at the root of which is an act—the international crime—that is contrary to peremptory norms of international law. From this perspective, and in these very particular circumstances, the right of access to justice may constitute a sufficient legal basis to conclude that immunity from foreign criminal jurisdiction is inapplicable in the case of international crimes.

210. In the case of the right of victims of international crimes to reparation, it cannot be denied that this is one of the most advanced developments in contemporary international criminal law: the commission of international crimes cannot have as its sole consequence the punishment of the perpetrators of those crimes; there should also be a system of reparations for the harm caused to the victims. This dimension of criminal justice is present in the laws of a number of countries establishing the right to reparation of the victims of a crime. The right is exercised either as an outcome of the criminal proceedings themselves or as a result of civil proceedings for the sole purpose of obtaining reparation for the harm caused by the crime, whether or not a criminal judgment has been issued on the matter.

211. The right to reparation is also a familiar concept in international law. For example, there are decisions of various international bodies that recognize the right to reparation of victims of human rights violations and

[327] See the commentary on the judgment of the Italian Constitutional Court of 22 October 2014 (para. 122 *supra*).

[328] See European Court of Human Rights, *Golder v. the United Kingdom*, 21 February 1975, Series A, No. 18, paras. 28–36.

[329] See chap. II, sect. C.2.

international crimes.[330] The right to reparation was even claimed before the International Court of Justice in the *Jurisdictional Immunities of the State* case, although the Court did not rule on that point.[331] In any case, the right to reparation of the victims of international crimes is expressly recognized in article 75 of the Rome Statute, which has led to significant institutional[332] and jurisprudential[333] developments.

212. However, the characterization of the right of victims to reparation as the basis for an exception to immunity in the case of international crimes requires a nuanced analysis that is to a large extent related to the ability to initiate legal action for compensation. In that context, it should be borne in mind that such legal action may be filed with the criminal or civil courts and, in civil cases, is not dependent on a prior criminal conviction. In both cases, the victim's right to reparation has a different effect on the limitation on or exception to immunity. It is clear that this should be borne in mind as a basis for a limitation or exception when reparation can be obtained only through criminal proceedings, which therefore become an essential condition for obtaining reparation. In this case, the effect that immunity may have on the victims' right to reparation supplements the argument referred to above on the substantive dimension of immunity from foreign criminal jurisdiction.

213. However, the conclusion is not so clear in cases where reparation can be obtained only through proceedings before the civil courts, since in such cases the alternative mechanisms referred to above may come into operation. Furthermore, in these cases there is a renewed risk of confusion between the immunity of the State official and the immunity of the State, which could be considered to bear subsidiary civil responsibility.

214. Consequently, irrespective of the debate on the right of victims to reparation, it does not appear possible to conclude that the right to reparation may constitute in and of itself an autonomous legal basis for an exception to the immunity of State officials from foreign criminal jurisdiction. In any case, this does not prevent the right to reparation from being evaluated as a complementary legal argument in favour of such an exception. In that context, the practice of certain States is particularly relevant; for example, the United States and Canada recognize in their domestic law an exception to immunity from civil jurisdiction in the case of certain claims for damages arising from the commission of international crimes. At a different level, the work of the Institute of International Law should also be borne in mind: in its resolution on universal civil jurisdiction[334] with regard to reparation for international crimes, it proclaimed both the right of victims to reparation and the right to effective access to justice to claim reparation (art. 1, paras. 1 and 2).

(c) *The obligation to prosecute international crimes*

215. The gravity of international crimes has been reflected in the adoption of a number of treaties that impose on States parties the obligation to exercise jurisdiction over such crimes. This treaty obligation has been regarded by some authors as the legal basis for concluding that the commission of international crimes constitutes a limitation or exception to immunity,[335] with reference in some degree to the experience of the *Pinochet* case. Accordingly, the duty of States parties to establish their own jurisdiction over certain international crimes obliges them to exercise jurisdiction in respect of any person who has committed crimes covered by such treaties, with no possibility of applying immunity. In a sense, States parties have implicitly waived the right to exercise of immunity from foreign criminal jurisdiction in respect of such crimes.

216. This is an interesting interpretation that seeks to preserve the duty of national courts to prosecute international crimes without the need to affect the essential elements of immunity from jurisdiction, in particular the consideration of immunity as an autonomous right of the State, and without the need to give a view on the characterization of international crimes as acts performed in an official capacity. It also has the advantage of being based on a treaty obligation that binds both the forum State and the State of the official, thus obviating the need to debate whether or not there is a customary norm that serves as the basis for limitations or exceptions to immunity. However, its value as a basis for limitations or exceptions is limited, since it would apply only to international crimes governed by treaties and does not take into account the existence of other treaties that do not include the obligation to establish jurisdiction. However, above all it is difficult to reconcile with the model of the relationship between jurisdiction and immunity described above, in which immunity can be applied only in respect of a pre-existing jurisdiction and in which, therefore, it is not logical to maintain that immunity does not apply precisely because the State has previously established its jurisdiction with

[330] See General Assembly resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Human Rights Council resolution 27/3 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and general comment No. 3 (2012) of the Committee against Torture on the implementation of article 14 (report of the Committee against Torture, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), p. 254). On the treatment of the right to reparation in the doctrine, see, *inter alia*, Cruz, "El derecho de reparación a las víctimas en el derecho internacional …".

[331] See chap. II, sect. C.1, above.

[332] For this purpose, the Assembly of States Parties established the Trust Fund for the benefit of victims, which is playing an important role in the Court's general system. In this regard, see resolution ICC-ASP/1/Res.6 of 9 September 2002 (Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims), in ICC-ASP/1/3, and resolution ICC-ASP/4/Res.3 (Regulations of the Trust Fund for Victims).

[333] International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 (ICC-01/04-01/06-2904). See also Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations of 3 March 2015 (ICC-01/04-01/06-3129). In the judgment, the Appeals Chamber concluded that the victims' right to reparation derived from the personal responsibility of the convicted person and instructed the Trust Fund to award collective reparations. See Val Garijo, *Las víctimas de graves violaciones de los derechos humanos y del derecho internacional humanitario en el derecho internacional penal*.

[334] See footnote 28 above.

[335] See Akande and Shah, "Immunities of State officials, international crimes and foreign domestic courts"; d'Argent, "Immunity of State officials and the obligation to prosecute".

regard to international crimes. In any case, this argument has the value of underlining the important contribution that treaties governing the phenomenon of international crimes have made to the definition of limitations and exceptions to immunity from foreign criminal jurisdiction and of emphasizing the fact that limitations and exceptions to immunity may in some cases have a treaty basis.

217. In sum, the arguments that have been analysed above make it clear that there are sufficient grounds in contemporary international law to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction. In the Special Rapporteur's view, there are therefore grounds to include such a limitation or exception in the draft articles, whether or not it is concluded that international custom establishes such a limitation or exception.

3. International crimes that constitute a limitation on or exception to immunity

218. In order to define a limitation on or exception to immunity from foreign criminal jurisdiction, it is necessary to define the concept of "international crime" and to identify the criminal acts that may be included within that concept.

219. At the outset, it should be noted that the term "international crime" refers to criminal conduct that is of international concern, either because it is undertaken in an international context and has a transnational or transboundary dimension, or because it undermines international legal values, irrespective of where it occurs. In both cases, these crimes are subject to international regulation. The first category includes crimes such as piracy, drug trafficking, human trafficking, corruption and other forms of international organized crime. The second includes the crime of genocide, crimes against humanity, war crimes, the crime of aggression, torture, enforced disappearance and apartheid. Although both categories generally consist of crimes that undermine the values and interests of States and the international community, only the latter category can, strictly speaking, be considered to constitute "international crimes" or "crimes under international law" that undermine the fundamental legal values of the international community as a whole.

220. Furthermore, a review of the practice analysed in chapter II of the present report shows that there are very few crimes identified in national laws as constituting exceptions to immunity from foreign criminal jurisdiction. Similarly, there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes. The same pattern may be discerned in treaty practice and the Commission's past work on other topics.

221. After analysing that practice, it is possible to conclude that international crimes that constitute a limitation on or exception to the application of immunity are generally those which, in the view of the international community, can give rise to criminal proceedings in international criminal courts or tribunals, in particular the International Criminal Court. As a result, these crimes should be placed in the same category as the crime of genocide, crimes against humanity and war crimes.

222. On the other hand, it is difficult, for the purposes of the present report, to extend this characterization to the crime of aggression, even though it, too, is a crime that falls under the jurisdiction of the International Criminal Court. There are several reasons for this: the Court's jurisdiction over this crime is optional and not automatic, as is the case with the other international crimes; the Commission itself already indicated in the draft Code of Crimes against the Peace and Security of Mankind of 1996 that the crime of aggression must be entrusted primarily to international courts and tribunals, given the political implications it could have for the stability of relations between States; there are very few pieces of national criminal legislation that address this crime; and, lastly, there do not appear to be any cases of State practice in which the crime of aggression has been characterized as a limitation on or an exception to the exercise of immunity, at either the legislative or the judicial level.

223. There is nothing to prevent the establishment, by means of a treaty, of an exception to immunity from foreign criminal jurisdiction in relation to the first category of international crimes identified above. However, their inclusion in the category of crimes that give rise to the definition of a custom-based limitation or exception is not supported by practice.

224. Finally, it must be borne in mind that the national case law that has given rise to the limitation or exception analysed in the present section was derived primarily from a large number of torture cases. Although the crime of torture may, in principle, be considered to be included under the category of crimes against humanity, it will not always be possible to do so, especially when the acts of torture in question are not part of a plan or policy. Nevertheless, national courts have sometimes withheld immunity from jurisdiction in cases of torture in which this criterion has not always been met. Thus, in view of the seriousness of this crime and the fact that its prohibition has consistently been regarded as a *jus cogens* norm, it seems reasonable to include torture expressly among the international crimes that constitute a limitation on or exception to the immunity of State officials from foreign criminal jurisdiction. Enforced disappearances are in a similar situation, although State practice in relation to them is more limited. In any event, owing to its seriousness, torture has been characterized as a "crime under international law" in various treaties when it is committed in a grave or systematic fashion. Given these circumstances, it seems appropriate to include torture in the list of crimes under international law that constitute a limitation on or exception to the immunity from the jurisdiction referred to in the present report.

B. "Territorial tort exception"

225. The "territorial tort exception" had its origin in the law of diplomatic immunities and was later extended to State immunity. It has been incorporated into all national laws governing immunity, with the exception of those of Pakistan, and into the United Nations Convention on Jurisdictional Immunities of States and Their Property. It can be

considered that the content of this exception is described in article 12 of the Convention (see paragraph 27 above).

226. As indicated by the Commission in its commentary to article 12, this exception is justified by the preferential nature of the jurisdiction of the State in whose territory the acts are carried out. In addition, it provides a remedy for individuals who have suffered harm as a result of acts committed by a State official and who would normally not have access to any other legal means of redress.[336] This exception was also analysed in the 2007 memorandum by the Secretariat[337] and in the second report of the previous Special Rapporteur, Mr. Kolodkin, who concluded that it could constitute an exception to immunity *ratione materiae*, provided that the acts were committed in the territory of the forum State by a foreign official who had been present in the territory of that State without the State's express consent for the discharge of his or her official functions.[338]

227. While the above-mentioned exception was intended to be applied mainly in the context of diplomatic relations and was later extended to the acts of agents and officials of international organizations and to the immunity of the State, it is certainly possible to find examples of State practice in which the courts of the forum State have relied on the "territorial tort exception" to conclude that immunity from jurisdiction is not applicable to the officials of a foreign State. These are cases in which the national courts have applied the territorial tort exception in relation to acts constituting injury, political assassination, espionage or sabotage committed in the territory of the forum State by officials of a foreign State.[339] In such cases, the courts have denied immunity, despite recognizing the person concerned as a State official and establishing a connection between the State of the official and the act in question.

228. In some cases, the courts have concluded that—in spite of everything—immunity would remain applicable, and justified that conclusion by characterizing the acts in question as *acta jure imperii* and immunity as the immunity of the State and not that of its officials. This was the case with the decision of the Irish court in *McElhinney* and that of the European Court of Human Rights on the same set of facts. Similarly, it is worth noting the case of *Jurisdictional Immunities of the State*, in which the International Court of Justice denied the claims of Italy with regard to the application of this exception, on the grounds that, because the acts that had caused the injury had been committed by the Nazi troops during an armed conflict, they should have been characterized as *acta jure imperii*.

229. In short, State practice, although limited, seems to be consistent in recognizing the application of this limitation on or exception to the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur considers that this conclusion, together with the importance to be accorded the principle of territoriality in this case, justifies the inclusion of the "territorial tort exception" as a limitation on or exception to immunity from jurisdiction in the draft articles currently being formulated.

C. Corruption as a limitation on or exception to immunity

230. As already mentioned in the Special Rapporteur's fourth report, immunity has sometimes been invoked before national courts in relation to certain forms of conduct which, even if they have the appearance of having been performed in an official capacity, were carried out in the exclusive interests of the State official in respect of whom the exercise of jurisdiction is sought. Immunity has also been invoked by State officials in the context of criminal proceedings concerning activities that are unrelated to the functions of the State (misappropriation of funds, money-laundering, etc.) but which can only be performed because of the perpetrator's status as an official and which, moreover, usually cause economic harm to the State of the official. In such cases, the response of national courts has generally been to deny immunity.[340] Such activities constitute a broad category, which includes embezzlement, diversion and misappropriation of public funds, money-laundering and other manifestations of corruption.

231. It can be asserted in general terms that, in the light of the criteria established in the fourth report, all these cases do not involve acts that can be considered as having been carried out in an official capacity. In principle, therefore, there appears to be no need at present to analyse them from the perspective of limitations or exceptions. However, practice shows that, in a number of the cases, it was not easy to determine clearly whether the act concerned was official or private, in particular since the act in question was only capable of being performed because of the official status of its perpetrator and the latter's ability

[336] See chap. II, sect. A above.

[337] See document A/CN.4/596 and Corr.1 (footnote 3 above), paras. 162–165.

[338] See *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, pp. 422–424, paras. 81–86.

[339] See the following cases: Germany, judgment of 15 May 1995, Federal Constitutional Court (immunity denied to intelligence officials of the former German Democratic Republic); New Zealand, *Rainbow Warrior*, judicial phase (see footnote 217 above) (attack on a Greenpeace ship that resulted in the death of a Dutch citizen and the sinking of the ship; the Court did not raise the issue of immunity); Italy, *Abu Omar* (cited by Gaeta: "*Extraordinary renditions* e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar" (abduction and illegal transfer of a person); United States, *Letelier v. Chile* (see footnote 228 above); United States, *Jiménez v. Aristeguieta* (see footnote 228 above); United States, *In re Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren, et al.* (see footnote 228 above); United Kingdom, England, *Khurts Bat v. Investigating Judge of the German Federal Court*, [2011] EWHC2029 (Admin) (abduction and illegal transfer of a person in Germany) (this decision provides an interesting analysis of the issue of exceptions in paragraphs 86–101). The courts of Italy and Greece have also accepted this exception, in Italy, *Ferrini v. Federal Republic of Germany* (footnote 215 above), and Greece, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of Cassation, judgment, 4 May 2000, ILR, vol. 129, p. 513 (see judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*). The International Criminal Tribunal for the Former Yugoslavia has also referred to this exception, in *Blaškić* (see footnote 187 above), para. 41.

[340] See, in particular, the following cases: Switzerland, *Adamov* (see footnote 216 above); Chile, *Fujimori* (footnote 215 above), paras. 15–17 (the decision was adopted in connection with extradition proceedings relating to grave human rights violations and corruption); France, *Teodoro Nguema Obiang Mangue*, judgment of 13 June 2013 and application for annulment, judgment of 16 April 2015 (footnote 210 above) (the Court made the statement cited after re-examining the arguments and statements of the judgment of 13 June 2013); United States, *In re Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren, et al.* (see footnote 228 above). However, a Swiss court has upheld immunity, even in a case concerning the diversion of public funds: *Marcos and Marcos v. Federal Department of Police* (see footnote 224 above).

to take advantage of the State structure, sometimes by means of acts that were ostensibly official. Nevertheless, even in such cases, in which the boundaries are not clear, national courts have as a rule concluded that immunity is not applicable, relying in most cases on the intention of the perpetrators of the acts, namely to make use of their official position exclusively for their own benefit, thereby causing harm to the State of which they are, or were, officials. Such a scenario therefore constitutes a clear case of what has been characterized above as a limitation to immunity, since immunity cannot be invoked in such cases owing to the incompatibility of the alleged act that gives rise to the attempt to exercise jurisdiction with one of the normative elements of immunity.

232. This is particularly clear in respect of acts that may fall under the term "corruption", where the State official acts unlawfully (in contravention of his or her mandate), or *ultra vires* (beyond his or her mandate). As stated in the previous reports, the fact that the act performed by the official is unlawful does not necessarily mean that he or she is not covered by immunity, if it is possible to determine that the act in question, despite being unlawful, was performed in an official capacity, that is to say, in the performance of State duties. However, *ultra vires* acts cannot in principle be covered by immunity, since, by definition, they are presumed not to have been performed in the exercise of State duties and, consequently, can never have been performed in an official capacity.

233. However, these conclusions, while theoretically indisputable, raise a considerable number of questions, and must in any event be reached on a case-by-case basis by the competent national court. This introduces a certain degree of uncertainty into an area—corruption among public officials—which is a focus of great concern for States, as demonstrated by the conclusion of international treaties dealing with this serious issue at both the international and the regional levels. Although such treaties do not generally refer to the question of immunity for the purpose of precluding its application in corruption cases involving foreign public officials, they have established a set of principles whose central aim is to ensure that State jurisdiction can be exercised effectively in order to suppress such conduct.[341]

234. Consequently, taking into account judicial practice and the fact that the suppression of corruption at the national and international levels constitutes a key objective of international cooperation,[342] it might be appropriate to include in the draft articles a provision that expressly defines corruption as a limitation on or exception to the immunity of State officials from foreign criminal jurisdiction.

D. Limitations on and exceptions to immunity *ratione personae* and immunity *ratione materiae*

235. Having identified the circumstances that might constitute a limitation on or exception to immunity, it is necessary to determine if they are generally applicable to all types of immunity of State officials from foreign criminal jurisdiction (*ratione personae* and *ratione materiae*) or only to one (*ratione materiae*). The goal is to determine whether or not Heads of State, Heads of Government and Ministers for Foreign Affairs, during their term of office, are affected by the limitations on or exceptions to immunity analysed above.

236. In making such a determination, it is important to bear in mind three considerations: (*a*) the way in which this matter has been approached in practice; (*b*) the purpose of, and the property protected by, immunity *ratione personae* and immunity *ratione materiae*; and (*c*) the differences between the normative elements of each of these types of immunity, in particular the temporal element. The substantive content of each limitation or exception analysed does not provide the information necessary to reach a decision as to the applicability or non-applicability of said limitation or exception to each type of immunity. In essence, crimes under international law, corruption and harm caused to persons and property are of the same gravity irrespective of who committed them.

237. Having said that, practice shows that national courts have generally recognized the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances, without taking into consideration the possible existence of one of the limitations or exceptions examined above. This is especially patent in the case of international crimes, where national courts have generally recognized the immunity of the members of the *troika*. Moreover, such immunity has been recognized at the highest jurisdictional levels; indeed, even when a court of first instance has ruled that immunity is not applicable in the case of an international crime, the higher courts have overturned said decision and concluded that immunity is applicable.[343] Similarly, it has not been possible to find cases

[341] In this connection, see United Nations Convention against Corruption, arts. 42 and 44–46; Criminal Law Convention on Corruption, arts. 17 and 25–27; Inter-American Convention against Corruption, art. V; and African Union Convention on Preventing and Combating Corruption, arts. 13, 15, 18 and 19.

[342] In a development closely related to the present report, it should be noted that the African Union has included corruption among the crimes within the jurisdiction of the International Criminal Law Section of the African Court of Justice and Human Rights. On a more general level, international concern about corruption and the need to combat it has been reflected in various activities undertaken by the Organization for Economic Cooperation and Development and the United Nations Office on Drugs and Crime. The General Assembly has affirmed the need for a zero-tolerance approach to corruption, including within the United Nations itself, emphasizing that "the zero-tolerance approach to fraudulent acts and corruption … is indispensable for the strengthening of accountability at all levels" (General Assembly resolution 70/255 of 1 April 2016: Progress towards an accountability system in the United Nations Secretariat, para. 4). This concern has also been reflected in the literature. See Boersma, *Corruption: a Violation of Human Rights and a Crime under International Law?*; American Society of International Law, *Proceedings of the 107th Annual Meeting. April 3–6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World"; Bonucci, "The fight against foreign bribery and international law: an exception or a way forward?"; Rose-Ackerman, "International anti-corruption policies and the U.S. national interest" and Dubois, "Remarks"); De la Cuesta Arazmendi, "Iniciativas internacionales contra la corrupción"; Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*; Jiménez García, *La prevención y lucha contra el blanqueo de capitales y la corrupción …*; Kofele-Kale, *"Sed quis custodiet ipsos custodies?* (But who will guard the guardians?) …"; Olaniyan, *Corruption and Human Rights Law in Africa*; Olivares Tramón, "Democracia, buena gobernanza y lucha contra la corrupción en el derecho internacional".

[343] See the case of *Gaddafi* before the French courts (footnote 209 above).

in which a national court has declared non-applicable the immunity of a Head of State, a Head of Government or a Minister for Foreign Affairs during his or her term of office on the grounds of the territorial tort exception or acts of corruption, with the sole exception, in the latter case, of the ruling of the Court of Appeal of Paris in the *Teodoro Nguema Obiang Mangue* case.

238. National laws that provide for limitations or exceptions to immunity for international crimes generally do not apply said limitations or exceptions in respect of members of the *troika* during their term of office. Furthermore, national laws that do not distinguish between Heads of State, Heads of Government and Ministers for Foreign Affairs and other State officials with regard to exceptions to immunity generally do so for the sole purpose of cooperating with the International Criminal Court. Only the laws of Burkina Faso, the Comoros, Ireland, Mauritius and South Africa appear to contemplate an exception in cases of international crimes that applies to all State officials, regardless of rank.[344]

239. In addition, the International Court of Justice has stated expressly that there exists a customary norm that recognizes the complete or absolute immunity of Ministers for Foreign Affairs, which is also applicable to Heads of State and Heads of Government, and which allows no exception, not even for the commission of the most serious crimes, such as genocide, crimes against humanity and war crimes. This limitation on the exception to immunity *ratione materiae* based on the commission of international crimes is also supported by the majority of publicists, especially the Institute of International Law, as seen in its 2009 resolution.[345]

240. Therefore, it has not been possible to determine, on the basis of practice, the existence of a customary rule that allows for the application of limitations on or exceptions to immunity *ratione personae*, or to identify a trend in favour of such a rule. However, the limitations on and exceptions to the immunity of State officials from foreign criminal jurisdiction do apply to State officials in the context of immunity *ratione materiae*.

241. This limitation cannot, however, be construed as a form of immunity. That said, it is important to recall that immunity *ratione personae* is of a highly temporal nature, as established in draft article 4, which was provisionally adopted by the Commission in 2013. Pursuant to that provision, following the end of their term of office, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs enjoy immunity *ratione materiae* in relation to acts carried out in their official capacity during their term of office. Following the end of their term of office, therefore, they are wholly subject to the regime of immunity *ratione materiae*, including the limitations thereon and exceptions thereto. In other words, the exclusion of Heads of State, Heads of Government and Ministers for Foreign Affairs from the regime of limitations on and exceptions to immunity is of a temporal nature, owing primarily to the role that they play as representatives of the State in international affairs.

242. Nevertheless, it is true that in specific circumstances, the exclusion may be permanent rather than temporary, especially in the case of monarchs, who are in office for life and who cannot be removed from office, and Heads of State and Government who, for various reasons, become mandate holders for life. Although in these cases, limitations on and exceptions to immunity are also non-applicable, it would be useful to recommend that the States concerned consider the possibility of lifting the immunity of their officials when requested, especially in the case of the most serious international crimes. Nevertheless, this recommendation will need to be analysed in the sixth report, in the context of the procedural aspects of immunity.

E. Draft article

243. On the basis of the analysis undertaken in this fifth report, a draft article on the limitations on and exceptions to immunity from foreign criminal jurisdiction is proposed below. In addition to the arguments developed above, the Special Rapporteur considered a number of other points when formulating the draft article.

244. Firstly, the distinction between limitations and exceptions, while useful in terms of methodology, had been controversial in normative terms, especially as a result of the discrepancies in the characterization of a particular act as a limitation or an exception in line with the analysis above; this is especially true in the case of international crimes. The Commission was faced with a similar situation when formulating its. At that time, the Commission opted for a cautious formulation which avoided the terms "limitation" and "exception" and instead generically referred to "proceedings in which … immunity cannot be invoked".[346] The Special Rapporteur has used the same formulation in the draft article proposed in the present report.

245. Secondly, the draft article does not cover waivers of immunity by the State of an official. Owing to its highly procedural nature, this issue should be dealt with in the sixth report which, according to the programme of work initially proposed by the Special Rapporteur, will be prepared once the substantive issues have been addressed. Taking such an approach to waivers is consistent not only with the study carried out by the Secretariat but also with the third report of the previous Special Rapporteur, Mr. Kolodkin; it is also in line with the Commission's approach in preparing its draft articles on jurisdictional immunities of States and their property.

246. Thirdly, it is recognized that nothing prevents States from establishing, by means of international treaties, circumstances in which immunity from foreign criminal jurisdiction is not applicable. This has already occurred in practice and is fully consistent with treaty law. Therefore, a specific reference to this possibility has been included in the proposed draft article. For the same reason, a specific reference to the duty to cooperate with international criminal courts or tribunals has also been included.

[344] See chap. II, sect. B, above.

[345] See footnote 28 above.

[346] *Yearbook … 1991*, vol. II (Part Two), p. 13, para. 28, at p. 33, part III of the draft articles on jurisdictional immunities of States and their property.

247. Lastly, the Special Rapporteur wishes to underscore that the application of this draft article should be understood in the light of the procedural rules on the application of immunity that may be established in the future. Although such rules would not change the substantive content of the draft article with regard to the identification of situations in which immunity does not apply, it will be possible at such time to establish specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protect both States and individuals. However, it does not appear necessary at this time to introduce a specific reference to this issue in the draft article.

248. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"Draft article 7. Crimes in respect of which immunity does not apply

"1. Immunity shall not apply in relation to the following crimes:

"(*a*) genocide, crimes against humanity, war crimes, torture and enforced disappearances;

"(*b*) corruption-related crimes;

"(*c*) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

"2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

"3. Paragraphs 1 and 2 are without prejudice to:

"(*a*) any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;

"(*b*) the obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State."

Chapter V

Future workplan

249. Following the programme of work initially proposed by the Special Rapporteur, her sixth report will address the procedural aspects of immunity of State officials from foreign criminal jurisdiction. It will also revisit the concepts of jurisdiction and immunity originally proposed by the Special Rapporteur in her second report. These concepts will have to be analysed from a procedural perspective with a view to identifying, in particular, the acts specific to the investigation and prosecution of a given crime in respect of which immunity is applicable.

250. The analysis of the procedural aspects of immunity is the last issue included in the initial programme of work; therefore, the Commission will be in a position to conclude its consideration of the topic and adopt the draft articles on first reading in 2017. Consequently, after the period required for States to submit written comments, the Commission will be able to review any such comments and the Special Rapporteur's proposals in 2019 and, as appropriate, proceed to the final adoption of the draft articles on second reading.

251. In any event, this workplan is subject to the decisions that will be adopted in the next quinquennium by the Commission members to be elected by the General Assembly in November 2016.

Annex I

Draft articles provisionally adopted by the Commission

Part One

INTRODUCTION

Draft 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 connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(*e*) "State official" means any individual who represents the State or who exercises State functions.

Part Two

IMMUNITY *RATIONE PERSONAE*

Draft 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.

Draft 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*

Draft article 5. Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Annex II

Draft articles provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session, in 2015

Part One

INTRODUCTION

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(*f*) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part three

IMMUNITY *RATIONE MATERIAE*

Draft 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.

Annex III

Draft article proposed for the consideration of the Commission at its sixty-eighth session, in 2016

Draft article 7. Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(*a*) genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(*b*) corruption-related crimes;

(*c*) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(*a*) any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(*b*) the obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/694

Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur*

[*Original: English*]
[*7 March 2016*]

CONTENTS

* The Special Rapporteur gratefully acknowledges the assistance in the preparation of the present report provided by Ms. Sonia Aichele (in particular relating to chap. II, sect. 5) and Ms. Janina Barkholdt (in particular relating to chap. II, sect. 4) (both of Humboldt University of Berlin).

Multilateral instruments cited in the present report

	Source
Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929)	League of Nations, *Treaty Series*, vol. CXXXVII, No. 3145, p. 11.
North Atlantic Treaty (Washington, D.C., 4 April 1949)	United Nations, *Treaty Series*, vol. 34, No. 541, p. 243.
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.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid*., vol. 189, No. 2545, p. 137.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid*., vol. 360, No. 5158, p. 117.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid*., vol. 500, No. 7310, p. 95.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) (opened for signature at New York on 7 March 1966)	*Ibid*., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid*., vol. 993, No. 14531, p. 3.
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008)	General Assembly resolution 63/117 of 10 December 2008, annex.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443.
Convention on Psychotropic Substances (Vienna, 21 February 1971)	*Ibid.*, vol. 1019, No. 14956, p. 175.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975)	*Ibid*., vol. 976, No. 14152, p. 105.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	*Ibid*., vol. 1249, No. 20378, p. 13.
Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980)	*Ibid*., vol. 1343, No. 22514, p. 89.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1833, No. 31363, p. 3.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid*., vol. 1465, No. 24841, p. 85.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	*Ibid.*, vol. 1582, No. 27627, p. 95.
Convention on the Rights of the Child (New York, 20 November 1989)	*Ibid*., vol. 1577, No. 27531, p. 3.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	*Ibid*., vol. 2220, No. 39481, p. 3.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid*., vol. 1771, No. 30822, p. 107.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	*Ibid*., vol. 2303, No. 30822, p. 162.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
Cartagena Protocol on Biosafety (Montreal, 29 January 2000)	*Ibid*., vol. 2226, No. 30619, p. 208.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	*Ibid*., vol. 2161, No. 37770, p. 447.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	*Ibid*., vol. 2716, No. 48088, p. 3.

Works cited in the present report

ALSTON, Philip, and Ryan GOODMAN

International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals. Oxford, Oxford University Press, 2013.

ALVAREZ, José E.

International Organizations as Law-makers. Oxford, Oxford University Press, 2005.

ANDERSON, David Heywood

"Developments in maritime boundary law and practice", *in* David A. Colson and Robert W. Smith, eds., *International Maritime Boundaries*, vol. V, Leiden, Martinus Nijhoff, 2005, pp. 3199–3222.

"1969 Vienna Convention: Article 5", *in* Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties—A Commentary*. Oxford, Oxford University Press, 2011, pp. 87–98.

ANDO, Nisuke

"L'avenir des organes de supervision: limites et possibilités du Comité des droits de l'homme", *Canadian Human Rights Yearbook 1991* (1991–1992), pp. 183–190.

ANDRUSEVYCH, Andriy, Thomas ALGE and Clemens KONRAD, eds.

Case Law of the Aarhus Convention Compliance Committee (2004–2011), 2nd ed. Lviv, Resource and Analysis Center "Society and Environment", 2011.

AUST, Helmut Philip, and Georg NOLTE, eds.

The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence. Oxford, Oxford University Press, 2016.

BARRETT, Damon

" 'Unique in international relations'? A comparison of the International Narcotics Control Board and the UN human rights treaty bodies". International Harm Reduction Association, London, 2008.

BENVENISTI, Eyal

"Reclaiming democracy: the strategic uses of foreign and international law by national courts", AJIL, vol. 102 (2008), pp. 241–274.

BOYLE, Alan, and Christine CHINKIN

The Making of International Law. Oxford, Oxford University Press, 2007.

BRÖLMAN, Catherine

"Specialized rules of treaty interpretation: international organizations", *in* Duncan Hollis, ed., *The Oxford Guide to Treaties*. Oxford, Oxford University Press, 2012, pp. 507–524.

ÇALI, Başak

"Specialized rules of treaty interpretation: human rights", *in* Duncan Hollis, ed., *The Oxford Guide to Treaties*. Oxford, Oxford University Press, 2012, pp. 525–550.

CANVAR, Anna

"Accountability and the Commission on the Limits of the Continental Shelf: Deciding who owns the ocean floor", *Cornell International Law Journal*, vol. 42 (2009), pp. 387–440.

CITRONI, Gabriella

"The Human Rights Committee and its role in interpreting the International Covenant on Civil and Political Rights *vis-à-vis* States Parties", Blogpost EJIL:Talk!, 28 August 2015.

CRAVEN, Matthew

The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development. Oxford, Clarendon Press, 1995.

"Legal differentiation and the concept of the human rights treaty in international law", EJIL, vol. 11 (2000), pp. 489–519.

CSETE, Joanne, and Daniel WOLFE

"Closed to reason: the International Narcotics Control Board and HIV/AIDS", Canadian HIV/AIDS Legal Network/International Harm Reduction Development (2007).

DENNIS, Michael J., and David P. STEWART

"Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health", AJIL, vol. 98 (2004), pp. 462–515.

FORTEAU, Mathias

"The role of the international rules of interpretation for the determination of direct effect of international agreements", *in* Helmut Philip Aust and Georg Nolte, eds., *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*. Oxford, Oxford University Press, 2016, pp. 96–112.

FITZMAURICE, Malgosia

"Interpretation of human rights treaties", *in* Dinah Shelton, ed., The *Oxford Handbook of International Human Rights Law*. Oxford, Oxford University Press, 2013, pp. 739–771.

GARDINER, Piers R. R.

"The limits of the Area beyond national jurisdiction—Some problems with particular reference to the role of the Commission on the Limits of the Continental Shelf", *in* Gerald Blake, ed., *Maritime Boundaries and Ocean Resources*. London, Croom Helm, 1987, pp. 63–76.

GARDINER, Richard K.

Treaty Interpretation, 2nd ed. Oxford, Oxford University Press, 2014.

GAU, Michael Sheng-ti

"Recent decisions by the Commission on the Limits of the Continental Shelf on Japan's submission for outer continental shelf", *Chinese Journal of International Law*, vol. 11 (2012), pp. 487–504.

GIEGERICH, Thomas

"Reservations to multilateral treaties", *in* Rüdiger Wolfrum, ed. *Max Planck Encyclopedia of Public International Law*. Oxford, Oxford University Press, 2012. Available from https://opil.ouplaw.com/home/mpil.

HANSKI, Raija, and Martin SCHEININ, eds.

Leading Cases of the Human Rights Committee. Turku/Åbo, Institute for Human Rights, 2007.

HAPPOLD, Matthew

"Julian Assange and diplomatic asylum", Blogpost EJIL:Talk!, 24 June 2012.

HERDEGEN, Matthias

Völkerrecht, 10th ed. Munich, C. H. Beck, 2011.

INTERNATIONAL LAW ASSOCIATION

"Final report on the impact of findings of the United Nations human rights treaty bodies", *Report of the Seventy-first Conference, Berlin, 16–21 August 2004*. London, 2004, pp. 621–689.

"Legal issues of the outer continental shelf", *Report of the Seventy-first Conference, Berlin, 16–21 August 2004*. London, 2004, pp. 773–825.

KÄLIN, Walter

"Examination of State reports", *in* Helen Keller and Geir Ulfstein, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy*. Cambridge, Cambridge University Press, 2012, pp. 16–72.

KELLER, Helen, and Leena GROVER

"General comments of the Human Rights Committee and their legitimacy", *in* Helen Keller and Geir Ulfstein, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy.* Cambridge, Cambridge University Press, 2012, pp. 116–198.

KLINGER, Stefanie

Die Implementationssicherungsmechanismen der UN-Drogenkonventionen von 1961, 1971 und 1988, Duncker & Humblot, Berlin, 1999.

KOESTER, Veit

"The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)", *in* Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann, eds., *Making Treaties Work. Human Rights, Environment and Arms Control.* Cambridge, Cambridge University Press, 2007, pp. 179–217.

MCDORMAN, Ted L.

"The continental shelf", *in* Donald R. Rothwell *et al.*, eds., *The Oxford Handbook of the Law of the Sea*. Oxford, Oxford University Press, 2015, pp. 181–202.

MECHLEM, Kerstin

"Treaty bodies and the interpretation of human rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905–947.

NOLTE, Georg

"Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", *in* Georg Nolte, ed., *Treaties and Subsequent Practice.* Oxford, Oxford University Press, 2013, pp. 210–302.

NOWAK, Manfred

U.N. Covenant on Civil and Political Rights, CCPR Commentary, 2nd ed. Kehl am Rhein, Engel Verlag, 2005.

NOWAK, Manfred, and Elizabeth MCARTHUR

The United Nations Convention against Torture: A Commentary. Oxford, Oxford University Press 2008.

O'FLAHERTY, Michael

"The concluding observations of United Nations human rights treaty bodies", *Human Rights Law Review*, vol. 6 (2006), pp. 27–52.

PELLET, Alain

"Article 38", *in* Andreas Zimmermann *et al.*, eds., *The Statute of the International Court of Justice: A Commentary,* 2nd ed. Oxford, Oxford University Press, 2012, pp. 731–870.

RODLEY, Nigel S.

"The role and impact of treaty bodies", *in* Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law.* Oxford, Oxford University Press, 2013, pp. 621–648.

SCHIELE, Simone

Evolution of International Environmental Regimes: The Case of Climate Change. Cambridge, Cambridge University Press, 2014.

SCHLÜTTER, Birgit

"Aspects of human rights interpretation by the UN treaty bodies", *in* Helen Keller and Geir Ulfstein, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy.* Cambridge, Cambridge University Press, 2012, pp. 261–319.

SCHMALENBACH, Kirsten

"Article 5", *in* Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties—A Commentary*. Heidelberg, Springer, 2012, pp. 89–103.

SHELTON, Dinah

"The legal status of normative pronouncements of human rights treaty bodies", *in* Holger P. Hestermeyer *et al.*, eds., *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, vol. I. Leiden, Martinus Nijhoff, 2012, pp. 553–576.

STEINER, Henry J., and Philip ALSTON

International Human Rights in Context: Law, Politics, Morals, 2nd ed. Oxford, Oxford University Press, 2000.

TZANAKOPOULOS, Antonios

"Judicial dialogue as a means of interpretation", *in* Helmut Philip Aust and Georg Nolte, eds., *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*. Oxford, Oxford University Press, 2016, pp. 72–95.

TOMUSCHAT, Christian

Human Rights: Between Idealism and Realism, 3rd ed. Oxford, Oxford University Press, 2014.

"Human Rights Committee", *in* Rüdiger Wolfrum, ed. *Max Planck Encyclopedia of Public International Law*. Oxford, Oxford University Press, 2012. Available from https://opil.ouplaw.com/home/mpil.

ULFSTEIN, Geir

"Treaty bodies", *in* Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law*. Oxford, Oxford University Press, 2007, pp 877–889.

"Individual complaints", *in* Helen Keller and Geir Ulfstein, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy.* Cambridge, Cambridge University Press, 2012, pp. 73–115.

"Treaty bodies and regimes", *in* Duncan Hollis, ed., *The Oxford Guide to Treaties*. Oxford, Oxford University Press, 2012, pp. 428–447.

"Law-making by human rights treaty bodies", *in* Rain Liivoja and Jarna Petman, eds., *International Law-Making. Essays in Honour of Jan Klabbers.* London, Routledge, 2014, pp. 249–258.

ULFSTEIN, Geir, and Jacob WERKSMANN

"The Kyoto compliance system: towards hard enforcement", *in* Olav Schram Stokke, Jon Hovi and Geir Ulfstein, eds., *Implementing the Climate Regime: International Compliance*. Earthscan, London, 2005, pp. 39–62.

VAN ALEBEEK, Rosanne, and André NOLLKAEMPER

"The legal status of decisions by human rights treaty bodies in national law", *in* Helen Keller and Geir Ulfstein, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy.* Cambridge, Cambridge University Press, 2012, pp. 356–413.

Introduction

1. In 2012, the International Law Commission placed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" on its current programme of work.[1] The topic originated from previous work of the Commission's Study Group on treaties over time.[2]

[1] *Yearbook … 2012*, vol. II (Part Two), chap. X, p. 77.

[2] *Yearbook … 2008*, vol. II (Part Two), annex I, p. 152; *Yearbook … 2009*, vol. II (Part Two), chap. XII, p. 148; *Yearbook … 2010*, vol. II (Part Two), chap. X, p. 194; *Yearbook … 2011*, vol. II (Part Two), chap. XI, p. 168.

2. During its sixty-fifth session, in 2013, the Commission considered the first report on the topic[3] and provisionally adopted five draft conclusions with commentaries.[4] States generally reacted favourably to the work during the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session.[5]

3. During its sixty-sixth session, in 2014, the Commission considered the second report on the topic[6] and provisionally adopted five additional draft conclusions with commentaries.[7] During the debate in the Sixth Committee in 2014, delegations generally welcomed the adoption of the five draft conclusions and considered them to be balanced and in line with the overall objective of the work on the topic.[8]

4. During its sixty-seventh session in 2015, the Commission considered the third report on the topic[9] and provisionally adopted draft conclusion 11 with commentaries.[10] In the course of the debate on the work in the Sixth Committee in 2015, delegations generally welcomed the adoption of draft conclusion 11.[11] Some States considered that the distinction between paragraphs 2 and 3 of draft conclusion 11 should be formulated more clearly.[12] Other States expressed the view that the relationship between an "established practice of the organization" and the subsequent practice of international organizations generally should have been elaborated upon.[13] Some States specifically agreed that the practice of an organization might contribute to the identification of the object and purpose of a constituent treaty, while others called that position into question.[14] It was suggested that the difference between the practice of States acting as such and States acting as members of a plenary organ of an international organization should be emphasized.[15] It was also pointed out that the distinction should be observed between subsequent practice that establishes the agreement of the parties and such practice that does not.[16]

5. Some delegations would have preferred to see more examples of cases envisaged in paragraph 4 of draft conclusion 11.[17] The European Union in particular proposed to have its practice covered more specifically in the commentary, as Jamaica did with regard to the case law of the Caribbean Court of Justice.[18] Different positions were voiced with regard to the question of whether a constituent treaty of an international organization could be modified as a result of subsequent practice, a question with regard to which the draft conclusion does not take a position.[19]

6. Some States proposed that the Commission modify draft conclusions 1, paragraph 4, and 4, paragraph 3, in order to take account of the practice of international organizations as a form of "other subsequent practice".[20] The inclusion of a draft conclusion regarding treaties adopted within an international organization was also proposed.[21]

7. At its sixty-seventh session, in 2015, the Commission requested that, by 31 January 2016, States and international organizations provide it with:

(*a*) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

(*b*) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.[22]

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[3] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/660, p. 51.

[4] *Ibid.*, vol. II (Part Two), pp. 51 *et seq.*, paras. 38–39.

[5] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666; available from the website of the Commission, documents of the sixty-sixth session), para. 4.

[6] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/671, p. 111.

[7] *Ibid.*, vol. II (Part Two), pp. 107 *et seq.*, paras. 75–76.

[8] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678; available from the website of the Commission, documents of the sixty-seventh session), para. 20.

[9] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/683, p. 37.

[10] *Yearbook … 2015*, vol. II (Part Two), pp. 54 *et seq.*, paras. 128–129.

[11] See A/C.6/70/SR.19 to A/C.6/70/SR.23: statements by Austria (A/C.6/70/SR.20, para. 34), Australia (A/C.6/70/SR.22, para. 52), Belarus (A/C.6/70/SR.21, para. 34), Chile (A/C.6/70/SR.22, para. 87), Czech Republic (A/C.6/70/SR.20, para. 60), El Salvador (A/C.6/70/SR.22, para. 106), Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 52), Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68), Italy (A/C.6/70/SR.22, para. 113), Jamaica (A/C.6/70/SR.22, para. 23), Malaysia (A/C.6/70/SR.23, para. 50), Netherlands (A/C.6/70/SR.21, para. 44), New Zealand (A/C.6/70/SR.22, para. 33), Poland (A/C.6/70/SR.21, para. 69), Portugal (A/C.6/70/SR.22, para. 62), Republic of Korea (A/C.6/70/SR.23, para. 58), Romania (A/C.6/70/SR.21, para. 80), Russian Federation (A/C.6/70/SR.23, para. 22), Singapore (A/C.6/70/SR.21, para. 60), Spain (A/C.6/70/SR.22, para. 96), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8), United Kingdom of Great Britain and Northern Ireland (A/C.6/70/SR.23, para. 33), United States of America (A/C.6/70/SR.22, paras. 42–43), with certain reservations regarding paragraph 3), and European Union (A/C.6/70/SR.19, para. 87); see, generally, topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689; available from the website of the Commission, documents of the sixty-eighth session), paras. 38–51.

[12] Australia (A/C.6/70/SR.22, para. 54), Czech Republic (A/C.6/70/SR.20, paras. 61–62), Italy (A/C.6/70/SR.22, para. 114), Romania (A/C.6/70/SR.21, para. 80), the Russian Federation (A/C.6/70/SR.23, para. 22) and Spain (A/C.6/70/SR.22, para. 98); the Netherlands, however, pointed out that it is often difficult to distinguish between the practice of the organization and that of States, regardless of the formulation (A/C.6/70/SR.21, para. 45).

[13] Austria (A/C.6/70/SR.20, para. 36), Belarus (A/C.6/70/SR.21, para. 34), El Salvador (A/C.6/70/SR.22, para. 106), Greece (A/C.6/70/SR.20, para. 54), Italy (A/C.6/70/SR.22, paras. 114–115) and Portugal (A/C.6/70/SR.22, para. 62).

[14] Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 53) and Romania (A/C.6/70/SR.21, para. 80); but see the Russian Federation (A/C.6/70/SR.23, para. 22) and the United States (A/C.6/70/SR.22, para. 44).

[15] Belarus (A/C.6/70/SR.21, para. 34) and Republic of Korea A/C.6/70/SR.23, para. 59).

[16] Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68).

[17] Czech Repubic (A/C.6/70/SR.20, paras. 60 and 63), Germany (A/C.6/70/SR.22, para. 16) and Portugal (A/C.6/70/SR.22, para. 62); see also Italy (A/C.6/70/SR.22, para. 115).

[18] European Union (A/C.6/70/SR.19, paras. 87–89); in this sense, see also Germany (A/C.6/70/SR.22, para. 16) and Jamaica (A/C.6/70/SR.22, paras. 24–26).

[19] Chile (A/C.6/70/SR.22, para. 87), Malaysia (A/C.6/70/SR.23, para. 49), Netherlands (A/C.6/70/SR.21, para. 45), New Zealand (A/C.6/70/SR.22, para. 33) and Singapore (A/C.6/70/SR.21, para. 60).

[20] Austria (A/C.6/70/SR.20, para. 38) and Malaysia (A/C.6/70/SR.23, para. 51).

[21] El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

[22] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 26.

8. As at the date of submitting the present report, responses have been received from eight States.[23] Further contributions are welcome at any time.

9. The first two reports on subsequent agreements and subsequent practice in relation to the interpretation of treaties considered general aspects of the topic.[24] The third report addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of constituent instruments of international organizations.[25] The present report concerns the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts.[26]

[23] By 7 March 2016, Australia, the Czech Republic, Germany, Paraguay, Spain and the International Labour Organization (ILO) had submitted information in writing (available from the website of the Commission, under the analytical guide to the current topic). Singapore (statement of 6 November 2015; see also A/C.6/70/SR.21, para. 62), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) made comments in response to the request in their statements to the Sixth Committee in 2015.

[24] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/660, and *Yearbook … 2014*, vol. II (Part One), document A/CN.4/671.

[25] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/683.

[26] During the debate in the Sixth Committee, Singapore (A/C.6/70/SR.21, para. 62), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) encouraged the Commission to deal with pronouncements of expert bodies.

Chapter I

Pronouncements of expert bodies

10. Treaties are applied in various ways. They are applied, first and foremost, by the States parties themselves, including by their courts. In many cases, international organizations contribute to the application of treaties, in particular to the application of their own constituent instruments.[27] There are also treaties which establish bodies that have the task of monitoring or contributing in other ways to the application of such treaties, including bodies consisting of experts who serve in their individual capacity (see sect. A below). Treaty bodies consisting of such experts adopt pronouncements (see sect. B below) as a form of practice, which contributes to the application of the treaty and which may be relevant for the purpose of interpretation of the treaty (see sect. C below). The best-known expert bodies are those established under human rights treaties (see sect. D below). But there are also other such bodies (see sect. E below).

A. Types of expert bodies

11. Most bodies established by treaties either consist of States or are organs of international organizations. The output of a treaty body composed of State representatives (and which is not an organ of an international organization) is a form of practice by those States that thereby act collectively within the framework of the treaty body. That is true, in particular, for decisions of Conferences of States Parties, with respect to which the Commission has already provisionally adopted draft conclusion 10.[28] The output of a treaty body that is an organ of an international organization (and which may or may not consist of States) is, in the first place, attributed to the organization.[29] Such output may, however, under certain circumstances also be attributed, for the purpose of interpretation, to the States represented therein.[30]

12. The present report is neither concerned with treaty bodies that consist of States, nor with bodies that are organs of an international organization.[31] Rather, it deals with treaty bodies that consist of experts who serve in their individual capacity.[32] The best-known examples for such bodies are the committees established under various human rights treaties at the universal level (the International Convention on the Elimination of All Forms of Racial Discrimination,[33] the International Covenant on Civil and Political Rights,[34] the International Covenant on Economic, Social and Cultural Rights,[35] the Conven-

[27] See *Yearbook … 2015*, vol. II (Part Two), para. 128, draft conclusion 11, at p. 55.

[28] *Yearbook … 2014*, vol. II (Part Two), paras. 75–76, at pp. 107 *et seq.*

[29] Art. 6, para. 1, of the articles on the responsibility of international organizations, General Assembly resolution 66/100 of 9 December 2011, annex (the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), at pp. 40 *et seq.*, paras. 87–88); the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, and therefore a subsidiary organ of the Council, see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

[30] See draft conclusion 12 [13] (Resolutions of international organizations and international conferences) of the draft conclusions on the identification of customary international law, provisionally adopted by the Drafting Committee (A/CN.4/L.869; available from the website of the Commission, documents of the sixty-seventh session); see also *Europäische Schule München v. Silvana Oberto, Barbara O'Leary*, Cases C464/13 and C465/13C, Judgment, 11 March 2015, European Court of Justice, Fourth Chamber, paras. 57–67, on the effects of decisions of the Complaints Board under the Statute of the European Schools.

[31] The Committee of Experts on the Application of Conventions and Recommendations of ILO is an important example of an expert body that is an organ of an international organization. It was established in 1926 to examine Government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms: see www.ilo.org and information provided by ILO to the Commission (available from the website of the Commission, under the analytical guide to the current topic).

[32] See, e.g., art. 28, para. 3, of the International Covenant on Civil and Political Rights; the members of such bodies are often called "independent experts" (see Tomuschat, *Human Rights: Between Idealism and Realism*, p. 219); treaties do not, however, usually specify what the term "serving in their individual capacity" means apart from freedom from governmental instruction, which does not exclude that members have a formal connection with the Government that has nominated them.

[33] International Convention on the Elimination of All Forms of Racial Discrimination, arts. 8–14.

[34] International Covenant on Civil and Political Rights, arts. 28–45.

[35] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, arts. 1–15; the Committee was

tion on the Elimination of All Forms of Discrimination against Women,[36] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[37] and others).[38] But there are also expert bodies established under other treaties. Important examples include the Commission on the Limits of the Continental Shelf under the United Nations Convention on the Law of the Sea,[39] the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[40] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[41] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[42] The members of such bodies are not necessarily lawyers, but some treaties require that, as far as the composition of the expert body is concerned, "consideration [is to be] given to the usefulness of the participation of some persons having legal experience".[43]

13. The pronouncements of such expert bodies[44] are not a form of State practice in the application of a treaty and those pronouncements are not usually attributed to an international organization. Their possible significance, for the purpose of the interpretation of a treaty, is the subject of the present chapter.

originally established by the Economic and Social Council, in its resolution 1985/17 of 28 May 1985, to monitor compliance with International Covenant on Economic, Social and Cultural Rights.

[36] Convention on the Elimination of All Forms of Discrimination against Women, arts. 17–22.

[37] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 17–24.

[38] See Rodley, "The role and impact of treaty bodies", pp. 622–623.

[39] The Commission on the Limits of the Continental Shelf was established under article 76, paragraph 8, of the United Nations Convention on the Law of the Sea and annex II to the Convention.

[40] The Compliance Committee under the Kyoto Protocol was established under article 18 of the Protocol and decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the Conference of the Parties serving as meeting of the Parties to the Kyoto Protocol, contained in Report of the Conference of the Parties on its Seventh Session, held at Marrakesh, from 29 October to 10 November 2001, Addendum, Part Two: Action taken by the Conference of the Parties, vol. III (FCCC/CP/2001/13/Add.3).

[41] The Compliance Committee under the Aarhus Convention was established under article 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and decision I/7 on review of compliance, adopted by the first Meeting of the Parties, in 2002, contained in Report of the First Meeting of the Parties, Addendum (ECE/MP.PP/2/Add.8).

[42] The International Narcotics Control Board was established under article 5 of the Single Convention on Narcotic Drugs.

[43] International Covenant on Civil and Political Rights, art. 28, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1. See also: decision 24/CP.7 (footnote 40 above), annex, sect. V, para. 3; decision I/7 on review of compliance (footnote 41 above), annex, para. 2.

[44] Further relevant expert bodies include the Compliance Committee established under article 34 of the Cartagena Protocol on Biosafety and decision BS-I/7 on establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety adopted by the First Meeting of the Conference of the Parties serving as Meeting of the Parties to the Cartagena Protocol on Biosafety, Kuala Lumpur, 23–27 February 2004, available from www.cbd.int/decisions/mop.

B. "Pronouncements"

14. The official designation in treaties of the forms of action of expert bodies varies (e.g., "views",[45] "recommendations",[46] "comments",[47] "measures",[48] "consequences"[49]). The present report employs, for the purpose of the present topic, the generic term "pronouncements".[50] Other generic terms in use include "findings",[51] "jurisprudence"[52] and "output".[53] The expression "findings" may be misunderstood as being limited to factual determinations, whereas the work of expert bodies often consists of action which is, explicitly or implicitly, declaratory (of law). The term "jurisprudence", on the other hand, may be mistaken as implying that the action of an expert body possesses a judicial quality, which is usually not the case. The term "output", although neutral, may be too broad. The expression "pronouncements", on the other hand, is sufficiently neutral and is able to cover all relevant factual and normative assessments by such expert bodies.

C. Legal effect of pronouncements of expert bodies generally

15. The legal effect of pronouncements by an expert body depends, first and foremost, on the applicable treaty itself. The effect must be determined by way of applying

[45] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[46] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child, art. 45, subpara. (*d*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 33, para. 5; United Nations Convention on the Law of the Sea, art. 76, para. 8.

[47] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 74, para. 1.

[48] Decision I/7 on review of compliance (see footnote 41 above), annex, paras. 36–37; Single Convention on Narcotic Drugs, art. 14.

[49] Decision 24/CP.7 (footnote 40 above), annex, sect. XV.

[50] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 26; see also International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 626–627, para. 15; European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome 10–11 October 2014), study No. 690/2012, document CDL-AD (2014)036, p. 31, para. 78.

[51] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*); International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 16.

[52] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, *I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; Rodley, "The role and impact of treaty bodies", p. 640; Andrusevych, Alge and Konrad, *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*; United Nations Economic Commission for Europe, Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date, available from www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf.

[53] Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", p. 402; Rodley, "The role and impact of treaty bodies", p. 639; Mechlem, "Treaty bodies and the interpretation of human rights", p. 908.

the rules on treaty interpretation according to articles 31 and 32 of the Vienna Convention on the Law of Treaties. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement mostly indicates that such pronouncements are not legally binding.[54] That is true, for example, for the terms "views" (art. 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (art. 14, para. 8, of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (art. 76, para. 8, of the United Nations Convention on the Law of the Sea). Sometimes treaties use terms that, as such, are unclear as to whether they imply a legally binding effect, but whose context contributes to identifying possible legal effects.[55] Therefore, treaties usually make it clear, by the terms they use to characterize pronouncements and by providing context, that pronouncements by expert bodies are not, as such, legally binding.[56]

16. That does not exclude the possibility, however, that such pronouncements might be relevant for the interpretation of a treaty as a form of practice subsequently arrived at under the treaty.[57] That possible effect is usually not explicitly addressed by the respective treaties. There are, however, authoritative indications and debates regarding the legal significance, for the purpose of the interpretation of a treaty, of pronouncements of expert bodies.[58] They mostly concern the significance of the pronouncements of expert bodies under human rights treaties (see sect. D below), but also those of expert bodies in other areas (see sect. E below).

D. Expert bodies under human rights treaties

17. Pronouncements by expert bodies under human rights treaties are usually adopted in reaction to State reports (e.g., "concluding observations"), or in response to individual communications (e.g., "views"), or regarding the implementation or interpretation of the respective treaties generally (e.g., "general comments").[59] The relevance of such pronouncements for the interpretation of the respective treaties is often assessed in general terms.[60]

18. The Human Rights Committee under the International Covenant on Civil and Political Rights did at one stage attempt to explain the relevance of its own pronouncements for the interpretation of the Covenant in terms of the Vienna Convention on the Law of Treaties. In its draft general comment No. 33, the Committee submitted the proposal, for comment by States, that its "general body of jurisprudence", or the acquiescence by States to that jurisprudence, constituted subsequent practice under article 31, paragraph 3 (*b*):

> In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the sense of article 31 (3) (*b*) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice.[61]

19. The United States of America, in its comment to draft general comment No. 33, strongly criticized the proposal:

> The views of the Committee cannot as a legal matter constitute the "subsequent practice" of the States Parties to the Covenant … The provision referred to in this case, article 31 (3) (*b*), has never been interpreted, so far as the United States is aware, to include the views of expert bodies. The "subsequent practice" referred to in this provision is generally understood to mean the actual practice of the States Parties, provided that such practice is consistent and is common to, or accepted by, all the Parties. The "subsequent practice" of the States Parties cannot be the views of experts that "serve in their personal capacity" as to what the practice of States Parties *should* be in carrying out their rights and obligations under the Covenant.[62]

20. Ultimately, the Human Rights Committee adopted general comment No. 33 without an explicit reference to article 31, paragraph 3 (*b*), or to the possible significance of its views, and the reactions of States parties to them, as a form of subsequent practice.[63] The Committee, rather, concluded:

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the

[54] This is generally accepted in the literature, see Rodley, "The role and impact of treaty bodies", p. 639; Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233 and 267; Shelton, "The legal status of normative pronouncements of human rights treaty bodies", p. 559; Keller and Grover, "General comments of the Human Rights Committee and their legitimacy", p. 129; Venice Commission, Report on the implementation of international human rights treaties … (footnote 50 above), p. 30, para. 76.

[55] This is true, for example, for the term "determine" in article 18 of the Kyoto Protocol and decision 24/CP.7 (see footnote 40 above): see Ulfstein and Werksmann, "The Kyoto compliance system: towards hard enforcement", pp. 55–56.

[56] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 18; Rodley, "The role and impact of treaty bodies", p. 639.

[57] Rodley, "The role and impact of treaty bodies", p. 639; Tomuschat, *Human Rights: Between Idealism and Realism*, p. 267.

[58] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 626–630, paras. 15–27; Rodley, "The role and impact of treaty bodies", p. 639; Keller and Grover, "General comments of the Human Rights Committee …", pp. 129–133; Ulfstein, "Individual complaints", pp. 92–93; Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 409–411; Ulfstein, "Treaty bodies and regimes"; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 929–930.

[59] Kälin, "Examination of State reports"; Ulfstein, "Individual complaints"; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 922–930. The legal basis for general comments under the International Covenant on Civil and Political Rights is article 40, paragraph 4, but this practice has been generally accepted also with regard to other expert bodies under human rights treaties: see Keller and Grover, "General comments of the Human Rights Committee …", pp. 127–128.

[60] E.g., Rodley, "The role and impact of treaty bodies", p. 639; Shelton, "The legal status of normative pronouncements of human rights treaty bodies", pp. 574–575; Boyle and Chinkin, *The Making of International Law*, p. 155.

[61] Draft general comment No. 33 on the obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), para. 18. This position has also been put forward by several authors: see Keller and Grover, "General comments of the Human Rights Committee …", pp. 130–132 with further references.

[62] United States, "Comments of the United States on the Human Rights Committee's 'Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights'", 17 October 2008, para. 17. Available from www.ohchr.org/en/calls-for-input/general-comment-no-33-obligations-states-parties-under-optional-protocol.

[63] Human Rights Committee, general comment No. 33 (2008) on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V.

Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.[64]

…

The Views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These Views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.[65]

21. The fact that the Committee did not pursue its proposal to consider its views, individually or collectively, to be a "general body of jurisprudence" and a form of subsequent practice under article 31, paragraph 3 (*b*), does not, however, necessarily lead to the conclusion that its pronouncements are irrelevant in the context of the present topic.

22. The question of the legal significance of pronouncements of expert bodies under human rights treaties, for the purpose of their interpretation, has been considered by international and national courts as well as by scientific bodies and many authors.[66] Among authors, the views range from those who consider the value of such pronouncements to be minimal[67] to those who consider that they possess an authoritative character[68] and thereby tend to transform them into legally binding obligations.[69]

23. The final report on the impact of findings of the United Nations human rights treaty bodies, which the International Law Association adopted in 2004, provides a good point of departure.[70] The report is based on a comprehensive collection of court decisions from a broad range of States, decisions by international courts and publications that were reasonably retrievable at the time of the report, as well as the deliberations of members of the International Law Association committee concerned. The report proceeds from the generally recognized position that pronouncements of expert bodies under human rights treaties "do not themselves constitute binding interpretations of the treaties".[71] The report also emphasizes that:

Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.[72]

24. In support, the report quotes a statement by Norway as an example:

While the recommendations and criticism of the monitoring committees are not legally binding, the Norwegian authorities attach great importance to them and they constitute important guidelines in the continuous efforts to ensure the conscientious implementation of the human rights conventions.[73]

25. On that basis, the report then addresses the "more difficult question" of whether pronouncements of expert bodies under human rights treaties "fit into the traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law".[74] The report distinguishes between two possible approaches:

If one adopts a traditional approach to interpretation of the human rights treaties—an approach strongly endorsed by the International Law Commission and some States parties in the specific context of reservations—the findings of the committees themselves would not amount to State practice … However, the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice.[75]

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[64] *Ibid.*, para. 11.

[65] *Ibid.*, para. 13.

[66] See footnote 58 above, as well as Alston and Goodman, *International Human Rights*, pp. 834–835; Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 77–78; Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233–237 and 266–268; O'Flaherty, "The concluding observations of United Nations human rights treaty bodies", p. 35; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, pp. 23–24.

[67] E.g., Ando, "L'avenir des organes de supervision: limites et possibilités du Comité des droits de l'homme", p. 186; Dennis and Stewart, "Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health", pp. 493–495; information of 3 February 2004 provided by the Special Rapporteur on the right to education, Katarina Tomasevski, for the first session of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (23 February–5 March 2005) (E/CN.4/2004/WG.23/CRP.4, para. 8) ("Another important issue for the Working Group to consider is the impact of general comments of the Committee on Economic, Social and Cultural Rights on the prospects for an optional protocol to the ICESCR. The Committee has adopted various general comments which reach far beyond the text of the ICESCR. … While this practice would support a rights-based rather than treaty-based human rights approach, it undermines the principle of legal security by reading into a legal text a contents which simply is not there. A helpful interpretative principle may therefore be a focus on the legal meaning of economic, social and cultural rights as affirmed in international and domestic jurisprudence.").

[68] E.g., Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 893; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, p. 23; Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, p. 265.

[69] Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 384–385; see also Ulfstein, "Individual complaints", pp. 92–93.

[70] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies.

[71] *Ibid.*, p. 626, para. 15; see also Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233 and 267.

[72] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 16.

[73] *Ibid.*, footnote 19, citing Norway, Ministry of Foreign Affairs, "Human rights in Norway", White Paper to the Storting, No. 21 (1999–2000); comments by the Government of the United States on the concluding observations of the Human Rights Committee, 12 February 2008 (CCPR/C/USA/CO/3/Rev.1/Add.1), pp. 8–9; views of the Government of Australia on draft general comment No. 35 on article 9 of the International Covenant on Civil and Political Rights—Right to Liberty and Security of Person and Freedom from Arbitrary Arrest and Detention, May 2014, available from www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/SubmissionsAustralianGovernment.doc, para. 6 ("Australia regards the views of the Committee on the interpretation of the rights under the Covenant as authoritative, however, it does not consider that they are determinative of the nature and scope of those obligations"); statement of the Canadian delegation during the discussion of the Human Rights Council's report on Canada, press release, 8 July 2015 ("the committee's views were not legally binding, but Canada had accepted its views in a majority of cases"), available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E; observations by the Government of the United Kingdom on Human Rights Committee general comment No. 24 (1995) ("The United Kingdom is, of course, aware that the General Comments adopted by the Committee are not legally binding.").

[74] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 17.

[75] *Ibid.*, pp. 628–629, para. 21.

26. According to the second, alternative approach:

> The reference in article 31 to subsequent practice—as with so many other provisions in the [Vienna Convention on the Law of Treaties]—is written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance. Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the [Vienna Convention on the Law of Treaties]. Given these differences it appears arguable that in interpreting these types of treaties … relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.[76]

27. The report, without explicitly taking a position as to which of the two positions is the correct one, pursues its own analysis by describing the practice of States parties in reaction to pronouncements of human rights bodies. It focuses in particular on how national and international courts have considered such pronouncements for the purpose of interpretation. It is indeed appropriate, before raising the question of whether human rights treaties call for special methods of interpretation,[77] to look at which positions international courts and States parties, and in particular their courts, have adopted regarding the interpretative relevance of pronouncements of human rights expert bodies.

1. International courts

28. The International Court of Justice has confirmed, in particular in 2010 in the case *Ahmadou Sadio Diallo* that pronouncements of the Human Rights Committee are relevant for the purpose of the interpretation of the International Covenant on Civil and Political Rights:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[78]

29. The final report of the International Law Association comes to a similar conclusion regarding international courts.[79] Regional human rights courts have also used pronouncements of expert bodies as a possible source of inspiration, but they have not treated them as binding.[80]

30. As with other international courts, the International Court of Justice did not, however, explain the relevance of "the interpretation adopted by this independent body" in terms of the rules of interpretation under the Vienna Convention on the Law of Treaties.[81]

2. Domestic courts

31. The final report of the International Law Association found a large number of decisions in which national courts have referred to pronouncements of human rights bodies.[82] The report, while recognizing certain "limitations of its data collection and analysis",[83] nevertheless provides a broad and regionally rather representative collection of decisions that does not seem to have been replaced by a richer specific analysis.[84]

32. In the large majority of the decisions, the domestic courts considered that pronouncements by expert bodies under human rights treaties were not legally binding on them as such;[85] reasons included the fact that such bodies were not courts[86] or that there was no legal basis in do-

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[76] *Ibid.*, p. 629, para. 22.

[77] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 263–266.

[78] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (see footnote 52 above), pp. 663–664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, *I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at pp. 179–181, paras. 109, 110 and 112, and at pp. 192–193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, pp. 422–423, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[79] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[80] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 28 August 2013, Inter-American Court of Human Rights, Series C, No. 268, paras. 189 and 191; *Civil Liberties Organisation et al. v. Nigeria*, Communication No. 218/98, Decision, African Commission on Human and Peoples' Rights, Twenty-ninth Ordinary Session, Tripoli, Libya, May 2001, para. 24 ("In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. This Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the [United Nations] treaty bodies."); *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision, African Commission on Human and Peoples' Rights, Thirtieth Ordinary Session, Banjul, the Gambia, October 2001, para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic[,] Social and Cultural Rights [in its in general comment No. 7]"); *Margus v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, European Court of Human Rights, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 *et seq.* and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see more broadly regarding regional courts, International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 662–675, paras. 116–155.

[81] See International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 17.

[82] *Ibid.*, pp. 639–659, paras. 46–109.

[83] *Ibid.*, p. 685, para. 180, and p. 631, para. 28, footnote 29.

[84] The collection *Oxford Reports on International Law in Domestic Courts* of the International Law in Domestic Courts service contains a number of relevant cases, see https://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

[85] See the decisions quoted in the report of the Venice Commission, Report on the implementation of international human rights treaties … (footnote 50 above), p. 30, para. 76 (Ireland, *Kavanagh (Joseph) v. Governor of Mountjoy Prison and Attorney General*, Supreme Court, [2002] IESC 13, para. 36; France, *Hauchemaille v. France*, 11 October 2001, Council of State, para. 22).

[86] France, *Hauchemaille* (see previous footnote), para. 22; Sri Lanka, *Singarasa (Nallaratnam) v. Attorney General, Application for judicial review*, 15 September 2006, Supreme Court, SC Spl (LA) No. 182/99, para. 21; New Zealand, *Wellington District Legal Services*

mestic law.[87] Most courts did, however, recognize that such pronouncements nevertheless "deserve[d] to be given considerable weight in determining the meaning of a relevant right and the existence of a violation".[88] The German Federal Administrative Court has set forth the following on that approach:

> These texts are not binding under international law. But the concluding observations give indications of what is generally consented in State practice. General comments authoritatively articulate the standards in the practice of the Committee on Economic, Social and Cultural Rights, and thus serve as means of interpretation and contribute to shaping the understanding of the terms of the treaty by the States parties.[89]

33. It was only exceptionally that a domestic court either considered a pronouncement of a human rights body to be "authoritative"[90] or, on the contrary, to have "no value".[91] A more recent analysis has confirmed that picture.[92] The final report of the International Law Association summarized its findings thereon as follows:

> While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognised that, as expert bodies entrusted by the States parties with functions under the treaties, the treaty bodies' interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation.[93]

34. That conclusion, however, is not incompatible with the fact that there are also decisions of domestic courts that do not refer to treaty bodies, although relevant pronouncements exist, a fact that led Van Alebeek and Nollkaemper to conclude:

> In brief, as a consequence of the non-binding nature of these decisions, national courts seem to generally approach treaty body output in a pick-and-choose manner. If courts are convinced by the interpretation of State obligations found in the treaty body output, they refer to its authoritative status. If not, its non-binding nature is emphasised.[94]

35. When considering such pronouncements and referring to them, domestic courts have only rarely attempted to explain the legal basis for their assessment that such pronouncements, while not legally binding as such, should or need to be taken into account. They have mostly merely referred to those pronouncements in passing.[95]

3. Previous work of the Commission

36. In its Guide to Practice on Reservations to Treaties,[96] the Commission addressed the question of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies under human rights treaties. Guideline 3.2.1 reads:

Competence of the treaty monitoring bodies to assess the permissibility of reservations

> 1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.
>
> 2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

37. The guideline assumes that pronouncements of treaty monitoring bodies that assess the permissibility of reservations produce the same effect as, and therefore have no greater effect than, such pronouncements generally. The carefully crafted guideline does not address the question of which exact legal effect, for the purposes of

Committee v. Tangiora [1998], Court of Appeal, 1 *New Zealand Law Reports* 129, 137; Spain, Case No. STC 70/2002, Judgment of 3 April 2002, Constitutional Court, sect. II, para. 7 (*a*).

[87] Canada, *Ahani v. Canada (Attorney General), Revised February 12, 2002*, Ontario Court of Appeal, para. 33 ("To give effect to Ahani's position, however, would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result."); Ireland, *Kavanagh (Joseph)* (see footnote 85 above), para. 42 ("The terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences against the State Act, 1939 or of a conviction by a court established under its provisions. For the reasons already stated, the views of the Committee cannot be invoked to invalidate that conviction without contravening the terms of article 29, section 6[,] article 15, section 2 (1) and article 34 section 1 of the Constitution."). But see Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 367–371, who quote decisions by domestic courts that have enabled the taking into account and implementation of pronouncements of expert bodies under human rights treaties in dualist legal systems, at pp. 379–380.

[88] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[89] Germany, Federal Administrative Court, Judgment, 29 April 2009, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 134, p. 1, at p. 22, para. 48 (translation by the author; original: "*Diese Texte sind völkerrechtlich nicht verbindlich. Jedoch können den abschließenden Bemerkungen Hinweise auf die allgemeine konsentierte Staatenpraxis entnommen werden. Die allgemeinen Bemerkungen beschreiben in autorisierter Form die Standards in der Praxis des Sozialausschusses, dienen damit als Interpretationshilfe und prägen so das Verständnis der vertraglichen Rechtsbegriffe durch die Vertragsstaaten mit.*").

[90] South Africa, High Court Witwatersrand, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) *Butterworths Constitutional Law Reports*, p. 625, at p. 629 ("general comments have an authoritative status under international law"); Hong Kong, China, Court of Appeal, *R v. Sin Yau-ming*, 30 September 1991, (1991) 1 *Hong Kong Public Law Reports*, p. 88, at p. 89, para. 3 ("considerable weight"); Canada, Supreme Court, *Suresh v. Canada*, 11 January 2002, [2002] 1 *Supreme Court Reports* 3, 2002 SCC 1, para. 67 ("clear import of the [International Covenant on Civil and Political Rights]"); New Zealand, Court of Appeal, *R. v. Goodwin (No. 2)*, [1990–1992] 3 *New Zealand Bill of Rights Reports*, p. 314, at p. 321 ("considerable persuasive authority"); Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank*, 21 July 2006, LJN: AY5560 (stating that even though the views of the Committee were not binding they have considerable weight for the interpretation and departure from them is only permissible if there are overriding reasons of public interest); Belize, Supreme Court, *Cal and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment & Coy and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment*, 18 October 2007, ILR, vol. 135 (2009), p. 77.

[91] United Kingdom, House of Lords, *Jones v. Saudi Arabia, 14 June 2006*, [2006] UKHL 26 (2007) 1 AC 270, para. 57 ("no value"); Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 *Hanrei Jiho*, p. 67, at p. 74 ("the General Comment neither represents authoritative interpretation of the [International Covenant on Civil and Political Rights] nor binds the interpretation of the treaty in Japan").

[92] Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 397–404.

[93] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[94] Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 402, also p. 403.

[95] *Ibid.*, p. 401; one of the few judgments in which this was the case is High Court of Osaka, Judgment of 28 October 1994, 1513 *Hanrei Jiho* 71, p. 87, also available from *Japanese Annual of International Law*, vol. 38 (1995), p. 109, at p. 118; Germany, Federal Administrative Court, Judgment (see footnote 89 above).

[96] *Yearbook … 2011*, vol. II (Part Three), p. 30.

interpretation of the treaty, such pronouncements produce. That question is, however, addressed more directly in guideline 3.2.3:

Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.[97]

38. In its commentary to that guideline, the Commission stated:

[T]here is no doubt that contracting States or contracting organizations have a general duty to cooperate with the treaty monitoring bodies that they have established—which is what is evoked by the expression "shall give consideration" in the guideline. Of course, if such bodies have been vested with decision-making power, the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to "give consideration" to their assessments in good faith.[98]

39. The commentary by the Commission is not limited to pronouncements of treaty monitoring bodies regarding the permissibility of reservations. It is formulated in general terms and on the basis of considerations that are generally applicable to pronouncements of such bodies in the fulfilment of their mandate. The commentary makes a statement not only regarding the legal effect of a pronouncement of a monitoring body as such, but also, by necessary implication, regarding their effect for the interpretation of the treaty itself.

40. Like most international and national courts, the Commission has not explained its position in terms of the general rules of interpretation under the Vienna Convention on the Law of Treaties. It is to that question that the present report now turns.

4. Relevance of pronouncements according to the rules of interpretation of the Vienna Convention on the Law of Treaties

41. Some authors have questioned whether it is appropriate to interpret human rights treaties according to the general rules of interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties, invoking a supposed special nature of such treaties.[99] Other authors have defended the applicability of articles 31 and 32 to human rights treaties by pointing out, *inter alia*, that the provisions leave room for eventual specific aspects of human rights treaties.[100] The Commission itself, when considering draft conclusion 1 of the present topic, left the question open as to whether it should refer to the "nature" of a treaty as a relevant consideration for its interpretation, but agreed that all questions of treaty interpretation can be resolved within the framework of articles 31 and 32 of the Vienna Convention.[101] There is indeed no reason why articles 31 and 32 would be insufficient to deal with particular aspects of human rights treaties. The provisions, and the Vienna Convention generally, are not only suitable for a limited "ideal type" of multilateral treaty,[102] but they were even elaborated when the existence of expert bodies within the emerging human rights regime was already well known.[103] Indeed, expert bodies under human rights treaties themselves, like international human rights courts, occasionally invoke and apply the Vienna Convention rules on interpretation.[104] It is therefore appropriate to assess the relevance of pronouncements of expert bodies for the purpose of the interpretation of human rights treaties on the basis and within the framework of the Vienna Convention rules of interpretation.

(a) *Pronouncements as reflecting or giving rise to subsequent agreements or subsequent practice of the States parties themselves*

42. A pronouncement of an expert body under a human rights treaty cannot, as such, constitute subsequent practice under article 31, paragraph 3 (*b*), since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties. Indeed, the Human Rights Committee has abandoned its own proposal to consider its pronouncements to be a form of subsequent practice under article 31paragraph 3 (*b*).[105]

43. Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice *by the parties themselves*, which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (*a*) or (*b*). That possibility has been recognized by the Commission,[106] States,[107] the final report of the International Law Association[108] and

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[97] *Ibid.*

[98] *Ibid.*, p. 239, para. (3).

[99] Craven, "Legal differentiation and the concept of the human rights treaty in international law", pp. 497–499; Giegerich, "Reservations to multilateral treaties", para. 31.

[100] Fitzmaurice, "Interpretation of human rights treaties", in particular pp. 769–770; Gardiner, *Treaty Interpretation*, pp. 474–478; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 919–920; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 317.

[101] *Yearbook … 2013*, vol. II (Part Two), para. 39, at pp. 21–22, para. (16) of the commentary to draft conclusion 1 as provisionally adopted.

[102] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 629, para. 22.

[103] The International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights were both adopted in 1966, after long and prominent negotiations.

[104] See, e.g., communication No. 118/1982, *Alberta Union v. Canada*, Views adopted on 18 July 1986, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex IX, sect. B, para. 6.3; Nolte, "Second report for the ILC Study Group on treaties over time", pp. 276–277 and 244–246 (European Court of Human Rights) and 268–270 (Inter-American Court of Human Rights); Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 273; Keller and Grover, "General comments of the Human Rights Committee …", p. 164.

[105] See para. 20 above, at footnote 63.

[106] *Yearbook … 2013*, vol. II (Part Two), para. 39, at pp. 23–24, para. (10) of the commentary to draft conclusion 2 as provisionally adopted.

[107] "States parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of article 31, paragraph 3." Statement of the United States before the Sixth Committee on 3 November 2015 (A/C.6/70/SR.22, para. 46).

[108] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 628–629, para. 21.

authors.[109] There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of *the parties themselves* regarding the interpretation of a treaty could not arise from, or be reflected in, a pronouncement of a human rights expert body. Such a possibility would not circumvent the treaty provisions according to which such pronouncements are not binding, since the legal effect under article 31, paragraph 3 (*a*) or (*b*), would not be produced by the pronouncement itself, but rather arise from the conduct and from the agreement of the States parties.

44. Whereas a pronouncement by a human rights expert body can, in principle, give rise to a subsequent agreement or a subsequent practice *by the parties* under article 31, paragraph 3 (*a*) and (*b*), that possibility is not easily fulfilled in practice.[110] Most human rights treaties at the universal level have many parties. It will mostly be very difficult to establish that all parties have agreed, explicitly or by way of their practice, that a particular pronouncement of an expert body reflects the correct interpretation of the treaty. In fact, expert bodies under human rights treaties themselves have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision.[111]

45. The pronouncement by the Committee under the International Covenant on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), that articles 11 and 12 of that Covenant imply a right to water, offers an example for the way in which an agreement of the parties may come about.[112] After a debate over a number of years, the General Assembly on 17 December 2015 finally adopted a resolution, by consensus, that follows the interpretation of the Committee.[113] That resolution may reflect an agreement under article 31, paragraph 3 (*a*) or (*b*), depending on whether the consensus actually implies the acceptance of all the parties regarding the interpretation that is contained in the pronouncement.[114]

46. Another way for pronouncements of expert bodies to reflect or give rise to a subsequent agreement or subsequent practice under article 31, paragraph 3 (*a*) or (*b*), may result from the recent practice of the Human Rights Committee under the International Covenant on Civil and Political Rights of submitting drafts of general comments to States for comments before their adoption.[115] Depending on the reactions of States, such general comments may ultimately reflect or give rise to an agreement of the parties regarding the interpretation of a treaty.

47. In many cases an agreement of all the parties to a treaty regarding the interpretation contained in a pronouncement would only be conceivable if the absence of objections can be counted as reflecting an agreement by those State parties that have remained silent. In respect of that question the Commission has provisionally adopted draft conclusion 9, paragraph 2, according to which, "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction".[116]

48. Whereas a State party to a human rights treaty may have an obligation, under the general duty to cooperate under the treaty, to take into account and to react to those pronouncements of an expert body that are specifically addressed to it (such as a pronouncement regarding the permissibility of a reservation that it has formulated,[117] or individual communications regarding its conduct and its own report[118]), it cannot be expected that States parties react to every pronouncement by such a body, be it addressed to another State or to all States generally.[119] The practice of one or more States parties that follow a pronouncement by a human rights expert body "in the application of the treaty" also does not usually call for a reaction by those other States parties that have not engaged in such practice.[120] It is true that regional human rights courts have sometimes recognized that the practice of a substantial majority of States parties may have an effect on the interpretation of a treaty.[121] But such courts have not taken the position that other States parties should have reacted in order to prevent such an

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[109] Mechlem, "Treaty bodies and the interpretation of human rights", pp. 920–921; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 289–290; Herdegen, *Völkerrecht*, p. 125; Ulfstein, "Individual complaints", p. 96; Craven, *The International Covenant on Economic, Social and Cultural Rights—A Perspective on its Development*, p. 91.

[110] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 293 and 318.

[111] See examples in Nolte, "Second report for the ILC Study Group on treaties over time", pp. 278–282, in particular p. 281; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 318; in this respect the practice of the expert bodies under the universal human rights treaties differs considerably from that of the European Court of Human Rights, see Nolte, "Second report for the ILC Study Group on treaties over time", pp. 246–262.

[112] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, *Official Records of the Economic and Social Council, 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV.

[113] General Assembly resolution 70/169 of 17 December 2015, adopted without a vote, recalling general comment No. 15 (2002) of the Committee on Economic, Social and Cultural Rights on the right to water, ninth preambular paragraph; see, for previous resolution on the topic, General Assembly resolution 64/292 of 28 July 2010, which was adopted with 41 abstentions.

[114] See *Yearbook … 2014*, vol. II (Part Two), para. 76, at p. 127, draft conclusion 10, para. 3, and pp. 133–134, paras. (31)–(38) of the commentary thereto, as provisionally adopted.

[115] Rodley, "The role and impact of treaty bodies", pp. 631–632; Keller and Grover, "General comments of the Human Rights Committee …", pp. 172–173: see statements of Australia, Belarus, Canada, Ireland, Japan, Switzerland, the United Kingdom and the United States prior to the adoption of general comment No. 35 of the Human Rights Committee in reaction to its draft, available from www.ohchr.org).

[116] See *Yearbook … 2014*, vol. II (Part Two), p. 107, para. 75, draft conclusion 9, para. 2.

[117] *Yearbook … 2011*, vol. II (Part Three), p. 239, para. (3) of the commentary to draft guideline 3.2.3.

[118] Tomuschat, "Human Rights Committee", para. 14 ("not to react at all … would appear to amount to a violation").

[119] Ulfstein, "Individual complaints", p. 97; it has been said that "in the practice of the [Human Rights Committee] to date, there have been no instances where any State other than the one examined has formally commented on the [Human Rights Committee] concluding observations": Citroni, "The Human Rights Committee and its role in interpreting the International Covenant on Civil and Political Rights *vis-à-vis* States Parties".

[120] See Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 410.

[121] *Yearbook … 2014*, vol. II (Part Two), para. 76, at p. 124, para. (6) of the commentary to draft conclusion 9; *Loizidou v. Turkey* (Preliminary Objections), 23 March 1995, European Court of Human Rights, Series A, No. 310, paras. 79–80 and 82.

effect. Human rights treaties are applied in a multitude of cases and their enforcement is typically expected to take place through specific national procedures. It would therefore be difficult to determine under which circumstances, among the multitude of applications of a human rights treaty, a reaction by other States parties would be called for. It cannot be excluded, however, that a particular pronouncement or practice may exceptionally "call for some reaction", perhaps owing to the importance of the rule in question or the intensity of the debate among States in a particular case.

(b) *Pronouncements of treaty bodies as a relevant means of interpretation as such*

49. Apart from possibly giving rise to, or reflecting, subsequent agreements or subsequent practice of the parties themselves under article 31, paragraph 3 (*a*) and (*b*), of the Vienna Convention on the Law of Treaties, pronouncements by human rights expert bodies may also be a relevant means of interpretation as such.

50. Since pronouncements of expert bodies are usually not legally binding, any possible legal effect for the purpose of interpretation must be a lesser one.[122] Two well-known categories of such a lesser effect exist: the first is that pronouncements of expert bodies, while not binding, nevertheless "shall" be "taken into account". The second possibility is that such pronouncements simply "may" be taken into account. The distinction between "shall" and "may" can be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 designates the principal means of interpretation that any interpreter of a treaty *needs* to take into account, whereas article 32 describes supplementary means of interpretation that an interpreter *may*, or may not, take into account.

51. It is not apparent why, under the rules of interpretation of the Vienna Convention on the Law of Treaties, pronouncements of expert bodies would *need* to be taken into account. Such pronouncements are not, as such, means of interpretation under article 31. The Commission has, however, stated in the commentary to its Guide to Practice on Reservations to Treaties that while "their conclusions are not legally binding … States parties are *obliged** only *to "give consideration" to** their assessments in good faith".[123] That proposition is not limited to a possibility ("may") to have recourse to pronouncements of expert bodies as a supplementary means of interpretation, as under article 32, but rather appears to designate such pronouncements as a means of interpretation that needs ("shall") be taken into account, as under article 31.

52. The statement in the commentary of the Guide to Practice on Reservations to Treaties does not, however, address the relevance of pronouncements of expert bodies under the rules of interpretation of the Vienna Convention on the Law of Treaties. It rather concerns the duty of every State party under a human rights treaty to cooperate in good faith and thus take account of pronouncements that are addressed to it (as are pronouncements regarding the permissibility of a reservation).[124] Moreover, the context in which the commentary is formulated suggests that the Commission was not so much concerned with the question of whether parties are actually generally *obliged* to take pronouncements of human rights bodies into account, but rather with explaining that such pronouncements are not binding. That does not exclude that pronouncements of expert bodies, as practice under the treaty generally, may contribute "to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty".[125]

53. The practice of international and domestic courts suggests that pronouncements of human rights expert bodies, in the vast majority of cases, are mostly not taken into account by those courts as a matter of obligation but rather as supplementary.[126] Therefore, domestic and international courts normally use pronouncements of treaty bodies in the way in which article 32 describes supplementary means of interpretation. Accordingly, the High Court of Osaka stated: "One may consider that the 'general comments' and 'views'… should be relied upon as supplementary means of interpretation of the [International Covenant on Civil and Political Rights]".[127]

54. States parties to a human rights treaty do not consider that their courts are under a general obligation pursuant to the treaty to take pronouncements of an expert

[122] Rodley, "The role and impact of treaty bodies", pp. 632 and 639.

[123] *Yearbook … 2011*, vol. II (Part Three), p. 239, para. (3) of the commentary to draft guideline 3.2.3.

[124] *Ibid.*

[125] *Yearbook … 2013*, vol. II (Part Two), para. 39, at p. 21, para. (15), footnote 58, of the commentary to draft conclusion 1 as provisionally adopted; see also *Yearbook … 2015*, vol. II (Part Two), para. 129, at p. 61, para. (34) of the commentary to draft conclusion 11, para. 3.

[126] See, e.g., Netherlands: on the one hand: Central Appeals Tribunal (footnote 90 above); on the other hand: Annual Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40* (A/46/40) chap. V, sect. J, para. 708: Netherlands do not share the Human Rights Committee's views and announce payment only "out of respect for the Committee"; United Kingdom: on the one hand: *Jones v. Saudi Arabia* (footnote 91 above) ("no value"); on the other hand: *A. v. Secretary of State for the Home Department*, House of Lords, [2005] UKHL 71, paras. 34–36, relying heavily on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture; Court of Appeal: *R (on the application of Al-Skeini) v. Secretary of State for Defence, Application for judicial review*, (2005) EWCA Civ 1609, (2006) *Human Rights Law Reports* 7, para. 101, citing general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant of the Human Rights Committee (*Human Rights Instruments*, vol. I: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty* Bodies, HRI/GEN/1/Rev.9(Vol.I), p. 243) to establish the extraterritorial application of the Human Rights Act 1998; South Africa: *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* (footnote 90 above) ("General comments have an authoritative status under international law"); on the other hand: Constitutional Court: *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37, rejecting the application of the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3 (1990) on the nature of States parties' obligations (HRI/GEN/1/Rev.9(Vol.I), p. 7); Japan: on the one hand: Osaka High Court, Judgment, 28 October 1994 (footnote 95 above) ("One may consider that the 'general comments' and 'views' … should be relied upon"); on the other hand: Tokyo District Court (footnote 91 above), ("the general comment neither represents authoritative interpretation of the [International Covenant on Civil and Political Rights] nor binds the interpretation of the treaty in Japan").

[127] Japan, Osaka High Court, Judgment of 28 October 1994 (footnote 95 above).

body into account whenever they apply the treaty.[128] Since human rights treaties are typically applied at the domestic level, and since such treaties usually leave room for States parties to decide the way in which they transpose the obligations that arise under the treaty to their domestic law,[129] it cannot be assumed that human rights treaties expect domestic courts to always take pronouncements of human rights expert bodies into account as a matter of legal obligation. Such a duty may, however, flow from the domestic law of a particular State itself, in particular if the national constitution is understood as encouraging the reception of international law generally, or at least certain kinds of international obligations.[130]

55. That does not exclude the idea that such pronouncements should nevertheless be taken very seriously. As the International Court of Justice has held, interpreters "should ascribe great weight to the interpretation [of the International Covenant on Civil and Political Rights] adopted by this independent body [the Human Rights Committee] that was established specifically to supervise the application of that treaty".[131] The point is rather that the weight that should be given to such pronouncements in each case depends on specific considerations, which include the cogency of their reasoning,[132] the character of the treaty and of the treaty provisions in question,[133] the professional composition of the responsible body,[134] the procedure by which a pronouncement has been arrived at[135] and possibly other factors.[136] It would therefore go too far to accord such pronouncements a general "presumption in favour of substantive correctness",[137] or to even assume that "the final arbiter for interpreting the Covenant [is] the Committee and not individual States".[138]

56. That means, in particular, that an individual pronouncement normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation ("jurisprudence" or "case law"). Accordingly, the International Court of Justice has emphasized the "considerable body of interpretative case law" and the "jurisprudence" of the Human Rights Committee in order to substantiate the proposition that "it should ascribe great weight to the interpretation adopted by this independent body" in a general comment[139] as it reflected "30 years of experience in the application of the above-mentioned Article 14".[140] The interpretative weight of a general comment, for the purpose of interpretation, accordingly depends on whether it reflects a thoroughly considered view of the Committee regarding the actual legal content (*lex lata*) of certain provisions of the Covenant,[141] in particular whether the general comment is based on repeated engagement by the Committee with certain specific cases or situations.[142] Every element of a general comment should be assessed separately under that standard.[143] The level of acceptance

[128] Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 408.

[129] Çalı, "Specialized rules of treaty interpretation: human rights", pp. 529–530.

[130] Germany, Order of the Second Senate of 14 October 2004, Federal Constitutional Court, 2 BvR 1481/04 ("*Görgülü*"), para. 33 ("This constitutional significance of an agreement under international law [here: the European Convention on Human Rights], aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (*Völkerrechtsfreundlichkeit*); the Basic Law encourages both the exercise of State sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law."), available from www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html; Rodley, "The role and impact of treaty bodies", p. 641.

[131] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (footnote 52 above), pp. 663–664, para. 66.

[132] Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8); the reasoning on which pronouncements of expert bodies under human rights treaties are based is often rather short and not very methodological insofar as they elaborate on the interpretation of existing legal obligations arising under the treaty: Nolte, "Second report for the ILC Study Group on treaties over time", p. 277; Kälin, "Examination of State reports", pp. 50–60; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 908 and 930; Shelton, "The legal status …", p. 574.

[133] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 266–267.

[134] Depending, *inter alia*, on whether "persons having legal experience" were involved; see Rodley, "The role and impact of treaty bodies", pp. 624–625.

[135] Rodley, "The role and impact of treaty bodies", pp. 641–644, estimates that, due to the more or less limited scope of activities, different expert bodies under human rights treaties do not have a "similar authority", and he notes that for these bodies "there is too much work to be done, in too short a time, with inadequate resources"; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 402–403.

[136] It may occur, for example, that the extraordinary circumstances of a particular case contribute to an unbalanced assessment by an expert body: see Happold, "Julian Assange and diplomatic asylum" (concerning an expert body that does not fall within the scope of the present report (para. 11 above)).

[137] Tomuschat, *Human Rights: Between Idealism and Realism*, p. 267; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, p. 23.

[138] United Nations, Office of the United Nations High Commissioner for Human Rights, "Human Rights Committee discusses the report of Canada", press release, 8 July 2015. Available from www.ohchr.org/en/press-releases/2015/07/human-rights-committee-discusses-report-canada?LangID=E&NewsID=16215.

[139] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (see footnote 52 above), pp. 663–664, para. 66.

[140] *Judgment No. 2867* (see footnote 78 above), p. 27, para. 39; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 78 above), p. 179, para. 109, referring to "the constant practice of the Human Rights Committee"; Rodley, "The role and impact of treaty bodies", p. 631 ("close to a codification of evolving practice").

[141] Keller and Grover, "General comments of the Human Rights Committee …", p. 124.

[142] *Judgment No. 2867* (see footnote 78 above), p. 27, para. 39, where the Court contrasted the first general comment No. 13 (1984) on administration of justice of the Human Rights Committee (concerning equality before courts and tribunals; HRI/GEN/1/Rev.9 (Vol.I) (see footnote 126 above), p. 184) with the second general comment on the question (general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32) and relied on the latter, as it reflected "30 years of experience in the application of the above-mentioned Article 14": Ulfstein, "Law-making by human rights treaty bodies", p. 252.

[143] Thus, for example, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 39, where the Committee under the International Covenant on Economic, Social and Cultural Rights states that "[t]o comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health *in other countries, and to prevent third parties from violating the right in other countries**, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law" (*Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV), which was clearly a statement *de lege ferenda*: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 78 above), pp. 180–181, para. 112.

of a particular pronouncement, or series of pronouncements, by States parties is also an important factor that determines the degree to which States, and their courts, should or need to take them into account.[144] It is, however, also clear that an expert body may always reconsider its own interpretative practice ("case law", "jurisprudence") in the light of further developments.[145]

57. The assessment of the weight to be given to pronouncements of expert bodies under human rights treaties, for the purpose of interpretation, is based on an analysis of State and court practice and of the literature. It avoids a misleading alternative between a "traditional approach" to the interpretation of human rights treaties and an approach that considers that "human rights treaties are different".[146] Pronouncements of expert bodies are no more binding or authoritative than what the respective treaty provides according to the rules of interpretation (arts. 31 and 32), but the rules are open enough to take any specific features of such treaties into account.[147]

5. Pronouncements of treaty bodies as "other subsequent practice" under article 32

58. Pronouncements of expert bodies are a form of practice under human rights treaties that takes place subsequent to their conclusion. The question is whether such pronouncements are therefore "other subsequent practice" under article 32 for the purpose of the present project.

59. In the course of the work on the present topic, the Commission has adopted draft conclusion 1, paragraph 4, according to which "recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32".[148] Pronouncements of expert bodies are indeed "in the application of the treaty" since such "application", according to the Commission:

> Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation.[149]

60. Pronouncements of expert bodies under human rights treaties, as acts in the fulfilment of their mandate given by the States parties under the treaty, are "official statements regarding its interpretation" even if they are not binding. Official statements by individual States parties regarding the interpretation of a treaty are, after all, also not binding (for the other party or parties). The designation of a pronouncement of an expert body as "official" does not, of course, mean that such pronouncements are thereby assimilated to (official) acts of a State. Just as (official) acts of international organizations are not attributed to their member States, the term "official" only serves to characterize acts that are performed in the exercise of an element of public authority, as opposed to "private acts and omissions".[150] Such an element of authority may also be derived from or be established between States, as in the case of a mandate that is provided to expert bodies by a treaty.

61. However, the classification of pronouncements of expert bodies as "other subsequent practice in the application of the treaty" under article 32 would be excluded if such practice were limited to the practice of one of the *parties* to the treaty. The Commission has provisionally adopted draft conclusion 4, paragraph 3, according to which "[o]ther 'subsequent practice' … consists of conduct by one or more parties in the application of the treaty, after its conclusion".[151] Later, however, the Commission provisionally adopted draft conclusion 11, paragraph 3, according to which "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[152] In its commentary to draft conclusion 11, paragraph 3, the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1, para. 4, and 4, para. 3, provisionally adopted by the Commission at its sixty-fifth session, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[153]

62. The pronouncements of expert bodies under human rights treaties and the practice of an international organization in the application of its own instrument have in common that, while they are not the practice of a party to the treaty, they are nevertheless official pronouncements and conduct whose purpose under the treaty is to contribute to its proper application. Like the practice of international organizations, pronouncements of expert bodies cannot themselves be a form of subsequent practice under article 31, paragraph 3 (*b*). It is, however, their purpose under the treaty to contribute to its interpretation. That means of interpretation is "supplementary" in the sense of article 32 and, in contrast to subsequent practice under article 31, paragraph 3 (*b*), there is no strict obligation to take them "into account". It is sufficient to consider

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[144] One example in which such factors, in their combination, have led to a situation that at least approaches a situation of subsequent practice under article 31, paragraph 3 (*b*), and its obligation to take such practice into account, is the articulation, by the Committee under the International Covenant on Economic, Social and Cultural Rights, of the right to water: see para. 45 above.

[145] Human Rights Committee, *Judge v. Canada*, communication No. 829/1998, Views adopted on 5 August 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex VI, sect. G, para. 10.3; Nolte, "Second report for the ILC Study Group on treaties over time", p. 277.

[146] Alternative referred to in International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 630, paras. 25–26; but see text at para. 41 above.

[147] Ulfstein, "Individual complaints", pp. 99–100; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 386.

[148] *Yearbook … 2013*, vol. II (Part Two), para. 38, draft conclusion 1, para. 4, as provisionally adopted.

[149] *Ibid.*, p. 30, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

[150] See art. 8 of the articles on responsibility of international organizations (footnote 29 above): "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions." See also the commentary to art. 8, *Yearbook …2011*, vol. II (Part Two), para. 88, at p. 60, para. (4).

[151] *Yearbook … 2013*, vol. II (Part Two), p. 17, para. 38, draft conclusion 4, para. 3, as provisionally adopted.

[152] *Yearbook … 2015*, vol. II (Part Two), para. 128, at p. 55.

[153] *Ibid.*, para. 129, at p. 61, para. (32) of the commentary to draft conclusion 11, footnote 347 with reference to *Yearbook … 2013*, vol. II (Part Two), paras. 38–39.

them to be "other subsequent practice" under article 32. Pronouncements of expert bodies may also contribute "to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty"[154] without being themselves one of those primary means of interpretation under article 31.

63. The conclusion that pronouncements of human rights expert bodies are, as such, supplementary means of interpretation under article 32 is, in substance, also reflected in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. That provision speaks of "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Whereas Article 38, paragraph 1 (*d*), does not explicitly mention pronouncements of expert bodies (which are neither "judicial decisions" nor "teachings … of publicists"), such pronouncements may "exhibit some of the principal characteristics" of both those means.[155] Whereas views regarding individual communications have certain elements in common with court decisions, general comments have more in common with teachings due to their general nature. General comments may also display features of jurisprudence or a settled case law. The fact that Article 38, paragraph 1 (*d*), of the Statute only explicitly mentions judicial decisions and teachings of publicists as classical subsidiary means can be explained by the fact that the provision was originally drafted in 1920 and was retained without much discussion in 1946, long before expert bodies and their practice came into existence.[156]

64. Pronouncements of expert bodies may simultaneously be "other subsequent practice" under article 32 of the Vienna Convention on the Law of Treaties and a supplementary means for the determination of the law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. Neither provision excludes the other, but they partly overlap where they refer to the same means, as demonstrated by the fact that decisions of domestic courts are recognized as falling both under Article 38, paragraph 1 (*d*), of the Statute and under article 32 of the Vienna Convention.[157] The main difference between both provisions lies not in the kinds of means that they envisage, but in their function for "determining" the law. Whereas Article 38, paragraph 1 (*d*), of the Statute focuses on the evidence for identifying the different sources of international law in judicial proceedings, article 32 of the Convention addresses treaty interpreters regardless of such proceedings.

65. Regardless of whether Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice encompasses pronouncements of treaty bodies or not, it is clear that the provision does not establish an *obligation* that the International Court of Justice, or of other interpreters, take those "subsidiary means" into account. Interpreters are merely "invited" to do so.[158] The subsidiary means for the determination of the different sources of international law under Article 38, paragraph 1 (*d*), of the Statute are therefore, like "supplementary means of interpretation" for treaties under article 32 of the Vienna Convention on the Law of Treaties, and are materials that interpreters may (and are encouraged but not required to) take into account.

E. Other expert bodies

66. Expert bodies have not only been established under human rights treaties. Other multilateral treaties that provide for such bodies include the United Nations Convention on the Law of the Sea, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the Single Convention on Narcotic Drugs.[159]

67. It is not necessary, for the purpose of the present report, to deal with all expert bodies that have been established on the basis of treaties. The report does not aim at proposing a conclusion that would articulate a rule that must be applied in all cases. The legal effect of pronouncements by an expert body depends, after all, first and foremost on the applicable treaty itself.[160] That effect must be determined by way of applying the rules on treaty interpretation (arts. 31 and 32). Those rules are open enough to provide guidance for all treaties by mandating a process of interpretation that takes several means of interpretation into account in a "single combined operation". They do not, however, provide for hard and fast rules that would risk circumventing the intentions of the parties.[161] The purpose of the present report, in that context, is to highlight certain cases that may provide some guidance for similar cases and to derive a preliminary conclusion regarding the possible effect of pronouncements by expert bodies for the interpretation of a treaty.

68. The expert bodies described below are particularly well-known and important examples of bodies which, at least at first sight, possess some similarities with expert bodies under human rights treaties.[162]

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[154] *Yearbook … 2013*, vol. II (Part Two), para. 39, at p. 21, para. (15), footnote 58, of the commentary to draft conclusion 1, as provisionally adopted.

[155] See Human Rights Committee, general comment No. 33 (footnote 63 above). Van Alebeek and Nollkaemper in "The legal status of decisions …", pp. 404–408 and 410–411, discuss important factors that distinguish expert bodies from courts, including the different status regarding the independence of their members: see also Ulfstein, "Individual complaints", pp. 79–82; and Pellet, "Article 38", pp. 859–860, para. 318, which discusses "the constant practice" of the Human Rights Committee as part of "jurisprudence".

[156] See Article 38 of the Statute of the Permanent Court of International Justice; Pellet, "Article 38", pp. 738–744, paras. 17–46; United Nations Conference on International Organization, "Summary of seventh meeting of the United Nations Committee of Jurists", document G/30, 13 April 1945, in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, p. 162, at p. 170, and "Offical comments relating to the statute of the proposed international court of justice", *ibid.*, p. 387, at pp. 435–436.

[157] *Yearbook … 2013*, vol. II (Part Two), para. 39, at p. 30, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

[158] Pellet, "Article 38", p. 854, para. 305; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 411.

[159] See para. 12 above.

[160] See para. 15 above.

[161] *Yearbook … 2013*, vol. II (Part Two), para. 39, at pp. 13 and 18–20, paras. (14)–(16) of the commentary to draft conclusion 1, as provisionally adopted.

[162] Alvarez, *International Organizations as Law-makers*, p. 318; Ulfstein, "Treaty bodies", p. 888.

1. Commission on the Limits of the Continental Shelf

69. The Commission on the Limits of the Continental Shelf, in accordance with article 76, paragraph 8, and annex II to the United Nations Convention on the Law of the Sea, consists of 21 members who are experts in the fields of geology, geophysics or hydrography. According to article 2, paragraph 1, of annex II to the Convention, they serve in their personal capacity. Article 76, paragraph 8, states:

> The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

70. A recommendation of that Commission is not binding as such. It is, however, a necessary condition if a State wishes to establish the outer limit of its continental shelf as binding among all parties to the Convention. Therefore, only by accepting a recommendation of the Commission can a State achieve a final and binding status of the outer limits of its continental shelf beyond 200 nautical miles under the Convention. If a State disagrees with a recommendation of the Commission it can make a new submission to the Commission (art. 8 of annex II to the Convention). That process can be repeated and it can lead to what has been called a game of "ping-pong".[163]

71. Although a recommendation of that Commission under article 76, paragraph 8, of the Convention is not binding as such, the question of possible legal effects of such a decision has been debated.[164] The Commission itself has emphasized that its own role as a technical review body does not give it the competence to engage in legal interpretation of any parts of the Convention other than article 76 and annex II.[165] For example, the Commission acknowledged, in reaction to a submission made by Japan in 2008,[166] that it has no role regarding matters relating to the legal interpretation of article 121 of the Convention.[167] That position was supported by all parties to the case (China, Japan and the Republic of Korea). China, for example, stated in its communication of 3 August 2011:

> As a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including article 121.[168]

72. Whereas the Commission itself does not seem to have expressed more developed views regarding the possible significance, for the purpose of interpretation, of its pronouncements, the International Law Association addressed the question in a report in 2004:

> [T]he Convention does not charge the Commission to consider and make recommendations on legal matters. However, the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it. This conclusion also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit line it proposes. At times this may require the interpretation of specific provisions of article 76.[169]

73. At the same time, the report emphasized:

> On the other hand, the competence to interpret and apply article 76 of the Convention rests in the first place with its States parties. The Commission is only competent to deal with the interpretation of the provisions of article 76 and other provisions of the Convention to the extent this is necessary to carry out the functions which have been assigned to it under the Convention. As a consequence, this competence has to be interpreted restrictively.[170]

74. The position of the report echoes guideline 3.2.1 of the International Law Commission's Guide to Practice on Reservations to Treaties,[171] according to which "a treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization" (para. 1). The question is whether the conclusion which the International Law Commission draws from there in guideline 3.2.3 ("States and international organizations … shall give consideration to that body's assessment") is transferable to recommendations of the Commission on the Limits of the Continental Shelf. The functions of the Commission on the Limits of the Continental Shelf, however, consist, in the first place, in providing "scientific and technical advice", as reflected in its composition, which consists of "experts in the fields of geology, geophysics or hydrography". That situation is in marked contrast to expert bodies under human rights treaties whose functions usually consist, in particular, of providing "views" regarding the interpretation of human rights treaties and which are composed of persons with a "recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience" (e.g., article 28, paragraph 2, of the International Covenant on Civil and Political Rights). Such differences are relevant for the weight of pronouncements for the purpose of interpretation.

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[163] Gardiner, "The limits of the Area beyond national jurisdiction—Some problems with particular reference to the role of the Commission on the Limits of the Continental Shelf", p. 69; McDorman, "The continental shelf", p. 195.

[164] Anderson, "Developments in maritime boundary law and practice", p. 3214; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf: Deciding who owns the ocean floor", pp. 402–407.

[165] See, e.g., Statement by the Chair of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission (CLCS/64), submitted to the twenty-fourth session (2009), paras. 18 and 25; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf", p. 403.

[166] See submission by Japan to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, executive summary, available from www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf; further documentation on the case is available from www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm; see, generally, Gau, "Recent decisions by the Commission on the Limits of the Continental Shelf on Japan's submission for outer continental shelf".

[167] Statement by the Chair of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission (CLCS/62), submitted to the twenty-third session (2009), paras. 54 and 59.

[168] Quoted in Gau, "Recent decisions by the Commission on the Limits of the Continental Shelf …", p. 491; see also the statement to that effect by Canada dated 2 April 1980 (A/CONF.62/WS/4, para. 15), available from https://legal.un.org/diplomaticconferences/1973_los/vol13.shtml.

[169] International Law Association, "Legal issues of the outer continental shelf", p. 778.

[170] *Ibid.*, pp. 779–780.

[171] *Yearbook … 2011*, vol. II (Part Three), p. 30.

75. The Commission on the Limits of the Continental Shelf has, however, adopted scientific and technical guidelines by which it explains, *inter alia*, how it interprets certain aspects of article 76 of the Convention:[172]

> With these Guidelines, the Commission aims … to clarify its interpretation of scientific, technical and legal terms contained in the Convention. Clarification is required in particular because the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology. In other cases, clarification is required because various terms in the Convention might be left open to several possible and equally acceptable interpretations. [173]

76. That particular pronouncement fulfils a function comparable to a general comment by an expert body under a human rights treaty, giving general advice on how to interpret specific provisions of a treaty, the Commission having "designed these Guidelines with a view to ensuring a uniform and extended State practice".[174]

2. Compliance Committee under the Kyoto Protocol

77. The Kyoto Protocol to the United Nations Framework Convention on Climate Change provides for different expert bodies whose members are expected to serve in their personal capacity. The Compliance Committee deals with individual noncompliance cases and is competent to determine violations of the Protocol.[175] The Expert Review Teams basically serve to review information on assigned amounts pursuant to article 3, paragraphs 7 and 8, of the Kyoto Protocol and ensure that the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Compliance Committee have adequate information.[176]

78. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. Each branch consists of 10 members serving in their personal capacities.[177] They "shall have recognized competence relating to climate change and in relevant fields such as scientific, technical, socio-economic or legal fields".[178]

79. The facilitative branch provides advice and facilitation of assistance to the individual parties, but does not determine legally binding questions of noncompliance. The members of the enforcement branch are required to also have "legal experience".[179] The enforcement branch has the function of determining cases of non-compliance with certain obligations. Furthermore, the enforcement branch deals with disagreements between parties and Expert Review Teams over adjustments or corrections proposed by the Expert Review Teams to the States parties.[180]

80. The responsibility of the enforcement branch to "determine" cases of noncompliance is based on article 18 of the Kyoto Protocol. The term "to determine" may seem to suggest that the decisions are final (unless overturned on appeal) and binding, but article 18 explicitly requires an amendment of the Protocol for such an effect to take place.[181] It is the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol that may consider reports of the Expert Review Teams, provide general political guidance and consider and decide appeals and has the prerogative to decide on the legal form of the procedures and mechanisms relating to compliance.[182]

81. Like other expert bodies, the compliance mechanism under the Kyoto Protocol has been confronted with the question of the significance, for the purpose of interpretation, of decisions of the Compliance Committee. For example, in a case concerning Croatia, regarding the calculation of its assigned amount of CO_2 (2009), the Expert Review Team held that the way in which Croatia had calculated its assigned amount of CO_2 was not in accordance with articles 3, paragraphs 7 and 8, and 7, paragraph 4, of the Kyoto Protocol.[183] Croatia had added 3.5 million tons of CO_2 equivalents to its base year, invoking article 4 of the United Nations Framework Convention on Climate Change (which grants flexibility to parties undergoing the process of transition to a market economy) and decision 7/CP.12 (which allows the adding of the amount of 3.5 million tons). The enforcement branch followed the view of the Expert Review Team and stated that decision 7/CP.12, which was adopted under the Convention, could not be applied to a calculation under the Kyoto Protocol.[184]

82. Croatia objected:

> The error [the enforcement branch of the Compliance Committee] committed is primarily caused by *grammatical* interpretation of the clause, contradicting the Convention and [the Conference of the Parties] decisions, 9/CP.2 in particular.
>
> Instead of grammatical interpretation, [the enforcement branch of the Compliance Committee] should have used *teleological* interpretation focusing on the intention of the Parties of the Convention, respecting particular circumstances of each party. Such interpretation would enable [the enforcement branch of the Compliance Committee] to adopt fair and equitable decision with respect to Croatia honouring the Convention, decision 7/CP.12, specific historical circumstances referring to Croatia, but also provisions of [the Kyoto Protocol].[185]

83. The enforcement branch, in its final decision of 26 November 2009, disagreed:

> After full consideration of the further written submission from Croatia, the enforcement branch concludes that there are not sufficient grounds provided in the submission to alter the preliminary finding of this branch. In this respect, the branch notes that:

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[172] Scientific and technical guidelines of the Commission on the Limits of the Continental Shelf adopted by the Commission on 13 May 1999 at its fifth session (CLCS/11).

[173] *Ibid.*, para. 1.3.

[174] *Ibid.*, para. 1.4; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf", pp. 404 and 407.

[175] Decision 24/CP.7 (see footnote 40 above), annex; Ulfstein and Werksmann, "The Kyoto compliance system", p. 44.

[176] Decision 23/CP.7 on Guidelines for review under article 8 of the Kyoto Protocol, appendix I, sect. A, contained in *Report of the Conference of the Parties on its Seventh Session, held at Marrakesh, from 29 October to 10 November 2001*, Addendum, Part Two: *Action taken by the Conference of the Parties*, vol. III (FCCC/CP/2001/13/Add.3).

[177] Decision 24/CP.7 (footnote 40 above), annex, sections II, IV and V.

[178] *Ibid.*, sect. II, para. 6.

[179] *Ibid.*, sect. V, para. 3.

[180] *Ibid.*, sects. X and XV.

[181] Ulfstein and Werksmann, "The Kyoto compliance system", pp. 55–59.

[182] Decision 24/CP.7 (footnote 40 above), preamble and annex, sect. XIII; Ulfstein and Werksmann, "The Kyoto compliance system", p. 58.

[183] Report of the review of the initial report of Croatia (FCCC/IRR/2008/HRV), para. 157.

[184] Enforcement branch of the Compliance Committee, Preliminary finding (CC-2009-1-6/Croatia/EB), para. 21.

[185] Further written submission from Croatia (CC-2009-1-7/Croatia/EB), p. 6.

Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.[186]

84. Croatia lodged an appeal against the final decision of the enforcement branch to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,[187] which it withdrew before the Conference of the Parties considered the case.[188]

85. The Compliance Committee under the Kyoto Protocol has little room for interpretation. Section XV, paragraph 1, of decision 24/CP.7 specifically lists the consequences that shall be applied in different cases.[189] The Committee may possess some discretion with regard to the determination of sanctions but that does not usually involve relevant questions of interpretation.[190] As the case of Croatia shows, there may be exceptional cases in which the Compliance Committee, in order to fulfil its function, needs to interpret the treaty in a way that risks controversy. In such a case, however, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol has the last word and does not need to consider whether the decision of the Compliance Committee is based on a proper interpretation of the treaty. Should the question arise before a court or another body, that institution should consider whether and to what extent legal expertise has been involved in the decision of the Compliance Committee.

86. The decisions of the Compliance Committee contribute to the practice in the application of the treaty. However, it goes too far to say that decisions of the enforcement branch may influence the determination of the applicable law in the international climate regime, "similar to the impact that judicial decisions on the international level have as a subsidiary source of international law".[191]

3. Compliance Committee under the Aarhus Convention

87. The Compliance Committee under the Aarhus Convention examines compliance issues, makes recommendations and prepares reports.[192] It consists of independent experts: "persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience".[193] In order to become final, the pronouncements of the Committee always require the agreement of the party concerned[194] or the endorsement of the Meeting of the Parties to the Convention.[195]

88. The Compliance Committee reports its activities to the Meeting of the Parties and submits recommendations to that body.[196] The Meeting of the Parties may then, upon consideration of the reports or recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention.[197] Therefore, although the Compliance Committee consists of independent experts, its pronouncements always need either the agreement of the party concerned or the endorsement of the Meeting of the Parties.[198] That requirement distinguishes the pronouncements of the Compliance Committee from the pronouncements of expert bodies under human rights treaties and gives them a more preliminary character, which in turn affects the weight that should be given to them for the purpose of interpretation.

89. It should also be mentioned, however, that the Compliance Committee has determined that when making recommendations it implicitly makes (provisional) determinations of non-compliance.[199] On that basis, authors have proposed that the Committee should be seen as "an independent and impartial review body of a quasi-judicial nature"[200] whose pronouncements result in "case law".[201] The Supreme Court of the United Kingdom of Great Britain and Northern Ireland has held that "the decisions of the Committee deserve respect on issues relating to standards of public participation".[202] And the Court of Appeal of England and Wales (Civil Division) stated that "there is persuasive authority … in decisions of the Aarhus Compliance Committee".[203] The Advocate General of the European Court of Justice has also repeatedly invoked recommendations of the Committee when dealing with provisions of the Aarhus Convention.[204]

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[186] Enforcement branch of the Compliance Committee, Final decision (CC-2009-1-8/Croatia/EB), para. 3 (*a*).

[187] Appeal by Croatia against a final decision of the enforcement branch of the Compliance Committee (FCCC/KP/CMP/2010/2), annex; Comments from Croatia on the final decision (CC-2009-1-9/Croatia/EB), para. 2.

[188] Withdrawal by Croatia of its appeal against a final decision of the enforcement branch of the Compliance Committee (FCCC/KP/CMP/2011/2); documents relating to the case are available from http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php.

[189] See Ulfstein and Werksmann, "The Kyoto compliance system", p. 55.

[190] Decision 24/CP.7 (footnote 40 above), annex, section XV, para. 1; Ulfstein and Werksmann, "The Kyoto compliance system", pp. 55–59.

[191] Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, p. 180.

[192] Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)", p. 203; decision I/7 on review of compliance (see footnote 41 above), annex, sect. III.

[193] Decision I/7 on review of compliance (see footnote 41 above), annex, paras. 1–2.

[194] *Ibid.*, para. 36.

[195] *Ibid.*, para. 37.

[196] *Ibid.*, para. 35.

[197] *Ibid.*, para. 37.

[198] *Ibid.*

[199] Koester, "The Convention on Access to Information …", p. 204; Report on the Fifth Meeting of the Compliance Committee, (MP.PP/C.1/2004/6), paras. 42–43.

[200] Koester, "The Convention on Access to Information …", p. 204.

[201] Term used by Andrusevych, Alge and Konrad, *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*.

[202] *Walton v. The Scottish Ministers (Scotland)* [2012] UKSC 44, para. 100 (Lord Carnwath).

[203] *The Secretary of State for Communities and Local Government v. Venn* [2014] EWCA Civ 1539, para. 13.

[204] *Council of the European Union, European Parliament, European Commission v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C401/12 P to C-403/12 P, Opinion of Advocate General Jääskinen, 8 May 2014, *Reports of Cases*, para. 114 ("Reference should also be made to the position adopted by the Aarhus Convention Compliance Committee"); *Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz*, case C-72/12, Opinion of Advocate General Cruz Villalón, 20 June 2013, *Reports of Cases*, para. 101 ("The Convention's Compliance Committee

4. International Narcotics Control Board

90. The International Narcotics Control Board is the monitoring body for the implementation of several international drug control treaties. According to article 9 of the Single Convention on Narcotic Drugs of 1961,[205] the Board has 13 members serving in their personal capacity, including those with medical, pharmacological or pharmaceutical experience.[206] The Board has been described as "an early example of the 'independent committee of experts' model that has been adopted and developed within the [United Nations] human rights system" whose similarities "far outweigh[]" the differences.[207]

91. The International Narcotics Control Board can take measures to ensure the execution of provisions of the Convention and call upon the Parties to the Convention, the Economic and Social Council of the United Nations and the Commission on Narcotic Drugs of the Council to impose sanctions if a State party has failed its obligations.[208] In its annual reports, the Board analyses the world situation with regard to drugs and provides recommendations.[209] The Board also considers in its reports whether States parties followed its previous recommendations.

92. States are not legally bound to follow the International Narcotics Control Board's interpretation of the con"ventions. A number of States have disagreed, for example, with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures,[210] criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[211]

5. Conclusion regarding other expert bodies

93. In summary, the pronouncements of the Commission on the Limits of the Continental Shelf, the Compliance Committee under the Kyoto Protocol, the Compliance Committee under the Aarhus Convention and the International Narcotics Control Board, as examples of relatively strong expert bodies that are not established under human rights treaties, are primarily designed to facilitate the agreement of the parties regarding the application of the treaty rather than playing a role in the interpretation of the treaty.

F. Proposed draft conclusion 12

94. The following draft conclusion is proposed:

"Draft conclusion 12. Pronouncements of expert bodies

"1. For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

"2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

"3. A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

"4. Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

"5. Paragraphs 1 to 4 apply without prejudice to any relevant rules of the treaty."

also regards the exclusion of environmental-law claims from actionable claims on the ground that actions relating to the rights of neighbours were restricted to subjective rights and the exclusion of environmental law from actions relating to the rights of neighbours as an infringement of article 9 (2). Even though that finding is not binding on the Court, it nevertheless supports my interpretation of the Convention."). See also Andrusevych, Alge and Konrad, *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*, pp. 138, 146 and 148.

[205] The International Narcotics Control Board was established under the Single Convention on Narcotic Drugs (see footnote 42 above). The 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances transfer further competencies to the Board: see generally Klinger, *Die Implementationssicherungsmechanismen der UN-Drogenkonventionen von 1961, 1971 und 1988*, p. 137.

[206] Csete and Wolfe in "Closed to reason: the International Narcotics Control Board and HIV/AIDS", p. 3, raise the criticism that "none of the Board's 13 members has formal training in international law, despite the importance of such credentials in interpreting treaty provisions".

[207] Barrett, " 'Unique in international relations'? A comparison of the International Narcotics Control Board and the UN human rights treaty bodies, pp. 5 and 12–13.

[208] Single Convention on Narcotic Drugs, art. 14; Convention on Psychotropic Substances, art. 19; and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 22.

[209] The requirement to issue annual reports on its work arises from article 15 of the Single Convention on Narcotic Drugs, article 18 of the Convention on Psychotropic Substances and article 23 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[210] International Narcotics Control Board, Report of the International Narcotics Control Board for 2009 (E/INCB/2009/1), para. 278; see also Csete and Wolfe, "Closed to reason", pp. 12 *et seq.*

[211] Barrett, " 'Unique in international relations'?", p. 8.

Chapter II

Decisions of domestic courts

95. One reason for the International Law Commission to address the present topic is that subsequent agreements and subsequent practice as a means of interpretation of treaties have implications at the domestic level.[212] When

[212] *Yearbook … 2008*, vol. II (Part Two), annex I, at p. 155, para. 17.

it adopted draft conclusion 4, the Commission said that subsequent practice under article 31, paragraph 3 (*b*), as "conduct in the application of the treaty", might also include judgments of domestic courts.[213] The Commission also concluded that other subsequent practice under article 32 could take the form of a judicial pronouncement.[214]

96. There are therefore two reasons why decisions of domestic courts are relevant in the present context: (*a*) such decisions themselves may be a form of subsequent practice in the application of the treaty; and (*b*) domestic courts should properly assess subsequent agreements and subsequent practice when they are called to interpret and apply a treaty. As forms of subsequent practice under articles 31 and 32, decisions of domestic courts do not raise specific problems. Since, however, it is one of the purposes of the present work to provide guidance to domestic courts regarding the way in which treaties are properly interpreted and applied,[215] it may be helpful to review the way in which domestic courts have approached subsequent agreements and subsequent practice as means of interpretation and to assess whether practice is in line with the draft conclusions that the Commission has so far provisionally adopted. Such a review will provide a basis for a draft conclusion whose purpose is to direct the attention of domestic courts to certain questions that have arisen in that context.

97. It would be impossible to review all published decisions of domestic courts in which a treaty was, or should have been, interpreted by taking into account a subsequent agreement under article 31, paragraph 3 (*a*), or subsequent practice under articles 31, paragraph 3 (*b*), or 32. The following review, although necessarily incomplete, benefits from a research project on the question of how domestic courts in a number of States have treated subsequent agreements and subsequent practice as a means of treaty interpretation.[216]

A. Constraints under domestic law

98. In most States, courts may apply treaties only within the framework of domestic law. Domestic law may therefore exclude the direct application of treaties or formulate certain constraints for such application.[217] Those constraints can affect the way in which treaties are interpreted, including the way in which subsequent agreements or subsequent practice under articles 31, paragraph 3 (*a*) and (*b*), and 32 are taken into account in the process of interpretation. The Federal Fiscal Court of Germany has stated, for example, that even if a subsequent agreement under article 31, paragraph 3 (*a*), were binding, domestic constitutional law would prevent that effect in domestic law.[218] The Court has argued, in particular, that a subsequent agreement under article 31, paragraph 3 (*a*), may not go so far as to override the law by which parliament has ratified the treaty and that this excluded an interpretation that would lead to an informal amendment of the treaty.[219] The German Federal Constitutional Court, on the other hand, has confirmed that the German Constitution accepts the "possibility under international law to (implicitly) modify the content or at least the interpretation of a treaty with respect to certain specific points by the practice of its application with the agreement of the other parties (see arts. 31, para. 3 (*b*), 39 [Vienna Convention on the Law of Treaties])".[220] That jurisprudence is based on the assumption that the distinction between a permissible interpretation and an informal amendment is relevant under both the domestic constitution and international law, and that the distinction can be drawn by clarifying whether the parties, by the respective practice, intended to interpret or to amend the treaty.[221]

B. Classification

99. Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are "authentic" means of interpretation.[222] They have, however, not always been certain about the legal consequences which that characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain binding effects,[223] others have rightly emphasized that article 31, paragraph 3, requires only that subsequent agreements and subsequent practice "be taken into account".[224]

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[213] *Yearbook … 2013*, vol. II (Part Two), pp. 28 and pp. 35–36, draft conclusion 4 and para. (12) of the commentary thereto, as provisionally adopted.

[214] *Ibid.*, p. 34, para. (36) of the commentary to draft conclusion 4, as provisionally adopted.

[215] On the interpretation of treaties by domestic courts generally, see the contributions in Aust and Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*.

[216] Katharina Berner, "Subsequent agreements and subsequent practice in domestic courts", doctoral thesis, Humboldt University of Berlin, 2015; this research has found pertinent decisions from Australia, Austria, Belgium, Canada, Germany, India, New Zealand, Switzerland, the United Kingdom, and the United States, as well as Hong Kong, China. The limitation of the study to those jurisdictions is due to reasons that include practice, availability and language. Spain, for example, in its response to the request of the Commission for information, has stated that no recent example could be found in the practice of its courts.

[217] Forteau, "The role of the international rules of interpretation for the determination of direct effect of international agreements".

[218] Germany, Federal Fiscal Court, *Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofes*, vol. 181, p. 158, at p. 161; vol. 219, p. 518, at pp. 527–528.

[219] *Ibid.*, vol. 157, p. 39, at pp. 43–44; vol. 227, p. 419, at p. 426.

[220] Decision of 15 December 2015 (not yet published), 2 BvL 1/12, para. 90: "völkerrechtlich vorgesehene Möglichkeit, den Inhalt oder zumindest die Auslegung eines Abkommens durch die Praxis seiner Anwendung in Übereinstimmung mit der anderen Vertragspartei in ganz bestimmten Punkten (konkludent) zu ändern (vgl. Art. 31 Abs. 3 Buchstabe b, Art. 39 WVRK)".

[221] Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 90, p. 286, at pp. 359–363; vol. 104, p. 151, at p. 201.

[222] Switzerland, Federal Court, Judgment of 8 April 2004, 4C.140/2003, *Bundesgerichtsentscheiden*, vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge")), and Judgment of 12 September 2012, 2C_743/2011, *Bundesgerichtsentscheiden*, vol. 138 II, p. 524, at pp. 527–528; Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 90 (see previous footnote), at p. 362; see also India, Supreme Court, *Godhra Electricity Co Ltd. v. The State of Gujarat* [1975] *All India Reporter* 32, at http://indiankanoon.org/doc/737188/.

[223] Germany, Federal Fiscal Court, *Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofes*, vol. 215, p. 237, at p. 241; vol. 181, p. 158, at p. 161.

[224] New Zealand, Court of Appeals, *Attorney-General v. Zaoui (No. 2)*, [2005] 1 *New Zealand Law Reports* 690 [130]; Hong Kong, China, Court of Final Appeals, *Ng Ka Ling v. Director of Immigration*

100. Decisions of domestic courts have not been uniform with regard to the relative weight that subsequent agreements and subsequent practice possess in the process of interpretation of a treaty. Whereas some decisions have clearly treated subsequent conduct under article 31 as a primary means of interpretation,[225] other decisions appear to have subordinated subsequent agreements and subsequent practice to other means of interpretation mentioned in article 31, in particular to textual interpretation.[226] The divergence may, however, be more apparent than real, because the same courts have pursued a different style of reasoning in different cases. Article 31 does not, after all, require that all means of interpretation must in each case be given the same predetermined weight.[227] Rather, the provision leaves room for putting more or less emphasis on certain of those means, as appropriate.

C. Range of possible interpretations

101. The identification of subsequent practice under articles 31, paragraph 3 (*b*), and 32 has sometimes led domestic courts to arrive at a broad interpretation, and sometimes at a narrow interpretation. On the one hand, for example, the House of Lords of the United Kingdom interpreted the term "damage" under article 26, paragraph 2, of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) as also including "loss", invoking the subsequent conduct of the parties.[228] On the other hand, the Supreme Court of the United States, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event but exclusively by the passenger's state of health.[229] Another example of a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of … dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[230]

102. In a similar manner, subsequent practice under articles 31, paragraph 3 (*b*), and 32 has contributed to domestic courts arriving at both a more evolutive and a more static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction, the Court of Appeal of New Zealand interpreted the term "custody rights" as encompassing not only legal rights but also "de facto rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31, paragraph 3 (*b*), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes" which led it to a modern understanding of the term "custody rights" rather than an understanding "through a 1980 lens".[231] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the treaty establishing the North Atlantic Treaty Organization in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31, paragraph 3 (*b*), "could acquire significance for the meaning of the treaty" and ultimately held that that had been the case.[232]

103. Other decisions of domestic courts confirm that subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd*, for example, the Supreme Court of the United States was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929 covered not only physical but also purely mental injuries. The court, taking account of the "post-1929 conduct" and "interpretations of the … signatories", emphasized that, despite some initiatives to the contrary, most parties had always understood the term to cover only bodily injuries.[233]

[1999] 1 *Hong Kong Law Reports and Digest* 315, at p. 354; Austria, Higher Administrative Court, Judgment of 30 March 2006, 2002/15/0098, pp. 2 and 5.

[225] United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47–48 (Lord Steyn); United States, Supreme Court, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), pp. 183–185, and *O'Connor v. United States*, 479 U.S. 27 (1986), pp. 31–32; Switzerland, Federal Administrative Court, Judgment of 21 January 2010, BVGE 2010/7, para. 3.7.11 and Federal Court, Judgment of 8 April 2004 (see footnote 222 above).

[226] United Kingdom, House of Lords, *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn); in the United States Supreme Court, Justice Scalia criticized the majority of the Court for relying on "[t]he practice of the treaty signatories" which, according to him, need not be consulted when the "Treaty's language resolves the issue presented, there is no necessity of looking further", *United States v. Stuart*, 489 U.S. 353, pp. 369 and 371.

[227] *Yearbook … 2013)*, vol. II (Part Two), p. 21, para. (15) of the commentary to draft conclusion 1 on the present topic, as provisionally adopted.

[228] United Kingdom, House of Lords, *Fothergill v. Monarch Airlines* [1980] UKHL 6, paras. 278 (Lord Wilberforce) and 279 (Lord Diplock); similarly, Germany, Federal Court (Civil Matters), *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, vol. 84, p. 339, at pp. 343–344.

[229] United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 403–404.

[230] Australia, Federal Court of Australia, *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* [1992] FCA 566, paras. 30–35 (Judge Einfeld); see also United Kingdom, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* (footnote 225 above), paras. 47–48 (Lord Steyn).

[231] New Zealand, Court of Appeal, *C v. H*, [2009] NZCA 100, paras. 175–177 and 195–196 (Judge Baragwanath); see also para. 31 (Judge Chambers): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (*b*) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"; similarly: Canada, Supreme Court, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 *Supreme Court Reports* 982, para. 129 (Judge Cory).

[232] Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* vol. 90 (see footnote 221 above), at pp. 363–364, para. 276, and *ibid.*, vol. 104 (see footnote 221 above), pp. 206–207.

[233] United States, Supreme Court, *Eastern Airlines Inc. v. Floyd* (1991), 499 U.S. 530, pp. 547–549; see also United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

D. Distinction between articles 31, paragraph 3, and 32 and the relevance of agreement between the parties

104. It is a more serious concern that domestic courts often do not distinguish clearly between subsequent agreements and subsequent practice under article 31, paragraph 3 (which requires agreement between the parties regarding the interpretation of a treaty), and other subsequent practice under article 32 (which does not require such agreement). The lack of distinction is not relevant when it only concerns the order in which a court considers different means of interpretation.[234] It does matter, however, when courts invoke article 31, paragraph 3 (*b*), without ascertaining whether the parties are actually in agreement regarding a particular interpretation.

105. That situation has occurred mainly in two types of cases: first, in cases in which courts have invoked article 31, paragraph 3, but have only referred to the practice of a limited number of parties to the treaty and thereby disregarded the requirement that such practice must establish the agreement of the parties;[235] and second, in cases in which domestic courts have simply assumed that the other parties have agreed, implicitly or by way of silence, to the practice of a limited number of parties, without providing any particular evidence or reason for that conclusion.[236]

106. In contrast, other court decisions have appropriately recognized that a particular subsequent practice did not establish an agreement between the parties,[237] or the courts have decided in conformity with the rule expressed in draft conclusion 9, paragraph 2, according to which silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[238] Such circumstances have sometimes been recognized in specific cooperative contexts, for example under a bilateral treaty that provided for a particularly close form of cooperation.[239] This may be different if the form of cooperation envisaged by the treaty comes within the ambit of an international organization whose rules exclude that the practice of the parties, and their silence, are relevant for the purpose of interpretation.[240]

E. Use of subsequent practice which is not accompanied by an agreement of the parties

107. The fact that domestic courts have sometimes applied article 31, paragraph 3 (*b*), without ascertaining whether a particular subsequent practice established the agreement of parties regarding the interpretation of the treaty does not mean, however, that a use of such practice for the purpose of interpretation is impermissible or not to be encouraged. As Judge Glazebrook of the Court of Appeal of New Zealand remarked, it is admissible to take decisions by the domestic court of another State into account because "[t]he Vienna Convention also permits supplementary means of interpretation to be used under art[icle] 32 such as decisions from other jurisdictions".[241]

108. Many domestic courts have used decisions from other domestic jurisdictions without explicitly basing that use on article 32[242] and therefore engage in a "judicial dialogue" even if no agreement of the parties can be established thereby. Apart from possibly confirming an interpretation under article 32, such engagement may add to the development of a subsequent practice together with other domestic courts.[243] However, a selective invocation of certain practice, executive or judicial, that either disregards significant countervailing practice or otherwise cannot claim to be representative, should not be given much weight and may provoke legitimate criticism.[244] The line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin. Lord Hope of the House of Lords, quoting the Vienna rules of interpretation, provided a reasonable general guide when he stated:

> In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.[245]

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[234] See, e.g., United States, Supreme Court, *O'Connor v. United States* (footnote 225 above), pp. 31–33.

[235] United Kingdom, House of Lords: *Deep Vein Thrombosis and Air Travel Group Litigation* (see footnote 226 above), paras. 54–55 and 66–85 (Lord Mance), *R (Mullen) v. Secretary of State for the Home Department* (footnote 225 above), para. 47 (Lord Steyn), and *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 80 (Lord Hope); New Zealand, Court of Appeal: *Attorney-General v. Zaoui and Others (No. 2)* (see footnote 224 above), para. 130 (Judge Glazebrook), and *Lena-Jane Punter v. Secretary for Justice, ex p Adam Punter*, [2004] 2 *New Zealand Law Reports* 28, para. 61 (Judge Glazebrook); Germany, Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 104 (see footnote 221 above), at pp. 256–257.

[236] United Kingdom, House of Lords, *R (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, para. 38; Germany, Federal Administrative Court: Judgment of 29 November 1988, 1 C 75/86, [1988] *Neue Zeitschrift für Verwaltungsrecht*, p. 765, at p. 766.

[237] Australia, High Court of Australia, *Minister for Immigration v. Ibrahim*, [2000] HCA 55, para. 140 (Judge Gummow); Germany, Federal Administrative Court, Decision of 7 February 2008, 10 C 33/07, para. 35, which, however, concerned a case in which the available practice was not uniform.

[238] Switzerland, Federal Court, Judgment of 17 February 1971, *Bundesgerichtsentscheiden*, vol. 97 I, p. 359, at pp. 370–371.

[239] See United States, Supreme Court, *O'Connor v. United States* (footnote 225 above), pp. 33–35; Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 59, p. 63, at pp. 94–95.

[240] See United Kingdom, Supreme Court: on the one hand, *Assange v. The Swedish Prosecution Authority*, [2012] UKSC 22, paras. 68–71 (Lord Phillips); and, on the other, *Bucnys v. Ministry of Justice, Lithuania*, [2013] UKSC 71, paras. 39–43 (Lord Mance).

[241] New Zealand, Court of Appeal, *Ye v. Minister of Immigration*, [2009] 2 *New Zealand Law Reports* 596, at para. 71.

[242] See, e.g., United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 397–407; *Abbott v. Abbott*, 560 U.S. 1 (2010), Opinion (Judge Kennedy), Slip Opinion at www.supremecourt.gov/opinions/09pdf/08-645.pdf, at pp. 12–16; Germany, Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 139, p. 272, at pp. 288–289; Australia, High Court of Australia, *Macoun v. Commissioner of Taxation*, [2015] HCA 44, at pp. 75–82.

[243] Tzanakopoulos, "Judicial dialogue as a means of interpretation", p. 94; Benvenisti, "Reclaiming democracy: the strategic uses of foreign and international law by national courts".

[244] United Kingdom, Supreme Court, *R (Adams) v. Secretary of State for Justice*, [2011] UKSC 18, para. 17 (Lord Philips) ("This practice on the part of only one of the many signatories to the [International Covenant on Civil and Political Rights] does not provide a guide to the meaning of article 14 (6) … It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6).").

[245] United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 81.

109. Much depends on how that general orientation is applied. For example, it is not appropriate, as a general rule, to selectively invoke the decisions of one particular national jurisdiction or the practice of a particular group of States, as important as they may be.[246] On the other hand it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a more representative group of jurisdictions[247] and to give more weight to the decisions of higher courts.[248]

F. Identification of subsequent agreements and subsequent practice

110. Not surprisingly, domestic courts have more frequently identified subsequent agreements under article 31, paragraph 3 (*a*), between two or very few parties rather than between the parties of open multilateral treaties.[249] In that context, domestic courts have not always carefully identified the evidence before concluding that the parties had subsequently agreed on a particular interpretation. For example, in *Diatlov v. Minister for Immigration and Multicultural Affairs*[250] the Federal Court of Australia stated that "it seems clear enough that the Stateless Persons Convention forms part of the context for the purposes of construing the Refugees Convention: see Vienna Convention, article 31 (3) (*a*), (*c*)". In order to draw the conclusion that the Convention relating to the Status of Stateless Persons constituted a subsequent agreement regarding the Convention relating to the Status of Refugees under article 31, paragraph 3 (*a*), the Court should have rather determined whether the Convention relating to the Status of Stateless Persons encompasses all parties to the Convention relating to the Status of Refugees (which it does not), and whether the former could be seen as having been concluded "regarding the interpretation" of the latter.

111. The Hong Kong Court of Final Appeal provided an example for a more rigorous approach when it was called to interpret the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Sino-British Joint Declaration) in the case of *Ng Ka Ling and another v. Director of Immigration*.[251] In that case, one party alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration by pointing to a booklet which stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find it established that the purpose of the booklet was to interpret or to apply the Joint Declaration within the meaning of article 31, paragraph 3 (*a*).[252]

G. Proposed draft conclusion 13

112. The following draft conclusion is proposed:

"*Draft conclusion 13. Decisions of domestic courts*

"1. Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31, paragraph 3 (*b*), and 32 for the interpretation of the treaty.

"2. Domestic courts, when applying a treaty, should:

"(*a*) consider that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are not binding as such;

"(*b*) be aware that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time;

"(*c*) distinguish between subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), which require the agreement of the parties, and other subsequent practice under article 32, which does not;

"(*d*) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice;

"(*e*) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty."

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[246] See, e.g., United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all the jurisdictions … that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991), and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air."; or Judge Einfeld for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* (see footnote 230 above), para. 30, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31, paragraph 3 (*b*), who stated that "international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom".

[247] Canada, Supreme Court, *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 1 *Supreme Court Reports* 649, para. 21 (Judge Rothstein).

[248] United Kingdom, House of Lords, *Sidhu v. British Airways*, [1997] *Appeal Cases* 430, at para. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd.* (see footnote 228 above), paras. 275–276 (Lord Wilberforce).

[249] Berner, "Subsequent agreements and subsequent practice in domestic courts", chap. 6.

[250] [1999] FCA 468, para. 28.

[251] [1999] 1 *Hong Kong Law Reports and Digest* 315.

[252] *Ibid.*, paras. 150–153.

Chapter III

Structure and scope of the draft conclusions

113. As the work on the present topic is advancing to the stage of first reading, it is necessary to consider some aspects that concern the proposed set of draft conclusions as a whole. The Special Rapporteur proposes to give the following general structure to the set of draft conclusions:

I. Introduction (with a new introductory draft conclusion 1*a*)

II. Basic rules and definitions (provisionally adopted draft conclusions 1, 2, 4, 5)

III. Subsequent agreements and subsequent practice in the process of interpretation (provisionally adopted draft conclusions 3, 6, 7, 8, 9)

IV. Specific forms and aspects of subsequent agreements and subsequent practice (provisionally adopted draft conclusions 10, 11, 12, 13)

V. Final clause (with a new final draft conclusion 14)

114. After its consideration of the present report, the Commission will have dealt with those aspects of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" that the Special Rapporteur originally proposed should be covered.[253] While it is possible that there remain certain aspects that have not been addressed, explicitly or implicitly, the cross-cutting and diverse nature of the present topic does not require that every possible aspect be addressed.

115. One aspect of the topic that has not been addressed is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations. The Special Rapporteur proposes that that aspect should be dealt with separately, if necessary, as the Commission did in its previous work on the law of treaties. In addition, the Special Rapporteur does not consider it necessary that subsequent agreements and subsequent practice regarding treaties that are "adopted within an international organization" in the sense of article 5 of the Vienna Convention on the Law of Treaties be addressed specifically.[254] There do not seem to be relevant general distinctions, at least as far as their interpretation is concerned, between such treaties and those that are adopted at a diplomatic conference.[255]

116. The commentary to a new introductory draft conclusion will accordingly make it clear that the draft conclusions as a whole do not deal with all circumstances in which subsequent agreements and subsequent practice may be taken into account in the interpretation of treaties.

117. The following draft conclusion is proposed:

"*New draft conclusion 1a. Introduction*

"The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties."

[253] *Yearbook … 2012*, vol. II (Part Two), paras. 237–239.

[254] See El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

[255] Anderson, "1969 Vienna Convention: Article 5", p. 94, para. 19; Brölman, "Specialized rules of treaty interpretation: international organizations"; and Gardiner, *Treaty Interpretation*, pp. 126–127, do not address treaties "adopted within an international organization"; see also Schmalenbach, "Article 5", pp. 93–95, paras. 10–13.

Chapter IV

Revision of draft conclusion 4, paragraph 3

118. The advanced stage of the work on the topic within the Commission also gives occasion to reconsider a previously adopted draft conclusion in the light of later developments. In that context, the Special Rapporteur proposes, as do two States,[256] to revisit provisionally adopted draft conclusion 4, paragraph 3, according to which "other subsequent practice consists of conduct by one or more parties in the application of the treaty, after its conclusion". As described above (paras. 58–62), the Commission later provisionally adopted draft conclusion 11, paragraph 3, according to which: "Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32."[257] In its commentary to draft conclusion 11, paragraph 3, the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1, para. 4, and 4, para. 3, provisionally adopted by the Commission at its sixty-fifth session, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[258]

119. The Special Rapporteur proposes in the present report that the pronouncements of expert bodies under human rights treaties, while not constituting practice of a party in the application of the treaty, are nevertheless official pronouncements whose purpose under the treaty it is to contribute to its proper application. Pronouncements of expert bodies are "in the application of the treaty", since such "application", according to the Commission:

[256] See footnote 20 above (Austria and Malaysia).

[257] *Yearbook … 2015*, vol. II (Part Two), para. 128, at p. 55, draft conclusion 11, para. 3, as provisionally adopted.

[258] *Ibid.*, para. 129, at p. 61, para. (32) of the commentary to draft conclusion 11, as provisionally adopted, footnote 347, referring to *Yearbook … 2013*, vol. II (Part Two), paras. 38–39.

Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation.[259]

120. Pronouncements by expert bodies fit as a "supplementary" means of interpretation, as envisaged in article 32. In contrast to subsequent practice of the parties under article 31, paragraph 3 (*b*), there is no strict obligation to take such supplementary means "into account". The fact that the pronouncements are envisaged by the treaty as an official means to contribute to its proper application is sufficient to consider them to be "other subsequent practice" under article 32. The Special Rapporteur therefore proposes to replace the words "by one or more parties" in draft conclusion 4, paragraph 3, with the word "official" and reformulate draft conclusion 4, paragraph 3, as follows:

"Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion."

[259] *Ibid.*, p. 30–31, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

It is not necessary to change the text of draft conclusion 1, paragraph 4, but only to make an appropriate reference in the commentary.

121. The commentary would then clarify that the term "official conduct" not only encompasses conduct by States parties to a treaty but also conduct by bodies that are established by the treaty and are mandated to contribute to its proper application.

122. The following revision to draft conclusion 4 is proposed:

"*Revised draft conclusion 4*

"…

"3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion."

Chapter V

Future programme of work

123. The present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur. If the Commission is able to provisionally adopt the draft conclusions that are proposed in the present report, the full set of draft conclusions could be adopted on first reading at the end of the sixty-eighth session in 2016. The Commission would then have adopted, in the four years from 2013 to 2016, the full set of draft conclusions with commentaries. A second reading could be envisaged for 2018, which would give States, international organizations and other relevant actors enough time to prepare written observations to the set of draft conclusions and commentaries adopted on first reading. The Special Rapporteur is aware that the programme of work is ambitious, and he is prepared to adapt the pace of progress to the circumstances.

ANNEX

Proposed draft conclusions

New draft conclusion 1a. Introduction

The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.

Proposed revised draft conclusion 4

…

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion.

Draft conclusion 12. Pronouncements of expert bodies

1. For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

3. A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

4. Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

5. Paragraphs 1 to 4 apply without prejudice to any relevant rules of the treaty.

Draft conclusion 13. Decisions of domestic courts

1. Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31, paragraph 3 (*b*), and 32 for the interpretation of the treaty.

2. Domestic courts, when applying a treaty, should:

(*a*) consider that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are not binding as such;

(*b*) be aware that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time;

(*c*) distinguish between subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), which require the agreement of the parties, and other subsequent practice under article 32, which does not;

(*d*) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice;

(*e*) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty.

PROVISIONAL APPLICATION OF TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/699 and Add.1

Fourth report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur*

[*Original: English and Spanish*]
[*23 June 2016*]

CONTENTS

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Multilateral instruments cited in the present report

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	*Ibid*., vol. 1946, No. 33356, p. 125.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women—"Convention of Belém do Pará" (Belém, 6 September 1994)	Available from www.oas.org/juridico/english/treaties/a-61.html.
Energy Charter Treaty (Lisbon, 17 December 1994)	United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	*Ibid*., vol. 2167, No. 37924, p. 3.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997)	*Ibid*., vol. 2056, No. 35597, p. 211.
Protocol on the Privileges and Immunities of the International Seabed Authority (Kingston, 27 March 1998)	*Ibid*., vol. 2214, No. 39357, p. 133.
Inter-American Convention on Transparency in Conventional Weapons Acquisitions (Guatemala City, 6 July 1999)	Available from www.oas.org/juridico/english/treaties/a-64.html.
Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (Guatemala City, 7 June 1999)	Available from www.oas.org/juridico/english/treaties/a-65.html.
International Cocoa Agreement, 2001 (Geneva, 2 March 2001)	United Nations, *Treaty Series*, vol. 2229, No. 39640, p. 2.
Inter-American Convention against Terrorism (Bridgetown, 2 June 2002)	OAS, *Acts and Documents*, OAS/Ser.P/XXXII-O/02, vol. 1, General Assembly resolution AG/RES.1840 (XXXII-O/02).
ECOWAS Energy Protocol A/P4/1/03 (Dakar, 31 January 2003)	ECOWAS, *Official Journal of the Economic Community of West African States*, vol. 42 (January 2003), p. 32.
Protocol Establishing an ECOWAS [Economic Community of West African States] Criminal Intelligence and Investigation Bureau (Niamey, 12 January 2006)	*Ibid.*, vol. 48 (January 2006), p. 7.
Economic Community of West African States [ECOWAS] Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (Abuja, 14 June 2006)	*Ibid.*, vol. 49 (June 2006), p. 5.
Supplementary Protocol A/SP.1/06/06 Amending the Revised [ECOWAS] Treaty (Abuja, 14 June 2006)	*Ibid*., p. 21.
Convention on Cluster Munitions (Dublin, 30 May 2008)	United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39.
Arms Trade Treaty (New York, 2 April 2013)	*Ibid*., vol. 3013, No. 52373, p. 269.
International Agreement on Olive Oil and Table Olives, 2015 (Geneva, 9 October 2015)	*Multilateral Treaties Deposited with the Secretary-General*, chap. XIX, TREATIES-XIX.49; available from https://treaties.un.org, *Depositary*, *Status of Treaties*.
Paris Agreement (Paris, 12 December 2015)	*Multilateral Treaties Deposited with the Secretary-General*, chap. XXVII, TREATIES-XXVII.7.d; available from https://treaties.un.org, *Depositary*, *Status of Treaties*.

Works cited in the present report

Arsanjani, Mahnoush H., and W. Michael Reisman

"Provisional application of treaties in international law: the Energy Charter Treaty awards", *in* Enzo Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention*, Oxford, Oxford University Press, 2011, pp. 86–102.

Bartels, Lorand

"Withdrawing provisional application of treaties: has the EU made a mistake?", *Cambridge Journal of International and Comparative Law*, vol. 1 (2012), pp. 112–118.

Belz, Matthew

"Provisional application of the Energy Charter Treaty: *Kardassopoulos v. Georgia* and improving provisional application in multilateral treaties", *Emory International Law Review*, vol. 22 (2008), pp. 727–760.

Bothe, Michael

"Article 46", in Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties. A Commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1090–1099.

Council of Europe and British Institute of International and Comparative Law, eds.

Treaty Making—Expression of Consent by States to Be Bound by a Treaty, The Hague, Kluwer Law International, 2001, pp. 82–87.

Da Silva, Clare, and Brian Wood

"Article 7. Export and Export Assessment", *in* Clare da Silva and Brian Wood, eds., *Weapons and International Law: The Arms Trade Treaty*, Brussels, Larcier, 2015, pp. 116–139.

Fahner, Johannes

"The empire strikes back: Yukos–Russia, 1–1", 26 May 2016, Blog of the *European Journal of International Law*. Available from www.ejiltalk.org/the-empire-strikes-back-yukos-russia-1-1/.

Gamarra, Yolanda

"Current questions of State succession relating to multilateral treaties", *in* Pierre Michel Eisemann and Martti Koskenniemi, eds., *State Succession: Codification Tested against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff, 2000, pp. 387–435.

Geslin, Albane

La mise en application provisoire des traités, Paris, Pedone, 2005.

Gomaa, Mohammed M.

Suspension or Termination of Treaties on Grounds of Breach, The Hague, Kluwer Law International, 1996.

Jennings, Robert Y.

"Treaties", *in* Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*, Paris and Dordrecht, UNESCO and Martinus Nijhoff, 1991, pp. 135–178.

Kohona, Palitha T.B.

"Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33 (2004–2005), pp. 415–450.

Koskenniemi, Martti

"Paragraph 3. Law of treaties", *in* Pierre Michel Eisemann and Martti Koskenniemi, eds., *State Succession: Codification Tested against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff, 2000, pp. 103–106.

Niebruegge, Alex M.

"Provisional application of the Energy Charter Treaty: the *Yukos* arbitration and the future place of provisional application in international law", *Chicago Journal of International Law*, vol. 8 (2007–2008), pp. 355–376.

Ouguergouz, Fatsah Santiago Villalpando and Jason Morgan-Foster

"Article 77", *in* Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties: A Commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1715–1753.

Provost, René

"Article 73", *in* Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties: A Commentary*, vol. II, Oxford, Oxford University Press, 2011, p. 1647.

Rosenne, Shabtai

"The depositary of international treaties", AJIL, vol. 61 (1967), pp. 923–945.

"More on the depositary of international treaties", AJIL, vol. 64 (1970), pp. 838–852.

Simma, Bruno, and Christian J. Tams

"Article 60", *in* Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties: A Commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1351–1381.

Yihdego, Zeray

"Article 23. Provisional application", *in* Clare da Silva and Brian Wood, eds., *Weapons and International Law: The Arms Trade Treaty*, Brussels, Larcier, 2015, pp. 289–291.

Introduction

1. In his third report on the provisional application of treaties,[1] the Special Rapporteur undertook the study of the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention"), namely articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*), and 27 (Internal law and observance of treaties).[2]

2. The report also analysed provisional application in relation to international organizations, focusing on provisional application of treaties establishing international organizations or international regimes, provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations and provisional application of treaties to which international organizations are party. To that end, it had the valuable support of a memorandum[3] by the Secretariat on legislative development of article 25 of the Vienna Convention between States and International Organizations or between International Organizations (hereinafter, "1986 Vienna Convention").

[1] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687.

[2] *Ibid.*, para. 31.

[3] *Ibid.*, document A/CN.4/676.

3. Also in his third report, the Special Rapporteur presented six draft guidelines for referral to the Drafting Committee of the Commission. The plenary decided to refer these draft guidelines to the Drafting Committee, which provisionally adopted draft guidelines 1 to 3.[4] It is expected that the Commission, at its sixty-eighth session in 2016, will request the Drafting Committee to continue its work from the point at which it stopped in 2015.

4. Meanwhile, the debates in the Sixth Committee of the General Assembly continue to contribute to the study on the practice and legal effects of provisional application. At the seventieth session of the General Assembly, 32 delegations, including the European Union and the States usually associated with its statements in the Sixth Committee, intervened on the topic of the provisional application of treaties, representing a significant increase compared to the interventions during the sixty-ninth session.[5]

5. In general, the delegations agreed that the provisional application of treaties produces legal effects. However, they underlined the importance of qualifying the scope of these legal effects and of differentiating them, where necessary, from those derived from the entry into force of the treaty. There also seemed to be agreement that the breach of an obligation derived from the provisional application of a treaty gives rise to the international responsibility of the State in question.

6. It was noted that the provisional application of a treaty does not modify or alter its content. Delegations pointed out the value of analysis of provisional application with respect to other provisions of the 1969 Vienna Convention. Accordingly, it was suggested that the Special Rapporteur should focus mainly on issues relating to the reservations regime and the regime pertaining to suspension, invalidity and termination of a treaty.

7. With regard to the expected result of the consideration of this topic by the Commission, there was general support for the preparation of guidelines, together with the possible formulation of model clauses. This would be subject to the stipulation, first, that the guidelines should be accompanied by commentaries offering clarification of their content and scope and second, that any evolving model clauses should be flexible enough so as not to prejudge either the will of the parties involved or the vast repertoire of possibilities that have been observed in practice with respect to the provisional application of treaties.

8. The Special Rapporteur also thanks all the delegations that formulated specific comments on the draft guidelines submitted in the third report. These observations, suggestions and recommendations have been duly taken into account and will be used to guide the discussions to take place in the Commission's Drafting Committee.

[4] *Ibid.*, vol. II (Part Two), paras. 250–251.

[5] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689), paras. 77–89, and statements by delegations during the Sixth Committee debate (A/C.6/71/SR.20 and A/C.6/71/SR.24–30).

Chapter I

Continuation of the analysis of views expressed by Member States

9. At the time of writing, the Commission had received comments on the national practice of 19 States: Austria, Botswana, Cuba, Czech Republic (which sent additional comments), Finland (on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)), Germany, Mexico, Micronesia (Federated States of), Norway, Republic of Korea, Russian Federation, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[6] These comments were considered in the third report.

10. In addition, the Commission has received new comments from Australia, the Netherlands, Paraguay and Serbia. As on previous occasions, none of the comments stated that the provisional application of treaties was prohibited by their domestic law. Nonetheless, Australia, the Netherlands and Serbia noted that their respective legislations established an internal process that must be followed in order for the provisional application of a treaty to be accepted, while Paraguay indicted that there was no rule governing the provisional application of treaties.

11. With regard to practice, Paraguay noted that in recent years it had signed only one bilateral treaty that provides for provisional application, namely the Agreement between the European Community and the Republic of Paraguay on certain aspects of air services.[7] Article 9 of this treaty reads as follows:

Entry into force and provisional application

1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.

2. Notwithstanding paragraph 1, the Parties agree to apply this Agreement provisionally from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.

3. Agreements and other arrangements between Member States and the Republic of Paraguay which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (*b*). This Agreement shall apply to all such agreements and arrangements upon their entry into force or provisional application.

12. In addition, Serbia reported that only 3 of the 468 treaties it had signed in the past four years provided for provisional application.[8]

[6] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 15–16.

[7] Signed in Brussels on 22 February 2007, *Official Journal of the European Union*, No. L122, 11 May 2007.

[8] Comments by Serbia, 29 January 2016, on file in the Codification Division, United Nations Office of Legal Affairs.

13. Lastly, the Netherlands explained that, in accordance with its internal law, provisional application of a treaty is permitted only where the interests of the State so require and where there is no conflict between the treaty in question and the Constitution of the Netherlands, in which case provisional application is prohibited.[9]

14. Despite the scant information received this year, the Special Rapporteur had access to an analytical report by the Council of Europe and the British Institute of International and Comparative Law, concerning the internal legal provisions of the 47 member States and 5 observer States of the Council of Europe on the signing of treaties and the forms of manifestation of consent to be bound by a treaty.[10]

15. That report lists the domestic legislation of the member States and observers of the Council of Europe, based on a questionnaire distributed to these States. With regard to provisional application, it points out the variety of situations and distinguishes between legal systems that generally admit provisional application, those that allow it provided that certain requirements are met and those that prohibit it. The report concludes that, with the exception of five States whose domestic law prohibits provisional application, no provision expressly prohibiting it could be found.

[9] Comments by the Netherlands, 26 April 2016, on file in the Codification Division, United Nations Office of Legal Affairs.

[10] See Council of Europe and British Institute of International and Comparative Law, *Treaty Making—Expression of Consent by States to Be Bound by a Treaty*, pp. 83–87.

Chapter II

Relationship of provisional application to other provisions of the 1969 Vienna Convention

16. The present chapter continues the analysis undertaken in the third report, which examined the relationship of provisional application to other provisions of the 1969 Vienna Convention, in particular articles 11, 18, 24, 26 and 27.[11]

17. The focus here is on issues raised by several delegations in the debates of the Sixth Committee of the General Assembly, such as those relating to the study of provisional application and its legal effects. In particular, it was suggested that the Special Rapporteur should study the regime of reservations, invalidity of treaties, termination and suspension arising out of a breach, and cases of succession of States.

18. The main objective of these analyses is to help shed more light on the legal regime of provisional application, without making an exhaustive study of the interpretation of the 1969 Convention. Provisions of the Convention that are not necessarily directly related to provisional application were therefore omitted.

19. This last category includes articles 7 to 10 of the 1969 Vienna Convention, which refer to the requirements surrounding the adoption or authentication of the text of a treaty. It is unnecessary to study these provisions, since article 25 offers enough flexibility to allow for agreement on the provisional application of all or part of a treaty, and what is important, at the time of interpreting a concrete situation, is to determine that the negotiating States have agreed "in some other manner" if the treaty has made no provision in that regard. Moreover, articles 7 to 10 must be applied where necessary in order to adopt or authenticate the text of the agreement by which provisional application is agreed.

20. The same is true of articles 11 to 13 of the 1969 Vienna Convention, which refer to the means of expressing consent to be bound by a treaty. The negotiating States frequently adopt one means or another to agree to provisional application; however, observed practice does not indicate a preference for any one means in particular.

21. Since the institution of provisional application generally terminates with the entry into force of the treaty, it does not appear necessary to consider articles 14 to 16 of the 1969 Vienna Convention, which establish means that, in most cases, assume the completion of the constitutional requirements necessary in each State for the entry into force of the treaty.

A. Part II, Section 2: Reservations

22. One of the issues raised on many occasions, both in the debates of the Sixth Committee of the General Assembly and in the Commission, is whether the reservations regime is applicable to the provisional application of treaties.

23. As in the case of provisional application, the reservations regime will be determined, in the first place, by what the treaty stipulates. Article 19 of the Vienna Convention clearly indicates that a State may formulate a reservation unless the reservation is prohibited by all or part of the treaty, and in cases where it is not prohibited by the treaty, the reservation in question must not be incompatible with the object and purpose of the treaty. In other words, in both cases, the Convention establishes a regime that sets conditions on the terms of the treaty.

24. The reservations regime in treaty law is codified in Part II, Section 2, of the 1969 Vienna Convention and covers matters relating to the formulation of reservations, acceptance of and objection to them, their legal effects, their withdrawal and procedures regarding them. This is such a complex topic that the Commission devoted a part of its agenda to it for nearly two decades from 1993 to 2011. As a result of this analysis, the Commission adopted the text, with commentaries, of a Guide to Practice on Reservations to Treaties.[12]

[11] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 27–70.

[12] *Yearbook … 2011*, vol. II (Part Three), paras. 1–2.

25. It is not the Special Rapporteur's intention to reconsider the study already carried out on the reservations regime in treaty law. The objective here is merely to analyse whether the formulation of reservations is compatible with the regime governing the provisional application of a treaty.

26. Both the 1969 Vienna Convention and the abovementioned Guide to Practice are silent about the possibility of formulating reservations in the context of the provisional application of a treaty. This is because, in accordance with article 19 of the Convention, a State may formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty, in other words, when motivated by any of the acts by virtue of which the State places on record at the international level its consent to be bound by the treaty.

27. Given that provisional application does not prejudge the decision that the State adopts *in fine* with respect to being definitively bound by the treaty, it is logical that the matter of reservations has not been addressed in the provisional application phase. In other words, the formulation of reservations is directly associated with the above-mentioned procedural stages.

28. Although there are many different forms and stages of consent to the provisional application of a treaty, a topic analysed by the Special Rapporteur in his first report on the provisional application of treaties,[13] it is interesting to note that many of the treaties cited by the Special Rapporteur in his three reports provide that provisional application may be decided at any of the procedural stages mentioned above, but without in any way pronouncing on the possibility of formulating reservations in relation to the regime established under provision application.

29. For example, article 18 of the Convention on Cluster Munitions stipulates the following:"Any State may, *at the time of its ratification, acceptance, approval or accession*,* declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State."

30. Likewise, article 18 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction provides as follows: "Any State may, *at the time of its ratification, acceptance, approval or accession*,* declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force."

31. More recently, article 23 of the Arms Trade Treaty set out the following: "Any State may, *at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession**, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State."

32. Whatever the form or procedural stage of the consent to accept provisional application, but especially if it takes the form of an agreement separate from the treaty, it will constitute a treaty in all senses of the term, in accordance with the definition in article 2, paragraph 1 (*a*), of the 1969 Vienna Convention.

33. One conclusion that may be drawn from this analysis is that a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time.

34. Nonetheless, given that, throughout the Special Rapporteur's study of the topic, no treaty has yet been seen that provides for the formulation of reservations as from the time of provisional application, nor have provisional application provisions been encountered that refer to the possibility of formulating reservations, and in the absence of proof of any type of practice in this regard, it is unnecessary to make an analysis in the abstract, as has been suggested.[14] As a corollary, no case has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally. Perhaps the reason for this is that it is much simpler for States *not to include* provisions in respect of provisional application on which they would have been required to formulate reservations.

35. The question seems to be the following: if a treaty is silent about the formulation of reservations, may a State formulate them at the time of agreeing to the provisional application of a treaty? The question is also valid in the case where the treaty is silent about the possibility of its provisional application.

36. In the Special Rapporteur's view, nothing would prevent the State from, in principle, effectively formulating reservations as from the time of its agreement to the provisional application of a treaty.

37. This view is primarily contingent on two elements: first, that the provisional application of treaties produces legal effects and, second, that the purpose of the reservations is precisely to exclude or modify the legal effects of certain provisions of the treaty on that State. Working on a similar hypothesis, the reservations regime referred to at the beginning of this chapter would be applicable, *mutatis mutandis*, to the provisional application regime, as has been suggested for the regime of international responsibility.[15]

38. It is important to note that this hypothesis does not prevent States with respect to which a contractual relation is generated under the provisional application regime from objecting to the reservation.

39. In the case of a multilateral treaty, the Secretary-General, in performing his depositary functions for treaties signed under the auspices of the United Nations, would circulate the declaration to negotiating States without comment and would allow these States to determine their legal position[16] and whether the proposed reservation is compatible with the object and purpose of the treaty.[17]

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[13] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, paras. 43–47.

[14] Czech Republic (A/C.6/70/SR.24), paras. 48–50.

[15] See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, paras. 91–95.

[16] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15) para. 178.

[17] Kohona, "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", p. 440.

B. Part V, Section 2: Invalidity of treaties

40. Part V, Section 2, of the 1969 Vienna Convention refers to the regime of invalidity of treaties. That section includes eight articles presenting the reasons that may give rise to annulment, namely: provisions of internal law regarding competence to conclude treaties (art. 46); specific restrictions on authority to express the consent of a State (art. 47); error (art. 48); fraud (art. 49); corruption of a representative of a State (art. 50); coercion of a representative of a State (art. 51); coercion of a State by the threat or use of force (art. 52); and treaties conflicting with a peremptory norm of general international law (*jus cogens*) (art. 53).

41. During the debate in the Sixth Committee of the General Assembly, a number of delegations have expressed interest in the relationship that may exist between provisional application and the regime of invalidity of treaties, specifically article 46 of the 1969 Vienna Convention.[18]

42. Article 46 of the 1969 Vienna Convention provides as follows:

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless that violation was manifest and concerned a rule of its internal law of fundamental importance*.*

2. A violation is manifest if it would be objectively evident to any State con ducting itself in the matter in accordance with normal practice and in good faith.

43. To a certain extent, the particular interest elicited by article 46 of the 1969 Vienna Convention in relation to provisional application stems from the question as to what extent the regime set out in article 25 of the Convention constitutes a sort of subterfuge for failing to comply with the requirements imposed by the domestic law of each State, as far as the manifestation of consent to be bound by a treaty is concerned.

44. Thus, it might be suggested that article 46 entails the need to determine, prior to agreeing on provisional application, whether doing so would violate "a rule of internal law of fundamental importance", thereby providing grounds for the invalidity of the treaty.

45. It would be neither correct nor reasonable to proceed in this way, in view of the following: (*a*) article 46 only refers to the "violation of a provision of … internal law regarding the *competence to conclude treaties**" and should concern "a rule … of *fundamental importance**"; (*b*) the rule contained in article 27 of the Vienna Convention makes no distinction between the provisions of domestic law and stipulates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"; and (*c*) nothing in article 25 entails the obligation for States contemplating provisional application to proceed, as a prerequisite, to a determination concerning the internal law of any of the parties involved on the basis of article 46.

46. The third report has already dealt with the question of the relationship between domestic law and observance of treaties (art. 27 of the 1969 Vienna Convention).[19] It concluded that "once a treaty is being provisionally applied, internal law may not be invoked as justification for failure to comply with the obligations deriving from provisional application".[20]

47. The debate in both the Commission and the General Assembly made it clear that under no circumstances should any reference to domestic law be included in the draft guidelines, so as not to create the false impression that the provisional application regime would be subordinated to the domestic law of States.

48. In any event, any substantive incompatibility that may arise will be governed by the principle of the primacy of international law; and even in cases of procedural violations, which might fall under article 46, such violations must be manifest and must concern a rule of fundamental importance.[21]

49. Another very different phenomenon occurs when the treaty expressly refers to the domestic law of the negotiating States and subjects the provisional application of the treaty to the condition that it would not constitute a violation of domestic law.

50. The *Yukos*[22] and *Kardassopoulos*[23] cases, which analyse the provisional application of the Energy Charter Treaty, provide excellent examples of controversies that have recently arisen.

51. The Special Rapporteur has already referred to these cases in previous reports.[24] Article 45 of the Energy Charter Treaty, which was also cited in the first report,[25] provides as follows:

Provisional Application

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, *to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*.

(2) (*a*) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

[18] Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/70/SR.23), para. 115; United Kingdom (A/C.6/70/SR.24), para. 27; Romania, *ibid.*, para. 56.

[19] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 60–70.

[20] *Ibid.*, para. 70.

[21] See Bothe, "Article 46", at p. 1094.

[22] *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, Case No. AA 227, provisional award on competence and admissibility, 30 November 2009, Permanent Court of Arbitration.

[23] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on jurisdiction of 6 July 2007; the text of the decision is available from https://icsid.worldbank.org/, *Cases*.

[24] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, para. 29; *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 62–66.

[25] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, para. 46.

(*b*) Neither a signatory which makes a declaration in accordance with subparagraph (*a*) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(*c*) Notwithstanding subparagraph (*a*), any signatory making a declaration referred to in subparagraph (*a*) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, *to the extent that such provisional application is not inconsistent with its laws or regulations**.

(3) (*a*) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(*b*) In the event that a signatory terminates provisional application under subparagraph (*a*), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (*c*).

(*c*) Subparagraph (*b*) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2) (*c*) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37 (3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

52. The underlying theme in the above-mentioned cases has been the possible existence of a conflict arising out of the incompatibility between the constitution of a State, on the one hand and, on the other hand, the provisional application of the Energy Charter Treaty, in whole or in part.[26]

53. In the first instance, the decision to sign or not to sign the treaty would appear to be sufficient proof that such determination has been made by the State concerned, acting in good faith, and independently of the possibility of resorting to provisional application.

54. In the *Yukos* case, the issue was resolved at various levels. Although article 45, paragraph 2 (*a*), expressly provides that any signatory may, when signing, deliver to the depository a declaration that it is not able to accept provisional application, this would seem to suggest that, if a signatory State does not submit such a declaration, it is accepting the real possibility of applying the treaty provisionally, as provided for in article 45, paragraph 1.[27]

55. Given that the Russian Federation signed the Treaty without delivering a declaration of conformity with article 45, paragraph 2, the arbitral tribunal in the *Yukos* case analysed whether the principle of provisional application as such was incompatible with Russian domestic law. Finding no conflict, the tribunal decided that the Russian Federation was subject to the provisional application regime as a whole, including article 26, which served as a basis for the Permanent Court of Arbitration to establish its competence, from the date of its signature until the date on which it delivered its decision to terminate the provisional application.

56. However, the issue that continues to give rise to controversy, as we shall see, is that relating to the determination of the existence of an incompatibility between the provisions of the treaty and the constitution of a signatory State, that is, a rule of fundamental importance in the terms of article 46 of the 1969 Vienna Convention.

57. The argument that the other signatories are responsible for ascertaining, to some extent, that there is no incompatibility that is being ignored by another signatory with respect to its domestic laws and for pointing out such incompatibility where it exists, which seems to underlie the reasoning of the arbitral tribunals that heard the *Yukos* and *Kardassopoulos* cases, respectively, has been sharply challenged in the legal literature, it being considered that it is unreasonable to require each signatory to review the diversity of domestic laws of its contractual partners.[28]

58. Thus, for example, Canada has pointed out the relevance of article 46 of the 1969 Vienna Convention with respect to provisional application, and that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its domestic law.[29] If we adhere to a basic criterion of legal certainty, it would be reasonable to assume that such determination would be made *a priori*, and not *a posteriori*.

59. However, on 20 April 2016, a district court in the Netherlands resolved three disputes submitted by the Russian Federation against the companies *Veteran Petroleum Limited, Yukos Universal Limited* and *Hulley Enterprises Limited*. The case argued by the Russian Federation sought to annul the decisions contained in the *Yukos* awards of 30 November 2009 and 18 July 2014, respectively.[30]

60. The Russian Federation held that the provisional application of the Energy Charter Treaty, established on the basis of article 45, could not include article 26 (Settlement of disputes between an investor and a contracting party), since the decision to accept provisional application in relation to this provision of the Treaty was the responsibility of other authorities within the structure of the Russian State. In the contrary case, the decision would be a violation of the Russian Constitution.

61. The Netherlands tribunal found that, in the light of the ordinary meaning of the terms of article 45, the

[26] See Niebruegge, "Provisional application of the Energy Charter Treaty …", p. 369.

[27] See Belz, "Provisional application of the Energy Charter Treaty …", p. 748.

[28] See Arsanjani and Reisman, "Provisional application of treaties in international law …", pp. 95–96.

[29] Statement by Canada (A/C.6/70/SR.25), para. 59.

[30] C/09/477160 / HA ZA 15-1; C/09/477162 / HA ZA 15-2; C/09/481619 / HA ZA 15-112. Available from https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230.

wording does not indicate that the limitation clause of paragraph 1 depends on the submission of a declaration under paragraph 2.[31] In other words, paragraph 2 of article 45 does not constitute the procedural rule that must be followed in order to exclude the provisional application of the Treaty under paragraph 1 of article 45.[32] Thus, the tribunal concluded that the Russian Federation was not obliged to submit a declaration in accordance with article 45, paragraph 2 (*a*), of the Energy Charter Treaty for a successful reliance on the limitation clause contained in article 45, paragraph 1.[33]

62. After conceding that the limitation clause in article 45, paragraph 1, can be invoked even at a time subsequent to the signature and without being obliged to submit the declaration provided for in paragraph 2, the Netherlands tribunal proceeded to analyse whether acceptance of provisional application by means of the signature included article 26 of the Treaty. This required an extensive analysis of the principle of the separation of powers in the Russian legal system in order to examine the procedure by which the State could accept the jurisdictional clause contained in article 26 of the Treaty.[34]

63. Lastly, the tribunal concluded that from the interpretation of article 45, paragraph 1, of the Treaty, it followed that the provisional application did not oblige the Russian Federation to observe article 26, since it was incompatible with the Constitution of the Russian Federation, and the Russian Federation had never made an unconditional offer with respect to possible arbitration. The Permanent Court of Arbitration had therefore committed an error in declaring itself competent in the dispute.[35] Consequently, the Netherlands tribunal quashed the *Yukos* awards.[36]

64. One view suggests that, beyond the analysis of the interpretation of provisional application, the difference of approaches between an arbitral tribunal and a national court may mean that each assigns different weight to the interests of the investors, on the one hand, and State sovereignty, on the other.[37]

65. Without doubt, it would be premature to advance any conclusion derived from this decision by a domestic court, since the parties affected could appeal the judicial decision.

66. From the point of view of international law, it is clear that, in respect of provisions of domestic law concerning competence to conclude treaties, article 46 refers to a different aspect from that referred to in article 27 of the 1969 Vienna Convention with regard to observance of treaties and in no way conditions its application.

67. Nevertheless, these cases, taken as a whole, confirm that provisional application produces legal effects; otherwise, it would be irrelevant to have to prove whether or not the acceptance of provisional application is compatible with the constitutional norms of a State, in order to determine the scope of the obligations contracted under provisional application or the international responsibility that might arise from a possible violation of those obligations.

68. Beyond the relationship between article 25 and article 26 of the 1969 Vienna Convention, the scope and duration of provisional application, given its relative infancy in the world of customary international law, as well as the validity of the theory as a whole, require further clarification.

C. Part V, Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach

69. The first report of the Special Rapporteur refers to the forms of termination of provisional application;[38] the second report explores the extinction of the legal effects of provisional application as a result of termination, including an analysis of article 70 of the 1969 Vienna Convention concerning the consequences of termination;[39] it is therefore unnecessary to repeat these considerations.

70. Termination of provisional application is governed by the second paragraph of article 25 of the 1969 Vienna Convention, which provides that:

> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

71. In that context, it is unnecessary to address all the situations envisaged in Part V, Section 3, of the 1969 Vienna Convention with respect to the termination of treaties. However, it is appropriate to analyse article 60, on the termination or suspension of the operation of a treaty as a consequence of its breach, since practice, as illustrated in that of the European Union, does not appear to subject termination to the mere assumption underlying article 25, paragraph 2.

72. For their part, a number of delegations in the Sixth Committee of the General Assembly have indicated the importance of addressing the relationship with article 60.[40]

73. Article 60 of the 1969 Vienna Convention reads as follows:

> *Termination or suspension of the operation of a treaty as a consequence of its breach*
>
> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

[31] *Ibid.*, para. 5.27.

[32] *Ibid.*

[33] *Ibid.*, para. 5.31.

[34] *Ibid.*, paras. 5.74–5.95.

[35] *Ibid.*, paras. 5.95–5.96.

[36] *Ibid.*, paras. 6.1–6.9.

[37] See Fahner, "The empire strikes back: Yukos–Russia, 1–1".

[38] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, paras. 48–52.

[39] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, paras. 69–85.

[40] Greece and Romania (A/C.6/70/SR.24); Canada, Ireland and Kazakhstan (A/C.6/70/SR.25).

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to pro visions prohibiting any form of reprisals against persons protected by such treaties.

74. As noted in the second report, in the terms of article 60 of the 1969 Vienna Convention, "the breach of a treaty applied provisionally may also give rise to the termination or suspension of provisional application by any State or States that have been affected by the breach".[41]

75. The principle of international law underlying the premise put forward in article 60 of the 1969 Vienna Convention, and also referred to in the second report,[42] is *inadimplenti non est adimplendum*. This principle, as we know, modifies the rule of *pacta sunt servanda* by incorporating the concept of negative reciprocity.[43]

76. A first consideration in delving into this analysis is that it is necessary to understand the terms "termination" and "suspension" as referred to in article 60 of the 1969 Vienna Convention in the context of article 25, in respect of phrases such as "termination of provisional application" or "suspension of provisional application". Article 60 of the Convention would apply to suspension or termination of a treaty that is being provisionally applied by a State as a consequence of a breach by another State.

77. Nevertheless, the breach of a norm does not necessarily lead to its abrogation, still less as a sanction on the State that committed the breach.[44] A material breach, in conformity with article 60, paragraph 2, is required.

78. Of course, the assumption here is of a "material breach" of the treaty that is being applied provisionally, i.e., a breach of an essential provision, as referred to in article 60, paragraph 3 (*b*), since such provisions are directly related to the very roots or bases of the contractual relationship, thereby calling into question the value or possibility of continuing such relationship.[45] In this case, the conditions set out in article 60 would be activated in order to terminate or suspend the provisional application of a treaty.

79. The International Court of Justice has found that only a material breach of the treaty itself, by a State party to that treaty, entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under article 60.[46]

80. Thus, a trivial violation of a provision that is considered essential may constitute a material breach for the purposes of article 60 of the 1969 Vienna Convention.[47]

81. However, since article does not define what is meant by an "essential provision", account must be taken of the reasons for the conclusion of the treaty.[48]

82. In the context of provisional application, it might be useful to ask the following question in analysing whether an "essential provision" has been breached: should the reasons for the recourse to provisional application also be taken into account?

83. The Special Rapporteur does not consider it necessary to meet this second threshold of proof, but there is no doubt that the reasons for recourse to provisional application of a particular part of a treaty may constitute evidence of its character as an essential provision within the meaning of article 60, paragraph 3 (*b*).

84. One example of this is the Arms Trade Treaty, which provides for the possibility of provisionally applying articles 6 and 7 of the Treaty. Article 7, on export and export assessment, is at the core of the Treaty, being directly linked with its object or purpose.[49] In that context, during the negotiations the States welcomed the possibility of provisionally applying these provisions of the Treaty, given their essential character.[50]

85. Beyond the analysis of the elements constituting article 60 of the 1969 Vienna Convention, however, there is an additional issue, perhaps of greater importance, which is at the heart of the discussion concerning the potential relationship between that provision and provisional application. The premise behind reliance on article 60, which also underlies the principle *inadimplenti non est adimplendum*, as obvious as it may seem, is the existence of a treaty in force between the parties. In other words, a breach of a contractual obligation cannot be invoked if there is no treaty from which such obligation emanates and if such treaty is not in force.[51]

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[41] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, para. 88.

[42] *Ibid.*, para. 89.

[43] See Simma and Tams, "Article 60", p. 1353.

[44] *Ibid.*, p. 1359.

[45] Jennings, "Treaties" pp. 157–158.

[46] See *Gabčikovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at p. 65, para. 106. See also *I.C.J Summaries 1997–2002*, p. 1.

[47] See Simma and Tams, "Article 60", p. 1359.

[48] *Ibid.*

[49] See Da Silva and Wood, "Article 7. Export and Export Assessment".

[50] Yihdego, "Article 23. Provisional application".

[51] Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, p. 52.

86. Accordingly, legal doctrine has examined the interval prior to the entry into force of a treaty, but only from the perspective of the existence of possible violations of the obligation not to frustrate the object and purpose of the treaty, and drawing a distinction to the effect that article 60 of the 1969 Vienna Convention refers only to breaches of treaties that are actually in force between the parties.[52] The Special Rapporteur has found no reference to provisional application in this context.

87. Nevertheless, the Special Rapporteur agrees that the starting point for identifying a breach that activates the assumptions underlying article 60 of the 1969 Vienna Convention is the existence of a legal relationship arising out of a treaty. Thus, taking into account that, as has been confirmed throughout the study of the present topic, provisional application of a treaty produces legal effects as if the treaty were actually in force,[53] and that obligations arise therefrom which must be performed under the *pacta sunt servanda* principle,[54] it may be concluded that in the case of provisionally applied treaties, the prerequisite of the existence of an effective obligation has been met. The conditions therefore exist under which the suspension or termination of a treaty may be sought, in accordance with the provisions of article 60 of the Convention.

D. Part VI, Article 73: Cases of State succession, State responsibility and outbreak of hostilities

88. During the debates in the Sixth Committee of the General Assembly, the Special Rapporteur was asked to address the topic of provisional application as it relates to cases of State succession in respect of treaties, as part of the study on the relationship with other provisions of the 1969 Vienna Convention.[55]

89. Article 73 of the 1969 Vienna Convention refers to cases of State succession, State responsibility and outbreak of hostilities: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

90. The topic of State succession with respect to the effects of treaties has generally been perceived in international law as a problem concerning the legal effects of a treaty in response to a fundamental change of circumstances (*rebus sic stantibus*),[56] which nevertheless must take into account the principle of State continuity in order to prevent, for example, a State from invoking a change of political system, no matter how radical it may be, to take advantage of the principles applicable to State succession.[57] A correct assessment will have to be made on a case-by-case basis, in the light of prevailing circumstances and the conduct of States.

91. With regard to multilateral treaties, a very useful indicator consists in the notifications received by the depositary of the treaty in question. Only when a notification of succession has been deposited with the Secretary-General of the United Nations, for example, does the latter include the State in question on the list of States parties, for which the assignment of rights and obligations is considered effective from the date on which the successor State has communicated its acceptance to the Secretary-General, provided that there are no objections by the other parties.[58]

92. Chapter XII of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* deals exclusively with succession of States.[59] It explains the principles on which the Secretariat of the United Nations has based itself in performing its functions in such cases.

93. Besides these considerations, the most complete treatment of provisional application of treaties in cases of succession of States is contained in the Vienna Convention on Succession of States in respect of Treaties (hereinafter, "1978 Vienna Convention").[60]

94. Part III, section 4, of that instrument refers exclusively to provisional application of both multilateral and bilateral treaties in the following manner:

Section 4. Provisional Application

Article 27. Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

4. Nevertheless, in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 28. Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when:

[52] *Ibid.*, p. 53.

[53] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, para. 37; *Yearbook … 2014*, vol. II (Part One) document A/CN.4/675, para. 24.

[54] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 56–59.

[55] Slovenia (A/C.6/70/SR.24), para. 44.

[56] Koskenniemi, "Paragraph 3. Law of Treaties".

[57] Provost, "Article 73".

[58] Gamarra, "Current questions of State succession relating to multilateral treaties", pp. 392–393.

[59] See footnote 16 above.

[60] In force since 6 November 1996.

(*a*) they expressly so agree; or

(*b*) by reason of their conduct they are to be considered as having so agreed.

Article 29. Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 27 may be terminated:

(*a*) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty and the expiration of the notice; or

(*b*) in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, by reasonable notice of termination given by the newly independent State or all of the parties or, as the case may be, all of the contracting States and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 28 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned and the expiration of the notice.

3. Unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

…

95. In its commentary to the draft articles that later became the basis of the Convention, the Commission noted that the importance of provisional application in the context of State succession in respect of multilateral treaties is centred on cases involving the establishment of newly independent States. Accordingly, it was said to be theoretically possible to inform the parties of the new State's intention to provisionally apply the treaty in question and obtain the consent of each party to such provisional participation. However, the Commission noted that this scenario did not occur in practice; what did occur was that provisional application of a treaty was agreed between the newly independent State and a State party on the basis of reciprocity. In the Commission's view, this produces two different legal regimes: that of the multilateral treaty between the parties, on the one hand, and, on the other, that produced in a particular manner between a State party and the new State through the provisional application of that multilateral treaty between them.[61]

96. At that time, the Commission also discussed whether it was necessary to make some reference to reservations in the context of provisional application in cases involving succession of States; it chose to leave the question aside, as it was not essential to the treatment of the topic, and considering that, under the above-mentioned scheme, the multilateral treaty would be applied provisionally, *de facto*, on the basis of bilateral arrangements and it would be possible to resolve any issues concerning reservations during the negotiations on such arrangements.[62]

97. It should be pointed out, in addition, that article 7, paragraph 3, on temporal application of the 1978 Convention, allows for the provisional application of the Convention:

3. A successor State may at the time of signing or of expressing its consent to be bound by the present Convention make a declaration that it will apply the provisions of the Convention provisionally in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

98. What is interesting about this provision is that the declaration of provisional application is dependent on the existence of a declaration of acceptance on the part of any other signatory or contracting State. This would take into account the political assessment that may be implied by the act of accepting the new State as a contracting party, in that it could be interpreted as an element of recognition of such State.

99. Lastly, there is also an express reference to provisional application of the Convention in respect of the effects of a notification of succession. The relevant part of article 23, paragraph 2, provides that:

the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession *except insofar as that treaty may be applied provisionally in accordance with article 27** or as may be otherwise agreed.

100. This provision permits the continuity of the production of the legal effects of the treaty, even in the absence of a notification of succession.

101. In brief, the provisions of the 1978 Vienna Convention illustrate the practical utility of provisional application of treaties in order to enhance legal certainty in situations generally associated with political instability within a State that give rise to the reconfiguration of its international relations.

[61] *Yearbook … 1974*, vol. II (Part One), p. 4, document A/CN.4/278 and Add.1–6, paras. 10 *et seq*.

[62] *Ibid.*

Chapter III

Practice of international organizations in relation to provisional application of treaties

102. The third report discussed the question of provisional application in relation to international organizations.[63] Part of this analysis considered the provisional application of treaties under which international organizations or regimes are created; the application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations; and provisional application of treaties to which an international organization is a party.

[63] *Yearbook … .2015*, vol. II (Part One), document A/CN.4/687, paras. 71–129.

Moreover, the Commission benefited from a memorandum by the Secretariat on the legislative development of article 25 of the 1986 Vienna Convention.[64]

103. The present chapter is a continuation of that first analysis, focusing more specifically on the depositary functions that may be carried out by international organizations. In the case of the United Nations, an analysis is also made of its work on the registration of treaties, in conformity with Article 102 of the Charter of the United Nations.

104. In addition, with the support of the offices of legal affairs of the secretariats of some regional international organizations, the Special Rapporteur collected more information on the following topics: treaties to which an international organization is a party that provide for provisional application; treaties deposited with an international organization that provide for their provisional application; and treaties that are or have been applied provisionally by an international organization. Accordingly, the present chapter will focus on the practice of the Organization of American States (OAS) the European Union, the Council of Europe, the North Atlantic Treaty Organization (NATO) and the Economic Community of West African States (ECOWAS).

A. United Nations

105. The International Court of Justice has held that the United Nations is the supreme type of international organization and could not carry out the intentions of its founders if it was devoid of international personality.[65] Indeed, the United Nations has a unique character that is projected in a very special relationship in respect of the law of treaties. In view of its legal capacity, the United Nations may sign treaties.

106. The Secretariat of the United Nations, for its part, performs the functions of registration and publication of treaties, under Article 102, paragraph 1, of the Charter of the United Nations, and carries out the functions of the Secretary-General as depositary of treaties, in the latter case when the treaty so provides.

107. With the valuable assistance of the Treaty Section of the Office of Legal Affairs, a description of how the Secretariat works with respect to the provisional application of treaties, in the framework of its registration functions and the depositary functions of the Secretary-General, is presented below.

1. Registration functions

108. Article 102, paragraph 1, of the Charter of the United Nations stipulates the following: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." Currently, 53,453 original treaties are registered with the United Nations, amounting to more than 70,000 if one includes subsequent original treaties and agreements. Taking into account all treaties and related actions, the total comes to over 250,000 registrations.[66]

109. On average, about 2,400 treaties and related actions are registered each year with the United Nations.[67] A detailed review of the information gathered from the registration of actions reveals that in some years the number of registrations is particularly high, owing to the fact that certain treaties elicit a greater number of acceptances of provisional application. For example, mainly owing to commodity agreements, there were 56 actions on provisional application in 1968; in 1973, there were 103 such actions; in 1982, 104 were registered; in 1988, 75 were registered; and in 1994, 153 were registered. In 1994, 113 of the actions on provisional application registered refer exclusively to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The following graph, provided by the Treaty Section of the Secretariat, shows some points in time when registered provisional application actions were at a peak.

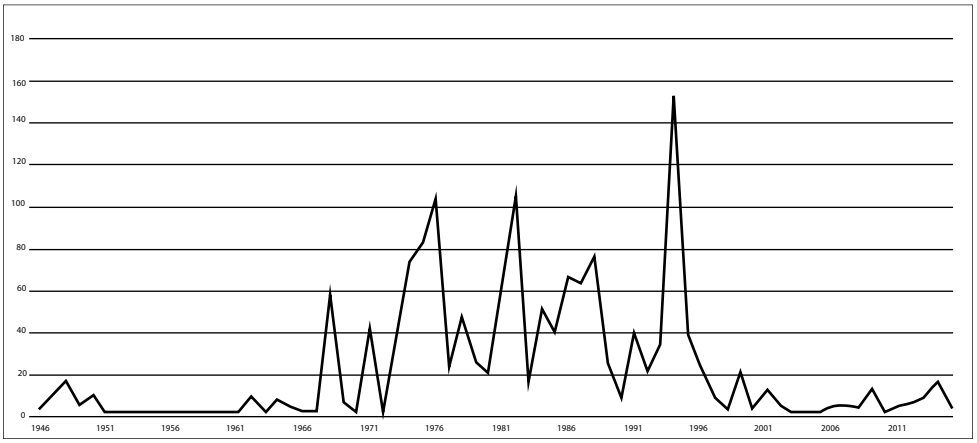
[64] *Ibid.*, document A/CN.4/676.

[65] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 179. See also *I.C.J. Summaries 1948–1991*, p. 10.

[66] Registrations may be consulted at https://treaties.un.org.

[67] Report of the Secretary-General on strengthening and coordinating United Nations rule of law activities (A/70/206), para. 11.

Number of provisional application actions registered in relation to treaties registered under Article 102 of the Charter of the United Nations



110. It is interesting to note that a large part of the registered actions took place subsequently to the entry into force of the 1969 Vienna Convention. This graph also gives an idea of the vast practice that has existed through the years with respect to recourse to provisional application, going beyond the simple inclusion of a provisional application clause in a treaty, but referring to an action taken, i.e., by registration of the recourse to such provisional application directly by the international community. From 1946 to 2015, a total of 1,349 provisional application actions were registered.

111. All these figures serve to place in context the very wide universe of treaty registration under Article 102 of the Charter of the United Nations.

112. Nevertheless, in accordance with article 1, paragraph 2, of the regulations to give effect to Article 102 of the Charter of the United Nations adopted by the General Assembly in 1946, "[r]egistration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto".[68] On the basis of this provision, the standard practice of the Secretariat is to decline to proceed with the registration of treaties until the date of their entry into force. This might suggest *prima facie* that treaties which are applied provisionally but which have not entered into force would not be subject to registration. However, the *Repertory of Practice of United Nations Organs* (1955) describes the practice in the following manner:

> 32. Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of an agreement between two or more parties. However, in adopting this rule at the first part of the first session of the General Assembly, Sub-Committee 1 generally agreed that the term "entry into force" was intended to be interpreted in its broadest sense. *It was the view of the Sub-Committee that, in practice, treaties which, by agreement, were being applied provisionally by two or more parties were, for the purpose of article 1 (2) of the regulations, in force**.
>
> 33. This point was stressed both in the report of Sub-Committee 1 to the Sixth Committee and in the report of the latter to the General Assembly at the second part of its first session. The following statement was made in both reports: "*It was recognized that, for the purpose of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto**".
>
> 34. In a number of cases to which this interpretation applies, the registration of an agreement was effected *prior to its definitive entry into force*.* Apart from these instances, the Secretariat has, on several occasions, declined to proceed with the registration of an agreement submitted prior to its actual entry into force. On one occasion, the registering party, after having effected the registration of an agreement, informed the Secretary-General that the date of its entry into force had been postponed for one year. As a result, the registration took effect almost a year before its entry into force. However, the registration was not cancelled and the agreement was published in the chronological order of registration with an accompanying explanatory note.[69]

113. Subsequently, in the updated version of the *Repertory of Practice of the United Nations, Supplement No. 3*, this criterion was reiterated, and a more in-depth analysis of this interpretation was made, as follows:

> (*h*) Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of the treaty or international agreement. However, under an early interpretation given to the term "entry into force" by the Sixth Committee for the purpose of that rule, "a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto". In a number of cases to which that interpretation applies, the registration of a treaty or agreement was effected prior to its definitive entry into force.
>
> (*i*) Notifications by the parties or specialized agencies of the definitive entry into force of treaties registered before that time clearly fall within the meaning of subsequent actions requiring registration as certified statements under article 2 of the regulations and have been registered by the Secretariat as such. As regards treaties and agreements for which the Secretary-General acts as depositary or to which the United Nations is a party, and which have been registered on provisional entry into force, the Secretariat ex officio registers their *definitive entry into force** on the date on which the conditions for bringing them *definitively into force** have been fulfilled.
>
> (*j*) A treaty or agreement, even though it contains provisions for provisional application, is often registered only after the definitive entry into force. In such instances, if the registering party or specialized agency specifies the dates of the provisional entry and the definitive entry into force, both dates are recorded in the register. When no reference is made to the provisional entry into force, only the definitive date is recorded and no information about the former is requested by the Secretariat. On the other hand, if only the provisional date of entry into force is given and it appears that the treaty has already entered into force definitively, the Secretariat solicits the required data from the registering party or specialized agency.[70]

114. It should be noted that these criteria have not been modified and are still valid. As a result, the criterion agreed by the Sixth Committee of the General Assembly for the purposes of registering treaties under Article 102 of the Charter of the United Nations has equated, *de facto*, to provisional application with entry into force when the treaty is applied provisionally, by agreement, by two or more contracting parties. Even today, the Secretariat continues to apply this criterion in the exercise of its registration and publication functions. This would appear contrary to the terminological and substantive distinction referred to by the Special Rapporteur since his first report, in which he pointed out that, although prior to the 1969 United Nations Conference on the Law of Treaties in Vienna, there might have been some confusion between the concepts of entry into force and provisional application, the Vienna Conference had clarified the distinction between the two legal regimes.[71]

115. It is important to point out, however, that both the regulations to give effect to Article 102 of the Charter of the United Nations and the *Repertory of Practice of the United Nations* existed prior to the adoption and entry into force of the 1969 Vienna Convention.

116. In accordance with that practice, in the context of its registration function under Article 102 of the Charter of the United Nations, the Secretariat has registered a total of 1,733 treaties subject to provisional application, and therefore subject to their presumed entry into force. This total includes bilateral treaties, closed multilateral treaties and open multilateral treaties.

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[68] General Assembly resolution 97(1) of 14 December 1946, modified by General Assembly resolutions 364 (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 of 19 December 1978.

[69] *Repertory of Practice of United Nations Organs*, vol. V, *Articles 92–111 of the Charter* (United Nations publication, Sales No. 1955.V.2 (vol. V)), Article 102, paras. 32–34.

[70] *Repertory of Practice of United Nations Organs, Supplement No. 3*, vol. IV, *Articles 92–111 of the Charter* (United Nations publication, Sales No. E.73.V.2), Article 102.

[71] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, paras. 7–24.

117. According to the legal literature, only 3 per cent of all treaties registered with the United Nations since 1945 have been subject to provisional application.[72]

118. The diversity of State practice with regard to provisional application is also reflected in the way in which the Secretariat has traditionally proceeded to register successive actions in respect of multilateral treaties. Throughout the decades of registration under Article 102 of the Charter of the United Nations, these actions have been classified in a great variety of categories, which show the diversity of provisional application clauses and options that have been submitted to the Secretariat.

119. Thus, the website of the United Nations *Treaty Series* offers 12 different search criteria with respect to actions related to provisional application, as follows: provisional acceptance, provisional acceptance/accession, provisional application; provisional application by virtue of a notification; provisional application by virtue of accession to the Agreement; provisional application by virtue of adoption of the Agreement; provisional application by virtue of signature, adoption of the Agreement or accession thereto; provisional application in respect of the Mandated Territory of Palestine; provisional application of the Agreement as amended and extended; provisional application to all its territories; provisional application under Article 23; and provisional entry into force.[73] The existence of specific references such as "all its territories" or "under Article 23" reflects how fields are created to cover specific treaties, thus reaffirming the difficulty of relying on a single search criterion.

120. Moreover, it is essential to note that the Secretariat registers treaties under Article 102 of the Charter of the United Nations at the express request of States. This implies that, beyond any legal views held by the Secretariat itself, what takes precedence in cases of treaties applied provisionally but not yet in force is the assessment made by States with respect to the validity of the treaty in question, as expressed through the request for registration Therefore, the States themselves decide, as we have seen, that a treaty applied provisionally has entered into force, on the basis of the criteria adopted by the Sixth Committee in the regulations to give effect to Article 102 of the Charter of the United Nations.

121. The Secretariat is limited to adding different dates to its registry on the basis of information provided by the State, but without adopting a criterion that draws a meaningful distinction between provisional application and entry into force.

2. Depositary functions

122. Articles 76 and 77 of the 1969 Vienna Convention regulate the functions of depositaries. These functions include keeping custody of the treaty, receiving and keeping custody of notifications relating to it, examining whether such communications are in due and proper form, and informing the parties of acts, communications and notifications relating to the treaty.

123. The depositary functions are especially important in dealing with practical aspects, such as the date of entry into force and termination of treaties, either in general or with respect to one particular State, or with respect to the date on which the treaty produces legal effects in relation to the other parties to the treaty.[74]

124. However, it has been suggested that the depositary lacks the competence to determine in a definitive manner the legal effects of the notifications it receives, in the sense that its function cannot substantively affect the rights or obligations of the parties to a treaty.[75]

125. Accordingly, the International Court of Justice has found, for example, that depositary functions should be limited to receiving and notifying States of reservations or objections thereto.[76] This position emphasizes that the attributions of the depositary are essentially juridical and formal, limiting to the greatest extent possible any political role that might be attributed to it.[77]

126. However, the proliferation of multilateral treaties and the growing complexity of such treaties, compounded by the changes in the international community itself, including the rise of new subjects of international law, have had a direct impact on the functions of depositaries, especially with respect to the scope of their functions.[78]

127. Without a doubt, the Secretary-General of the United Nations is the depositary *par excellence*. The transfer of this function in the transition from the League of Nations to the United Nations was determined by the General Assembly in 1946.[79] Currently, the Secretary-General is the depositary for more than 560 multilateral treaties.

128. In that regard, the Secretary-General, in his capacity as depositary, is also limited to performing the functions entrusted to him by the parties to a treaty, focusing on the provisions of the treaty itself.

129. As for provisional application, this means in practical terms that the Secretary-General will proceed in accordance with the terms of the multilateral treaties deposited with the Secretariat, without having competence to amend these terms on the basis of his own interpretation of what would be legally correct in accordance with the law of treaties. This is a truly complex task, since, as we have seen, States use a very wide variety of formulas to agree to provisional application of treaties, and these change without maintaining a set pattern.

130. In some cases, as in the case of the Protocol on the Privileges and Immunities of the International Seabed Authority, the depositary is limited to receiving and circulating notifications of provisional application under

[72] Geslin, *La mise en application provisoire des traités*, p. 347.

[73] See https://treaties.un.org/pages/searchActions.aspx.

[74] Rosenne, "The depositary of international treaties", p. 925.

[75] *Ibid.*, p. 928.

[76] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 27. See also *I.C.J. Summaries 1948–1991*, p. 25.

[77] Rosenne, "The depositary of international treaties", p. 931.

[78] Ouguergouz, Villalpando and Morgan-Foster, "Article 77".

[79] General Assembly resolution 24 (I) of 12 February 1946.

article 19 of the treaty, which provides as follows: "A State which intends to ratify, approve, accept or accede to this Protocol may at any time notify the depositary that it will apply this Protocol provisionally for a period not exceeding two years". What is interesting in this case is that the provisional application period is limited to a maximum of two years. In depositary practice, a provision of this type, for example, simply implies that the Secretary-General would indicate, in the depositary notification, that the State in question has accepted to apply the treaty provisionally for a period of two years (or less), in accordance with the provisions of the treaty, and therefore, when this time period expires, the treaty is no longer applied provisionally.

131. Another example that could be studied is the recent International Agreement on Olive Oil and Table Olives, 2015. This Treaty contains an article concerning provisional application followed by the provision on its entry into force. The two texts, if read together, are very interesting:

Article 30. Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement, or any Government for which the Council of Members has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 31, or, if it is already in force, at a specified date.

2. A Government which has submitted a notification of provisional application under paragraph 1 of this article will apply this Agreement when it enters into force, or, if it is already in force, at a specified date *and shall, from that time, be a Contracting Party**. It shall remain a Contracting Party until the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 31. Entry into force

1. This Agreement shall *enter into force definitively** on 1 January 2017, provided that at least five of the Contracting Parties among those mentioned in annex A to this Agreement and accounting for at least 80 per cent of the participation shares out of the total 1,000 participation shares have signed this Agreement definitively or have ratified, accepted or approved it, or acceded thereto.

2. If, on 1 January 2017, this Agreement has not entered into force in accordance with paragraph 1 of this article, it shall *enter into force provisionally** if by that date Contracting Parties satisfying the percentage requirements of paragraph 1 of this article have signed this Agreement definitively or have ratified, accepted or approved it, or have notified the depositary that they will apply this Agreement provisionally.

3. If, on 31 December 2016, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Contracting Parties which have signed this Agreement definitively or have ratified, accepted or approved it, or have notified that they will apply this Agreement provisionally, to decide whether to bring this Agreement into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine.

4. For any Contracting Party which deposits an instrument of ratification, acceptance, approval or accession after the entry into force of this Agreement, this Agreement shall enter into force on the date of such deposit.

132. These provisions, which seem to add more confusion to a situation that is already anarchic, are particularly interesting because the State that formulated a notification of provisional application was considered a contracting party; the terms "provisional application", "enter into force provisionally" and "enter into force definitively" coexist in the same article, as if they were equivalent expressions; the contracting parties, via the notification of provisional application, count for the purposes of the entry into force; and, if the treaty does not enter into force within the established time periods, a mandate is given to the depositary to invite the contracting parties to decide whether the treaty will enter into force either provisionally or definitively

133. The legal doctrine has held that one of the essential elements characterizing the functions of the depositary is that it does not have the power to set criteria for the various actions that States may take in relation to a treaty.[80] The function of the depositary is governed essentially by a requirement of impartiality that considerably limits the scope of its functions.[81] But as has been pointed out, the very complex evolution of the depositary's work currently calls into question such affirmations.

134. Another current example is the Paris Agreement on climate change adopted on 12 December 2015. The decision of the Conference of the Parties to the Framework Convention on Climate Change, by which this Agreement was adopted, provides as follows: "*Recognizes* that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force, and *requests* Parties to provide notification of any such provisional application to the Depositary."[82] This is another example of provisional application that was not envisaged in the treaty but was rather agreed by a decision of the Conference of the Parties.

135. It is also noteworthy that some treaties on the United Nations Treaty Collection website, such as the Arms Trade Treaty, the Convention on Cluster Munitions, or the large number of treaties on commodities that contain provisions on provisional application,[83] a column on the page reflecting their status identifies any declarations of provisional application. This column is generated once the provisional application action is registered by a State, and the system updates automatically upon the deposit of successive provisional application actions.

3. United Nations publications on treaties

136. The Treaty Section of the Office of Legal Affairs has prepared a *Treaty Handbook*, whose latest revised edition was published in 2013.[84] The prologue describes the function of the *Handbook* as follows:

This *Handbook*, prepared by the Treaty Section of the United Nations Office of Legal Affairs, is a practical guide to the depositary practice of the Secretary-General and the registration practice of the Secretariat. It is intended as a contribution to the United Nations efforts to assist

[80] Rosenne, "More on the depositary of international treaties", p. 851.

[81] *Ibid.*, pp. 840–841.

[82] *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum: Part Two: Action taken by the Conference of the Parties at its twenty-first session* (FCCC/CP/2015/10/Add.1), decision 1/CP.21, para. 5.

[83] See https://treaties.un.org/pages/Treaties.aspx?id=19&subid=A&lang=en.

[84] *Treaty Handbook* (United Nations publication, Sales No. E.02.V2).

States in becoming party to the international treaty framework. […] It is presented in a user-friendly format with diagrams and step-by-step instructions, and touches upon many aspects of treaty law and practice. This *Handbook* is designed for use by States, international organizations and other entities.[85]

137. The glossary of the *Handbook* reflects Secretariat practice with regard to registration and publication of treaties under Article 102 of the Charter of the United Nations, together with the depositary practice of the Secretary-General, both of which have been described in previous sections. Thus, the *Handbook* defines provisional application, distinguishing between the case of a treaty that has entered into force and that of a treaty that has not entered into force. These definitions are cited below:

Provisional application of a treaty that has entered into force

Provisional application of a treaty that has entered into force may occur when a State *unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis** .The State would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The State may terminate this provisional application at any time. In contrast, a State that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law ….

Provisional application of a treaty that has not entered into force

Provisional application of a treaty that has not entered into force may occur when a State *notifies the signatory States to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis. Since this is a unilateral act by the State, subject to its domestic legal framework, it may terminate this provisional application at any time**.

A State may continue to apply a treaty provisionally, even after the treaty has entered into force, until the State has ratified, approved, accepted or acceded to the treaty. A State's provisional application terminates if that State notifies the other States among which the treaty is being applied provisionally of its intention not to become a party to the treaty … .[86]

138. Since the Special Rapporteur already addressed the latter case, relating to unilateral notifications, in chapter II, section A (Source of obligations),[87] of his second report, he does not consider it appropriate to deal further with it here. He merely points out that, although some favour has been expressed in both the Commission and the General Assembly for a strict interpretation of article 25 of the 1969 Vienna Convention, giving preference to agreements between the negotiating States and apparently not open to—but not excluding—the possibility that third States might decide to apply the treaty unilaterally and provisionally, the Secretariat *Handbook* describes a practice which is perhaps more extensive than might have been thought.

139. Nor can it be ignored that the *Handbook* also draws attention to the production of legal effects arising out of the provisional application of treaties, noting that States will *give effect* to the obligations derived from the treaty in question.

140. The Special Rapporteur is in no way suggesting that the *Handbook* constitutes an authoritative interpretation of the 1969 Vienna Convention. The *Handbook* itself contains a note waiving responsibility and explaining that "[t]his *Handbook* is provided for information only and does not constitute formal legal or other professional advice". Nonetheless, the *Handbook* is offered as a "guide to practice",[88] and it is logical to conclude that, as the decision was made to include these "definitions" as described above, it is because they reflect State practice with regard to registration and deposit, as discussed in the previous sections.

141. Although this topic was mentioned in the Special Rapporteur's first report,[89] it is appropriate to reiterate the way in which the *Handbook* refers to the provisional application of treaties, as follows:

3.4 Provisional application …

Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994, provides "If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force". The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 1995, also provides for provisional application, ceasing upon its entry into force. Article 56 of the International Cocoa Agreement, of 2010, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.

A State provisionally applies a treaty that has entered into force *when it unilaterally undertakes**, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the 1969 Vienna Convention). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).

142. This citation reveals the way in which the Secretariat of the United Nations understands, and therefore processes, situations involving provisional application in the performance of its functions.

143. Moreover, in response to regular requests from the General Assembly, the Secretariat of the United Nations prepared and published a *Handbook on Final Clauses of Multilateral Treaties*, most recently issued in 2003.[90] As the Under-Secretary-General for Legal Affairs notes in his foreword, the *Handbook* "incorporates recent developments in the practice of the Secretary-General as depositary of multilateral treaties with regard to matters normally included in the final clauses of these treaties".

[85] *Ibid.*, p. iv.

[86] *Ibid.*, p. 65.

[87] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, paras. 32–43.

[88] *Treaty Handbook*, p. 1.

[89] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, para. 38.

[90] *Final Clauses of Multilateral Treaties: Handbook* (United Nations publication, Sales No. E.04.V.3).

144. In section G (Provisional application of a treaty), the *Handbook* again draws attention to the assumption of a unilateral decision as a point of departure for the implementation of article 25 of the 1969 Vienna Convention and provides some examples of provisional application clauses contained in some multilateral treaties, either before or after their entry into force.[91]

145. Furthermore, the *Handbook* reflects the distinction found in final clauses of multilateral treaties, as described in the previous section, between the definitive entry into force of a treaty and the so-called provisional entry into force.

146. It is interesting to note, however, that the two Secretariat handbooks referred to by the Special Rapporteur in the present report do not appear to call into question the obligatory character of the provisions of a treaty that States have decided to apply provisionally.

147. Moreover, in addition to the two handbooks cited above, the Secretariat uses the above-mentioned *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*.

148. Clearly, the Secretariat of the United Nations can record only what States provide to it, while trying to systematize the information coherently and in conformity with the 1969 Vienna Convention and the practice of States. The source of the ambiguous use of the two concepts is the States themselves, not the United Nations.

149. In conclusion, it is worth considering the merits of the idea that, in due time, the Commission should recommend to the Sixth Committee that the 1946 regulations to give effect to Article 102 of the Charter of the United Nationsshould be revised in order to adapt them to the current state of practice relating to the provisional application of treaties. This would serve as a guide to practice in line with the scope and content of article 25 of the 1969 Vienna Convention, which in turn would enable the Secretariat to reflect at a later time, both in the abovementioned handbooks and in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the new trends in the matter that are developing in accordance with contemporary practice.

B. Organization of American States

150. The Special Rapporteur held an informal consultation with the Office of Legal Affairs of the OAS General Secretariat in relation to the Organization's practice in the use of provisional application of treaties concluded under its auspices or to which it is a party.

151. The unofficial response was that, with respect to OAS and the inter-American treaties deposited with the Secretary-General, in the past 20 years no treaty had been registered that provided for provisional application before its entry into force. It was also indicated that some provisions of the inter-American treaties might have been applied provisionally, but not under the treaty itself, but rather on the basis of some later agreement between the negotiating States.

152. A partial explanation of this absence of provisional application clauses in inter-American treaties might be the fact that these treaties usually contain provisions on entry into force which require a very small number of ratifications, frequently between 2 and 6, out of a total of 35 States members of OAS, in order for the treaty to enter into force; this practice makes it somewhat less attractive or desirable to resort to provisional application.

153. As an example, some inter-American treaties open to signature and ratification or accession in the 35 States members of OAS have been identified as having entry into force clauses like the one described above.

154. Thus, article X of the Inter-American Convention on Transparency in Conventional Weapons Acquisitions provides that six instruments of ratification acceptance approval or accession by the members of OAS are required to be deposited with the General Secretariat of the Organization in order for it to enter into force. The same is true of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the Inter-American Convention against Terrorism.

155. In the case of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women—"Convention of Belém do Pará", the number of ratifications necessary for entry into force is only two States.

C. European Union

156. The European Union submitted a document to the Special Rapporteur containing a list of examples of recent practice in relation to provisional application of agreements with third States. This document, which lists a total of 24 referenced treaties, specifies the name of the agreement, the article of the instrument that deals with provisional application and the corresponding reference of the decision by the Council of the European Union in that respect. Given the usefulness of this list, the Special Rapporteur has included it as a document annexed to the present report.

157. A recent example illustrating the constant practice of the European Union is the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.[92] Article 486 of this treaty refers to "entry into force and provisional application" as follows:

> 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union.
>
> 2. This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval.
>
> 3. Notwithstanding paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable.

[91] *Ibid.*, pp. 42–43.

[92] *Official Journal of the European Union*, L 161, 29 May 2014.

4. The provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary of the following:

– the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and

– Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation.

5. For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to be the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article.

6. During the period of the provisional application, insofar as the provisions of the Partnership and Cooperation Agreement between the European Communities and their Member States, on the one hand, and Ukraine, on the other hand, signed in Luxembourg on 14 June 1994 and which entered into force on 1 March 1998, are not covered by the provisional application of this Agreement, they continue to apply.

7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the Depositary.[93]

158. This provision is relevant for the purposes of the present report because, despite the fact that entry into force is, of course, subject to compliance with the requirements of the internal law of each member of the European Union, paragraph 5 expressly states that the date of entry into force of the Agreement is understood to be the date from which the Agreement is provisionally applied; this bears witness to the negotiating States' desire to confer on provisional application all the weight and legal effects that arise out of the entry into force of the treaty, without prejudice to the ability of any State, at any moment, to terminate the provisional application.

159. Once again, provisional application seems to be an attractive possibility in view of the uncertainty produced by the necessarily different ratification procedures in each of the 28 member States, some of which, as in the case of Belgium, require passage through three national parliaments.

160. One interesting case has been the discussion in European Union institutions—the Council, Commission and Parliament—about the advisability of putting an end to provisional application of treaties concluded with the States that may be known as the ACP States (Africa, the Caribbean and the Pacific) which deal with trade preferences, not because the Union has reached the conclusion that it will not eventually become a party to such treaties, in conformity with a strict reading of article 25, paragraph 2, of the 1969 Vienna Convention, but on the contrary because it wishes to put pressure on the other negotiating States to complete the necessary requirements for entry into force.[94]

161. This suggests that the wording of article 25, paragraph 2, has been interpreted in a broad sense to include situations that go beyond those expressly provided for in this provision, and this interpretation may imply an explicit preference in favour of provisional application in European Union practice.

[93] *Ibid.*, p. 170.

[94] Bartels, "Withdrawing provisional application of treaties … ".

D. Council of Europe

162. As in other cases, the Special Rapporteur consulted the Council of Europe Treaty Office to inquire about the practice of that regional organization on the matter. As in the case of OAS, the preliminary view, subject to a pending final opinion, was that provisional application is infrequent in the practice of the Council of Europe.

163. The Special Rapporteur's attention was drawn to a document presented at the 51st meeting of the Committee of Legal Advisers on Public International Law (CAHDI), entitled "Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe".[95] This document was distributed to the members of CAHDI on a restricted basis. Suffice it to say that no reference whatsoever is made in this set of model clauses to provisional application of treaties; this would appear to confirm the above-mentioned opinion.

E. North Atlantic Treaty Organization

164. The Special Rapporteur is grateful for the support offered by the NATO Office of Legal Affairs in the preparation of this fourth report. The information provided is of great value to the report, as it reveals the practice of an important international organization in relation to the provisional application of treaties.

165. According to a note received from the NATO Office of Legal Affairs,[96] this international organization is party to approximately 180 treaties, only 5 of which contain provisional application clauses, 3 of them referring to transit arrangements between NATO and its partners.

166. The note also explains that there is no previously determined policy with respect to provisional application. In relation to agreements involving the establishment of NATO offices, the Organization has developed the practice by which it requests States to ensure that headquarters agreements enter into force at the time of signature.

167. However, if this is not possible under the provisions of the domestic law of the State in question, NATO resorts to provisional application from the time of signature until the entry into force of the agreement. In cases where this is unacceptable to the contracting State, NATO waits until the completion of the time periods established by the domestic requirements of that State.

F. Economic Community of West African States

168. As the Special Rapporteur mentioned in the oral presentation of his third report to the Commission on 14 July 2015, he had received, on a date subsequent to the preparation and submission of the third report to the Secretariat for processing, a publication from the Ministry of Foreign Affairs of Nigeria entitled *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS)*.[97]

[95] Document CAHDI (2016) 8, of 12 February 2016.

[96] Note dated 28 January 2016, on file with the Codification Division.

[97] *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States [1975–2010]*, Abuja, Ministry of Foreign Affairs, 2011.

169. This publication is a collection of a total of 59 treaties concluded under the auspices of ECOWAS in the period 1975–2010. After an exhaustive review of the 59 treaties, it was observed that only 11 of them did not provide for provisional application. Moreover, it was particularly interesting that the formula generally used in the remaining instruments is as follows:

> The treaty shall enter into force provisionally upon the signature by Heads of State and Government and definitively upon ratification.

170. Clearly, the use of the phrase "enter into force provisionally" instead of "provisional application" confirms that States continue to draw a precise distinction between the two concepts of the law of treaties, and this has an impact subsequently on the way in which universal organizations like the United Nations perform their registration and depository functions, as we have seen above. However, the reiteration of this formula shows that the States of this region are interested in ensuring the full effectiveness of the treaties they conclude as soon as possible.

171. Only one instrument, ECOWAS Energy Protocol A/P4/1/03,[98] refers explicitly in article 40 to its provisional application. This provision, which is quite long, sets out *in extenso* the rights and obligations arising out of provisional application as they apply to a State or regional economic integration organization.

172. The following temporal observation may also be made: from the adoption of the treaty establishing ECOWAS in 1975 until the adoption of the revised treaty in 1993, all instruments contained the same clause on provisional application.

173. For some reason, starting in 1993, this clause stops appearing in treaties concluded under the auspices of ECOWAS. It has been only since 2001 that the provisional application clause has been reincorporated in a protocol (A/SP.2/12/01), which has since remained, except in three cases: Protocol Establishing an ECOWAS Criminal Intelligence and Investigation Bureau; the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials; and Protocol A/SP.1/06/06 Amending the Revised [ECOWAS] Treaty, all in 2006.

174. All these examples illustrate the importance of provisional application in regional commitments of States, the relationship of such application to international organizations and its vitality in the practice of the law of treaties.

[98] For the ECOWAS documents mentioned in these paragraphs, see also www.ecowas.int/ecowas-law/.

Chapter IV

Draft guidelines on the provisional application of treaties

175. The third report of the Special Rapporteur presented six draft guidelines on the provisional application of treaties.[99] During the debates in the Sixth Committee, States expressed generally favourable views of the development of such guidelines.[100]

176. As noted in the report presented by the Chair of the Drafting Committee to the Commission on 4 August 2015,[101] the draft guidelines put forward by the Special Rapporteur in his third report were referred to the Drafting Committee, which adopted on a provisional basis, at its meetings on 29 and 30 July 2015,[102] the following three guidelines:

"*Draft guideline 1. Scope*

"The present draft guidelines concern the provisional application of treaties.

"*Draft guideline 2. Purpose*

"The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the 1969 Vienna Convention and other rules of international law.

"*Draft guideline 3. General rule*

"A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed."

177. It should be noted that the Drafting Committee worked in English and French.

178. In addition, the Drafting Committee is considering six draft guidelines (draft guidelines 4 to 9) submitted to it by the Special Rapporteur on 28 July 2015 in a revised version of the text originally presented in the third report, taking into account comments received from the members of the Commission; these draft guidelines are currently pending discussion.

179. Lastly, in addition to the draft guidelines pending consideration by the Drafting Committee, the Special Rapporteur is submitting the following draft guideline to the Commission for possible referral to the Drafting Committee. The number assigned to this new draft guideline is a continuation of the numbering of those already presented, without prejudice to the order in which the Drafting Committee decides to rearrange the draft guidelines, where necessary, in order to improve the coherence of the treatment of the topic.

[99] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, paras. 130–131.

[100] See Norway (on behalf of the Nordic countries)(A/C.6/70/SR.23); Greece, United Kingdom, Slovenia, Austria, Portugal and Croatia (A/C.6/70/SR.24); Poland, Vietnam, Turkey and Mexico (A/C.6/70/SR.25).

[101] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 4 August 2015. Available from https://legal.un.org/ilc, *Research, Analytical Guide, Provisional application of treaties*.

[102] *Ibid.*

"*Draft guideline 10. Internal law and the observation of provisional application of all or part of a treaty*

"A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. "This rule shall be without prejudice to article 46 of the 1969 Vienna Convention."

Chapter V

Conclusion

180. The Special Rapporteur considers that this report has, for the most part, dealt with the topics in which States expressed special interest during the debates in the Sixth Committee of the General Assembly at its seventieth session.

181. In addition, the Special Rapporteur wishes to thank those States that submitted comments to the Commission concerning their practice in relation to the provisional application of treaties. The Special Rapporteur again urges States that have not yet done so to submit their reports to the Commission in order to complement the information already received.

182. The Special Rapporteur considers that both the Commission and Member States have expressed their support for continuing the work on the basis of the development of guidelines that will be of practical use to States and international organizations when they decide to resort to provisional application of treaties. In his next report, the Special Rapporteur will deal with some pending topics not dealt with in the present report, such as the provisional application of treaties that enshrine rights of individuals, and will propose some model clauses, a topic that has received general support from States.

ANNEX

Examples of recent European Union practice on provisional application of agreements with third States

Agreement	*Article in agreement*	*Article in Council decision*
Association agreements		
Agreement establishing an Association between the European Union and its member States, on the one hand, and Central America on the other (*Official Journal of the European Union*, No. L 346, 15 December 2012, p. 3)	Article 353 (Entry into force), paragraphs 4–7 4. Notwithstanding paragraph 2, Part IV [Trade] of this Agreement may be applied by the European Union and each of the Republics of the CA [Central America] Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. In this case, the institutional bodies necessary for the functioning of the Agreement shall exercise their functions. 5. By the date of entry into force as provided in paragraph 2, or by the date of application of this Agreement, if applied pursuant to paragraph 4, each Party shall have fulfilled the requirements established in Article 244 [System of Protection] and Article 245 [Established Geographical Applications], paragraph 1 *(a)* and (*b*) of Title VI (Intellectual Property) of Part IV of this Agreement. If a Republic of the CA Party has not fulfilled such requirements, the Agreement shall not enter into force in accordance with paragraph 2 or shall not be applied in accordance with paragraph 4 between the EU [European Union] Party and such non-compliant Republic of the CA Party, until those requirements have been fulfilled. 6. Where a provision of this Agreement is applied in accordance with paragraph 4, any reference in such provision to the date of entry into force of this Agreement shall be understood to refer to the date from which the Parties agree to apply that provision in accordance with paragraph 4. 7. The Parties for which Part IV of this Agreement has entered into force in accordance with paragraph 2 or 4 may also use materials originating in the Republics of the CA Party for which this Agreement is not in force.	Article 3, Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU) (*Official Journal of the European Union*, No. L 346, 15 December 2012, p. 1) Part IV of the Agreement shall be applied on a provisional basis by the European Union in accordance with Article 353 (4) of the Agreement, pending the completion of the procedures for its conclusion. Article 271 shall not be provisionally applied. In order to determine the date of provisional application the Council shall fix the date by which the notification referred to in Article 353 (4) of the Agreement is to be sent to the republics of Central America. That notification shall include reference to the provision which is not to be provisionally applied. The date from which Part IV of the Agreement will be provisionally applied shall be published in the *Official Journal of the European Union* by the General Secretariat of the Council.
Agreement establishing an association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 3)	Article 198 (Entry into force) 1. This Agreement shall enter into force the first day of the month following that in which the Parties have notified each other of the completion of the procedures necessary for this purpose. 2. Notifications shall be sent to the Secretary General of the Council of the European Union, who shall be the depository of this Agreement. 3. Notwithstanding paragraph 1, the Community and Chile agree to apply Articles 3 to 11 [Title II (Institutional framework) of Part I (General and institutional provisions)], Article 18 [Cooperation on standards, technical regulations and conformity assessment procedures], Articles 24 to 27 [Cooperation on agriculture and rural sectors and sanitary and phytosanitary measures; Fisheries; Customs cooperation; Cooperation on statistics], Articles 48 to 54 [Title VII (General provisions) of Part III (Cooperation)], Article 55 (*a*), (*b*), (*f*), (*h*), (*i*) [some of the Objectives of Part IV (Trade and trade-related matters)], Articles 56 [Customs unions and free trade areas] to 93 [Articles 57 to 93 compose Title II (Free movement of goods) of Part IV], Articles 136 to 162 [Title IV (Government procurement) of Part IV], and Articles 172 to 206 [Title VII (Competition), Title VIII (Dispute settlement), Title IX (Transparency), Title X (Specific tasks in trade matters of the bodies established under this Agreement) and Title XI (Exceptions in the area of trade) of Part IV, and Part V (Final provisions)], from the first day of the month following the date on which the Community and Chile have notified each other of the completion of the procedures necessary for this purpose.	Article 2, Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC) (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1). The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force: Articles 3 to 11, Article 18, Articles 24 to 27, Articles 48 to 54, Article 55 *(a)*, (*b*), (*f*), (*h*), (*i*), Articles 56 to 93, Articles 136 to 162, and Articles 172 to 206.

Agreement	*Article in agreement*	*Article in Council decision*
	4. Where a provision of this Agreement is applied by the Parties pending its entry into force, any reference in such provision to the date of entry into force of this Agreement shall be understood to be made to the date from which the Parties agree to apply that provision in accordance with paragraph 3. 5. From the date of its entry into force in accordance with paragraph 1, this Agreement shall replace the Framework Cooperation Agreement. By way of exception, the Protocol on Mutual Assistance in Customs Matters to the Framework Cooperation Agreement of 13 June 2001, shall remain in force and become an integral part of this Agreement.	
Association Agreement between the European Union and its member States, of the one part, and Ukraine, of the other part (*Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3)	Article 486 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary of the following:—the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and—Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation. 5. For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement'' shall be understood to the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article. 6. During the period of the provisional application, insofar as the provisions of the Partnership and Cooperation Agreement between the European Communities and their member States, on the one hand, and Ukraine, on the other hand, signed in Luxembourg on 14 June 1994 and which entered into force on 1 March 1998, are not covered by the provisional application of this Agreement, they continue to apply. 7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the Depositary.	Article 4, Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) (*Official Journal of the European Union*, No. L 278, 20 September 2014, p. 1) Pending its entry into force, and in accordance with Article 486 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied on a provisional basis between the Union and Ukraine, but only to the extent that they cover matters falling within the Union's competence: – Title III: Articles 14 and 19, – Title IV (with the exception of Article 158, to the extent that it concerns criminal enforcement of intellectual property rights; and with the exception of Articles 285 and 286, to the extent that those Articles apply to administrative proceedings, review and appeal at member State level). The provisional application of Article 279 shall not affect the sovereign rights of the member States over their hydrocarbon resources in accordance with international law, including their rights and obligations as Parties to the 1982 United Nations Convention on the Law of the Sea. Provisional application of Article 280 (3) by the Union shall not affect the existing delineation of competences between the Union and its member States in respect of the granting of authorisations for the prospection, exploration and production of hydrocarbon, – Title V: Chapter 1 (with the exception of Articles 338 (*k*), and Articles 339 and 342), Chapter 6 (with the exception of Articles 361, Article 362 (1) (*c*), Article 364, and points (*a*) and (*c*) of Article 365), Chapter 7 (with the exception of Article 368 (3) and point (*a*) and (*d*) of Article 369), Chapters 12 and 17 (with the exception of Article 404 (*h*)), Chapter 18 (with the exception of Articles 410 (*b*) and Article 411), Chapters 20, 26 and 28, as well as Articles 353 and 428, – Title VI,

Agreement	*Article in agreement*	*Article in Council decision*
		– Title VII (with the exception of Article 479 (1)), to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement in accordance with this Article, – Annexes I to XXVI, Annex XXVII (with the exception of nuclear issues), Annexes XXVIII to XXXVI (with the exception of point 3 in Annex XXXII), – Annexes XXXVIII to XLI, Annexes XLIII and XLIV, as well as Protocols I to III.
Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and the Republic of Moldova, of the other part (*Official Journal of the European Union*, No. L 260, 30 August 2014, p. 4)	Article 464 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their internal procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of the deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2 of this Article, the Union and the Republic of Moldova agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation, as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the depositary of this Agreement of the following: (*a*) the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and (*b*) the Republic of Moldova's notification of the completion of the procedures necessary for the provisional application of this Agreement. 5. For the purposes of the relevant provisions of this Agreement, including its respective Annexes and Protocols, as laid down in Article 459, any reference in such provisions to the 'date of entry into force of this Agreement' shall be understood to the 'date from which this Agreement is provisionally applied' in accordance with paragraph 3 of this Article. 6. During the period of provisional application, insofar as the provisions of the Partnership and Cooperation Agreement between the European Communities and their member States, of the one part, and the Republic of Moldova, of the other part, signed in Luxembourg on 28 November 1994 and which entered into force on 1 July 1998, are not covered by the provisional application of this Agreement, those provisions shall continue to apply. 7. Either Party may give written notification to the depositary of this Agreement of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the depositary of this Agreement.	Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and the Republic of Moldova, of the other part (2014/492/EU) (*Official Journal of the European Union*, No. L 260, 30 August 2014, p. 1) 1. Pending its entry into force, in accordance with Article 464 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and the Republic of Moldova, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy: (*a*) Title I; (*b*) Title II: Articles 3, 4, 7 and 8; (*c*) Title Ill: Articles 12 and 15; (*d*) Title IV: Chapters 5, 9 and 12 (with the exception of point (*h*) of Article 68), Chapter 13 (with the exception of Article 71 to the extent that it concerns maritime governance and with the exception of points (*b*) and (*e*) of Article 73 and Article 74), Chapter 14 (with the exception of point (*i*) of Article 77), Chapter 15 (with the exception of points (*a*) and (*e*) of Article 81 and Article 82 (2)), Chapter 16 (with the exception of Article 87, point (*c*) of Article 88 and points (*a*) and (*b*) of Article 89, to the extent that that point (*b*) concerns soil protection), Chapters 26 and 28, as well as Articles 30, 37, 46, 57, 97, 102 and 116; (*e*) Title V (with the exception of Article 278 to the extent that it concerns criminal enforcement of intellectual property rights, and with the exception of Articles 359 and 360 to the extent that they apply to administrative proceedings and review and appeal at member State level); (*f*) Title VI; (*g*) Title VII (with the exception of Article 456 (1), to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement as defined in this paragraph); (*h*) Annexes II to XIII, Annexes XV to XXXV, as well as Protocols I to IV. 2. The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

Agreement	*Article in agreement*	*Article in Council decision*
Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and Georgia, of the other part (*Official Journal of the European Union*, No. L 261, 30 August 2014, p. 4)	Article 431 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of the deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2 of this Article, the Union and Georgia agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the depositary of this Agreement of the following: (*a*) the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of this Agreement that shall be provisionally applied; and (*b*) Georgia's deposit of the instrument of ratification in accordance with its procedures and applicable legislation. 5. For the purpose of the relevant provisions of this Agreement, including the respective Annexes and Protocols hereto, any reference in such provisions to the 'date of entry into force of this Agreement' shall be understood to the 'date from which this Agreement is provisionally applied' in accordance with paragraph 3 of this Article. 6. During the period of the provisional application, insofar as the provisions of the Partnership and Cooperation Agreement between the European Communities and their member States, of the one part, and Georgia, of the other part, signed in Luxembourg on 22 April 1996 and which entered into effect on 1 July 1999, are not covered by the provisional application of this Agreement, they continue to apply. 7. Either Party may give written notification to the depositary of this Agreement of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the depositary of this Agreement.	Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and Georgia, of the other part (2014/494/EU) (*Official Journal of the European Union*, No. L 261, 30 August 2014, p. 1) 1. Pending its entry into force, in accordance with Article 431 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and Georgia, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy: (*a*) Title I; (*b*) Title II: Articles 3 and 4 and Articles 7 to 9; (*c*) Title Ill: Articles 13 and 16; (*d*) Title IV (with the exception of Article 151, to the extent that it concerns criminal enforcement of intellectual property rights; and with the exception of Articles 223 and 224, to the extent that they apply to administrative proceedings and review and appeal at member State level); (*e*) Title V: Articles 285 and 291; (*f*) Title VI: Chapter 1 (with the exception of points (*a*) and (*e*) of Article 293, points (*a*) and (*b*) of Article 294 (2)), Chapter 2 (with the exception of point (*k*) of Article 298), Chapter 3 (with the exception of Article 302 (1)), Chapters 7 and 10 (with the exception of point (*i*) of Article 333), Chapter 11 (with the exception of point (*b*) of Article 338 and Article 339), Chapters 13, 20 and 23, as well as Articles 312, 319, 327, 354 and 357; (*g*) Title VII; (*h*) Title VIII (with the exception of Article 423 (1), to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement as defined in this paragraph); (*i*) Annexes II to XXXI and Annex XXXIV, as well as Protocols I to IV. 2. The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

Agreement	*Article in agreement*	*Article in Council decision*
Framework agreements/Partnership and cooperation agreements		
Framework Agreement between the European Union and its member States, on the one part, and the Republic of Korea, on the other part (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 2)	Article 49 (Entry into force, duration and termination) 1. This Agreement shall enter into force on the first day of the month following the date on which the Parties have notified each other of the completion of the legal procedures necessary for that purpose. 2. Notwithstanding paragraph 1, this Agreement shall be applied on a provisional basis pending its entry into force. The provisional application begins on the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures. 3. This Agreement shall be valid indefinitely. Either Party may notify in writing the other Party of its intention to denounce this Agreement. The denunciation shall take effect six months after the notification.	Article 2, Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU) (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 1) Pending the completion of the necessary procedures for its entry into force, the Agreement shall be applied on a provisional basis. The provisional application begins on the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for provisional application.
Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations (*Official Journal of the European Union*, No. L 143, 31 May 2011, p. 2)	Article 10 (Entry into force and termination) 1. This Agreement shall enter into force on the first day of the first month after the Parties have notified each other of the completion of the internal procedures necessary for that purpose. 2. This Agreement shall be provisionally applied from the date of signature. 3. This Agreement shall be subject to regular review by the Parties. 4. This Agreement may be amended on the basis of a mutual written agreement between the Parties. 5. Either Party may terminate this Agreement upon six months' written notice to the other Party.	Article 3, Council Decision 2011/318/CFSP of 31 March 2011 on the signing and conclusion of the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations (*Official Journal of the European Union*, No. L 143, 31 May 2011, p. 1) The Agreement shall be applied on a provisional basis as from the date of signature thereof, pending the completion of the procedures for its conclusion.
Partnership and Cooperation Agreement between the European Union and its member States, of the one part, and the Republic of Iraq, of the other part (*Official Journal of the European Union*, No. L 204, 31 July 2012, p. 20)	Article 117 (Provisional Application) 1. Notwithstanding Article 116, the Union and Iraq agree to apply Article 2 [Basis], and Titles II [Trade and investments], III [Areas of cooperation] and V [Institutional, general and final provisions] of this Agreement from the first day of the third month following the date on which the Union and Iraq have notified each other of the completion of the procedures necessary for this purpose. Notifications shall be sent to the Secretary-General of the Council of the European Union, who shall be the depository of this agreement. 2. Where in accordance with paragraph 1, a provision of this Agreement is applied by the Parties pending its entry into force, any reference in such provision to the date of entry into force of this Agreement shall be understood to be made to the date from which the Parties agree to apply that provision in accordance with paragraph 1.	Article 3, Council Decision of 21 December 2011 on the signing, on behalf of the European Union, and provisional application of certain provisions of the Partnership and Cooperation Agreement between the European Union and its member States, of the one part, and the Republic of Iraq, of the other part (2012/418/EU) (*Official Journal of the European Union*, No. L 204, 31 July 2012, p. 18) Pending the completion of the necessary procedures for its entry into force, Article 2 and Titles II, III, and V of the Agreement shall be applied provisionally, in accordance with Article 117 of the Agreement only insofar as it concerns matters falling within the Union's competence, from the first day of the third month following the date on which the Union and Iraq have notified each other of the completion of the necessary procedures for provisional application.

Agreement	*Article in agreement*	*Article in Council decision*
Enhanced Partnership and Cooperation Agreement between the European Union and its member States, of the one part, and the Republic of Kazakhstan, of the other part (*Official Journal of the European Union*, No. L 29, 4 February 2016, p. 3)	Article 281 (Entry into force, provisional application, duration and termination) 1. This Agreement shall enter into force on the first day of the second month following the date on which the Parties notify the General Secretariat of the Council of the European Union through diplomatic channels of the completion of the procedures necessary for that purpose. 2. Title III (Trade and Business), unless otherwise specified therein, shall apply as of the date of the entry into force referred to in paragraph 1, provided that the Republic of Kazakhstan has become a member of the WTO by that date. In case the Republic of Kazakhstan becomes a member of the WTO after the date of entry into force of this Agreement, Title III (Trade and Business), unless otherwise specified therein, shall apply as of the date the Republic of Kazakhstan has become a Member of the WTO. 3. Notwithstanding paragraphs 1 and 2, the European Union and the Republic of Kazakhstan may apply this Agreement provisionally in whole or in part, in accordance with their respective internal procedures and legislation, as applicable. 4. The provisional application begins on the first day of the first month following the date on which: (*a*) the European Union has notified the Republic of Kazakhstan of the completion of the necessary procedures, indicating, where relevant, the parts of this Agreement that shall be provisionally applied; and (*b*) the Republic of Kazakhstan has notified the European Union of the ratification of this Agreement. 5. Title III (Trade and Business) of this Agreement, unless otherwise specified therein, shall apply provisionally as of the date of provisional application referred to in paragraph 4, provided that the Republic of Kazakhstan has become a Member of the WTO by that date. In case the Republic of Kazakhstan becomes a member of the WTO after the date of the provisional application of this Agreement but before its entry into force, Title III (Trade and Business), unless otherwise specified therein, shall apply provisionally as of the date the Republic of Kazakhstan has become a member of the WTO. 6. For the purposes of the relevant provisions of this Agreement, including the Annexes and Protocols thereto, any reference in such provisions to the ‘date of entry into force of this Agreement’ shall be understood to also refer to the date from which this Agreement is provisionally applied in accordance with paragraphs 4 and 5. 7. Upon the entry into force of this Agreement, the Partnership and Cooperation Agreement between the European Communities and their member States, of the one part, and the Republic of Kazakhstan, of the other part, signed in Brussels on 23 January 1995 and in force from 1 July 1999, shall be terminated.	

Agreement	*Article in agreement*	*Article in Council decision*
	During the period of the provisional application, insofar as the provisions of the Partnership and Cooperation Agreement between the European Communities and their member States, of the one part, and the Republic of Kazakhstan, of the other part, signed in Brussels on 23 January 1995 and which entered into force on 1 July 1999, are not covered by the provisional application of this Agreement, they continue to apply.	
	8. This Agreement replaces the Agreement referred to in paragraph 7. References to that Agreement in all other agreements between the Parties shall be construed as referring to this Agreement.	
	9. This Agreement is concluded for an unlimited period, with the possibility of termination by either Party by means of a written notification delivered to the other Party through diplomatic channels. The termination shall take effect six months after receipt by a Party of the notification to terminate this Agreement. Such termination shall not affect ongoing projects commenced under this Agreement prior to the receipt of the notification.	
	10. Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels. The termination shall take effect six months after receipt by a Party of the notification to terminate the provisional application of this Agreement. Such termination shall not affect ongoing projects commenced under this Agreement prior to the receipt of the notification.	
Other agreements (services, etc.)		
Free Trade Agreement between the European Union and its member States, of the one part, and the Republic of Korea, of the other part (*Official Journal of the European Union*, No. L 127, 14 May 2011, p. 6)	Article 15.10 (Entry into force), paragraph 5	Article 3, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU) (*Official Journal of the European Union*, No. L 127, 14 May 2011, p. 1).
	5. (*a*) This Agreement shall be provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures.	1. The Agreement shall be applied on a provisional basis by the Union as provided for in Article 15.10.5 of the Agreement, pending the completion of the procedures for its conclusion. The following provisions shall not be provisionally applied: – Articles 10.54 to 10.61 (criminal enforcement of intellectual property rights), – Articles 4 (3), 5 (2), 6 (1), 6 (2), 6 (4), 6 (5), 8, 9 and 10 of the Protocol on cultural cooperation.
	(*b*) In the event that certain provisions of this Agreement cannot be provisionally applied, the Party which cannot undertake such provisional application shall notify the other Party of the provisions which cannot be provisionally applied. Notwithstanding subparagraph (*a*), provided the other Party has completed the necessary procedures and does not object to provisional application within 10 days of the notification that certain provisions cannot be provisionally applied, the provisions of this Agreement which have not been notified shall be provisionally applied the first day of the month following the notification.	2. In order to determine the date of provisional application the Council shall fix the date by which the notification referred to in Article 15.10.5 of the Agreement is to be sent to Korea. That notification shall include references to those provisions which cannot be provisionally applied. The Council shall coordinate the effective date of provisional application with the date of the entry into force of the proposed Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.
	(*c*) A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification.	
	(*d*) Where this Agreement, or certain provisions thereof, is provisionally applied, the term ‘entry into force of this Agreement’ shall be understood to mean the date of provisional application.	3. The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

Agreement	*Article in agreement*	*Article in Council decision*
Agreement between the European Community and the Government of Australia on certain aspects of air services (*Official Journal of the European Union*, No. L 149, 7 June 2008, p. 65)	Article 7 (Entry into force) 1. This Agreement shall enter in force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between member States and Australia which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (*b*) [Air services agreements and other arrangements initialled or signed between the Commonwealth of Australia and member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 7 April 2008 on the signing and provisional application of the Agreement between the European Community and the Government of Australia on certain aspects of air services (2008/420/EC) (*Official Journal of the European Union*, No. L 149, 7 June 2008, p. 63) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.
Agreement between the European Community and the Hashemite Kingdom of Jordan on certain aspects of air services (*Official Journal of the European Union*, No. L 68, 12 March 2008, p. 15)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between member States and the Hashemite Kingdom of Jordan which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (*b*) [Air service agreements and other arrangements initialled or signed between Jordan and member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 25 June 2007 on the signing and provisional application of the Agreement between the European Community and the Hashemite Kingdom of Jordan on certain aspects of air services (2008/216/EC) (*Official Journal of the European Union*, No. L 68, 12 March 2008, p. 14) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the parties have notified each other of the completion of the necessary procedures for this purpose.

Agreement	*Article in agreement*	*Article in Council decision*
Agreement between the European Community and the United Arab Emirates on certain aspects of air services (*Official Journal of the European Union*, No. L 28, 1 February 2008, p. 21)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between member States and the United Arab Emirates which, at the date of the signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (*b*) [Air services agreements and other arrangements initialled or signed between the United Arab Emirates and member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally.—Agreement between the Government of Romania and the Government of the United Arab Emirates relating to civil air transport initialled at Abu Dhabi on 8 March 1989, hereinafter referred to as 'the United Arab Emirates–Romania Agreement' in Annex II; To be read together with the Confidential Memorandum of Understanding done at Abu Dhabi on 8 March 1989]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 30 October 2007 on the signing and provisional application of the Agreement between the European Community and the United Arab Emirates on certain aspects of air services (2008/87/EC) (*Official Journal of the European Union*, No. L 28, 1 February 2008, p. 20) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Contracting Parties have notified each other of the completion of the necessary procedures for this purpose.
Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services (*Official Journal of the European Union*, No. L 179, 7 July 2007, p. 39)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter into force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose. 3. This Agreement shall apply to all Agreements and other arrangements between member States and the Kyrgyz Republic listed in Annex I which, at the date of signature of this Agreement, have not yet entered into force, upon their entry into force or provisional application.	Article 3, Council Decision of 30 May 2007 on the signing and provisional application of the Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services (2007/470/EC) (*Official Journal of the European Union*, No. L 179, 7 July 2007, p. 38) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.
Agreement between the European Community and New Zealand on certain aspects of air services (*Official Journal of the European Union*, No. L 184, 6 July 2006, p. 26)	Article 8 (Entry into force) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to apply this Agreement provisionally from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between member States and New Zealand which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I *(b)* [Air services agreements and other arrangements initialled or signed between New Zealand and member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 5 May 2006 on the signing and provisional application of the Agreement between the European Community and New Zealand on certain aspects of air services (2006/466/EC) (*Official Journal of the European Union*, No. L 184, 6 July 2006, p. 25) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.

Agreement	*Article in agreement*	*Article in Council decision*
Agreement between the European Community and the Government of the Republic of Singapore on certain aspects of air services (*Official Journal of the European Union*, No. L 243, 6 September 2006, p. 22)	Article 7 (Entry into force) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between member States and Singapore which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (*b*) [Air services agreements and other arrangements initialled or signed between the Republic of Singapore and member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 5 May 2006 on the signing and provisional application of the Agreement between the European Community and the Government of the Republic of Singapore on certain aspects of air services (2006/592/EC) (*Official Journal of the European Union*, No. L 243, 6 September 2006, p. 21) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.
Euro-Mediterranean Aviation Agreement between the European Community and its member States, of the one part and the Kingdom of Morocco, of the other part (*Official Journal of the European Union*, No. L 386, 29 December 2006, p. 57)	Article 30 (Entry into force) 1. This Agreement shall be applied provisionally, in accordance with the national laws of the Contracting Parties, from the date of signature. 2. This Agreement shall enter into force one month after the date of the last note in an exchange of diplomatic notes between the Contracting Parties confirming that all necessary procedures for entry into force of this Agreement have been completed. For purposes of this exchange, the Kingdom of Morocco shall deliver to the General Secretariat of the Council of the European Union its diplomatic note to the European Community and its member States, and the General Secretariat of the Council of the European Union shall deliver to the Kingdom of Morocco the diplomatic note from the European Community and its member States. The diplomatic note from the European Community and its member States shall contain communications from each member State confirming that its necessary procedures for entry into force of this Agreement have been completed.	Article 1, Decision of the Council and of the representatives of the Governments of the member States, meeting within the Council of 4 December 2006 (2006/959/EC) (*Official Journal of the European Union*, No. L 386, 29 December 2006, p. 55) Signature and provisional application 1. The signing of the Euro-Mediterranean Aviation Agreement between the European Community and its member States, of the one part, and the Kingdom of Morocco, of the other part, hereinafter ‘the Agreement’, is hereby approved on behalf of the Community, subject to the conclusion of the Agreement. 2. The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Community, subject to its conclusion. 3. Pending its entry into force, the Agreement shall be applied in accordance with Article 30 (1) thereof. 4. The text of the Agreement is attached to this Decision.
Euro-Mediterranean Agreement establishing an Association between the European Community and its member States, of the one part, and the Republic of Lebanon, of the other part (*Official Journal of the European Union*, No. L 143, 30 May 2006, p. 2)	Article 93 (Interim Agreement) In the event that, pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions of certain parts of this Agreement, in particular those relating to the free movement of goods, are put into effect by means of an Interim Agreement between the Community and Lebanon, the parties agree that, in such circumstances, for the purposes of Titles II and IV of this Agreement and Annexes 1 and 2 and Protocols 1 to 5 thereto, the terms ‘date of entry into force of this Agreement’ mean the date of entry into force of the Interim Agreement in relation to obligations contained in these Articles, Annexes and Protocols.	Council Decision of 14 February 2006 concerning the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Community and its member States of the one part, and the Republic of Lebanon, of the other part (2006/356/EC) (*Official Journal of the European Union*, No. L 143, 30 May 2006, p. 1)

Agreement	*Article in agreement*	*Article in Council decision*
Protocols for the accession of Bulgaria, Croatia and Romania		
Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Republic of Croatia to the European Union (*Official Journal of the European Union*, No. L 373, 31 December 2014, p. 3)	Article 4 1. This Protocol shall be approved by the Parties, in accordance with their own procedures. The Parties shall notify each other of the completion of the procedures necessary for that purpose. The instruments of approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Protocol shall enter into force on the first day of the first month following the date of deposit of the last instrument of approval. 3. This Protocol shall apply provisionally after 15 days from the date of its signature. 4. This Protocol shall apply to the relations between the Parties within the framework of the Agreement as of the date of accession of the Republic of Croatia to the European Union.	Article 3, Council Decision of 23 July 2014 on the signing, on behalf of the European Union and its member States, and provisional application, of the Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Republic of Croatia to the European Union (2014/956/EU) (*Official Journal of the European Union*, No. L 373, 31 December 2014, p. 1) The Protocol shall be applied on a provisional basis, as from 1 July 2013, pending the completion of the procedures for its conclusion.
Protocol to the Stabilisation and Association Agreement between the European Communities and their member States, of the one part, and the Republic of Serbia, of the other part, to take account of the accession of the Republic of Croatia to the European Union (*Official Journal of the European Union*, No. L 233, 6 August 2014, p. 3)	Article 14 1. This Protocol shall enter into force on the first day of the first month following the date of the deposit of the last instrument of approval. 2. If not all the instruments of approval of this Protocol have been deposited before the first day of the second month following the date of signature, this Protocol shall apply provisionally. The date of provisional application shall be the first day of the second month following the date of signature.	Article 3, Council Decision of 14 April 2014 on the signing, on behalf of the European Union and its member States, and provisional application of the Protocol to the Stabilisation and Association Agreement between the European Communities and their member States, of the one part, and the Republic of Serbia, of the other part, to take account of the accession of the Republic of Croatia to the European Union (2014/517/EU) (*Official Journal of the European Union*, No. L 233, 6 August 2014, p. 1) The Protocol shall be applied on a provisional basis, in accordance with its Article 14, as from the first day of the second month following the date of its signature, pending the completion of the procedures for its conclusion.

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 6]

DOCUMENT A/CN.4/695 and Add.1

Fourth report on identification of customary international law, by Sir Michael Wood, Special Rapporteur*

[*Original: English*]
[*8 March 2016*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Works cited in the present report

Akehurst, Michael

"Custom as a source of international law", BYBIL 1974–1975, vol. 47 (1977), pp. 1–53.

Allott, Philip

"Language, method and the nature of international law", BYBIL, vol. 45 (1971), pp. 79–136.

Baxter, R. R.

"Treaties and custom", *Collected Courses of The Hague Academy of International Law, 1970-I,* vol. 129, pp. 25–105.

Bos, Maarten

"The identification of custom in international law", GYBIL. Berlin, Duncker and Humblot, vol. 25 (1982), pp. 9–53.

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Briggs, Herbet W.

"Official interest in the work of the International Law Commission: Replies of Governments to requests for information or comment", AJIL, vol. 48 (1954), pp. 603

The International Law Commission. Ithaca, New York, Cornell University Press, 1965.

Caflisch, Lucius

"The CAHDI model plan for the classification of documents concerning State practice in the field of public international law", *in* Council of Europe, ed., *The CAHDI Contribution to the Development of Public International Law: Achievements and Future Challenges.* Leiden, Brill Nijhoff, 2016, pp. 12–18.

Danilenko, Gennady M.

*Law-making in the Internatio*nal Community. Dordrecht, Martinus Nijhoff, 1993.

Ferrari Bravo, Luigi

"Méthodes de recherche de la coutume internationale dans la pratique des Etats", *Collected Courses of The Hague Academy of International Law, 1985-III*, vol. 192 (1986), pp. 233–330.

Gaebler, Ralph F., and Alison A. Shea, eds.

Sources of State Practice in International Law, 2nd rev. ed. Leiden, Brill Nijhoff, 2014.

Graefrath, B.

"The International Law Commission tomorrow: Improving its organization and methods of work", AJIL, vol. 85 (1991), pp. 595–612.

Green, James A.

The Persistent Objector Rule in International Law. Oxford, Oxford University Press, 2016.

Jennings, Sir Robert

"The identification of international law", *in* Bin Cheng, ed., *International Law: Teaching and Practice.* London, Stevens and Sons, 1982, pp. 3–9.

"Universal international law in a multicultural world", *in* Maarten Bos and Ian Brownlie, eds., *Liber Amicorum for Lord Wilberforce.* Oxford, Clarendon, 1987, pp. 39–52.

Jiménez de Aréchaga, Eduardo

"International law in the past third of a century", *Collected Courses of The Hague Academy of International Law, 1978-I*, vol. 159 (1979), pp. 2–343.

Liang, Yuen-Li

"Notes on legal questions concerning the United Nations—The second session of the International Law Commission: Review of its work by the General Assembly", AJIL, vol. 45 (1951), pp. 509–525.

MacGibbon, Iain

"The scope of acquiescence in international law", BYBIL 1954, vol. 31 (1956), pp. 143–186.

Meron, Theodor

"The continuing role of custom in the formation of international humanitarian law", AJIL, vol. 90 (1996), p. 238–249.

Mersky, Roy M., and Jonathan Pratter

"A comment on the ways and means of researching customary international law a half-century after the International Law Commission's work", *International Journal of Legal Information*, vol. 24 (1996), pp. 302–309.

Parry, C.

"[Review:] Ways and means of making the evidence of customary international law more readily available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission (Memorandum submitted by the Secretary-General)", *International Law Quarterly* (1950), vol. 3, pp. 462–464.

Preuss, Lawrence

"[Review:] Ways and means of making the evidence of customary international law more readily available. Memorandum submitted by the Secretary-General (A/CN.4/6)", AJIL, vol. 43 (1949), pp. 834–835.

Pulkowski, Dirk

"Theoretical premises of 'regionalism and the unity of international law'", *in* Mariano J. Aznar and Mary E. Footer, eds., *Select Proceedings of the European Society of International Law,* vol. IV: *Regionalism and International Law. Valencia, 13–15 September 2012*. Oxford, Hart, 2015, pp. 77–86.

Rosenne, Shabtai

Practice and Methods of International Law. London, Oceana Publications, 1984.

Schwarzenberger, Georg

"The inductive approach to international law", *Harvard Law Review*, vol. 60 (1947), pp. 539–570.

Sepúlveda-Amor, Bernardo

"Comments on Fawcett and Obregón", *in* Mariano J. Aznar and Mary E. Footer, eds., *Select Proceedings of the European Society of International Law,* vol. IV: *Regionalism and International Law. Valencia, 13–15 September 2012*. Oxford, Hart, 2015, pp. 39–44.

Sur, Serge

"Sources du droit international—La coutume", *Juris Classeur du Droit international*, vol. 118 (1989) (fasc. 13).

Tomka, Peter

"Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 195–216.

Treves, Tullio

"Customary international law", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. 9. Oxford, Oxford University Press, 2012, pp. 937–957.

Waldock, Sir Humphrey

"General course on public international law", *Collected Courses of The Hague Academy of International Law, 1962-II*, vol. 106, pp. 1–251.

Watts, Arthur

The International Law Commission 1949–1998, vol. III. Oxford, Oxford University Press, 1999.

Wolfke, Karol

Custom in present international law, 2nd ed. Dordrecht, Martinus Nijhoff, 1993.

Wood, Michael, and Omri Sender

"State practice", Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law.* 2017, available from https://opil.ouplaw.com/home/mpil.

Yee, Sienho

"Report on the ILC project on 'Identification of customary international law'", *Chinese Journal of International Law*, vol. 14 (2015), pp. 375–398

Introduction

1. In 2012, the International Law Commission placed the topic "Formation and evidence of customary international law" in its current programme of work,[1] and held an initial debate on the basis of a preliminary note by the Special Rapporteur.[2]

2. In 2013, the Commission held a general debate[3] on the basis of the Special Rapporteur's first report[4] and a memorandum by the Secretariat.[5] The Commission changed the title of the topic to "Identification of customary international law".[6]

3. In 2014, the Commission considered the Special Rapporteur's second report,[7] and confirmed its support for the "two-element" approach to the identification of customary international law. Following the debate, the 11 draft conclusions proposed in the second report were referred to the Drafting Committee, which provisionally adopted eight draft conclusions.[8]

4. A third report by the Special Rapporteur,[9] prepared for the Commission's sixty-seventh session in 2015, sought to complete the set of draft conclusions. In doing so, it addressed certain matters not covered in the second report, and others to which it was agreed the Commission would return in 2015. In particular, it analysed further the issue of the relationship between the two constituent elements; contained more detailed enquiries into inaction as a form of practice and/or evidence of acceptance as law (*opinio juris*), and the relevance of practice of international organizations; examined the role of treaties and resolutions, judicial decisions and teachings; and explored particular customary international law and the persistent objector rule.

5. The Commission debated the Special Rapporteur's third report from 13 to 21 May 2015.[10] The members of the Commission reiterated their support for the "two-element" approach; and there was general agreement that the outcome of the topic should be a set of practical conclusions with commentaries, aiming at assisting practitioners and others in the identification of rules of customary international law. It was suggested, moreover, that the draft conclusions proposed in the report would benefit from further specification, and many particular proposals were voiced in this regard.

6. Following the debate, the draft conclusions proposed in the third report were referred to the Drafting Committee, which provisionally adopted eight additional draft conclusions as well as additional paragraphs for two of the draft conclusions adopted at the previous session. On 29 July 2015, the Chair of the Drafting Committee presented to the plenary a report on the work of the Committee on the topic at the sixty-seventh session, which contained the full set of 16 draft conclusions provisionally adopted by the Committee at the sixty-sixth and sixty seventh sessions.[11]

7. On 6 August 2015, the Commission took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee.[12] It was anticipated that the Commission would, at its next session, consider the adoption on first reading of the draft conclusions as well as the commentaries thereto.

8. In addition, the Commission requested the Secretariat to prepare a memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of identification of customary international law. The memorandum considers the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice before proceeding to analyse the case law of various international courts and tribunals in order to deduce some general observations. These are consistent with the Commission's treatment of national court decisions in the present topic as both a form of State practice or evidence of acceptance as law (*opinio juris*), and as a subsidiary means for determining the existence or content of customary international law.[13]

9. In the debate in the Sixth Committee in 2015, delegations generally commended the Commission for the work accomplished on this topic thus far and for the pragmatic approach taken. In particular, delegations reiterated their support for the general approach followed in the draft conclusions provisionally adopted by the Drafting Committee and looked forward to a first reading of the draft conclusions by the Commission during the sixty-eighth session. Valuable comments and suggestions were made with respect to matters addressed in the draft conclusions.[14] In addition, following information from other States received previously, a detailed written statement was received from Switzerland in response to the Commission's request to States for information related to the topic.

10. The present report seeks to address, in chapter I, some of the main comments and suggestions that have been made by States and others in relation to the 16 draft conclusions

[1] *Yearbook … 2012*, vol. II (Part Two), para. 19.

[2] *Ibid*., vol. II (Part One), document A/CN.4/653.

[3] *Yearbook … 2013*, vol. I, 3181st–3186th meetings; see also *ibid.*, vol. II (Part Two), pp. 64 *et seq.*, paras. 66−107.

[4] *Ibid.*, vol. II (Part One), document A/CN.4/663.

[5] *Ibid*., document A/CN.4/659.

[6] *Ibid.*, vol. I, 3186th meeting.

[7] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672.

[8] *Ibid.*, vol. I, 3242nd meeting; the full text of the Chair's interim report of 7 August 2014 may be found at https://legal.un.org/ilc, *Annual Sessions*, under the information on the sixty-sixth session of the Commission. The Drafting Committee was unable to consider two draft conclusions because of a lack of time, and one draft conclusion was omitted.

[9] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682.

[10] *Ibid.*, vol. I, 3250th to 3254th meetings; *ibid*., vol II (Part Two), pp. 28 *et seq.*, paras. 62–107.

[11] Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.869). See also the Chair's statement of 29 July 2015, at https://legal.un.org/ilc, *Annual Sessions*, under the information on the sixty-seventh session of the Commission.

[12] *Yearbook … 2015*, vol. II (Part Two), pp. 27–28, para. 60.

[13] Document A/CN.4/691, reproduced in the present volume.

[14] The Sixth Committee discussed the report of the Commission at its 17th to 26th meetings, on 2, 3, 4, 6, 9 to 11 November 2015 (A/C.6/70/SR.17–26). See also topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689; available from the website of the Commission), paras. 15–27.

provisionally adopted by the Drafting Committee in 2014 and 2015. It is suggested that the Commission review the draft conclusions (and accompanying commentaries) in the light of such comments before adopting the draft conclusions on first reading. In chapter II, the Special Rapporteur proposes some minor modifications to the texts provisionally adopted by the Drafting Committee, which could be made at the present stage if the Commission so decides.[15] Chapter III then concerns ways and means to make the evidence of customary international law more readily available, a matter that the Commission had of course dealt with some sixty-five years ago. The chapter recalls the background of that prior work, as a basis for further consideration of the matter within the Commission at present. Finally, chapter IV contains suggestions concerning the future programme of work on the topic.

[15] A similar procedure was proposed by the Special Rapporteur on responsibility of international organizations in his seventh report (*Yearbook … 2009,* vol. II (Part One), A/CN.4/610, para. 4 *et seq*.) and taken up by the Commission.

Chapter I

Suggestions by States and others on the draft conclusions provisionally adopted

11. The Special Rapporteur has consulted widely on the draft conclusions provisionally adopted by the Drafting Committee, and participated in various meetings at which they were discussed, including a meeting of the Asian-African Legal Consultative Organization (AALCO) informal expert group on customary international law held in Bangi, Malaysia in August 2015.[16] In particular, representatives in the debate in the Sixth Committee provided a wealth of valuable suggestions, for which the Special Rapporteur is very grateful. As indicated below, some of the points raised may be addressed in the commentaries. Others could be considered this year, at the first reading stage, and yet others may be more appropriate for consideration on second reading. The Special Rapporteur would welcome the views of members of the Commission on the following points; his own views, provided below, are for the most part tentative and, of course, subject to the debate in the Commission.

12. A question was raised with respect to the use of the term "conclusions" to describe the Commission's output on the present topic; some asked whether the term "guidelines" would not be more appropriate, given the objective of providing practical guidance on the way in which the existence or otherwise of rules of customary international law, and their content, are to be determined. The Special Rapporteur suggests that this be considered at second reading, in the light of the nature of the texts then adopted.

13. It was also suggested that draft conclusion 1 ("Scope") is not, *stricto sensu*, a conclusion on the identification of customary international law, and that its content, which is of an introductory nature, could be taken up in the general commentary that the Special Rapporteur will propose to the Commission. The Special Rapporteur tends to agree with this suggestion, which is along the same lines as the Drafting Committee's 2015 decision under the topic "Protection of the environment in relation to armed conflict".[17] Such a change could be made either this year or on second reading.

14. One delegation in the Sixth Committee suggested that the draft conclusions should be more detailed. As the Special Rapporteur has indicated in the past, and as the ensuing discussions in the Commission have shown, the need to achieve a balance between making the draft conclusions clear and concise on the one hand, and comprehensive on the other, needs constantly to be borne in mind. Several draft conclusions proposed in the second and third reports were indeed expanded following the debates in plenary and in the Drafting Committee. Other important nuances, it is hoped, will be brought out in the draft commentaries. It is the aim of the Special Rapporteur that the latter will provide the necessary additional depth and detail, and that they will be read together with the draft conclusions as an indissoluble whole. Any further specific suggestions in this respect would be welcome.

15. A concern was voiced in the Sixth Committee that the reference in the draft conclusions to a wide array of potential types of evidence of customary international law might be taken to suggest that customary international law was easily created or inferred. While this concern is understandable, the reference to multiple forms of State practice and various manifestations of State behaviour through which acceptance as law (*opinio juris*) may be made known simply reflects the fact that States exercise their powers in various ways and do not confine themselves only to some types of acts. This does not imply that the existence of rules of customary international law is lightly to be assumed, particularly when in principle "those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law".[18] It is the intention of the Special Rapporteur that, in line with the draft conclusions provisionally adopted, the draft commentaries make it clear that establishing the existence and content of a rule of customary international law entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation. The test must always be: is there a general practice that is accepted as law?

[16] Some of the contributions to the meeting in Bangi are to be published in *Chinese Journal of International Law*, vol. 15 (2016). See also Yee, "Report on the ILC project on 'Identification of customary international law'".

[17] The proposal of the Special Rapporteur on the topic "Protection of the environment in relation to armed conflict" to this effect was adopted by the Drafting Committee in 2015. See the statement of the Chair of the Drafting Committee of 30 July 2015 at https://legal.un.org/ilc, under the information on the sixty-seventh session of the Commission, p. 2.

[18] Waldock, "General course on public international law", p. 49.

16. Several delegations suggested that the formation of customary international law should not be overlooked in the draft conclusions and commentaries, recalling that the topic was originally entitled "Formation and evidence of customary international law". The Special Rapporteur would concur, in particular as the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions indeed refer in places, explicitly or otherwise, to the formation of rules of customary international law, and it is intended that the draft commentaries will also do so. At the same time, the aim of the topic is to assist in the determination of the existence (or not) and content as of a particular time of rules of customary international law. The task that faces counsel, judges or arbitrators concerns identifying the law as it is, or was, at a particular time, as opposed to how the law developed over time or might develop in the future. As has previously been agreed, it is not the aim of the topic to explain the myriad of influences and processes involved in the development of rules of customary international law over time, especially given the desire is to keep such processes flexible, as they inherently are.

17. Closely connected is the reference by some delegations to the difficulty that often arises in identifying the precise moment when a critical mass of practice accompanied by acceptance as law (*opinio juris*) has accumulated, and a rule of customary international law has thus come into being. One delegation mentioned the similar challenge associated with an enquiry into the exact time when treaty parties might acquire a sense of being under a legal obligation extending also to nonparties. These comments reflect the fact that the creation of customary international law is not an event that occurs at a particular moment, but rather "emanates from an 'intensive dialectic process' between different actors of the international society".[19] But again, the draft conclusions seek to provide guidance as to whether, at a given moment, it may be said that such process had occurred.[20] Much depends upon the point in time at which evidence is considered.

18. Several delegations provided very helpful comments on the process of assessment of evidence for the two constituent elements, currently dealt with in draft conclusion 3. It is intended that these will be reflected in the commentary, which would seek to explain the reference in the draft conclusion to "overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found". As suggested by some delegations, the commentaries would clarify, moreover, that the requirement for a separate inquiry for each of the two constituent elements of customary international law does not exclude the possibility that, in some cases, the same material may be used to ascertain both practice and acceptance as law (*opinio juris*).

19. A concern was raised that the reference in draft conclusion 4, paragraph 2, to the practice of international organizations as "also" creative or expressive of customary international law puts such practice on the same level as the practice of States, notwithstanding the inclusion of the words "[i]n certain cases". This, it was argued, does not find support in existing international law, where the practice of international organizations (with the exception of the European Union), while it may play an important indirect role, does not contribute directly to the formation, or expression, of customary international law. A suggestion was made in this connection to delete paragraph 2 and either to explain in the commentary the roles that international organizations do play, or deal with the matter in a separate draft conclusion. Others, however, supported the present text of paragraph 2, and some suggested that international organizations should not be treated in isolation (also providing some drafting proposals to that effect). It was also noted that at present the reference to international organizations is not entirely consistent throughout the draft conclusions as a whole, since in places the latter refer explicitly to State practice alone.

20. The Special Rapporteur continues to consider that the practice of international (intergovernmental) organizations as such, in certain cases, may contribute to the creation, or expression, of customary international law. The relevance of such practice is difficult to deny in the case of the European Union or, in fact, in any case where member States may direct an international organization to execute on their behalf actions falling within their own competences. The relevance of practice by international organizations should not be controversial, moreover, if it is accepted that the practice of international organizations in their relations among themselves, at least, could give rise or attest to rules of customary international law binding in such relations.[21] At the same time, as several delegations have also emphasized, given that international organizations are not States, and vary greatly (not just in their powers, but also in their membership and functions), in each case their practice must be appraised with caution. This should be made clear in the commentary to the current paragraph 2. Alternatively, apart from the possible changes mentioned in paragraph 19 above, the language of paragraph 2 may be revisited, either now, or on second reading after States have had a chance to see

[19] James Crawford, "The identification and development of customary international law", keynote speech, Spring Conference of the International Law Association, British Branch, 23 May 2014 (citing Allott, "Language, method and the nature of international law", pp. 103 and 129).

[20] See also Wolfke, *Custom in Present International Law*, p. 54 ("Writers are, in general, in agreement that the moment of formation of a custom—and hence the moment in which a customary rule begins to have binding effect—cannot be ascertained, since it is practically speaking intangible. We can ascertain only whether at a precise moment the custom exists, and at most, upon analysis of practice, make certain anticipations concerning the evolution of a particular custom.").

[21] This notion appears to be accepted in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, which refers in its preamble to the "codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations", and in which it is affirmed (also in the preamble) that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention"; see also art. 38 of the Convention. It may also be noteworthy that the European Bank for Reconstruction and Development's current standard terms and conditions for loan, guarantee and other financing agreements recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include "forms of international custom, including the practice of States *and international financial institutions** of such generality, consistency and duration as to create legal obligations": European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), sect. 8.04 (*b*) (vi) (c)).

the accompanying draft commentary. The Special Rapporteur would welcome the further views of members of the Commission on this.

21. A couple of delegations were concerned that the wording of draft conclusion 4, paragraph 3, dealing with the conduct of actors other than States and international organizations, was too strict, in that it does not adequately recognize the important contribution that such actors may make to international practice related to their work and the possible development of customary international law. Reference was made in this context to the International Committee of the Red Cross (ICRC) in particular. The Special Rapporteur would like to draw attention to the words "but may be relevant when assessing the practice [of States and international organizations]", found in paragraph 3, which acknowledge that, although the conduct of "other actors" is not directly creative, or expressive, of customary international law, it may very well have an important (albeit indirect) role in the development and identification of customary international law. In fact, it was the work of ICRC and its significant contribution to the development of customary international humanitarian law (by stimulating or recording practice and acceptance as law (*opinio juris*) by States)[22] that to a large extent inspired the text of paragraph 3.

22. The revised references in the draft conclusions to inaction as a form of practice and/or evidence of acceptance as law (*opinio juris*), following the closer examination of the issue by the Commission in 2015, were widely supported. A large number of delegations underlined again that the relevance of inaction as evidence of acceptance as law (*opinio juris*) had to be assessed with caution: States are not to be expected to react to everything, and attributing legal significance to their inaction depended on the particular circumstances of each situation. Support was expressed in this connection for the development of draft conclusion 10, paragraph 3, by the Drafting Committee in 2015, and it was suggested that the accompanying commentary further clarify the requirements for attributing probative value to inaction. The Special Rapporteur agrees, and will seek to make clear in the draft commentary not only that it is essential that a reaction to the relevant practice would have been called for, but also that where a State does not or cannot have been expected to know of a certain practice, or has not yet had a reasonable time to respond, its inaction cannot to be attributed to a belief on its part that such practice is mandated (or permitted) under customary international law.

23. One delegation was concerned that draft conclusion 7, paragraph 2 (which in its current form provides that where the practice of a particular State varies, the weight to be given to that practice may be reduced), might disadvantage States where the independence of the judiciary and the juxtaposition of Government and parliament might lead to different views, or at least to different nuances being expressed. The Special Rapporteur would note in this connection that States do generally attempt to speak with one voice on matters of international affairs, and that the draft conclusion does not seek to take any position with respect to the internal order of any State. More specifically, and as the draft commentary would seek to make clear, the word "may" in the draft conclusion indicates that an assessment of a State's practice as a whole needs to be approached with care. One example where such an approach is evident may be found in the *Fisheries Case*, where the International Court of Justice held with respect to the relevant practice that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … They may be easily understood in the light of the variety of facts and conditions prevailing in the long period".[23] In any event, such assessment should take account of the constitutional position of the relevant State organs, including the question which of them has the final say in the relevant matter.[24]

24. An observation was made that, while draft conclusion 12 stated correctly that resolutions cannot, in and of themselves, constitute customary international law, the same was true of treaties, yet the draft conclusion dealing with the latter (draft conclusion 11) did not contain such an express statement. The drafting of draft conclusion 11 reflects an understanding that the basic rule according to which a treaty cannot in principle create obligations for third parties is well understood; the guidance felt necessary to be provided in draft conclusion 11 rather has to do with how treaties may shed light on the existence and content of rules of customary international law.[25] The com-

[22] See also *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, International Tribunal for the Former Yugoslavia, 2 October 1995, *Judicial Reports 1994–1995*, para. 109 ("As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules"); Meron, "The continuing role of custom in the formation of international humanitarian law", pp. 245 and 247 ("The ICRC is of course neither a State nor an intergovernmental organization, but an association under Swiss civil law. Thus, it is not a direct participant in the making of international law, which under the prevailing theory of sources is still reserved to States, with some allowance for the role of intergovernmental organizations … [however, it] influences State practice and thus, indirectly, the development of customary law").

[23] *Fisheries Case*, Judgment of December 18th, 1951, *I.C.J. Reports 1951*, p. 116, at p. 138.

[24] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Greek Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[25] It should also be noted that the International Court of Justice remarked in the *North Sea Continental Shelf* cases that, if "a very widespread and representative participation in the convention …, provided it included that of States whose interests were specially affected", is registered, that "might" suffice of itself to transform a conventional rule into a rule of customary international law (*North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at p. 42, para. 73). In other words, a

mentary would explain, however, that the words "if it is established that" make it clear that ascertaining whether a conventional formulation does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty; in each case the existence of the rule must be confirmed by practice (and acceptance as law (*opinio juris*)).

25. Several delegations stressed that great caution should be used when assessing the relevance and significance of resolutions of international organizations and intergovernmental conferences in the identification of customary international law. It was agreed that, as noted in the third report, only some resolutions may be evidence of existing or emerging law, depending on various factors which must be carefully assessed in each case. The Special Rapporteur intends that the commentary will explain further the cautious language of draft conclusion 12, and specify what factors are to be taken into account. It is also intended that, as suggested in the Sixth Committee, the particular relevance of the General Assembly as a forum of near universal participation would be highlighted in this context.

26. Some delegations suggested that a separate conclusion, or at least a specific reference in the commentary accompanying draft conclusion 14 ("Teachings"), should be devoted to the role of the Commission's output in the identification of customary international law. Such output, it was said, did not seem to equate to scholarly work given the Commission's status and relationship with States as a subsidiary organ of the General Assembly. The Special Rapporteur agrees that the Commission does hold a special place in the present context and recalls that this was also highlighted by members of the Commission in the debate in 2015. It is intended that the draft commentary would recognize the particular value that may attach to a determination by the Commission affirming the existence and content of a rule of customary international law (or a conclusion by the Commission that no rule exists), and explain why this is so. Furthermore, the importance of the Commission's work as a catalyst for State practice and expressions of legal opinion is alluded to in other draft conclusions, in particular those dealing with forms of practice, forms of evidence of acceptance as law (*opinio juris*), and the potential relevance of treaties. As noted by one delegation, the Commission's work may also feed into resolutions of the General Assembly. The commentaries to the relevant draft conclusions would seek to capture these points.

27. The inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations that addressed the matter in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law.[26] Some delegations, however, expressed concern that recognizing the rule in the draft conclusions may destabilize customary international law or be invoked as a means to avoid customary international law obligations. The Special Rapporteur intends, in this connection, that the commentary, like draft conclusion 15 itself, would emphasize the stringent requirements associated with the rule and, in particular, that once a rule of customary international law has come into being, an objection not voiced earlier will not avail a State wishing to exempt itself from its binding force. Several delegations suggested that the draft commentary should refer to the question of persistent objection *vis-à-vis* rules of *jus cogens*. However, the Commission decided at an early stage not to deal with *jus cogens* as part of the present topic and has now taken it up as a separate topic.

28. One delegation questioned the need for an objection to an emerging rule of customary international law to be repeated and maintained (including after the rule has come into being) in order to secure persistent objector status. It was suggested, instead, that once a State had made it clear that it did not wish to be bound by an emerging rule, it had no obligation to reiterate that stance time and again; the State would lose its status of persistent objector only when its subsequent practice or legal views explicitly expressed support for the new rule and deviated from its earlier position. While this approach does have its appeal, it seems to disregard the legal force that may sometimes attach to silence (when it amounts to acquiescence), and to downplay the importance of inaction in both the development and the identification of rules of customary international law. Nevertheless, there is no requirement that States constantly object: it is intended that the commentary will make clear that objection should be expected only as and when the circumstances are such that a restatement of the objection is to be expected (i.e. where silence or inaction may lead to the conclusion that the State has given up its objection).[27] As

multilateral treaty might, in certain circumstances, "because of its own impact" (*ibid*., para. 70), give rise to a rule of customary international law. As has recently been written, however, "the Court was careful not to determine definitely whether the method was even a possible one … In any event, widespread participation in a codification convention has never, in the jurisprudence of the Court, been sufficient on its own for the confirmation of a customary rule", Tomka, "Custom and the International Court of Justice", p. 207.

[26] For illustration in State practice and the case law of international courts and tribunals, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682, paras. 86–87 and accompanying footnotes; Green, *The Persistent Objector Rule in International Law*, in general, but particularly chapter two (p. 55: "[T]here is … more than enough evidence to support the existence of the persistent objector rule today. The State acceptance and usage of the rule, especially when taken alongside the increasingly notable judicial endorsement of it and its ubiquity in scholarship, confirms that the rule is indeed a secondary rule of the international legal system"). See also Wolfke, *Custom in Present International Law*, pp. 66–67 ("The argument that, in practice, such objections [by a persistent objector] are rarely upheld and the objectors finally join the general practice and the arising custom does not undermine the principle of persistent objector. On the contrary, it confirms the consensual basis of customary international law. It shows merely that for extra-legal reasons, the so-called 'societal context', it is in practice difficult, if not impossible, for individual States to abstain *à la longue* from the general evolution of international law"); Danilenko, *Law-Making in the International Community*, p. 112 ("Experience shows that community pressure often results in situations where objecting States are compelled to recognize new rules which have won broad support in the framework of the international community. However, the possibility of effective preservation of the persistent objector status should not be confused with the legally recognized right not to agree with new customary rules.").

[27] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246, at p. 305, para. 130; Bos, "The identification of custom in international law", p. 37 ("it should be emphasized that silence may not always be taken to mean acquiescence: for States cannot be deemed to live under an obligation of permanent protest against anything not pleasing them. For legal consequences to ensue, there must be good reason to require some form

(*Continued on next page.*)

was also suggested, this requirement should be approached in a balanced and pragmatic manner.

29. Some delegations expressed concern that referring to rules of particular customary international law, which by definition apply only among a limited number of States, might be taken to encourage fragmentation of international law. While such concerns are understandable, it is undisputed that rules of particular customary international law exist (as is confirmed, *inter alia*, in the case law of the International Court of Justice).[28] Even if they are not all that frequently encountered in practice, rules of particular customary international law sometimes play a significant role in inter-State relations, accommodating differing interests and values peculiar to some States only. Guidance as to how such rules are to be identified (including the clarification that stricter criteria apply) may thus prove useful. The Special Rapporteur would like the commentaries to make clear, however, that it is not to be excluded that rules of particular customary international law may evolve over time into rules of general customary international law.[29]

(*Footnote 27 continued.*)

of action"); MacGibbon, "The scope of acquiescence in international law", p. 143 ("Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"). This is consistent with the approach adopted in draft conclusion 10, paragraph 3, dealing with inaction as a form of evidence of acceptance as law (*opinio juris*).

[28] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682, para. 80.

[29] See also "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr. 1 and Add.1) (available from the website of the Commission, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 201 ("these regional influences appear significant precisely because they have lost their originally geographically limited character and have come to contribute to the development of universal international law"); Jennings, "Universal international law in a multicultural world", p. 41 ("[The universality of international law] is not to say, of course, that there is no room for regional variations, perhaps even in matters of principle … Every law, including the law within the sovereign State, readily accommodates such variations. Universality does not mean uniformity. It does mean, however, that such a regional international law, however variant, is a part of the system as a whole and not a separate system, and it ultimately derives its validity from the system as a whole."); Sepúlveda-Amor, "Comments on Fawcett and Obregón", p. 39 ("Remarkably, some of the doctrines and rules that originated in this region [of Latin America] in the nineteenth and twentieth centuries were regarded in many quarters, at first, as extravagant and contrary to the laws of civilised nations. Ultimately, however, some of them came to be embraced as part and parcel of general international law. The *uti possidetis juris* principle is a paradigmatic example."); Pulkowski, "Theoretical premises of 'regionalism and the unity of international law'", pp. 84–85 ("regionalism does not affect legal unity in ways that are qualitatively different from other phenomena of modern international lawmaking. Regional law is a sub-variant of particular international law [ranging from plurilateral treaties with limited adherence, to quasi-universal multilateral conventions], and as such is neither more nor less prone to creating disorder in the international system than other forms of particularism.").

Chapter II

Proposed amendments to the draft conclusions in the light of comments received

30. In the light of suggestions made since the sixty-seventh session, the Special Rapporteur proposes that a limited number of minor modifications be made to the text of the draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015. As noted above, other possible changes may well be considered, either this year or upon second reading. For convenience, the suggested amendments to the draft conclusions are set out (and marked-up) in the annex to the present report.

31. In draft conclusion 3 ("Assessment of evidence for the two elements"), paragraph 2, it is suggested that the text be clarified and its context be emphasized by replacing the words "Each element is to be separately ascertained", which refer to the two constituent elements of customary international law, with "Each of the two elements is to be separately ascertained".

32. In draft conclusion 4 ("Requirement of practice"), paragraph 1, it is suggested that small amendments be made in order to indicate better not only whose practice is primarily relevant for the identification of customary international law, but also the role of such practice. This would provide clearer guidance and better correspond to the title of the draft conclusion. Among the amendments suggested, replacing the words "formation, or expression" with the words "expressive, or creative" draws inspiration from the language of the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, where the actual practice of States was referred to as "expressive, or creative, of customary rules".[30] It would also serve to focus the paragraph on the task of identification of a rule. The paragraph could thus read: "The requirement, as a constituent element of customary international law, of a general practice refers primarily to the practice of States as expressive, or creative, of rules of customary international law."

33. If draft conclusion 4, paragraph 1, is amended in this way, corresponding changes would be made to draft conclusion 4, paragraph 2, and draft conclusion 4, paragraph 3.

34. In draft conclusion 6 ("Forms of practice"), paragraph 2, it is suggested that the words "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" be deleted. While such conduct may sometimes be relevant as State practice, in practice it is more often useful as evidence of acceptance as law (*opinio juris*) or lack thereof, and draft conclusion 6, paragraph 2, in any case does not give an exhaustive list of forms of practice. The reference to "conduct in connection with resolutions" would of course remain in

[30] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 18, at p. 46, para. 43 ("it should be borne in mind that, as the Court itself made clear in that [1969] Judgment, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules").

draft conclusion 10, paragraph 2, which lists possible forms of evidence of acceptance as law (*opinio juris*).

35. In draft conclusion 9 ("Requirement of acceptance as law (*opinio juris*)"), paragraph 1, it is suggested that the words "undertaken with" be replaced by the words "accompanied by". The words "undertaken with" could more easily be read to encompass the legal opinion both of States carrying out the relevant practice and those in a position to react to it; they were also employed recently by the International Court of Justice, in its 2012 judgment in the *Jurisdictional Immunities of the State* case.[31]

[31] See *Jurisdictional Immunities of the State* (footnote 24 above), para. 55 ("the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court"), and para. 77 ("[t]hat practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity").

36. In draft conclusion 12 ("Resolutions of international organizations and intergovernmental conferences"), paragraph 1, it is suggested to replace the word "cannot" by the words "does not", since this would better reflect the factual rather than normative nature of the statement, and is better drafting.

37. In draft conclusion 12, paragraph 2, it is suggested, first, that the word "establishing" be replaced with the word "determining", for greater consistency within the draft conclusions as a whole (the word "determine" is used in draft conclusions 1, 2, 13, 14, and 16 in connection with rules of customary international law). It is also suggested that the words "or contribute to its development", be deleted to better focus the draft conclusion on the identification of customary international law; the potential contribution of resolutions of international organizations and intergovernmental conferences to the development of the law could be covered in the commentary.

Chapter III

Making the evidence of customary international law more readily available

38. The practical challenges of access to evidence in order to ascertain the practice of States and their *opinio juris* have long been recognized. Such difficulties, which of course are closely linked to the nature of customary international law as *lex non scripta*,[32] were also acknowledged by the Committee on the Progressive Development of International Law and its Codification (the Committee of Seventeen) in 1947.[33] The Committee therefore recommended in its report to the General Assembly that the Commission "consider ways and means for making the evidences of customary international law more readily available",[34] and this led to the inclusion of article 24 in the Statute of the Commission (1947), within the section entitled "Codification of international law". Article 24 stipulates that:

> The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.[35]

39. The question of the implementation of article 24 was among the first items on the Commission's agenda.[36] In this connection, the Commission had before it at its first session a memorandum submitted by the Secretary-General entitled "Ways and means of making the evidence of customary international law more readily available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission".[37] The

[32] See also Rosenne, *Practice and Methods of International Law*, p. 56 ("[t]he evidence of customary law [given that it is essentially based on practice] is therefore scattered, elusive, and on the whole unsystematic"); Mersky and Pratter, "A comment on the ways and means of researching customary international law …", p. 304.

[33] Sir Dalip Singh, Chair of the Committee, explained that "the evidence of customary international law was not easily available in contradistinction to the evidence of scientific international law which was always laid down in books" (A/AC.10/SR.27, p. 11). It was observed at about that time, in connection with the identification of customary international law, that "[n]othing could be worse than the current repetition of quotations from the very limited repertoire of diplomatic notes which are taken over from one textbook into another and only rarely supplemented by casual personal excursions of writers into the unknown wilderness of State papers": Schwarzenberger, "The inductive approach to international law", p. 564.

[34] Report of the Committee on the Progressive Development of International Law and its Codification, A/331, para. 18 ("In connection with the development of customary international law, as well as with the development of the law through the judicial process, the Committee desired to recommend that the [Commission] consider ways and means for making the evidences of customary international law more readily available by the compilation of digests of State practice, and by the collection and publication of the decisions of national and international courts on international law questions."). A memorandum on the methods for encouraging the progressive development of international law and its eventual codification submitted to the Committee by its secretariat suggested that, "[w]hile customary international law develops as a result of State practice and its growth is not dependent upon conscious international efforts, the United Nations can stimulate its development through taking steps to render more accessible the evidence of the practice of States in the form of digests of international law … [a useful approach for ascertaining and compiling such digests] might be the consideration of methods whereby the materials containing such evidences can be made more readily available" (A/AC.10/7 and Corr.1–2, pp. 5–6).

[35] The task assigned to the Commission under article 24 of its Statute was "distinct from the other functions of the Commission, namely, the progressive development and the codification of international law … [it] relates exclusively to evidence of customary international law, yet it is concerned not merely with any particular topic but with the whole range of customary international law. The task, specifically stated, is to explore ways and means of remedying the present unsatisfactory state of documentation. This is made clearer by the French text, which speaks of 'documentation', than by the English text, which employs the word 'evidence'": Ways and means of making the evidence of customary international law more readily available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General (A/CN.4/6 and Corr.1; United Nations publication, Sales No. 1949.V.6), p. 5.

[36] *Yearbook … 1949*, Report to the General Assembly (document A/925), p. 277, at pp. 283–284, paras. 35–37. See also, more generally, Briggs, *The International Law Commission*, pp. 203–206.

[37] A/CN.4/6 and Corr.1 (see footnote 35 above). The Commission also had before it a working paper prepared by the Secretariat based on the memorandum (Working Paper based on Part III of the preparatory work done by the Secretariat upon ways and means of making the evidence of customary international law more readily available (A/CN.4/6), A/CN.4/W.9; incorporated in *Yearbook … 1949*, 31st meeting, footnote 10).

memorandum comprised three parts: (*a*) a short introduction on "The problem of making the evidence of customary international law more readily available"; (b) an extensive survey of "The existing state of the evidence of customary international law and suggestions hitherto made for its improvement"; and (c) an evaluation of the state of the evidence of customary international law at that time and possible "ways and means" to improve it.[38] Following a debate on the memorandum and the topic more broadly, the Commission invited one of its members, Mr. Manley O. Hudson, to prepare a working paper on the subject for consideration during the Commission's second session.[39]

40. On the basis of Hudson's working paper,[40] the Commission observed in its 1950 report to the General Assembly that "[e]vidence of the practice of States is to be sought in a variety of materials", but considered it impractical to enumerate "all the numerous types of materials which reveal State practice on each of the many problems of international relations".[41] Instead it found it useful to list and survey "[w]ithout any intended exclusion, certain rubrics", or types, of evidence of customary international law: texts of international instruments; decisions of international courts; decisions of national courts; national legislation; diplomatic correspondence; opinions of national legal advisers; and practice of international organizations.[42]

41. As for the availability of such evidence, the Commission suggested that this

> may be considered in three aspects. First, availability for meeting the needs of particular groups of persons [these being private individuals engaged in the exploration of international law, government and international officials]. Second, the extent to which materials already published are available throughout the world. Third, the extent to which materials not yet published may be made available throughout the world.[43]

In this connection, it was noted, *inter alia*, that extensive collections of published materials "are to be found only in great libraries of international law" that "[u]nfortunately … are few and far between"; and that, while

> it is extremely difficult to estimate the present availability of many of the principal collections of evidence of customary international law, which have been published … [i]n many instances, stocks probably do not exist to be drawn upon for meeting present or future demands.[44]

42. Against this background, the Commission then suggested "specific ways and means" for making the evidence of customary international law more readily available. These included: (*a*) distribution, as wide as possible and for a price as low as possible, of publications relating to international law issued by organs of the United Nations, and prompt publication of the texts of international instruments registered with, or filed and recorded by the Secretariat; (*b*) authorization of the Secretariat, insofar as has not yet been done, to prepare and distribute widely various publications containing legal materials from the various States and covering their practice (and that of the United Nations), reporting international arbitral awards and outlining significant developments; (*c*) publication of occasional digests of the reports of the International Court of Justice; (*d*) the General Assembly calling to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law; and (*e*) consideration by the General Assembly to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.[45]

43. Most of these recommendations have been acted upon,[46] giving rise to some important documentation frequently consulted by international lawyers. Publication of State practice (and of other evidence of such practice, as may be found in scholarly writings, documents stemming from international organizations, and decisions of international courts and tribunals) has greatly expanded, in part also thanks to "manifestations of zeal" of private national or international institutes.[47] The growing intensity of international relations has also made the practice and positions of States better known; and powerful new means to collect, preserve and disseminate data have mitigated in the digital era many of the difficulties of accessing and collating published information that were foreseen in 1949–1950.[48]

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[38] The memorandum was said to be "the most complete and usable biographical manual which has appeared in this field … admirably accomplishes its immediate purpose in providing full data and a sound and progressive program[me] for the work of the International Law Commission and the General Assembly": Preuss, "[Review:] Ways and means of making the evidence of customary international law more readily available. Memorandum submitted by the Secretary-General (A/CN.4/6)", p. 835. See also Mersky and Pratter, "A comment on the ways and means of researching customary international law …", p. 308 ("This is an impressive survey of the documentation of international law relevant to custom. There is not room here to go into the details of its content. It is enough to say that this document can still today be fully recommended as a resource for law librarians and other researchers.").

[39] Commission members, with one exception, were very appreciative of the memorandum: see *Yearbook … 1949*, 31st and 32nd meetings, pp. 228–235. The decision by the Commission reads: "It was decided that no Rapporteur should be appointed to deal with the question of ways and means for making customary international law more readily available, but that a member of the Commission should prepare a working paper on that subject to be submitted to the second session of the International Law Commission" (p. 235, para. 54).

[40] *Yearbook … 1950*, vol. II, document A/CN.4/16 and Add.1.

[41] *Ibid.*, document A/1316, p. 368, para. 31.

[42] *Ibid.*, pp. 368–372, paras. 32–78.

[43] *Ibid.*, p. 372, para. 80.

[44] *Ibid.*, paras. 82–83.

[45] *Ibid.*, pp. 373–374, paras. 90–94.

[46] See also General Assembly resolution 487 (V) of 12 December 1950, inviting the Secretary-General to consider and report upon some of the Commission's recommendations; Liang, "Notes on legal questions concerning the United Nations", pp. 510–514.

[47] The Commission had observed in 1950 that "[r]esults of the fruitful activities of non-official scientific bodies have appeared in the numerous reviews, and recent years have seen the launching of yearbooks or journals of international law in a number of countries. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which may be relied upon for the sustained effort involved in the publication of useful compendiums of the evidence of customary international law. Few of them can undertake and continue a long-range programme of solid work; their personnel changes rapidly, their interest is easily deflected, and their funds are seldom adequate": *Yearbook … 1950*, vol. II, document A/1316, p. 373, para. 89. But the position is very different today.

[48] See also Treves, "Customary international law", para. 80 ("Important changes in the availability of manifestations of international practice have been brought about in recent times by electronic means of knowledge now widely available. Such means have made it possible for a very high number of States to make their practice accessible, remedying, at least as far as recent practice is concerned, the lack of balance of printed collections. They have also, admittedly only

44. The work of the Commission has itself made, and continues to make, the evidence of customary international law more readily available. As has been observed,

> [t]oday, the process of codification furnishes an easy and convenient way of discovering the actual practice of States

given that

> [t]he observations of governments on drafts elaborated by the International Law Commission, the discussions in the Sixth Committee of the General Assembly, the statements of representatives of States in plenipotentiary codification conferences constitute a sort of public enquiry about the practice of States and about their views as to the rules which are followed or ought to be followed on a certain subject; this is an evidence "free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice".[49]

The regular publication by the United Nations of information supplied by Governments in response to requests by the Commission is important.[50]

45. At the same time, the expanded number of States (and international organizations), the far greater volume of international intercourse, and the multiple formats of evidence now in existence, pose significant challenges to a thorough enquiry into the practice and *opinio juris* of States. The sheer quantity of available material is daunting: even thirty years ago, one author was of the view that "one difficulty now is the embarrassingly rich and varied range of evidences, in these days of digests and national practices, and almost daily spat of resolutions, recommendations, and assertions from some more or less authoritative body or other".[51] Such challenges are compounded by the absence of a common classification system to compare and contrast the practice of States and others.[52]

46. In addition, despite the great mass of materials that is now at hand, coverage of State practice remains limited given that many official documents and other indications of governmental action are still unpublished and thus unavailable.[53] This may sometimes reflect a political choice,[54] but more often derives from the simple fact that publishing State practice systematically "requires considerable resources, and relatively few States have succeeded in sustaining publication of comprehensive material over an extended period".[55]

47. As has been written,

> For a legal system so heavily dependent on customary international law, and thus on State practice as evidence of that law, improvements in ways and means of making that practice more widely available are necessary if the rule of law in international affairs is to prosper. The International Law Commission fully recognized the importance of State practice being widely available, and its report [in 1950] did much to prompt action towards that end. Two developments, however, now threaten the full attainment of the objectives set in 1950 by the Commission: first, the enormous proliferation in the available material on the many aspects of international law and relations, and second the rising costs associated with its accumulation, storage, and distribution.

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in part, made less acute the unfavourable position of those (government officials or scholars) who do not have access to the relatively few large and well organized libraries where the printed materials can be accessed. Lastly, electronic means have made practice available almost at the time the manifestations concerned come into being, thus eliminating the information gap existing between those States that have at their disposal well organized foreign services and other States, as well as most scholars.").

[49] Jiménez de Aréchaga, "International law in the past third of a century", p. 26 (quoting Baxter, "Treaties and custom", p. 36). See also Preuss, "Ways and means …", p. 835 (suggesting at the time that given the lack of adequate documentation of much State practice, "[t]he development of a veritable *corpus juris gentium* is possible only under the guidance and direction of some such central agency as the International Law Commission, acting with the full cooperation of governments").

[50] See also Briggs, "Official interest in the work of the International Law Commission …", pp. 605 and 612 (referring to a document submitted by the United States of America in response to the Commission's work on the law of treaties when remarking that "[i]t seems unfortunate that the document has not yet been published by the United States or issued as a United Nations document", and adding more generally with respect to replies from Governments to the Commission's requests for information that "[i]t is unfortunate for the professional student of international law that these materials are mostly issued only in impermanent mimeographed form and are of limited availability. These factors underline the pressing need for a *United Nations Juridical Yearbook* in which these and comparable materials might be printed so as to form a readily available and permanent record of contemporary developments in international law"). Comments by Governments on the Commission's draft texts have sometimes been published by individual Governments or privately (for example, "Comments by certain Governments on the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea adopted by the United Nations International Law Commission at its seventh session in 1955", AJIL, vol. 50 (1956), pp. 992–1049), but this has not been done comprehensively or consistently. The Secretariat has now begun publishing on the website of the Commission, for each topic under consideration, not only comments and observations received on first-reading products of the Commission, but also other responses from Governments received following requests from the Commission during the deliberations on the topic.

[51] Jennings, "The identification of international law", p. 5 (referring in particular to the ascertainment of *opinio juris*). See also Graefrath, "The International Law Commission tomorrow …", p. 606 ("[t]oday, State practice and legal activities have become so extensive and technical, and information is so voluminous and scattered"); Mersky and Pratter, "A comment on the ways and means of researching customary international law …", p. 304 ("[t]he reality is that the recorded evidence of a State practice is scattered throughout a literature as vast as international law itself"); Gaebler and Shea, *Sources of State Practice in International Law*, p. 4 ("comprehensiveness of coverage seems to be an ever more elusive goal").

[52] The exception of the model plan for the classification of documents concerning State practice in the field of public international law, adopted by the Committee of Ministers of the Council of Europe in 1968 (Resolution (68) 17 of 28 June 1968) and amended in 1997 (Recommendation No. R (97) 11 of 12 June 1997), bears mention in this context: See Caflisch, "The CAHDI Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law".

[53] See also Akehurst, "Custom as a source of international law", p. 13 ("Much of the evidence of State practice is hidden in unpublished archives. Consequently one can never prove a rule of customary law in an absolute manner but only in a relative manner – one can only prove that the majority of the evidence *available* supports the alleged rule.").

[54] See also Treves, "Customary international law", para. 79 ("[r]eluctance to make available manifestations of practice by a number of secretive States, both large and small, and selectivity as to the documents made available, reflect a political choice between the desire to avoid criticism and to make it easier to contradict previous practice, on the one hand, and the desire to exercise leadership and influence the customary process, on the other").

[55] Wood and Sender, "State practice", para. 30. See also Ferrari Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des Etats", p. 310; Sur, "Sources du droit international – La coutume", para. 57. But see Treves, "Customary international law", para. 78 ("It has been observed that the collections of State practice give an unbalanced view, as they concern the practice of the relatively small group of the main powers. While there is some truth in this observation, it must also be stressed that the main powers engage in relations with most other States, so that the practice of almost all States is, at least in part, reflected in these collections. Moreover, in recent times a number of collections and reviews of practice of smaller and third world States have begun to appear.").

With the added impact in recent years of revolutionary developments in global information technology, the subject covered in the Commission's 1950 report might repay renewed attention.[56]

48. For the Commission to consider once more ways and means for making the evidence of customary international law more readily available, after over sixty-five years and taking into account the significant changes that have occurred in this context since 1949–1950, may indeed prove useful; it could well assist those attempting to identify the existence and content of rules of customary international law. Several States speaking at the Sixth Committee in 2015 have already voiced their support for such an undertaking.

49. The Special Rapporteur would welcome the thoughts of members of the Commission on whether, and if so how, the matter should be revisited. In any event, as an initial step, the Special Rapporteur suggests that the Secretariat be requested to provide an account of the evidence currently available by updating the "General survey of compilations and digests of evidence of customary international law" that formed part of its 1949 memorandum, including, if appropriate, its recommendations.[57]

[56] Watts, *The International Law Commission 1949–1998*, p. 2106. Briggs, too, has suggested that "[a]s the French version of Article 24 indicates, the International Law Commission is not limited to making a single report in this field": Briggs, *The International Law Commission*, p. 206.

[57] It probably remains true, that, as in 1950 "[t]he part of the Commission must … inevitably be limited to direction. The actual work [of making the evidence of customary international law more readily available] must be carried out by Governments, the Secretariat and individuals, either independently or in combination. And, without the co-operation of Governments, at least to the extent of opening their archives, relatively little can be achieved": Parry, "[Review:] Ways and means of making the evidence of customary international law more readily available …", p. 463.

Chapter IV

Future programme of work

50. It is proposed that the Commission's final outcome on the present topic could consist of three components: a set of conclusions, with commentaries; a further review of ways and means for making the evidence of customary international law more readily available; and a bibliography.

51. If the Commission is able to complete the first reading of the draft conclusions, with commentaries, at its sixty-eighth session in 2016, a second reading could take place in 2018. Following the sixty-eighth session, States (and others, including international organizations) would have adequate time to consider and comment on the draft adopted on first reading. States and international organizations should be invited to send to the Commission written comments on the draft conclusions and commentaries by 31 January 2018, at the latest. It is hoped that States will also offer initial observations during the Sixth Committee debate in 2016.

52. The question of ways and means for making the evidence of customary international law more readily available could continue to be considered in the period between the end of the Commission's sixty-eighth session and its session in 2018, with a view to refining the output on this matter. This could be done in the light of a Secretariat memorandum as proposed at paragraph 49 above, as well as suggestions from States, interested international organizations, non-governmental organizations, and academic institutions.

53. The Special Rapporteur is preparing a draft bibliography on the topic, which will initially be circulated to Commission members informally at the sixty-eighth session. It is proposed that, amended in the light of any suggestions that members may make, the draft bibliography will be circulated as an annex to the present report. It will then be revised by 2018 to ensure that it is up-to-date, representative, and user-friendly. This will be done in the light of suggestions from members of the Commission, States, international organizations, and academic and other institutions.

ANNEX I

Proposed amendments to the draft conclusions

Words suggested for deletion are struck through; suggested additions are in bold.

Draft conclusion 3. Assessment of evidence for the two elements

[…]

2. Each **of the two** element**s** is to be separately ascertained. This requires an assessment of evidence for each element.

Draft conclusion 4. Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice **refers** ~~means that it is~~ primarily **to** the practice of States **as expressive, or creative,** ~~that contributes to the formation, or expression,~~ of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the ~~formation, or~~ expression, **or creation**, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the ~~formation, or~~ expression, **or creation**, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Draft conclusion 6. Forms of practice

[…]

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; ~~conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference~~; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

~~[…]~~

Draft conclusion 9. Requirement of acceptance as law (opinio juris)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be ~~undertaken with~~ **accompanied by** a sense of legal right or obligation.

~~[…]~~

Draft conclusion 12. Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference ~~cannot~~ **does not**, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for ~~establishing~~ **determining** the existence and content of a rule of customary international law~~, or contribute to its development~~.

Annex II

Identification of customary international law: bibliography

The subject of identification of customary international law is one on which a great deal has been written, and the present bibliography does not seek to be exhaustive.

Part A lists writings dealing with identification of customary international law in general, including textbooks. Part B contains studies on particular aspects of the identification of customary international law, which correspond in part to issues dealt with by some of the draft conclusions on the identification of customary international law. Part C is dedicated to studies relevant to the identification of customary international law in different fields.

A. General studies on customary international law

1. Documents

International Law Association, London Statement of Principles Applicable to the Formation of General Customary International Law, with commentary, resolution 16/2000 on formation of general customary international law, adopted at the Sixty-ninth Conference of the International Law Association, in London, on 29 July 2000.

International Law Commission, Article 24 of the Statute of the International Law Commission, Working Paper by Manley O. Hudson, Special Rapporteur, *Yearbook … 1950*, vol. II, document A/CN.4/16.

———, Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659.

———, First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, *ibid.*, document A/CN.4/663.

———, Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672.

———, Third report on identification of customary international law by Michael Wood, Special Rapporteur, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682.

———, Fourth report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, document A/CN.4/695 reproduced in the present volume.

———, The role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, document A/CN.4/691 reproduced in the present volume.

2. Books

Bederman, D. J., *Custom as a Source of Law*. Cambridge, Cambridge University Press, 2010.

Bradley, C. A., ed., *Custom's Future: International Law in a Changing World*. Cambridge, Cambridge University Press, 2016.

Byers, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge, Cambridge University Press, 1999.

Chigara, B., *Legitimacy Deficit in Custom: A Deconstructionist Critique*. Aldershot/Burlington, Ashgate Dartmouth, 2001.

D'Amato, A. A., *The Concept of Custom in International Law.* London/Ithaca, Cornell University Press, 1971.

Danilenko, G. M., *Обычай в современном международном праве* [*Obychay v sovremennom mezhdunarodnom prave*]. Moscow, Nauka, 1988.

Deumier, P., *Le droit spontané*. Paris, Economica, 2002.

Elias, O. A., and C. L. Lim, *The Paradox of Consensualism in International Law*. The Hague, Kluwer Law International, 1998.

Lepard, B., *Customary International Law: A New Theory with Practical Applications*. Cambridge, Cambridge University Press, 2010.

———, ed., *Reexamining Customary International Law*. Cambridge, Cambridge University Press, 2017.

Lijnzaad, L., and Council of Europe, eds., *The Judge and International Custom*. Leiden, Brill/Nijhoff, 2016.

Mateesco, N., *La coutume dans les cycles juridiques internationaux*. Paris, Pedone, 1947.

Mendelson, M. H., "The formation of customary international law", *Collected Courses of the Hague Academy of International Law*, 1998, vol. 272, pp. 155–410.

Peñaranda, A., *La costumbre en el derecho internacional*. Madrid, Editorial de la Universidad Complutense, 1988.

Simma, B., *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts*. Munich, Fink Verlag, 1970.

Sur, S., *La coutume internationale* (excerpt from *Juris-Classeur Droit international*). Paris, Librairies techniques, 1990.

Suy, E., *La coutume comme fait de production juridique*, Paris, LGDJ, 1965.

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

Unger, R. F., *Völkergewohnheitsrecht—objektives Recht oder Geflecht bilateraler Beziehungen*. Munich, Tuduv Verlagsgesellschaft, 1978.

Villiger, M. E., *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed. The Hague, Kluwer Law International, 1997.

Wolfke, K., *Custom in Present International Law*, 2nd rev. ed. Dordrecht, Martinus Nijhoff Publishers, 1993.

3. Sections in Textbooks

Arangio-Ruiz, G., "Consuetudine (consuetudine internazionale)", *in* P. Spirito, ed., *Enciclopedia Giuridica*, Rome, Istituto della Enciclopedia Italiana Roma, 1988, pp. 1–2.

Boas, G., *Public International Law: Contemporary Principles and Perspectives*. Cheltenham, Edward Elgar, 2012, pp. 73–105.

Chen, L.-C., *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 3rd ed. Oxford, Oxford University Press, 2015, pp. 426–430.

Clapham, A., *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th ed. Oxford, Oxford University Press, 2012, pp. 57–63.

Corten, O., *Méthodologie du droit international public*. Brussels, Université de Bruxelles, 2009, pp. 149–178.

Crawford, J., *Brownlie's Principles of Public International Law*, 8th ed. Oxford, Oxford University Press, 2012, pp. 23–34.

———, "Chance, order, change: The course of international law", *Collected Courses of the Hague Academy of International Law*, vol. 365 (2013), pp. 48–69.

Daillier, P., M. Forteau and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 8th ed. Paris, LGDJ, 2009, pp. 353–379.

Danilenko, G. M., *Law-Making in the International Community*. Dordrecht, Martinus Nijhoff, 1993, pp. 75–129.

Degan, V. D., *Sources of International Law*, The Hague, Martinus Nijhoff, 1997, pp. 142–252.

Diez de Velasco Vallejo, M. (C. Escobar Hernández, ed.), *Instituciones de derecho internacional público*, 18th ed. Madrid, Tecnos, 2012, pp. 136–149.

Dugard, J., *International Law: A South African Perspective*, 4th ed. Cape Town, Juta, 2011, pp. 26–34.

Jennings, R., and A. Watts, eds., *Oppenheim's International Law*, vol. I, *Peace*, 9th ed. Harlow, Longmans, 1991, pp. 25–31.

Klabbers, J., *International Law*. Cambridge, Cambridge University Press, 2013, pp. 26–34.

Koskenniemi, M., *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge, Cambridge University Press, 2005, pp. 388–473.

Lowe, V., *International Law*. Oxford, Oxford University Press, 2007, pp. 36–63.

Lukashuk, I. I., *Международное право*, vol. 1, 3rd ed. Moscow, Wolters Kluwer Russia, 2008, pp. 105–113.

Menzhinskiy V. I., and G. M. Danilenko, "Процесс образования и действия международного обычного права", *in* N. A. Ushakov, ed., *Международное право и международный правопорядок*, Moscow, Institute of State and Law, 1981, pp. 53–54.

Monroy Cabra, M. G., *Derecho Internacional Público*, 4th ed. Santa Fe de Bogotá, Temis, 1998, pp. 73–76.

Mulamba Mbuyi, B., "La coutume internationale", in *Introduction à l'étude des sources modernes du droit international public*. Québec, Les Presses de l'Université Laval, 1999, pp. 25–49.

Murase, S., *International Lawmaking: Sources of International Law*, Tokyo, Toshindo, 2002 (in Japanese), translated by Yihe Qin, Chinese People's Public Safety University Press, 2012 (in Chinese).

Murphy, S. D., *Principles of International Law*, 2nd ed. Saint Paul, Minnesota, West, 2012, pp. 92–101.

Parry, C., *The Sources and Evidences of International Law*. Manchester, Manchester University Press, 1965, pp. 56–82.

Pastor, J., *Curso de Derecho Internacional Público y Organizaciones Internacionales*. Madrid, Tecnos, 2003, pp. 69–82.

Pellet, A., "Article 38", *in* A. Zimmermann *et al.*, eds., *The Statute of the International Court of Justice: A Commentary*, 2nd ed., Oxford, Oxford University Press, 2012, pp. 748–764.

Remiro Brotóns, A., *et al.*, *Derecho Internacional*. Valencia, Tirant Lo Blanch, 2010, pp. 205–236.

Shaw, M. N., *International Law*, 7th ed. Cambridge, Cambridge University Press, 2014, pp. 51–69.

Thirlway, H., *The Sources of International Law*. Oxford, Oxford University Press, 2014, pp. 53–91.

———, "The sources of international law", *in* M. Evans, ed., *International Law*, 4th ed., Oxford, Oxford University Press, 2014, pp. 97–103.

Tunkin, G. I., "Особенности создания обычных норм международного права", *in* V. N. Kudryavtsev *et al.*, *Курс международного права*, Moscow, Nauka, 1989, vol. I, pp. 189–197.

——— (L. N. Shestakov, ed., W. E. Butler, ed., trans.), *Theory of International Law*. London, Wildy, Simmonds and Hill, 2003, pp. 121–159.

van Hoof, G. J. H., *Rethinking the Sources of International Law*. Antwerp, Kluwer Law International, 1983, pp. 85–116.

4. Articles and book chapters

Abi-Saab, G., "La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I, Milan, Giuffrè, 1987, pp. 53−65.

Akehurst, M., "Custom as a source of international law", BYBIL *1974–1975*, vol. 47 (1977), pp. 1−53.

Baker, R. B., "Customary international law in the 21st century: Old challenges and new debates", EJIL, vol. 21 (2010), pp. 173–204.

Barberis, J. A, "Es la costumbre una fuente de derecho internacional?", *Anuario Argentino de Derecho Internacional*, vol. 3 (1987–1989), pp. 11–22.

———, "Réflexions sur la coutume internationale", AFDI, vol. 36 (1990), pp. 9−46.

———, "La coutume est-elle une source de droit international?", in *Le droit international au service de la paix, de la justice et du développement: mélanges Michel Virally*, Paris, Pedone, 1991, pp. 43–52.

Barboza, J., "The customary rule: From chrysalis to butterfly", *in* C.A. Armas Barea *et al.*, eds., Liber Amicorum 'In Memoriam*' of Judge José María Ruda*, The Hague, Kluwer Law International, 2000, pp. 1–14.

Bernhardt, R., "Ungeschriebenes Völkerrecht", *Heidelberg Journal of International Law*, vol. 36 (1976), pp. 50–76.

———, "Customary international law: New and old problems", *Thesaurus Acroasium: Sources of International Law*, vol. 19 (1992), pp. 199–221.

Bleckmann, A., "Zur Feststellung und Auslegung von Völkergewohnheitsrecht", *Heidelberg Journal of International Law*, vol. 37 (1977), pp. 504–529.

Blutman, L., "Conceptual confusion and methodological deficiencies: Some ways that theories on customary international law fail", EJIL, vol. 25 (2014) 529–552.

Bodansky, D., "Prologue to a theory of non-treaty norms", *in* M. H. Arsanjani *et al.*, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Leiden, Martinus Nijhoff, 2011, pp. 119–134.

Bokor-Szegö, H., "Le rôle du droit coutumier dans le droit international contemporain", *Acta Juridica Academiae Scientiarum Hungaricae*, vol. 15 (1973), pp. 299–318.

Bos, M., "The identification of custom in international law", GYBIL, vol. 25 (1982), pp. 9–53.

Bühler, T., "La coutume en droit international", in *Transactions of the Jean Bodin Society for Comparative Institutional History*, vol. LIV: *Custom*, Brussels, De Boeck-Wesmael, 1989, pp. 13–42.

Byers, M., "Custom, power, and the power of rules: Customary international law from an interdisciplinary perspective", *Michigan Journal of International Law*, vol. 17 (1995), pp. 109–180.

———, "Power, obligation, and customary international law", *Duke Journal of Comparative & International Law*, vol. 11 (2001), pp. 81–88.

Cançado Trindade. A. A., "Some thoughts on contemporary international law-making and customary international law", *in* J. Pérez de Cuéllar *et al*., *Desarrollo Progresivo del Derecho Internacional: Aportaciones de organizaciones, tribunales y parlamentos internacionales*, Buenos Aires, Consejo de Estudios Internacionales Avanzados, 1991, pp. 219–230.

Charpentier, J., "Tendances de l'élaboration du droit international public coutumier", *in* Société française pour le droit international, *Colloque de Toulouse: l'élaboration du droit international public*, Paris, Pedone, 1975, pp. 105–131.

Charlesworth, H., "The unbearable lightness of customary international law", *ASIL Proceedings*, vol. 92 (1998), pp. 44–47.

Charney, J. I., "Universal international law", AJIL, vol. 87 (1993), pp. 529–551.

Charney, J., "Remarks on the contemporary role of customary international law", *in* W. P. Heere, ed., *Contemporary International Law Issues: Conflicts and Convergence—Proceedings of the Third Joint Conference in The Hague, the Netherlands, July 13–15, 1995*. American Society of International Law and Netherlands Society of International Law, The Hague, TMC Asser Instituut, 1996, pp. 20–24.

Chaumont, C., "Méthode d'analyse du droit international", *Belgian Review of International Law*, vol. 11 (1975), pp. 32–37.

Cheng, B., "Custom: The future of general State practice in a divided world", *in* R. St.J. Macdonald and D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, Martinus Nijhoff, 1983, pp. 513–554.

———, "Some remarks on the constituent element(s) of general (or so-called customary) international law", *in* A. Anghie and G. Sturgess, eds., *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, The Hague, Kluwer Law International, 1998, pp. 377–390.

Chodosh, H. E., "Neither treaty nor custom: The emergence of declarative international law", *Texas International Law Journal*, vol. 26 (1991), pp. 87–124.

Chung, J. J., "Customary international law as explained by status instead of contract", *North Carolina Journal of International Law and Commercial Regulation*, vol. 37 (2012), pp. 609–664.

Condorelli, L., "Consuetudine internazionale", *Digesto delle discipline pubblicistiche*, vol. 4, Turin, UTET, 1989, pp. 1–48.

———, "La coutume", *in* M. Bedjaoui, ed., *Droit international: bilan et perspectives*, Paris, Pedone. 1991, pp. 187–221.

Crawford, J. R., "The identification and development of customary international law", keynote speech, Spring Conference of the International Law Association, British Branch, 23 May 2014.

Crootof, R., "Constitutional convergence and customary international law", *Harvard International Law Journal Online*, vol. 54 (2013), pp. 195–203.

D'Amato, A. A., "Wanted: A comprehensive theory of custom in international law", *Texas International Law Forum*, vol. 4 (1968), pp. 28–41.

———, "Trashing customary international law", AJIL, vol. 81 (1987), pp. 101–105.

———, "Customary international law: a reformulation", *International Legal Theory*, vol. 4 (1998), pp. 1–6.

Danilenko, G. M., "The theory of international customary law", GYBIL, vol. 31 (1988), pp. 9–47.

Degan, V.-D., "Customary process in international law", *Finnish Yearbook of International Law*, vol. 1 (1990), pp. 1–76.

Dodge, W. S., "Customary international law and the question of legitimacy", *Harvard Law Review Forum*, vol. 120 (2007), pp. 19–27.

Dunbar, N. C. H., "The myth of customary international law", *Australian Year Book of International Law*, vol. 8 (1978–1980), pp. 1–19.

Dupuy, R.-J., "Coutume sage et coutume sauvage", in *La communauté internationale: Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 75–87.

———, "Droit déclaratoire et droit programmatoire: de la coutume sauvage à la 'soft law' ", *in* Société française pour le droit international, *Colloque de Toulouse: l'élaboration du droit international public*, Paris, Pedone, 1975, pp. 132–148.

Elias, O., and C. Lim, "Some tentative epistemological claims concerning the basis of customary international law", *Cambrian Law Review*, vol. 25 (1994), pp. 103–125.

Estreicher, S., "Rethinking the binding effect of customary international law", *Virginia Journal of International Law*, vol. 44 (2003), pp. 5–17.

Fidler, D. P., "Challenging the classical concept of custom: Perspectives on the future of customary international law", GYBIL, vol. 39 (1996), pp. 199–248.

Fon, V., and F. Parisi, "International customary law and articulation theories: an economic analysis", *International Law and Management Review*, vol. 2 (2006), pp. 201–232.

Goldsmith, J. L., and E. A. Posner, "Notes toward a theory of customary international law", *ASIL Proceedings*, vol. 92 (1998), pp. 53–57.

———, "A theory of customary international law", *University of Chicago Law Review*, vol. 66 (1999), pp. 1113–1177.

———, "Understanding the resemblance between modern and traditional customary international law", *Virginia Journal of International Law*, vol. 40 (2000), pp. 639–672.

———, "Further thoughts on customary international law", *Michigan Journal of International Law*, vol. 23 (2001), pp. 191–200.

Golove, D. M., "Leaving customary international law where it is: Goldsmith and Posner's The Limits of International Law", *Georgia Journal of International and Comparative Law*, vol. 34 (2006), pp. 333–377.

Gradoni, L., "Consuetudine internazionale e caso inconsueto", *Rivista di diritto internazionale*, vol. 95 (2012), pp. 704–720.

———, "La Commissione del diritto internazionale riflette sulla rilevazione della consuetudine", *Rivista di diritto internazionale*, vol. 97 (2014), pp. 667–698.

Guggenheim, P., "Les deux éléments de la coutume en droit international", in *La technique et les principes du droit public: études en l'honneur de Georges Scelle*, vol. 1, Paris, LGDJ, 1950, pp. 275–284.

Guzman, A. T., "Saving customary international law", *Michigan Journal of International Law*, vol. 27 (2005), pp. 115–176.

———, and T. L. Meyer, "Customary international law in the 21st century", *in* R. Miller and R. M. Bratspies, eds., *Progress in International Law*, Leiden, Brill, 2008, pp. 197–217.

———, and J. Hsiang, "Some ways that theories on customary international law fail: A reply to László Blutman", EJIL, vol. 25 (2014), pp. 553–559.

Guzmán Brito, A., "El Fundamento de Validez de la Costumbre como Fuente de Derecho", *Revista Chilena de Derecho*, vol. 22 (1995), pp. 623–628.

Heathcote, S., "Est-ce que l'état de nécessité est un principe de droit international coutumier ?", *Revue belge de droit international*, vol. 40 (2007), pp. 53–89.

Hwang, J., "A sense and sensibility of legal obligation: customary international law and game theory", *Temple International and Comparative Law Journal*, vol. 20 (2006), pp. 111–131.

Jiménez de Aréchaga, E., "Custom", *in* A. Cassese and J. H. H. Weiler, eds., *Change and Stability in International Law-Making*, Berlin, Walter de Gruyter, 1988, pp. 1–4.

Kammerhofer, J., "Uncertainty in the formal sources of international law: Customary international law and some of its problems", EJIL, vol. 15 (2004), pp. 523–553.

Kelsen, H., "Théorie du droit international coutumier", *Revue internationale de la théorie du droit*, vol. 1 (1939), pp. 253–274.

Kelly, J. P., "The twilight of customary international law", *Virginia Journal of International Law*, vol. 40 (2000), pp. 449–543.

Kirgis, F. L., "Custom on a sliding scale", AJIL, vol. 81 (1987), pp. 146–151.

Klabbers, J., "The curious condition of custom", *International Legal Theory*, vol. 8 (2002), pp. 29–39.

Kolb, R., "Selected problems in the theory of customary international law", *Netherlands International Law Review*, vol. 50 (2003), pp. 119–150.

———, "La *clausula rebus sic stantibus* s'applique-t-elle aussi au droit international coutumier?", RGDIP, vol. 115 (2011), pp. 711–718.

———, "Nullité, inapplicabilité ou inexistence d'une norme coutumière contraire au jus cogens universel?", RGDIP, vol. 117 (2013), pp. 281–298.

———, "Réflexions sur le droit international coutumier: des pratiques et des opiniones juris légitimes plutôt que simplement effectives?", in *Liber Amicorum en l'honneur de Serge Sur*, Paris, Pedone, 2014, pp. 93–108.

Kontorovich, E., "Inefficient customs in international law", *William and Mary Law Review*, vol. 48 (2006), pp. 859–922.

Kopelmanas, L., "Custom as a means of the creation of international law", BYBIL *1937*, vol. 18 (1937), pp. 127–151.

Koskenniemi, M., "The normative force of habit: International custom and social theory", *Finnish Yearbook of International Law*, vol. 1 (1990), pp. 77–153.

Kunz, J. L., "The nature of customary international law", AJIL, vol. 47 (1953), pp. 662–669.

Lazarev, M. I., "International legal custom at a contemporary stage", *Indian Journal of International Law*, vol. 19 (1979), pp. 511–514.

Lobo de Souza, I. M., "The role of State consent in the customary process", *International and Comparative Law Quarterly*, vol. 44 (1995), pp. 521–539.

Lukashuk, I. I., "Customary norms in contemporary international law", *in* J. Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, pp. 487–508.

Malenovský, J., "Evolution des opinions doctrinales sur la coutume internationale dans les pays socialistes", *Revue belge de droit international*, vol. 22 (1989), pp. 307–338.

———, "Evolution of opinions on international custom in Czechoslovak theory of international law", *Nordic Journal of International Law*, vol. 59 (1990), pp. 235–246.

———, "Le juge et la coutume internationale: perspective de l'Union européenne et de la Cour de justice", *Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 217–241.

———, "The judge and international custom: perspective of the European Union and its Court of Justice/Le juge et la coutume internationale : perspective de l'Union européenne et de la Cour de justice", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 46–72.

Maluwa, T., "Custom, authority and law: some jurisprudential perspectives on the theory of customary international law", *African Journal of International and Comparative Law*, vol. 6 (1994), pp. 387–410.

McGinnis, J. O., "The comparative disadvantage of customary international law", *Harvard Journal of Law and Public Policy*, vol. 30 (2006), pp. 7–14.

Mejía-Lemos, D. G., "Some considerations regarding 'instant' international customary law", fifty years later", *Indian Journal of International Law*, vol. 55 (2015), pp. 85–108.

Meijers, H., "How is international law made?—The stages of growth of international law and the use of its customary rules", *Netherlands Yearbook of International Law*, vol. 9 (1978), pp. 3–26.

———, "On international customary law in the Netherlands", *in* I. F. Dekker and H. H. G. Post, eds., *On the Foundations and Sources of International Law*, The Hague, T.M.C. Asser Press, 2003, pp. 77–128.

Meyer, T., "Codifying custom", *University of Pennsylvania Law Review*, vol. 160 (2012), pp. 995–1069.

Milisavljević, B., and B. Čučković, "Identification of custom in international law", *Annals of the Faculty of Law in Belgrade*, vol. 62 (2014), pp. 31–51.

Moca, G., "La notion et l'importance de la coutume internationale dans le processus d'instauration de nouvelles relations entre les Etats", *Revue roumaine d'études internationales*, vol. 9 (1975), pp. 237–246.

Mohamad, R., "Some reflections on the International Law Commission topic 'Identification of customary international law' ", *Chinese Journal of International Law*, vol. 15 (2016), pp. 41–46.

Müller, T., "Customary transnational law: attacking the last resort of State sovereignty—Conference on Democracy and the Transnational Private Sector", *Indiana Journal of Global Legal Studies*, vol. 15 (2008), pp. 19–47.

Müllerson, R., "On the nature and scope of customary international law", *Austrian Review of International and European Law*, vol. 2 (1997), pp. 341–360.

———, "The interplay of objective and subjective elements in customary law", *in* K. Wellens, ed., *International Law: Theory and Practice—Essays in Honour of Eric Suy*, The Hague, Martinus Nijhoff, 1998, pp. 161–178.

Norman, G., and J. P. Trachtman, "The customary international law game", AJIL, vol. 99 (2005), pp. 541–580.

Oeter, S., "The legitimacy of customary international law", *in* T. Eger, S. Oeter and S. Voigt, eds., *Economic Analysis of International Law: Contributions to the XIIIth Travemünde Symposium on the Economic Analysis of Law (March 29–31, 2012)*, Tübingen, Mohr Siebeck, 2014, pp. 1–22.

Orakhelashvili, A., "Customary law and inherent rules", *in* A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, Oxford University Press, 2008, pp. 70–101.

Orrego Vicuña, F., "Customary international law in a global community: tailor made?", *Estudios Internacionales*, vol. 148 (2005), pp. 21–38.

Park, P.-K., "Change of customary international law", *Korean Journal of International Law*, vol. 43 (1998), pp. 97–111 (in Korean).

Paulus, A., "The judge and international custom", *Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 253–265.

Pearce, J., "Customary international law: not merely fiction or myth", *Australian International Law Journal*, vol. 125 (2003), pp. 125–140.

Petersen, N., "Customary law without custom? Rules, principles, and the role of State practice in international norm creation", *American University International Law Review*, vol. 23 (2008), pp. 275–310.

———, "Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung", *Archiv des Völkerrechts*, vol. 46 (2008), pp. 502–523.

Posner, E. A., and A. O. Sykes, "Customary international law", *in* L. Bernstein and F. Parisi, eds., *Customary Law and Economics*, Cheltenham, Edward Elgar, 2014, pp. 451–464.

Postema, G. J., "Custom in international law: a normative practice account", *in* A. Perreau-Saussine and J. B. Murphy, eds., *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, 2007, pp. 279–306.

———, "Custom, normative practice, and the law", *Duke Law Journal*, vol. 62 (2012), pp. 707–738.

Rama Rao, T. S., "International custom", *Indian Journal of International Law*, vol. 19 (1979), pp. 515–521.

Reisman, W. M. "The cult of custom in the late 20th century", *California Western International Law Journal*, vol. 17 (1987), pp. 133–145.

Roberts, A. E., "Traditional and modern approaches to customary international law: a reconciliation", AJIL, vol. 95 (2001), pp. 757–791.

Roberts, A., "Who killed Article 38 (1) (*b*)? A reply to Bradley and Gulati", *Duke Journal of Comparative and International Law*, vol. 21 (2010), pp. 173–190.

Schachter, O., "New custom: power, *opinio juris* and contrary practice", *in* J. Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, pp. 531–540.

Schauer, F., "The jurisprudence of custom", *Texas International Law Journal*, vol. 48 (2013), pp. 523–534.

Schweisfurth, T., "Das Völkergewohnheitsrecht—verstärkt im Blickfeld der sowjetischen Völkerrechtslehre", GYBIL, vol. 30 (1987), pp. 36–77.

Séfériadès, S., "Aperçus sur la coutume juridique internationale et notamment sur son fondement", RGDIP, vol. 43 (1936), pp. 129–196.

Seibert-Fohr, A., "Modern concepts of customary international law as a manifestation of a value-based international order", *in* A. Zimmermann and R. Hofmann, eds., *Unity and Diversity in International Law*, Berlin, Duncker & Humblot, 2006, pp. 257–283.

Sender, O., and M. Wood, "The emergence of customary international law: between theory and practice", *in* Y. Radi and C. Brölmann, eds., *Research Handbook on the Theory and Practice of International Law-Making*, Cheltenham, Edward Elgar, 2016, pp. 133–159.

Sobrino Heredia, J., and M. Abad Castelos, "Reflexiones sobre la formación del derecho internacional en un escenario mudable", *Anuario Español de Derecho Internacional*, vol. 17 (2001), pp. 195–238.

Stern, B., "Custom at the heart of international law", *Duke Journal of Comparative and International Law*, vol. 11 (2001), pp. 89–108.

Sur, S., "La coutume internationale: sa vie, son œuvre", *Droits: Revue française de théorie juridique*, No. 3 (1986), pp. 111–124.

———, "Sources du droit international: la coutume", *Juris-Classeur Droit international*, Fascicule No. 13 (1989).

Swaine, E. T., "Rational custom", *Duke Law Journal*, vol. 52 (2002), pp. 559–627.

Szurek, S., "L'étude sur le droit international coutumier: 'les voies d'une normativité en action' ", *in* J.-F. Akandji-Kombé, ed., *L'homme dans la société internationale: mélanges en hommage au Professeur Paul Tavernier*, Brussels, Bruylant, 2013, pp. 1447–1464.

Tasioulas, J., "Customary international law and the quest for global justice", *in* A. Perreau-Saussine and J. B. Murphy, eds., *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, 2007, pp. 307–335.

Tesón, F. R., "Falsa costumbre", *Revista Latinoamericana de Derecho Internacional*, vol. 3 (2015), pp. 1–20.

Thévenaz, H., "À propos de la coutume", *in* S. Engel and R. A. Métall, eds., *Law, State and International Legal Order—Essays in Honor of Hans Kelsen*, Knoxville, University of Tennessee Press, 1964, pp. 317–327.

Treves, T., "Customary international law", *in* R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. II, Oxford, Oxford University Press, 2012. Available from https://opil.ouplaw.com /home/mpil.

Tunkin, G. I., "Remarks on the juridical nature of customary norms of international law", *California Law Review*, vol. 46 (1961), pp. 419–430.

———, "Is general international law customary law only?", EJIL, vol. 4 (1993), pp. 534–541.

Vagts, D. F., "International relations look at customary international law: a traditionalist's defence", EJIL, vol. 15 (2004), pp. 1031–1040.

Venkata Raman, K., "Toward a general theory of international customary law", *in* W. M. Reisman and B. H. Weston, eds., *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal*, New York, Free Press, 1976, pp. 365–402.

Vio Grossi, E., "Customary international law in the case law of the Inter-American Court of Human Rights"/"Le droit international coutumier dans la jurisprudence de la Cour interaméricaine des droits humains", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 83–99.

Verdier, P.-H., and E. Voeten, "Precedent, compliance, and change in customary international law: an explanatory theory", AJIL, vol. 108 (2014), pp. 389–434.

Verdross, A., "Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts", *Heidelberg Journal of International Law*, vol. 29 (1969), pp. 635–653.

Voyiakis, E., "Customary international law and the place of normative considerations", *American Journal of Jurisprudence*, vol. 55 (2010), pp. 163–200.

———, "A disaggregative view of customary international law-making", *Leiden Journal of International Law*, vol. 29 (2016), pp. 365–388.

Vylegzhanin, A. N., and R. A. Kalamkarian, "Международный обычай как основной источник международного права", *Государство и право*, vol. 6 (2012), pp. 78–89.

Walden, R. M., "Customary international law: a jurisprudential analysis", *Israel Law Review*, vol. 13 (1978), pp. 86–102.

Weil, P., "Towards relative normativity in international law?" AJIL, vol. 77 (1983), pp. 413–442.

Wolfke, K., "Some persistent controversies regarding customary international law", *Netherlands Yearbook of International Law*, vol. 24 (1993), pp. 1–16.

Wolfrum, R., "Sources of international law", in *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2012. Available from https://opil.ouplaw.com/home/mpil.

Wood, M., "The present position within the ILC on the topic 'Identification of customary international law': in partial response to Sienho Yee, Report on the ILC Project on 'Identification of Customary International Law' ", *Chinese Journal of International Law*, vol. 15 (2016), pp. 3–15.

Worster, W. T., "The transformation of quantity into quality: critical mass in the formation of customary international law", *Boston University International Law Journal*, vol. 31 (2013), pp. 1–73.

———, "The inductive and deductive methods in customary international law analysis: traditional and modern approaches", *Georgetown Journal of International Law*, vol. 45 (2014), pp. 445–521.

Yee, S., "Report on the ILC project on 'Identification of Customary International Law'", *Chinese Journal of International Law*, vol. 14 (2015), pp. 375–398.

———, "A reply to Sir Michael Wood's response to AALCOIEG's work and my report on the ILC project on identification of customary international law", *Chinese Journal of International Law*, vol. 15 (2016), pp. 33–40.

5. Audiovisual lectures

Mendelson, M., "Customary international law", United Nations Audiovisual Library of International Law. Available from https://legal.un.org/avl/.

B. Studies on particular aspects of customary international law

1. State practice

Bleckmann, A., "Die Praxis des Völkergewohnheitsrechts als konsekutive Rechtsetzung", *in* R. Bernhardt *et al.*, eds., *Völkerrecht als Rechtsordnung: Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler*, Berlin, Springer, 1983, pp. 89–110.

Boisson de Chazournes, L., "Qu'est-ce que la pratique en droit international?", in *La pratique et le droit international: Colloque de Genève*, Paris, Pedone, 2004, pp. 13–47.

Brownlie, I., "Some problems in the evaluation of the practice of States as an element of custom", in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, vol. I, Naples, Editoriale Scientifica, 2004, pp. 313–318.

Carty, A., "Doctrine versus State practice", *in* B. Fassbender, A. Peters, eds., *The Oxford Handbook of the History of International Law*, Oxford, Oxford University Press, 2012, pp. 972–996.

Ferrari Bravo, L., "Méthodes de recherche de la coutume internationale dans la pratique des États", *Collected Courses of the Hague Academy of International Law, 1985-III*, vol. 192, pp. 233–330.

Gaebler, R. F., and A. A. Shea, *Sources of State Practice in International Law*, 2nd ed., Leiden, Martinus Nijhoff, 2014.

Mendelson, M., "State acts and omissions as explicit or implicit claims", in *Le droit international au service de la paix, de la justice et du développement : Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 373–382.

Parry, C., "The practice of States", *Transactions of the Grotius Society*, vol. 44 (1958), pp. 145–186.

Prakash Sinha, S., "New nations and the international custom", *William and Mary Law Review*, vol. 9 (1968), pp. 788–803.

Weisburd, A. M., "The International Court of Justice and the concept of State practice", *University of Pennsylvania Journal of International Law*, vol. 31 (2009), pp. 295–372.

Wood, M., and O. Sender, "State practice", *in* R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2017. Available from https://opil.ouplaw.com/home/mpil.

Zemanek, K., "What is 'State practice' and who makes it?", *in* U. Beyerlin *et al.*, eds., *Recht zwischen Umbruch und Bewahrung, Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt*, Berlin, Springer, 1995, pp. 289–306.

2. International organizations and customary international law

Alvarez, J. E., *International Organizations as Lawmakers*, Oxford, Oxford University Press, 2005.

Cahin, G., *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*, Paris, Pedone, 2001.

DeBartolo, D. M., "Identifying international organizations' contributions to custom", *AJIL Unbound*, 23 December 2014. Available from www.asil.org.

Fry, J. D., "Formation of customary international law through consensus in international organizations", *Austrian Review of International and European Law*, vol. 17 (2012), pp. 49–82.

Hannikainen, L., "The collective factor as a promoter of customary international law", *Baltic Yearbook of International Law*, vol. 6 (2006), pp. 125–141.

Hoffmeister, F., "The contribution of EU practice to international law", *in* M. Cremona, Developments *in EU External Relations Law*, Oxford, Oxford University Press, 2008, pp. 37–127.

Johnstone, I., "Law-making through the operational activities of international organizations", *George Washington International Law Review*, vol. 40 (2008), pp. 87–122.

Klabbers, J., "International organizations in the formation of customary international law", *in* E. Cannizzaro and P. Palchetti, eds., *Customary International Law on the Use of Force*, Leiden, Martinus Nijhoff, 2005, pp. 179–195.

Mathias, S., "The work of the International Law Commission on identification of customary international law: a view from the perspective of the Office of Legal Affairs", *Chinese Journal of International Law*, vol. 15 (2016), pp. 17–31.

Schachter, O., "The development of international law through the legal opinions of the United Nations Secretariat", BYBIL, vol. 25 (1948), pp. 91–132.

Skubiszewski, K., "Forms of participation of international organizations in the law-making processes", *International Organization*, vol. 18 (1964), pp. 790–805.

Vanhamme, J., "Formation and enforcement of customary international law: the European Union's contribution", *Netherlands Yearbook of International Law*, vol. 39 (2008), pp. 127–154.

Vignes, D., "The impact of international organizations on the development and application of public international law", *in* R. St. John Macdonald and D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*. Leiden, Martinus Nijhoff, 1986, pp. 809–855.

Wood, M., "International organizations and customary international law", *Vanderbilt Journal of Transnational Law*, vol. 48 (2015), pp. 609–620.

Wouters, J., and P. De Man, "International organizations as law-makers", *in* J. Klabbers and A. Wallendahl, eds., *Research Handbook on the Law of International Organizations*, Cheltenham, Edward Elgar, 2011, pp. 190–224.

3. Non-State actors and customary international law

Henckaerts, J.-M., and C. Wiesener, "Human rights obligations of non-State armed groups: a possible contribution from customary international law?", *in* R. Kolb and G. Gaggioli, eds., *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, Edward Elgar, 2013, pp. 146–169.

Hobe, S., "The role of non-State actors, in particular of NGOs, in non-contractual law-making and the development of customary international law", *in* R. Wolfrum and V. Röben, eds., *Developments of International Law in Treaty-Making*, Berlin, Springer, 2005, pp. 319–329.

Ochoa, C., "The individual and customary international law formation", *Virginia Journal of International Law*, vol. 48 (2007), pp. 119–186.

Paust, J. J., "Nonstate actor participation in international law and the pretense of exclusion", *Virginia Journal of International Law*, vol. 51 (2011), pp. 977–1004.

Roberts, A., and S. Sivakumaran, "Lawmaking by nonstate actors: engaging armed groups in the creation of international humanitarian law", *Yale Journal of International Law* (2012), pp. 107–152.

4. Duration of practice

Arangio-Ruiz, G., "Customary law: a few more thoughts about the theory of 'spontaneous' international custom", *in* N. Angelet, ed., *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, pp. 93–124.

Cheng, B., "United Nations resolutions on outer space: 'instant' international customary law?", in *Studies in International Space Law*, Oxford, Clarendon Press, 1997, pp. 125–149.

Scharf, M. P., "Seizing the 'Grotian moment': accelerated formation of customary international law in times of fundamental change", *Cornell International Law Journal*, vol. 43 (2010), pp. 439–469.

———, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge, Cambridge University Press, 2013.

5. Inaction and customary international law

Buzzini, G. P., "Abstention, silence et droit international général", *Rivista di Diritto Internazionale*, vol. 88 (2005), pp. 342–382.

MacGibbon, I. C., "Customary international law and acquiescence", BYBIL *1957*, vol. 33 (1957), pp. 115–145.

Quane, H., "Silence in international law", BYBIL *2013*, vol. 84 (2014), pp. 240–270.

6. Acceptance as law (*opinio juris*)

Boisson de Chazournes, L., "Le rôle de l'*opinio juris*: commentaire", *in* R. Huesa Vinaixa and K. Wellens, eds., *L'influence des sources sur l'unité et la fragmentation du droit international: travaux de séminaire tenu à Palma, les 20–21 mai 2005*, Brussels, Bruylant, 2006, pp. 75–80.

Braillon, C., "La théorie classique de la coutume et le rôle nouveau de l'*opinio juris*": discours de la justice en droit international et en droit interne", *Revue de la faculté de droit de l'Université de Liège*, vol. 54 (2009), pp. 663–675.

Casella, P. B., "Contemporary trends on *opinio juris* and the material evidence of customary international law", *Zanzibar Yearbook of Law*, vol. 3 (2013), pp. 27–49.

Cheng, B., "*Opinio juris*: a key concept in international law that is much misunderstood", *in* S. Yee and W. Tieya, eds., *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, London, Routledge, 2001, pp. 56–76.

Dahlman, C., "The function of *opinio juris* in customary international law", *Nordic Journal of International Law*, vol. 81 (2012), pp. 327–339.

Elias, O., "The nature of the subjective element in customary international law", *International and Comparative Law Quarterly*, vol. 44 (1995), pp. 501–520.

Giannattasio, A. R. C., "A '*opinio juris sive necessitatis*': do elemento subjetivo consuetudinário à intersubjetividade jurídica", *in* P. Borba Casella and A. de Carvalho, eds., *Direito Internacional: Homenagem a Adherbal Meira Mattos*, São Paulo, Quartier Latin, 2009, pp. 575–617.

GUGGENHEIM, P., "L'origine de la notion de l''*opinio juris sive necessitatis*' comme deuxième élément de la coutume dans l'histoire du droit des gens", in *Hommage d'une génération de juristes au Président Basdevant*, Paris, Pedone, 1960, pp. 258–262.

HUESA VINAIXA, R., *El Nuevo Alcance de la "Opinio Iuris" en el Derecho Internacional Contemporaneo*, Valencia, Tirant lo Blanch, 1991.

———, "Le rôle de l'*opinio iuris*", *in* R. Huesa Vinaixa and K. Wellens, eds., *L'influence des sources sur l'unité ou la fragmentation du droit international: travaux de séminaire tenu à Palma, les 20–21 mai 2005*, Brussels, Bruylant, 2006, pp. 55–73.

KADENS, E., and E. A. YOUNG, "How customary is customary international law?", *William and Mary Law Review*, vol. 54 (2013), pp. 885–920.

LEFKOWITZ, D., "(Dis)solving the chronological paradox in customary international law: a Hartian approach", *Canadian Journal of Law and Jurisprudence*, vol. 21 (2008), pp. 129–148.

MENDELSON, M., "The subjective element in customary international law", BYBIL *1995*, vol. 66 (1995), pp. 177–208.

MILLÁN MORO, L., *La* "Opinio Iuris" *en el Derecho Internacional Contemporáneo*, Madrid, Editorial Centro de Estudios Ramon Areces, 1990.

PATTARO, E., Opinio iuris*: il diritto è un'opinione: chi ne ha i mezzi ce la impone: lezioni di filosofia del diritto*, Turin, Giappichelli, 2011.

PIZA ESCALANTE, R. E., "La '*opinio juris*' como fuente autónoma del derecho internacional ('*opinio juris*' y '*jus cogens*' ", *Anuario Hispano-Luso-Americano de Derecho Internacional*, vol. 8 (1987), pp. 131–194.

SLAMA, J. L., "*Opinio juris* in customary international law", *Oklahoma City University Law Review*, vol. 15 (1990), pp. 603–656.

TAKI, H., "*Opinio juris* and the formation of customary international law: a theoretical analysis", GYBIL, vol. 51 (2008), pp. 447–466.

TASIOULAS, J., "Comment: *Opinio juris* and the genesis of custom: a solution to the 'paradox'", *Australian Yearbook of International Law*, vol. 26 (2007), pp. 199–205.

WALDEN, R. M., "The subjective element in the formation of customary international law", *Israel Law Review*, vol. 12 (1977), pp. 344–364.

WILSON, E., "*Mare liberum* and *opinio juris*: a Grotian reading of the *North Sea Continental Shelf* cases", *Monash University Law Review*, vol. 28 (2002), pp. 299–326.

WOLFKE, K., "L'elément subjectif dans la coutume internationale", *Zeszyty naukowe Uniwersytetu Wrocławskiego*, Series A, No. 27 (Law) (1960), pp. 161–170.

YEE, S., "The news that *opinio juris* 'is not a necessary element of customary [international] law' is greatly exaggerated", GYBIL, vol. 43 (2000), pp. 227–238.

7. The interrelationship of customary international law and treaties

BAXTER, R. R., "Multilateral treaties as evidence of customary international law", BYBIL *1965–1966*, vol. 41 (1968), pp. 275–300.

———, "Treaties and custom", *Collected Courses of the Hague Academy of International Law, 1970-I*, vol. 129 (1970), pp. 25–105.

BORDIN, F. L., "Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law", *International and Comparative Law Quarterly*, vol. 63 (2014), pp. 535–567.

BOWETT, D. W., "Treaty revision in the light of the evolution of customary international law", *African Journal of International and Comparative Law*, vol. 5 (1993), pp. 84–96.

BRÖLMANN, C., "Law-making treaties: form and function in international law", *Nordic Journal of International Law*, vol. 74 (2005), pp. 383–404.

CHARNEY, J. I., "International agreements and the development of customary international law", *Washington Law Review*, vol. 61 (1986), pp. 971–996.

D'AMATO, A. A., "Manifest intent and the generation by treaty of customary rules of international law", AJIL, vol. 64 (1970), pp. 892–902.

D'AMATO, A., "Custom and Treaty: A Response to Professor Weisburd", *Vanderbilt Journal of Transnational Law*, vol. 21 (1988), pp. 459–472.

DANILENKO, G. M., "Соотношение и взаимодействие международного договора и международного обычая" ["Relationship and interaction between international treaty and international custom"], *Soviet Yearbook of International Law*—1983, Moscow, Nauka 1984, pp 12–25.

DE VISSCHER, C., "Coutume et traité en droit international public", RGDIP, vol. 26 (1955), pp. 353–369.

DINSTEIN, Y., "The interaction between customary international law and treaties", *Collected Courses of the Hague Academy of International Law*, vol. 322 (2006), pp. 243–427.

Do Nascimento E Silva, G. E., "Treaties as evidence of customary international law", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, Milan, Giuffrè, 1987, pp. 387–397.

Gamble, J. K., "The treaty/custom dichotomy: an overview", *Texas International Law Journal*, vol. 16 (1981), pp. 305–319.

Jia, B. B., "The relations between treaties and custom", *Chinese Journal of International Law*, vol. 9 (2010), pp. 81–109.

Kolb, R., *The Law of Treaties: An Introduction*. Cheltenham, Edward Elgar, 2016, pp. 260–269.

Kontou, N., *The Termination and Revision of Treaties in the Light of New Customary International Law*. Oxford, Clarendon Press, 1995.

Mendelson, M., "Disentangling treaty and customary international law", *ASIL Proceedings*, vol. 81 (1987), pp. 157–164.

Morrison, F. L., "The importance of generality in law-making international agreements", *in* H. P. Hestermeyer *et al*., eds., *Coexistence, Cooperation and Solidarity:* Liber Amicorum *Rüdiger Wolfrum*, vol. II, Leiden, Martinus Nijhoff, 2012, pp. 1497–1505.

Schachter, O., "Entangled treaty and custom", *in* Y. Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff, 1989, pp. 717–738.

Schwebel, S. M., "The influence of bilateral investment treaties on customary international law", *ASIL Proceedings*, vol. 98 (2004), pp. 27–30.

Scott, G. L., and C. L. Carr, "The International Court of Justice and the treaty/custom dichotomy", *Texas International Law Journal*, vol. 16 (1981), pp. 347–359.

Scott, G. L., and C. L. Carr, "Multilateral treaties and the formation of customary international law", *Denver Journal of International Law and Policy*, vol. 25 (1996), pp. 71–94.

Shihata, I. F. I., "The treaty as a law-declaring and custom-making instrument", *Revue égyptienne de droit international*, vol. 22 (1966), pp. 51–90.

Sinclair, I., "The impact of the unratified codification convention", *in* A. Bos and H. Siblesz, eds., *Realism in Law-Making: Essays on International Law In Honour of Willem Riphagen*, Dordrecht, Martinus Nijhoff, 1986, pp. 211–229.

Sohn, L. B., "Unratified treaties as a source of customary international law", *in* A. Bos and H. Siblesz, eds., *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen*, Dordrecht, Martinus Nijhoff, 1986, pp. 231–246.

Teboul, G., "Remarques sur le rang hiérarchique des conventions inter-étatiques et du droit international coutumier dans l'ordre juridique international", *Journal du droit international*, vol. 137 (2010), pp. 705–735.

Torrione, H., ed., *L'influence des conventions de codification sur la coutume en droit international public*. Freiburg, Editions universitaires Fribourg, 1989.

Villiger, M. E., *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties*. Dordrecht, Martinus Nijhoff, 1985.

Weisburd, A. M., "Customary international law: the problem of treaties", *Vanderbilt Journal of Transnational Law*, vol. 21 (1988), pp. 1–46.

Wolfke, K., "Treaties and custom: aspects of interrelation", *in* J. Klabbers and R. Lefeber, eds., *Essays on the Law of Treaties: A Collection of Essays In Honour of Bert Vierdag*. The Hague, Martinus Nijhoff, 1998, pp. 31–39.

8. Resolutions of international organizations and customary international law

Cheng, B., "United Nations resolutions on outer space: 'instant' international customary law?", *Indian Journal of International Law*, vol. 5 (1965), pp. 23–48.

Corten, O., "La participation du Conseil de sécurité à l'élaboration, à la cristallisation ou à la consolidation de règles coutumières", *Revue belge de droit international*, vol. 37 (2004), pp. 552–567.

Detter, I., "The effect of resolutions of international organizations", *in* J. Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, pp. 381–392.

Higashi, J., "The role of resolutions of the United Nations General Assembly in the formative process of international customary law", *Japanese Annual of International Law*, vol. 25 (1982), pp. 11–25.

Higgins, R., *The Development of International Law through the Political Organs of the United Nations*. Oxford, Oxford University Press, 1963.

Institut de Droit International, "Conclusions of the Thirteenth Commission on resolutions of the General Assembly of the United Nations, with respect to the topic of the elaboration of general multilateral conventions and of non-contractual instruments having a normative function of objective", Session of Cairo, 1987. Available from www.idi-iil.org.

MacGibbon, I., "Means for the identification of international law—General Assembly resolutions: custom, practice and mistaken identity", *in* B. Cheng, ed., *International Law: Teaching and Practice*, London, Stevens and Sons, 1982, pp. 10–26.

Öberg, M. D., "The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ", EJIL, vol. 16 (2006), pp. 879–906.

Schwebel, S. M., "The effect of resolutions of the U.N. General Assembly on customary international law", *ASIL Proceedings*, vol. 73 (1979), pp. 301–309.

———, "United Nations resolutions, recent arbitral awards and customary international law", *in* A. Bos and H. Siblesz, eds., *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen*, Dordrecht, Martinus Nijhoff, 1986, pp. 203–210.

Simma, B., "Zur völkerrechtlichen Bedeutung von Resolutionen des UN-Generalversammlung", *Fünftes deutsch-polnisches Juristen-Kolloquium*, vol. 2 (1981), pp. 45–76.

Skubiszewski, K., "Can future international law be developed through the resolutions of intergovernmental bodies?", in *International Law Tomorrow*, Neuchâtel, Éditions Ides et Calendes, 1974, pp. 55–66.

———, "Rechtscharakter der Resolutionen der Generalversammlung der Vereinten Nationen", *Fünftes deutsch-polnisches Juristen-Kolloquium*, vol. 2 (1981), pp. 13–43.

———, "Resolutions of the UN General Assembly and evidence of custom", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, Milan, Giuffrè, 1987, pp. 503–519.

Sloan, B., "General Assembly resolutions revisited (forty years later)", BYBIL, vol. 58 (1987), pp. 39–150.

———, *United Nations General Assembly Resolutions in Our Changing World*, Ardsley, New York, Transnational Publishers, 1991.

Thierry, H., "Les résolutions des organes internationaux dans la jurisprudence de la Cour internationale de Justice", *Collected Courses of the Hague Academy of International Law*, vol. 167 (1980), pp. 385–450.

Tunkin, G. I., "The role of resolutions of international organisations in creating norms of international law", *in* W. E. Butler, ed., *International Law and the International System*, Dordrecht, Martinus Nijhoff, 1987, pp. 5–19.

Von Grünigen, M., "Die Resolutionen der Generalversammlung der Vereinten Nationen und ihr Einfluss auf die Fortbildung des Völkerrechts", in E. Diez et al., eds., *Festschrift für Rudolf Bindschedler zum 65. Geburtstag am 8. Juli 1980*, Bern, Stämpfli Verlag AG, 1980, pp. 187–200.

Voyiakis, E., "Voting in the General Assembly as evidence of customary international law?", *in* S. Allen and A. Xanthaki, eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart, 2011, pp. 209–223.

9. Decisions of courts and tribunals

(a) *Customary international law and the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*

Alvarez-Jiménez, A., "Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009", *International and Comparative Law Quarterly*, vol. 60 (2011), pp. 681–712.

Charlesworth, H. C. M., "Customary international law and the *Nicaragua* case", *Australian Yearbook of International Law*, vol. 11 (1984–1987), pp. 1–31.

Choi, S. J. and M. Gulati, "Customary international law: how do courts do it?", *in* C. Bradley, ed., *Custom's Future: International Law in a Changing World*, Cambridge, Cambridge University Press, 2016, pp. 117–147.

Ferrer Lloret, J., "La insoportable levedad del derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia: el caso de las inmunidades jurisdiccionales del Estado", *Revista Electrónica de Estudios Internacionales*, vol. 24 (2012), pp. 1–36.

Fumagalli, L., "Evidence before the International Court of Justice: issues of fact and questions of law in the determination of international custom", *in* N. Boschiero *et al.*, eds., *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague, T.M.C. Asser Press, 2013, pp. 137–148.

Geiger, R. H., "Customary international law in the jurisprudence of the International Court of Justice: a critical appraisal", *in* U. Fastenrath *et al.*, eds., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011, pp. 673–694.

Hagemann, M., "Die Gewohnheit als Völkerrechtsquelle in der Rechtsprechung des internationalen Gerichtshofes", *Schweizerisches Jahrbuch für internationales Recht*, vol. 10 (1953), pp. 61–88.

Haggenmacher, P., "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", RGDIP, vol. 90 (1986), pp. 5–125.

Kirchner, J., "Thoughts about a methodology of customary international law", *Austrian Journal of Public and International Law*, vol. 43 (1992), pp. 215–239.

Palchetti, P., "La rilevanza dell' atteggiamento degli Stati parti nell' accertamento del diritto internazionale generale da parte della Corte internazionale di giustizia", *Rivista di Diritto Internazionale*, vol. 82 (1999), pp. 647–679.

Skubiszewski, K., "Elements of custom and the Hague Court", *Heidelberg Journal of International Law*, vol. 31 (1971), pp. 810–854.

Sørensen, M., "La 'coutume'" *in* M. Sørensen, *Les sources du droit international: Etude sur la jurisprudence de la Cour permanente de justice internationale*, Copenhagen, Einar Munksgaard 1946, pp. 84–111.

Talmon, S., "Determining customary international law: the ICJ's methodology between induction, deduction and assertion", EJIL, vol. 26 (2015), pp. 417–443.

Tams, C. J., "Meta-custom and the court: A study in judicial law-making", *The Law and Practice of International Courts and Tribunals*, vol. 14 (2015), pp. 51–79.

Tomka, P., "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 195–216.

———, "Customary international law in the jurisprudence of the World Court: the increasing relevance of codification"/"Le droit international coutumier dans la jurisprudence de la Cour mondiale: l'importance croissante de la codification", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 2–24.

Tzevelekos, V. P., "*Juris Dicere*: custom as a matrix, custom as a norm, and the role of judges and (their) ideology in custom making", *in* N. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen, eds., *The Power of Legality: Practices of International Law and their Politics*, Cambridge, Cambridge University Press, 2016, pp. 188–208.

Vismara, F., "La prova di una pratica generale accettata come diritto nella prassi della Corte internazionale di giustizia", *La Comunità Internazionale*, vol. 3 (2000), pp. 439–463.

Watts, A., "The International Court and the continuing customary international law of treaties", *in* N. Ando, E. McWhinney and R. Wolfrum, eds., *Liber Amicorum Judge Shigeru Oda*, The Hague, Kluwer Law International, 2002, pp. 251–266.

(b) *Customary international law and national court decisions*

Beaulac, S., "Customary international law in domestic courts: imbroglio, Lord Denning, stare decisis", *in* C. P. M. Waters, ed., *British and Canadian Perspectives on International Law*, Leiden, Martinus Nijhoff, 2006, pp. 379–392.

Burmester, H., "The determination of customary international law in Australian courts", *Non-State Actors and International Law*, vol. 4 (2004), pp. 39–47.

Butkevich, V. G., "Применение правил международного обычая во внутригосударственном суде" ["Transposing international customary rules to domestic courts"], *Вестник Киевского университета. Международные отношения и международное право* [Vestnik Kievskovo universiteta. Mezhdunarodniye otnosheniya i mezhhdunarodnoye parvo], vol. 15 (1982), pp. 35–42.

Chibundu, M. O, "Making customary international law through municipal adjudication: a structural inquiry", *Virginia Journal of International Law*, vol. 39 (1999), pp. 1069–1149.

Collins, L. and Cross, T., "The law of international custom in the case law of the House of Lords and the United Kingdom Supreme Court"/"Le droit de la coutume internationale dans la jurisprudence de la Chambre des Lords et de la Cour suprême du Royaume-Uni", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 160–179.

Dedov, D., "The development of the public order concept in Russian case law"/"L'élaboration de la notion d'ordre public dans la jurisprudence russe", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 135–142.

Gattini, A., "Le rôle du juge international et du juge national et la coutume internationale", *in* D. Alland *et al.*, eds., *Unité et diversité du droit international: écrits en l'honneur du professeur Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, pp. 253–273.

Geiger, R., "Zur Lehre vom Völkergewohnheitsrecht in der Rechtsprechung des Bundesverfassungsgerichts", *Archiv des öffentlichen Rechts*, vol. 103 (1978), pp. 382–407.

Greenwood, C., "The contribution of national courts to the development of international law", lecture before the British Institute of International and Comparative Law, 4 February 2014.

Johnson, C. D., "*Filartiga v. Pena Irala*: a contribution to the development of customary international law by a domestic court", *Georgia Journal of International and Comparative Law*, vol. 11 (1981), pp. 335–341.

Jones, D. L., "The role of lawyers in 'establishing' customary international law in the *Pinochet* case", *Non-State Actors and International Law*, vol. 4 (2004), pp. 49–58.

Lauterpacht, H., "Decisions of municipal courts as a source of international law", BYBIL *1929*, vol. 10 (1929), pp. 65–95.

Lijnzaad, L., "Customary international law before Dutch courts: *Nyugat* and beyond"/"L'application du droit international coutumier par les tribunaux néerlandais, l'arrêt *Nyugat* et ses suites", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 121–134.

Moremen, P. M., "National court decisions as State practice: a transnational judicial dialogue?", *North Carolina Journal of International Law and Commercial Regulation*, vol. 32 (2006), pp. 259–309.

Nollkaemper, A., and E. de Wet, "The application of customary international law by national courts: introduction", *Non-State Actors and International Law*, vol. 4 (2004), pp. 1–2.

Olleson, S., "Internationally wrongful acts in the domestic courts: the contribution of domestic courts to the development of customary international law relating to the engagement of international responsibility", *Leiden Journal of International Law*, vol. 26 (2013), pp. 615–642.

Paulus, A., "Customary law before the Federal Constitutional Court of Germany"/"Le droit coutumier devant la Cour constitutionnelle fédérale d'Allemagne", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 106–120.

Petrič, E., "Customary international law in the case law of the Constitutional Court of the Republic of Slovenia"/"Le droit international coutumier dans la jurisprudence de la Cour constitutionnelle de la République de Slovénie", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 143–159.

Reinisch, A., and P. Bachmayer, "The identification of customary international law by Austrian Courts", *Austrian Review of International and European Law*, vol. 17 (2015), pp. 1–48.

Roberts, A., "Comparative international law: the role of national courts in creating and enforcing international law", *International and Comparative Law Quarterly*, vol. 60 (2011), pp. 57–92.

Ruffert, M., "Der Entscheidungsmaßstab im Normverifikationsverfahren nach Art.100 II GG.", *JuristenZeitung*, vol. 56 (2001), pp. 633–639.

Stirling-Zanda, S., "The determination of customary international law in European courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)", *Non-State Actors and International Law*, vol. 4 (2004), pp. 3–24.

Stirn, B., "International custom in French public law"/"La place de la coutume internationale en droit public français", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 101–105.

Willems, J. H. M., "Treatment of customary international law and use of expert evidence by the Dutch Court in the *Bouterse* case", *Non-State Actors and International Law*, vol. 4 (2004), pp. 65–74.

Wouters, J., "Customary international law before national courts: some reflections from a continental European perspective", *Non-State Actors and International Law*, vol. 4 (2004), pp. 25–38.

Wuerth, I., "International law in domestic courts and the *Jurisdictional Immunities of the State* case", *Melbourne Journal of International Law*, vol. 13 (2012), pp. 819–837.

10. Customary international law and the teachings of publicists

Kammerhofer, J., "Orthodox generalists and political activists in international legal scholarship", *in* M. Happold, ed., *International Law in a Multipolar World*, London, Routledge, 2012, pp. 138–157.

Oraison, A., "Réflexions sur 'La doctrine des publicistes les plus qualifiés des différentes nations' (Flux et reflux relatifs des forces doctrinales académiques et finalisées)", *Revue belge de droit international*, vol. 24 (1991), pp. 507–580.

Wood, M., "Teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute)", *in* R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2012. Available from https://opil.ouplaw.com/home/mpil.

11. Persistent objector

Barsalou, O. "La doctrine de l'objecteur persistant en droit international public", *Revue québécoise de droit international*, vol. 19 (2006), pp. 1–18.

Bederman, D. J., "Acquiescence, objection and the death of customary international law", *Duke Journal of Comparative and International Law*, vol. 21 (2010), pp. 31–45.

Bradley, C. A and Gulati, M., "Withdrawing from international custom", *Yale Law Journal*, vol. 120 (2010), pp. 202–275.

Charney, J. I., "The persistent objector rule and the development of customary international law", BYBIL *1985*, vol. 56 (1985), pp. 1–24.

Colson, D. A., "How persistent must the persistent objector be?", *Washington Law Review*, vol. 61 (1986), pp. 957–970.

Dumberry, P., "Incoherent and ineffective: the concept of persistent objector revisited", *International and Comparative Law Quarterly*, vol. 59 (2010), pp. 779–802.

———, "The last citadel! Can a State claim the status of persistent objector to prevent the application of a rule of customary international law in investor-State arbitration?", *Leiden Journal of International Law*, vol. 23 (2010), pp. 379–400.

Dupuy, P.-M., "A propos de l'opposabilité de la coutume générale: enquête brève sur 'l'objecteur persistant'", in *Le droit international au service de la paix, de la justice et du développement: Mélanges offerts à Michel Virally*, Paris, Pédone, 1991, pp. 257–272.

Elias, O., "Some remarks on the persistent objector rule in customary international law", *Denning Law Journal*, vol. 6 (1991), pp. 37–51.

———, “Persistent objector”, *in* R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2006. Available from https://opil.ouplaw.com/home/mpil.

Eto, J., “The persistent objector rule in the *Fisheries* case”, *Toyo Hogaku*, vol. 32 (1989), pp. 295–323 (in Japanese).

———, “The theory of customary international law and the persistent objector rule”, *Journal of International Law and Diplomacy*, vol. 88 (1989), pp. 38–64.

Fitzmaurice, G., “The general principles of international law considered from the standpoint of the rule of law”, *Collected Courses of the Hague Academy of International Law*, vol. 92 (1957), pp. 1–227.

Green, J. A., *The Persistent Objector Rule in International Law*, Oxford, Oxford University Press, 2016.

———, “Persistent objector teflon? Customary international human rights law and the United States in international adjudicative proceedings”, *in* J. A. Green and C. Waters, eds., *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi*, Leiden, Brill, 2015, pp. 167–191.

Guldahl, C. G., “The role of persistent objection in international humanitarian law”, *Nordic Journal of International Law*, vol. 77 (2008), pp. 51–86.

Kritsiotis, D., “On the possibilities of and for persistent objection”, *Duke Journal of Comparative & International Law*, vol. 21 (2010), pp. 121–141.

Lau, H., “Rethinking the persistent objector doctrine in international human rights law”, *Chicago Journal of International Law*, vol. 6 (2005), pp. 495–510.

Loschin, L., “The persistent objector rule and customary human rights law: a proposed analytical framework”, *University of California Davis Journal of International Law and Policy*, vol. 2 (1996), pp. 147–172.

McClane, J. B., “How late in the emergence of a norm of customary international law may a persistent objector object?”, *ILSA Journal of International Law*, vol. 13 (1989), pp. 1–26.

Pentassuglia, G., *La Rilevanza dell’Obiezione Persistente nel Diritto Internazionale*, Bari, Laterza, 1996.

Quince, C., *The Persistent Objector and Customary International Law*, Denver, Colorado, Outskirts Press, 2010.

Stein, T. L., “The approach of the different drummer: the principle of the persistent objector in international law”, *Harvard International Law Journal*, vol. 26 (1985), pp. 457–482.

Steinfeld, A., “Nuclear objections: the persistent objector and the legality of the use of nuclear weapons”, *Brooklyn Law Review*, vol. 62 (1996), pp. 1635–1686.

Trachtman, J. P., “Persistent objectors, cooperation, and the utility of customary international law”, *Duke Journal of Comparative and International Law*, vol. 21 (2010), pp. 221–233.

Weil, P., “Le droit international en quête de son identité”, *Collected Courses of the Hague Academy of International Law*, vol. 237 (1992), pp 189–201.

12. Particular customary international law

Briggs, H. W., “The *Colombian-Peruvian Asylum* case and proof of customary international law”, AJIL, vol. 45 (1951), pp. 728–731.

Cohen-Jonathan, G., “La coutume locale”, AFDI, vol. 7 (1961), pp. 119–140.

Crema, L., “The ‘right mix’ and ‘ambiguities’ in particular customs: a few remarks on the *Navigational and Related Rights* case”, in N. Boschiero *et al.*, eds., *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague, T.M.C. Asser Press, 2013, pp. 65–75.

D’Amato, A. A., “The concept of special custom in international law”, AJIL, vol. 63 (1969), pp. 211–223.

Elias, O., “The relationship between general and particular customary international law”, *African Journal of International and Comparative Law*, vol. 8 (1996), pp. 67–88.

Forteau, M., “Regional international law”, *in* R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2006. Available from https://opil.ouplaw.com/home/mpil.

Francioni, F., “La consuetudine locale nel diritto internazionale”, *Rivista di diritto internazionale*, vol. 54 (1971), pp. 396–422.

Gamio, J. M., “Costumbre universal y particular”, *in* M. Rama-Montaldo, ed., *El derecho internacional en un mundo en transformación*, vol. 1 (1994), pp. 69–98.

Gros Espiell, H., “La doctrine du droit international en Amérique latine avant la première conférence panaméricaine”, *Journal of the History of International Law*, vol. 3 (2001), pp. 1–17.

C. Customary international law in different fields of international law

1. Customary international law and human rights

Chan, P. C. W., “The protection of refugees and internally displaced persons: *non-refoulement* under customary international law?”, *International Journal of Human Rights*, vol. 10 (2006), pp. 231–239.

Chetail, V., “The transnational movement of persons under general international law—Mapping the customary law foundations of international migration law”, *in* V. Chetail and C. Bauloz, eds., *Research Handbook on International Law and Migration*, Cheltenham, Edward Elgar, 2014, pp. 1–72.

COLAVITTI, R., "L'ONU et la protection des minorités: un droit coutumier *in statu nascendi*?", *L'Observateur des Nations Unies*, Nos. 20/21 (2006), pp. 261–283.

GREIG, D. W., "The protection of refugees and customary international law", *Australian Year Book of International Law*, vol. 8 (1978/1980), pp. 108–141.

GUNNING, I. R., "Modernizing customary international law: the challenge of human rights", *Virginia Journal of International Law*, vol. 31 (1991), pp. 211–247.

HAILBRONNER, K., "*Nonrefoulement* and 'humanitarian' refugees: customary international law or wishful legal thinking", in *The New Asylum Seekers: Refugee Law in the 1980s—The Ninth Sokol Colloquium on International Law*, Dordrecht, Martinus Nijhoff , 1988, pp. 123–158.

HAMMER, L. M., "Reconsidering the Israeli courts' application of customary international law in the human rights context", *ILSA Journal of International and Comparative Law*, vol. 5 (1998), pp. 23–41.

HANNUM, H., "The status of the Universal Declaration of Human Rights in national and international law", *Georgia Journal of International and Comparative Law*, vol. 25 (1995–1996), pp. 287–397.

HENCKAERTS, J.-M. and WIESENER, C., "Human rights obligations of non-State armed groups: a possible contribution from customary international law?", *in* R. Kolb and G. Gaggioli, eds., *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, Edward Elgar, 2013, pp. 146–169.

KLEIN, E. (ed.) *Menschenrechtsschutz durch Gewohnheitsrecht: Kolloquium, 26.-28. September 2002, Potsdam*, Berlin, Berliner Wissenschafts-Verlag, 2003.

LAUTERPACHT, E. and BETHLEHEM, D., "The scope and content of the principle of *non-refoulement*: Opinion", *in* E. Feller, V. Türk and F. Nicholson, eds., *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003, pp. 87–177.

LENZERINI, F., "Suppressing slavery under customary international law", *Italian Yearbook of International Law*, vol. 10 (2000), pp. 145–180.

LILLICH, R. B., "The growing importance of customary international human rights law", *Georgia Journal of International and Comparative Law*, vol. 25 (1995/1996), pp. 1–30.

LOWE, A., "Customary international law and international human rights law: a proposal for the expansion of the alien tort statute", *Indiana International and Comparative Law Review*, vol. 23 (2013), pp. 523–553.

MERON, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1991.

PAUST, J. J., "The complex nature, sources and evidences of customary human rights", *Georgia Journal of International and Comparative Law*, vol. 25 (1996), pp. 147–164.

SIMMA, B., and P. ALSTON, "The sources of human rights law: custom, *jus cogens*, and general principles", *Australian Yearbook of International Law*, vol. 12 (1989), pp. 82–108.

THIRLWAY, H., "Human rights in customary law: an attempt to define some of the issues", *Leiden Journal of International Law*, vol. 28 (2015), pp. 495–506.

ULLOM, V., "Voluntary repatriation of refugees and customary international law", *Denver Journal of International Law and Policy*, vol. 29 (2000/2001), pp. 115–149.

WOUTERS, J., and C. RYNGAERT, "Impact on the process of the formation of customary international law", *in* M. T. Kamminga and M. Scheinin, eds., *The Impact of Human Rights Law on General International Law*, Oxford, Oxford University Press, 2009, pp. 111–131.

ZIEMELE, I., "Customary international law in the case law of the European Court of human rights: the method", *Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 243–252.

2. Customary international humanitarian law

ALDRICH, G. H., "Customary international humanitarian law: an interpretation on behalf of the International Committee of the Red Cross", BYBIL, vol. 76 (2005), pp. 503–524.

ARROCHA, P., "The never-ending dilemma: is the unilateral use of force by States legal in the context of humanitarian intervention?", *Anuario Mexicano de Derecho Internacional*, vol. 11 (2011), pp. 11–44.

BELLINGER, J. B., and W. J. HAYNES, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89 (2007), pp. 443–471.

BENOIT, J. P., "Mistreatment of the wounded, sick and shipwrecked by the ICRC study on customary international humanitarian law", *Yearbook of International Humanitarian Law*, vol. 11 (2008), pp. 175–219.

BOTHE, M. "Customary international humanitarian law: some reflections on the ICRC Study", *Yearbook of International Humanitarian Law*, vol. 8 (2005), pp. 143–178.

BRUUN, L. L., "Beyond the 1948 Convention: emerging principles of genocide in customary international law", *Maryland Journal of International Law and Trade*, vol. 17 (1993), pp. 193–226.

BUGNION, F., "Droit international humanitaire coutumier", *Revue suisse de droit international et de droit européen*, vol. 17 (2007), pp. 165–214.

Carducci, G., "L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit conventionnel avant et après la Convention de La Haye de 1954: l'importance du facteur temporel dans les rapports entre les traités et la coutume", RGDIP, vol. 104 (2000), pp. 289–357.

Charney, J. I., "Customary international law in the *Nicaragua* case judgment on the merits", *Hague Yearbook of International Law*, vol. 1 (1988), pp. 16–29.

Dahlitz, J., "The role of customary law in arms limitation", *in* J. Dahlitz and D. C. Dicke, eds., *The International Law of Arms Control and Disarmament: Proceedings of the Symposium, Geneva, 28 February–2 March 1991* (United Nations publication, Sales No. GV.E.91.0.14), pp. 157–178.

d'Aspremont, J., "Théorie des Sources—An autonomous regime of identification of customary international humanitarian law: do not say what you do or do not do what you say?", *in* R. van Steenbergh, ed., *Droit international humanitaire: un régime spécial de droit international?* Brussels, Bruylant, 2013, pp. 73–101.

Dinstein, Y., "The ICRC Customary International Humanitarian Law Study", *International Law Studies*, vol. 82 (2006), pp. 99–112.

Emanuelli, C., "L'étude du CICR sur le droit humanitaire coutumier: la coutume en question", RGDIP, vol. 110 (2006), pp. 435–444.

Fleck, D., "Die IKRK-Gewohnheitsrechtsstudie", *Humanitäres Völkerrecht*, vol. 22 (2009), pp. 120–124.

Greenwood, C., "Customary law status of the 1977 Geneva Protocols", *in* A. J. M. Delissen and G. J. Tanja, eds., *Humanitarian Law of Armed Conflict: Challenges Ahead—Essays in Honour of Frits Kalshoven*, Dordrecht, Martinus Nijhoff, 1991, pp. 93–114.

Hakimi, M., "Custom's method and process: lessons from humanitarian law", *in* C. Bradley, ed., *Custom's Future: International Law in a Changing World*, Cambridge, Cambridge University Press, 2016, pp. 148–171.

Henckaerts, J.-M., "International humanitarian law as customary international law", *Refugee Survey Quarterly*, vol. 21 (2002), pp. 186–193.

———, "Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, vol. 87 (2005), pp. 175–212.

———, "Customary international humanitarian law: a response to US comments", *International Review of the Red Cross*, vol. 89 (2007), pp. 473–488.

———, and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules* and vol. II, *Practice*, International Committee of the Red Cross, Cambridge, Cambridge University Press, 2005.

Lynn Hogue, L., "Identifying customary international law of war in Protocol I: a proposed restatement", *Loyola of Los Angeles International and Comparative Law Journal*, vol. 13 (1990), pp. 279–303.

Mendelson, M. H., "The *Nicaragua* case and customary international law", in W. E. Butler, ed., *The Non-Use of Force in International Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, pp. 85–99.

Meron, T., "The Geneva Conventions as customary law", AJIL, vol. 81 (1987), pp. 348–370.

———, "The continuing role of custom in the formation of international humanitarian law", 90 AJIL (1996) 238–249.

———, "Revival of customary humanitarian law", AJIL, vol. 99 (2005), pp. 817–834.

———, "Customary humanitarian law today: from the academy to the courtroom", *in* A. Clapham and P. Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, pp. 37–49.

Morkyte, D., "International law as a legal basis for unilateral humanitarian intervention", *Hague Yearbook of International Law*, vol. 24 (2011), pp. 121–152.

Pocar, F. "To what extent is Protocol I customary international law?", in A. E. Wall, ed., *Legal and Ethical Lessons of NATO's Kosovo Campaign*, Newport, Rhode Island, Naval War College, 2002, pp. 337–351.

Post, H. H. G., "The role of State practice in the formation of customary international humanitarian law", *in* I. F. Dekker and H. H. G. Post, eds., *On the Foundations and Sources of International Law*, The Hague, T.M.C. Asser Press, 2003, pp. 129–147.

Rijpkema, P. R., "Customary international law in the *Nicaragua* case", *Netherlands Yearbook of International Law*, vol. 20 (1989), pp. 91–116.

Sheldon, J. M., "Nuclear weapons and the laws of war: does customary international law prohibit the use of nuclear weapons in all circumstances?", *Fordham International Law Journal*, vol. 20 (1996), pp. 181–262.

Szpak, A., "The Eritrea-Ethiopia Claims Commission and customary international humanitarian law", *Journal of International Humanitarian Legal Studies*, vol. 4 (2013), pp. 296–314.

Villanueva Sainz-Pardo, P., "Is child recruitment as a war crime part of customary international law?", *International Journal of Human Rights*, vol. 12 (2008), pp. 555–612.

Zajadło, J., "Humanitarian intervention: threat to international order, moral imperative, or customary norm *in statu nascendi*?", *Polish Yearbook of International Law*, vol. 27 (2004/2005), pp. 33–48.

3. Customary international criminal law

Arajärvi, N., *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*. Abingdon, Oxon, Routledge, 2014.

———, "The role of the international criminal judge in the formation of customary international law", *European Journal of Legal Studies*, vol. 1 (2007), pp. 90–120.

Bufalini, A., "The principle of legality and the role of customary international law in the interpretation of the ICC Statute", *Law and Practice of International Courts and Tribunals*, vol. 14 (2015), pp. 233–254.

Cryer, R., "Of custom, treaties, scholars and the gavel: the influence of the international criminal tribunals on the ICRC Customary Law Study", *Journal of Conflict and Security Law*, vol. 11 (2006), pp. 239–263.

Fałkowska, M., "La coutume dans les statuts et la jurisprudence des juridictions pénales internationales: vers l'émergence d'une nouvelle définition de la coutume internationale?", *in* M. Arcari and L. Balmond, eds., *Diversification des acteurs et dynamique normative en droit international*, Naples, Editoriale Scientifica, 2013, pp. 159–194.

Frulli, M., "The contribution of international criminal tribunals to the development of international law: the prominence of *opinio juris* and the moralization of customary law", *Law and Practice of International Courts and Tribunals*, vol. 14 (2015), pp. 80–93.

Kirakosyan, Y., "Finding custom: the ICJ and the international criminal courts and tribunals compared", in L. Van den Herik and C. Stahn, eds., The Diversification and Fragmentation of International Criminal Law, Leiden, Martinus Nijhoff, 2012, pp. 149–161.

Mack, E. C. W., "Does customary international law obligate States to extradite or prosecute individuals accused of committing crimes against humanity?", *Minnesota Journal of International Law*, vol. 24 (2015), pp. 73–100.

Massé, M., "Droit pénal international: la coutume internationale dans la jurisprudence de la Chambre criminelle : affaires Kadhafi et Aussarès", *Revue de science criminelle et de droit pénal comparé*, vol. 4 (2003), pp. 894–901.

Mettraux, G., "Identifying customary international law and the role of judges in the customary process", in *International Crimes and the Ad Hoc Tribunals*, Oxford, Oxford University Press, 2006, pp. 13–18.

O'Keefe, R., "Customary international crimes in English courts", BYBIL, vol. 72 (2001), pp. 293–335.

———, *International Criminal Law*, Cambridge, Cambridge University Press, 2015.

Plesch, D. and Sattler, S., "A new paradigm of customary international criminal law: the UN War Crimes Commission of 1943–1948 and its associated courts and tribunals", *Criminal Law Forum*, vol. 25 (2014),pp. 17–43.

Schabas, W., "Customary law or 'judge-made' law: judicial creativity at the UN criminal tribunals", *in* J. Doria *et al.*, eds., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden, Martinus Nijhoff, 2009, pp. 77–101.

Schlütter, B., *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*. Leiden, Martinus Nijhoff, 2010.

Singer, I., "Reductio ad absurdum: the Kapo Trial judgements contribution to international criminal law jurisprudence and customary international law", *Criminal Law Forum*, vol. 24 (2013), pp. 235–258.

van den Herik, L., "Using custom to reconceptualize crimes against humanity", *in* S. Darcy and J. Powderly, eds., *Judicial Creativity at the International Criminal Tribunals*, Oxford, Oxford University Press, 2010, pp. 80–105.

———, "The decline of customary international law as a source of international criminal law", *in* C. Bradley, ed., *Custom's Future: International Law in a Changing World*, Cambridge, Cambridge University Press, 2016, pp. 230–252.

4. Customary international law on the use of force

Ambos, K. and Timmermann, A., "Terrorism and customary international law", *in* B. Saul, ed., *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar, 2014, pp. 20–38.

Banks, W. C. and Criddle, E. J., "Customary constraints on the use of force: article 51 with an American accent", *Leiden Journal of International Law*, vol. 29 (2016), pp. 67–93.

Brisibe, T. C., "Customary international law, arms control and the environment in outer space", *Chinese Journal of International Law*, vol. 8 (2009), pp. 375–393.

Cannizzaro, E. and Palchetti, P., eds., *Customary International Law and the Use of Force: A Methodological Approach*, Leiden, Martinus Nijhoff, 2005.

Constantinou, A., *The Right of Self-Defence under Customary International Law and Article 51 of the United Nations Charter*. Brussels, Bruylant, 2000.

Corten, O., *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain*, 2nd ed. Paris, Pedone, 2014, pp. 9–63.

———, Dubuisson, F., "L'hypothèse d'une règle émergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de sécurité", RGDIP, vol. 104 (2000), pp. 873–910.

Koplow, D. A., "ASAT-isfaction: customary international law and the regulation of anti-satellite weapons", *Michigan Journal of International Law*, vol. 30 (2009), pp. 1187–1272.

Ruys, T., *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*. Cambridge, Cambridge University Press, 2010.

Schreiber, R. E., "Ascertaining *opinio juris* of States concerning norms involving the prevention of international terrorism: a focus on the U.N. process", *Boston University International Law Journal*, vol. 16 (1998), pp. 309–330.

Waldock, C. H. M., "The regulation of the use of force by individual States in international law", *Collected Courses of the Hague Academy of International* Law, vol. 81 (1952), pp. 451–517.

Wilmshurst, E., "The crime of aggression: custom, treaty and prospects for international prosecution", *in* I. Buffard *et al.*, eds., *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Martinus Nijhoff, 2008, pp. 603–623.

5. Customary international law of treaties

Corten O., Klein P., eds., *The Vienna Conventions on the Law of Treaties: A Commentary*. Oxford, Oxford University Press, 2011.

Distefano G., Gaggioli G. and Hêche A., eds., *La convention de Vienne de 1978 sur la succession d'États en matière de traités: commentaire article par article et études thématiques*. Brussels, Bruylant, 2016.

Sinclair I., "The scope of the Convention and its relationship to customary law", *in* I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, Manchester University Press, 1984, pp. 1–28.

Vierdag, E.W., "The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention", AJIL, vol. 76 (1982), pp. 779–801.

6. Customary international law of State immunity

Bring, O.E., "The impact of developing states on international customary law concerning protection of foreign property", *Scandinavian Studies in Law*, vol. 24 (1980), pp. 97–132.

Cuniberti, G., "Droit international coutumier et régime de l'immunité diplomatique", *Journal du droit international*, vol. 2 (2012), pp. 668–676.

Vylegzhanin, A. N., Churilina, N. A., "Международно-правовые основания юрисдикционного иммунитета государств" ["International legal bases of jurisdictional immunity of States"], *Moscow Journal of International Law*, vol. 98 (2015), pp. 35–47.

7. Customary international law and diplomatic immunities

Pedretti, R., *Immunity of Heads of State and State Officials for International Crimes*. Leiden, Brill, 2015.

Wood, M., "The immunity of official visitors", *Max Planck Yearbook of United Nations Law*, vol. 16 (2012), pp. 35–98.

8. Customary international law of international responsibility

Brugnatelli, S., "Human rights judicial and semi-judicial bodies and customary international law on State responsibility", *in* N. Boschiero et al, eds., *International Courts and The Development of International Law: Essays in Honour of Tullio Treves*, The Hague, T.M.C., Asser Press, 2013, pp. 475–487.

Crawford, J., *State responsibility: The General Part*. Cambridge, Cambridge University Press, 2013.

Verdier, P.-H., "Cooperative States: international relations, State responsibility and the problem of custom", *Virginia Journal of International Law*, vol. 42 (2002), pp. 839–867.

Wood, M., "'Weighing' the articles on responsibility of international organizations" *in* M. Ragazzi, ed., *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Leiden, Martinus Nijhoff, 2013, pp. 55–66.

9. Customary international law of the sea

Arrow, D.W., "The customary norm process and the deep seabed, ocean development and international law", *Journal of Marine Affairs*, vol. 9 (1981), pp. 1–59.

Bangert, K., "Internal waters: customary rules of the extension of internal waters", *Nordic Journal of International Law*, vol. 61 (1992), pp. 43–60.

Bernhardt, R., "Verfall und Neubilding von Gewohnheitsrecht im Meeresvölkerrecht", *in* H. P. Ipsen and K. H. Necker, eds., *Recht über See. Festschift für Rolf Stöder zum 70. Geburtstag am 22.4.1979*, Hamburg, Springer, 1979, pp. 155–166.

Bernhardt, R., "Custom and treaty in the law of the sea", *Collected Courses of the Hague Academy of International Law*, vol. 205 (1987), pp. 247–330.

Charney, J. I., "The Antarctic system and customary international law", *in* F. Francioni and T. Scovazzi, eds., *International Law for Antarctica*, The Hague, Kluwer Law International, 1996, pp. 51–101.

Chigara, B., "The International Tribunal for the Law of the Sea and customary international law", *Loyola of Los Angeles International and Comparative Law Review*, vol. 22 (2000), pp. 433–452.

Hutchinson, D. N., "The seaward limit to continental shelf jurisdiction in customary international law", BYBIL, vol. 56 (1985), pp. 111–188.

Jiménez de Aréchaga, E., "Customary international law and the Conference on the Law of the Sea", *in* J. Makarczyk, ed., *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague, Martinus Nijhoff, 1984, pp. 575–585.

Larson, D. L., "Conventional, customary, and consensual law in the United Nations Convention on the Law of the Sea", *Ocean Development and International Law*, vol. 25 (1994), pp. 75–85.

Laylin, J. G., "Emerging customary law of the sea", *International Lawyer*, vol. 10 (1976), pp. 669–680.

Le Floch, G., "La coutume dans la jurisprudence de la Cour Internationale de Justice en Droit de la Mer", *Revue juridique de l'Ouest*, vol. 14 (2001), pp. 535–573.

MacRae, L. M., "Customary international law and the United Nations' Law of the Sea Treaty", *California Western International Law Journal*, vol. 13 (1983), pp. 181–222.

Mahmoudi, S., "Customary international law and transit passage", *Ocean Development and International Law*, vol. 20 (1989), pp. 157–174.

Peschurov, I. S., "Режим дна Северного Ледовитого океана согласно международному обычному праву", *Moscow Journal of International Law*, vol. 95(2014), pp. 145–170.

Roach, J. A., "Today's customary international law of the sea", *Ocean Development and International Law*, vol. 45 (2014), pp. 239–259.

Ruiz Fabri, H., "Règles coutumières générales et droit international fluvial", AFDI, vol. 36 (1990), pp. 818–842.

Schwabach, A., "The United Nations Convention on the Law of Non-navigational Uses of International Watercourses, customary international law, and the interests of developing upper riparians", *Texas International Law Journal*, vol. 33 (1998), pp. 257–279.

Schweisfurth, T., "The influence of the Third United Nations Conference on the Law of the Sea on international customary law", *Heidelberg Journal of International Law*, vol. 43 (1983), pp. 566–584.

Slouka, Z. J., *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law*, The Hague, Martinus Nijhoff, 1968.

Sohn, L. B., "The law of the sea: customary international law developments", *American University Law Review*, vol. 34 (1985), pp. 271–280.

Talaie, F., "Final chapter in a conflict over the breadth of the territorial sea: recognition of the twelve nautical mile limit as declaratory of customary international law", *Indian Journal of International Law*, vol. 36 (1996), pp. 36–63.

Treves, T., "Appunti sull'influenza sull diritto consetudinario della Terza Conferenza delle Nazioni Unite sul diritto del mare", in *Studi in onore di Giuseppe Sperduti*, Milan, Giuffrè, 1984, pp. 333–343.

———, "Notes on transit passage through straits and customary law", *in* A. Bos and H. Siblesz, eds., *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen*, Dordrecht, Martinus Nijhoff, 1986, pp. 247–259.

———, "Codification du droit international et pratique des Etats dans le droit de la mer", *Collected Courses of the Hague Academy of International Law*, vol. 223 (1990), pp. 9–302.

———, and X. Hinrichs, "The International Tribunal for the Law of the Sea and customary international law"/"Le Tribunal international du droit de la mer et le droit international coutumier", *in* L. Lijnzaad and Council of Europe, eds., *The Judge and International Custom*, Leiden, Brill Nijhoff, 2016, pp. 25–45.

10. Customary international law and outer space

Danilenko, G. M., "Space activities and customary law of environmental protection", *in* K. H. Böckstiegel, ed., *Environmental Aspects of Activities in Outer Space: State of the Law and Measures of Protection*, Cologne, Carl Heymanns Verlag, 1990, pp. 169–180.

Frowein, J. A., "Customary international law and general principles concerning environmental protection in outer space", *in* K. H. Böckstiegel, ed., *Environmental Aspects of Activities in Outer Space: State of Law and Measures of Protection*, Cologne, Carl Heymanns Verlag, 1990, pp. 163–167.

Jennings, R. "Customary law and general principles of law as sources of space law", *in* K. H. Böckstiegel, ed., *Environmental Aspects of Activities in Outer Space: State of Law and Measures of Protection*, Cologne, Carl Heymanns Verlag, 1990, pp. 149–152.

Kolosov, Y. M. and Yuzbashyan, M. R., "Вклад российской (советской) юриспруденции в становление и развитие международного космического права", *Moscow Journal of International Law*, vol. 98 (2015), pp. 12–31.

Marcoff, M. G., "Sources du droit international de l'espace", *Collected Courses of the Hague Academy of International Law*, vol. 168 (1980), pp. 9–122.

Rauschning, D., "Customary international law and general principles of international law concerning the protection of outer space from pollution?", *in* K. H. Böckstiegel, ed., *Environmental Aspects of Activities in Outer Space: State of Law and Measures of Protection*, Cologne, Carl Heymanns Verlag, 1990, pp. 181–186.

Vereshchetin, V. S. and G. M. Danilenko, "Custom as a source of international law of outer space", *Journal of Space Law*, vol. 13 (1985), pp. 22–35.

11. Customary international law and the environment

Bodansky, D., "Customary (and not so customary) international environmental law", *Indiana Journal of Global Legal Studies*, vol. 3 (1995), pp. 105–119.

Brownlie, I., "A survey of international customary rules of environmental protection" *Natural Resources Journal*, vol. 13 (1973), pp. 179–189.

Del Lujan Flores, M., "The scope of customary international law on the question of liability and compensation for environmental damage", *in* N. Al-Nauimi and R. Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 237–271.

Dupuy, P. M., "Overview of the existing customary legal regime regarding international pollution", *in* D. B. Magraw, ed., *International Law and Pollution*, Philadelphia, University of Pennsylvania Press, 1991, pp. 61–89.

Kiss, A., "La contribution de la Conférence de Rio de Janeiro au développement du droit international coutumier", *in* N. Al-Nauimi and R. Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 1079–1092.

McIntyre, O., "The role of customary rules and principles of international environmental law in the protection of shared international freshwater resources", *Natural Resources Journal*, vol. 46 (2006), pp. 157–210.

12. Customary international law and international investment

Al Faruque, A., "Creating customary international law through bilateral investment treaties: a critical appraisal", *Indian Journal of International Law*, vol. 44 (2004), pp. 292–318.

Alvarez, J. E., "A bit on custom", *Journal of International Law and Politics*, vol. 42 (2009), pp. 17–80.

Alvarez-Jiménez, A., "Minimum standard of treatment of aliens, fair and equitable treatment of foreign investors, customary international law and the Diallo case before the International Court of Justice", *Journal of World Investment and Trade*, vol. 9 (2008), pp. 51–70.

Alvarez-Jiménez, A., "Foreign investment protection and regulatory failures as States' contribution to the state of necessity under customary international law: a new approach based on the complexity of Argentina's 2001 crisis, *Journal of International Arbitration*, vol. 27 (2010), pp. 141–177.

Audit, M. and Forteau, M., "Investment arbitration without BIT: toward a foreign investment customary based arbitration?", *Journal of International Arbitration*, vol. 29 (2012), pp. 581–604.

Congyan, C., "International investment treaties and the formation, application and transformation of customary international law rules", *Chinese Journal of International Law*, vol. 7 (2008), pp. 659–679.

D'Aspremont, J., "International customary investment law: story of a paradox", *in* T. Gazzini and E. De Brabandere, eds., *International Investment Law: The Sources of Rights and Obligations*, Leiden, Martinus Nijhoff Publishers, 2012, pp. 5–47.

Dolzer, R. and von Walter, A., "Fair and equitable treatment—lines of jurisprudence on customary law", *in* F. Ortino et *al.*, eds., *Investment Treaty Law: Current Issues II*, London, British Institute of International and Comparative Law, 2007, pp. 99–115.

Dumberry, P., "Are BITs Representing the 'new' customary international law in international investment law?", *Pennsylvania State International Law Review*, vol. 28 (2010), pp. 675–702.

Dumberry, P., "The legal standing of shareholders before arbitral tribunals: has any rule of customary international law crystallised?", *Michigan State Journal of International Law*, vol. 18 (2010), pp. 353–374.

Dumberry, P., *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge, Cambridge University Press, 2016.

Forteau, M., "La contribution au développement du droit international général de la jurisprudence arbitrale relative aux investissements étrangers", *Anuário Brasileiro de Direito Internacional*, vol. 4 (2009), pp. 11–39.

Gazzini, T., "The role of customary international law in the field of foreign investment", *Journal of World Investment and Trade*, vol. 8 (2008), pp. 691–715.

Kill, T., "Don't cross the streams: past and present overstatement of customary international law in connection with conventional fair and equitable treatment obligations", *Michigan Law Review*, vol. 106 (2008), pp. 853–880.

Kishoiyian, B., "The utility of bilateral investment treaties in the formulation of customary international law", *Northwestern Journal of International Law and Business*, vol. 14 (1993), pp. 327–375.

Lee, L. J., "*Barcelona Traction* in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later", *Stanford Journal of International Law*, vol. 42 (2006), pp. 237–289.

McLachlan, C., "Investment treaties and general international law", *International and Comparative Law Quarterly*, vol. 57 (2008), pp. 361–401.

Milano, E., "The investment arbitration between Italy and Cuba: the application of customary international law under scrutiny", *Law and Procedure of International Courts and Tribunals*, vol. 11 (2012), pp. 499–524.

Orrego Vicuña, F., "Customary international law in action: from the international minimum standard to fair and equitable treatment" *in* H. P. Hestermeyer *et al*., eds., *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, vol. I, Leiden, Martinus Nijhoff, 2012, pp. 181–197.

Porterfield, M. C., "State practice and the (purported) obligation under customary international law to provide compensation for regulatory expropriations", *North Carolina Journal of International Law and Commercial Regulation*, vol. 37 (2011), pp. 159–197.

Reisman, W. M., "Canute confronts the tide: States versus tribunals and the evolution of the minimum standard in customary international law", *ICSID Review*, vol. 30 (2015), pp. 616–634.

Viñuales, J. E, "Customary law in investment regulation", *Italian Yearbook of International Law*, vol. 23 (2013), pp. 23–48.

13. Customary international law and international finance

Bohoslavsky, J. P., Y. Li, and M. Sudreau, "Emerging customary international law in sovereign debt governance?", *Capital Markets Law Journal*, vol. 9 (2013), pp. 55–72.

Dodge, W. S, "Corporate liability under customary international law", *Georgetown Journal of International Law*, vol. 43 (2012), pp. 1045–1051.

Lim, C. L., "The strange vitality of custom in the international protection of contracts, property, and commerce", *in* C. Bradley, ed., *Custom's Future: International Law in a Changing World*, Cambridge, Cambridge University Press, 2016, pp. 205–229.

Thomas, S., "Customary international law and State taxation of corporate income: the case for the separate accounting method", *Berkley Journal of International Law*, vol. 14 (1996), pp. 99–136.

Waibel, M., "Out of thin air?: Tracing the origins of the UNCTAD Principles in Customary International Law", *in* C. Esposito *et al*., eds., *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*, Oxford, Oxford University Press, 2013, pp. 87–112.

Zamora, S., "Is there customary international economic law?", GYBIL, vol. 32 (1989), pp. 9–42

14. Customary international trade law

Cook, G., *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*. Cambridge, Cambridge University Press, 2015, pp. 237–241.

Zin, S.M., and A.U.S. Kazi, "The role of customary international law in the World Trade Organisation (WTO) disputes settlement mechanism", *International Journal of Public Law and Policy*, vol. 2 (2012), pp. 229–262.

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 6]

DOCUMENT A/CN.4/691

The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law

Memorandum by the Secretariat

[*Original: English*]
[*9 February 2016*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Hague Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915.
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid*., vol. 78, No. 1021, p. 277.

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq.*
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.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid.*, vols. 1867–1869, No. 31874.
Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)	*Ibid.*, vol. 1869, p. 401.

Introduction

1. At its sixty-third session, in 2011, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work[1] and, at its sixty-fourth session, in 2012, the Commission included the topic in its current programme of work.[2] At its sixty-fifth session, in 2013, the Commission decided to change the title of the topic to "Identification of customary international law".[3] At the sixty-seventh session of the Commission, in 2015, the Chair of the Drafting Committee presented the report of the Drafting Committee on "Identification of customary international law", containing draft conclusions 1 to 16 [15], provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions of the Commission.[4] The Commission took note of those draft conclusions.[5]

2. At its sixty-seventh session, in 2015, the Commission further requested the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.[6] The present memorandum has been prepared in fulfilment of that request.

3. The scope of the memorandum is limited to the case law of "international courts and tribunals of a universal character". The term "universal character" is not to be understood as relating to universal membership of the constitutive instruments of the judicial organs considered, but to the fact that they are open to universal membership, and that the judicial organ in question therefore potentially exercises its jurisdiction *ratione materiae* at the global level.[7] The International Criminal Court has been considered here on this basis. Regional courts and tribunals, by contrast, have not. Similarly, hybrid criminal courts established by negotiation between the United Nations and a single affected State have not been included. The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have been included in view of their establishment as subsidiary organs in decisions of the Security Council—decisions which, in accordance with Article 25 of the Charter of the United Nations, all Member States have agreed to accept and carry out. On this basis, they are regarded as "universal" for the purpose of the present memorandum, regardless of their competence *ratione temporis*, *ratione loci* or *ratione personae*. Furthermore, arbitral awards have not been systematically analysed in the present memorandum by virtue of the *ad hoc* character of arbitral tribunals. For the same reason, reports issued by panels and decisions rendered by arbitrators under the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (WTO) have not been included in this analysis.

4. The term "national courts" is used here interchangeably with the terms "domestic courts" and "internal courts" to encompass all judicial organs exercising their functions within the domestic legal order, regardless of their position in the legal system. The present memorandum addresses exclusively the role of decisions of national courts for the purpose of the identification of rules of customary international law. Such judicial decisions may be referred to by international courts and tribunals in other contexts, or for other purposes, which are outside the scope of the present memorandum. As stated by the Permanent Court of International Justice, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[8] Thus, a domestic judicial decision may be

[1] *Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367. In its resolution 66/98 of 9 December 2011, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

[2] *Yearbook … 2012*, vol. II (Part Two), p. 85, para. 268.

[3] *Yearbook … 2013*, vol. II (Part Two), p. 65, para. 65.

[4] The statement of the Chair of the Drafting Committee is available from the website of the Commission, at: http://legal.un.org/ilc.

[5] *Yearbook … 2015*, vol. II (Part Two), pp. 27–28, para. 60.

[6] *Ibid.*, p. 28, para. 61.

[7] In the commentary to draft article 1 of the draft articles on the representation of States in their relations with international organizations, the Commission indicated that "[t]he question whether an international organization is of universal character depends not only on the actual character of its membership but also on the potential scope of its membership and responsibilities". Para. (4), *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, sect. D, at p. 285.

[8] *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926, *P.C.I.J. Reports 1926, Series A*, No. 7, p. 19.

considered in order to enlighten the facts underlying the dispute adjudicated upon,[9] or indeed as one of the alleged internationally wrongful acts that constitute the object of the dispute.[10] Decisions of national courts could also be at issue in a procedural context, such as when taken on the admissibility of claims based on the exercise of diplomatic protection, which requires the exhaustion of local remedies.[11] Furthermore, domestic judicial decisions may be relevant as State practice in the application of a treaty under article 31, paragraph 3 (*b*), of the Vienna Convention on the Law of Treaties,[12] or they could be employed as evidence of how a State construes its own treaty obligations.[13] A domestic judicial decision might also be relevant for the purpose of the identification of general principles of law.[14] Finally, decisions of national courts may be referred to in order to illustrate well-established principles of law or procedure, without any direct implication as to their value in international law as such.[15]

5. The present memorandum only addresses explicit references to decisions of national courts in the decisions of international courts and tribunals applying or referring to customary international law. In the course of their deliberation process, international courts and tribunals may well consider the decisions of national courts and then either disregard them or borrow from their line of reasoning without making any reference thereto in the final text of the judgment. This use of domestic judicial decisions is, however, inherently unquantifiable. Furthermore, even when explicit, such references, as well as their purpose, need to be assessed with caution by taking into account the context of the decision and its line of reasoning. It is therefore necessary to consider them together with the other evidence referred to by international courts and tribunals on the same occasion, such as legislation, treaty provisions or academic writings.

6. The present memorandum first reviews the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice (chap. I below). It then proceeds with the analysis of relevant decisions of the Permanent Court of International Justice (chap. II below); the International Court of Justice (chap. III below); the International Tribunal for the Law of the Sea (chap. IV below); the Appellate Body established under article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (WTO Appellate Body) (chap. V below); the International Tribunal for the Former Yugoslavia (chap. VI below); the International Criminal Tribunal for Rwanda (chap. VII below); and the International Criminal Court (chap. VIII below). For each of these chapters, the most relevant findings are discussed in the form of observations and accompanying explanatory notes. Some general observations arising from the whole analysis are included in the final section (chap. IX below).

[9] See e.g. *Interhandel Case*, Judgment of March 21st, 1959, *I.C.J. Reports 1959*, p. 6, at p. 27; *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 15; *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; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045, at p. 1066, para. 33; *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12, at p. 61, para. 127; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, pp. 3, 87 and 105, at paras. 238, 333 and 343.

[10] See, e.g., *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, at pp. 113–116, paras. 27–36, and at pp. 145–146, para. 109.

[11] See art. 14 of the articles on diplomatic protection, General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 49–50. See also, most recently, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582.

[12] See also the commentary to draft conclusion 6 provisionally adopted by the Commission on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". *Yearbook … 2014*, vol. II (Part Two), pp. 108 *et seq.*, para. 76.

[13] *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber, International Tribunal for the Former Yugoslavia, 19 April 2004, para. 141; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at pp. 176–177, para. 100.

[14] See, e.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 161, at pp. 354–358 (Separate Opinion by Judge Simma).

[15] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, Separate Opinion by Judge Lachs, at p. 171; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, Separate Opinion by Judge Shahabuddeen, at p. 205, and, Separate Opinion by Judge Weeramantry, at p. 220.

Chapter I

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

7. The present chapter provides an overview of the role of the decisions of national courts in the determination of customary international law as envisaged in Article 38, paragraph 1, of the Statute of the International Court of Justice. This provision, which has come to be regarded as an authoritative enumeration of the sources of international law, reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> *a.* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> *b.* international custom, as evidence of a general practice accepted as law;
>
> *c.* the general principles of law recognized by civilized nations;
>
> *d.* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Observation 1

Decisions of national courts may constitute forms of evidence of State practice or acceptance as law (*opinio juris*) for the purpose of determining the existence and content of a rule of customary international law under Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice.

8. National courts are organs of States and as such their decisions are relevant for the determination of a general practice that is accepted as law (*opinio juris*). From the point of view of international law, all national courts and tribunals are State organs, so that any judicial decision may in principle be relevant for the purpose of the identification of customary rules. It is common for international courts and tribunals to refer generally to the decisions of national courts. For example, in the *Nottebohm* case, the International Court of Justice referred to the practice of "[t]he courts of third States … confronted with a similar situation" when identifying which customary international law rules applied to the opposability to third States of the acquisition of nationality by naturalization in the context of diplomatic protection.[16] Furthermore, in the *Jurisdictional Immunities* case, the International Court of Justice referred to decisions of national courts in its assessment of both State practice and acceptance as law (*opinio juris*).[17] Similarly, in the *Tadić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia made a general reference to "national case-law" as evidence of the formation of customary international law.[18]

Observation 2

Under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, judicial decisions constitute subsidiary means for the determination of customary international law.

Observation 3

The Statute of the International Court of Justice contains no definition of the term "judicial decisions", nor does it clarify whether the term encompasses decisions by both national and international courts and tribunals.

9. Under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, "judicial decisions" constitute one of the "subsidiary means for the determination of rules of law". The rules in question are those deriving from the sources listed under paragraphs (*a*) to (*c*), including international custom.

10. Except for the addition of the phrase "whose function is to decide in accordance with international law such disputes as are submitted to it", the text of Article 38 of the Statute of the International Court of Justice is identical to the corresponding provision in the Statute of its predecessor, the Permanent Court of International Justice. The draft scheme of the Statute was developed by an Advisory Committee of Jurists, appointed in 1920 by the Council of the League of Nations to submit a report on the establishment of the future Permanent Court of International Justice. While, during the first phase of discussions, some draft proposals explicitly referred only to international decisions, no such express limitation was included in the final text, for reasons which are unknown.

11. Indeed, several proposals made by members of the 1920 Advisory Committee of Jurists were explicitly limited to international judicial decisions or to the decisions of the future Court itself, and the initial proposal made by Baron Edouard Descamps, Chair of the Advisory Committee of Jurists, referred explicitly to "international jurisprudence as a means for the application and development of law".[19] Mr. Descamps also referred to international jurisprudence in his statement on the rules of law to be applied by the Court.[20] In the discussion that followed, several members of the Committee expressed reservations regarding the inclusion of judicial decisions and doctrine in Article 38.[21] As regards the ensuing debate, the *procès-verbaux* indicates merely that a "discussion followed between M. de Lapradelle, the President and Lord Phillimore, as a result of which point 4 was worded as follows: 'The authority of judicial decisions and the doctrines of the best qualified writers of the various nations'".[22]

12. The subsequent discussion in the Council of the League of Nations provides little by way of clarification. A statement by the relevant subcommittee appointed by the Third Committee of the First Assembly of the League, in response to a proposal by Argentina, noted that the reference to judicial decisions in Article 38 was intended to facilitate the Court's contribution, via its jurisprudence, to the development of international law.[23] No record, however, exists of any discussion of the role of national courts.

13. It can be noted that, between the end of the nineteenth century and the adoption of the Statute of the International Court of Justice in 1945, arbitral tribunals at times referred to decisions of national courts as

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[16] *Nottebohm Case (Second Phase)*, Judgment of April 6th, 1955: *I.C.J. Reports 1955*, p. 4, at p. 22 (see generally pp. 21–23).

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), at p. 123, para. 55 (reference to State practice) and at p. 135, para. 77 (reference to *opinio juris*).

[18] *Prosecutor v. Duško Tadić,* Judgment, Case No. IT-94-1-A, Appeals Chamber, International Tribunal for the Former Yugoslavia, 15 July 1999, *Judicial Reports 1999*, para. 292.

[19] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th, 1920, with Annexes* (The Hague, Van Langenhuysen Frères, 1920), 13th meeting, annex 3 thereto, p. 306.

[20] *Ibid.*, 14th meeting, annex 1 thereto, p. 322 ("Not to allow the judge to make use of existing international jurisprudence as a means of defining the law of nations is, in my opinion, to deprive him of one of his most valuable resources.").

[21] For example, *ibid.*, 15th meeting, p. 334 (Mr. Ricci-Busatti stating that it was "inadmissible to put them on the same level as positive rules of law"), and annex 4 thereto, p. 351 (containing a proposed amendment appending the "subsidiary means" to the article as follows: "The Court shall take into consideration the judicial decisions rendered by it in analogous cases, and the opinions of the best qualified writers of the various countries, as means for the application and development of law.").

[22] *Ibid.*, 15th meeting, p. 337.

[23] League of Nations, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court*, 1921, p. 211. Available from www.icj-cij.org/en/pcij-other-documents.

subsidiary means for the determination of rules of customary international law.[24]

14. When the Statute of the International Court of Justice was adopted, the view was expressed in the Advisory Committee of Jurists in charge of the preparation of the draft Statute that "it would be difficult to make a better draft in the time at disposal of the Committee", and, since "the Court had operated very well under Article 38", "time should not be spent in redrafting it".[25] The article was the object of a very limited discussion beyond the addition, upon the proposal of Chile, of the words "whose function is to decide in accordance with international law such disputes as are submitted to it".[26]

[24] Examples of the use of decisions of national courts as subsidiary means for the determination of customary international law by arbitral tribunals include: *Disagreements between the United States and the United Kingdom, relating to the Treaty extending the right of fishing, signed at Washington, 5 June 1854*, Decisions of 8 April 1858, UNRIAA, vol. XXVIII (United Nations publication, Sales No. E.06.V.9), pp. 73–106, at pp. 87–88; *Aroa Mines* case, Mixed Claims Commission United Kingdom–Venezuela, Decision, 1903, UNRIAA vol. IX (United Nations publication, Sales No. 1959.V.5), pp. 402–445, at pp. 413 and 436; *Kummerow, Otto Redler and Co., Fulda, Fischbach*, and *Friedericy* cases, Mixed Claims Commission Germany–Venezuela, 1903, UNRIAA, vol. X (United Nations publication, Sales No. 60.V.4), pp. 369–402, at p. 397; *American Electric and Manufacturing Company* case (damages to property), Mixed Claims Commission United States–Venezuela, 1903, UNRIAA, vol. IX, pp. 145–147, at p. 146; *Jarvis* case, Mixed Claims Commission United States–Venezuela, UNRIAA, vol. IX, pp. 208–213, at pp. 212–213; *E. R. Kelley (U.S.A. v. United Mexican States)*, General Claims Commission United Mexican States–United States of America, 1930, UNRIAA, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 608–615, at pp. 612–613; *The Diverted Cargoes* case, Greece–United Kingdom of Great Britain and Northern Ireland, Award of 10 June 1955, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 53–81, at p. 79. A particularly notable example is the *Trail Smelter* case between the United States and Canada, in which the arbitral tribunal had to deal with a relatively unprecedented question under international law, and explicitly discussed the relevance of domestic judicial decisions of federal States as a potentially fruitful subsidiary means in the identification of customary international law in the absence of international decisions on the matter (*Trail Smelter case (United States/Canada)*, Award of 15 April 1938 and 11 March 1941, UNRIAA vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982, at pp. 1963–1964).

[25] United Nations Conference on International Organization, Summary of seventh meeting of the United Nations Committee of Jurists, document G/30, 13 April 1945, in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, p. 162, at pp. 170–171.

[26] United Nations Conference on International Organization, Summary report of nineteenth meeting of Committee IV/1, document 828, 7 June 1945, in *ibid.*, vol. XIII, p. 279, at pp. 284–285. Furthermore, Colombia requested that a statement be annexed to the records of the meeting highlighting its understanding that the sources of law referred to in Article 38 should be consulted "in consecutive order", *ibid.*, annex A, p. 287. See also United Nations Conference on International Organization, Summary report of fifth meeting of Committee IV/1, document 843, 11 May 1945, *ibid.*, p. 162, at p. 164.

Chapter II

Permanent Court of International Justice

Observation 4

The case law of the Permanent Court of International Justice contains few references to decisions of national courts for the purposes of determining customary international law.

15. References to decisions of national courts present in the case law of the Permanent Court of International Justice are limited to the Court's early contentious cases (*Series A*). None appear in *Series B* or *Series A/B*. Given that the Court dealt primarily with treaty law, recourse to customary international law was seldom deemed necessary. This ought to be taken into account when interpreting the elements presented in the present chapter, because the lack of references may reflect more on the infrequency with which the Court had recourse to customary international law than on the role of domestic court decisions in the process of its identification.

16. The case in which the decisions of domestic courts figure most prominently is that of the *S.S. Lotus*.[27] An argument of one of the Parties was that a customary rule had developed according to which criminal proceedings in collision cases came exclusively within the jurisdiction of the State whose flag was flown.[28] In evaluating this claim, the Permanent Court of International Justice referred to several decisions of domestic courts invoked by the Parties, but eventually dismissed their relevance on account of their inconsistency. It is unclear whether the decisions referred to were considered as subsidiary means, in addition to forms of evidence of State practice and *opinio juris* in the identification of custom. It may be noted that the Court employed the language of the two-element approach by examining the "conduct" of the States concerned, and whether their "conception of that law", was being "generally accepted".[29] Nevertheless, the Court's reference to international judicial decisions concurrently with those of domestic courts may suggest that it also considered these cases as subsidiary means.[30] Thus, the question of whether domestic judicial decisions can constitute subsidiary means for the determination of rules of international law in addition to forms of evidence of elements of customary rules was left open. The Court adopted a cautious approach on the issue, by merely concluding that "as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law".[31] The Court did so "[w]ithout pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law".[32]

[27] *Case of the S.S. "Lotus" (France v. Turkey)*, Judgment No. 9, 7 September 1927, *P.C.I.J. Reports 1928, Series A*, No. 10, at pp. 18–19.

[28] *Ibid.*, pp. 28–30.

[29] *Ibid.*, p. 29.

[30] *Ibid.*, p. 28 ("So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited.").

[31] *Ibid.*, p. 29.

[32] *Ibid.*, p. 28.

17. Decisions of domestic courts were referred to more often in separate and dissenting opinions by individual judges of the Permanent Court of International Justice, both as forms of evidence of State practice or *opinio juris*, and as subsidiary means. For example, Judge Altamira's dissenting opinion in the *S.S. Lotus* case employed domestic judicial decisions as State practice.[33] Other judges referred to domestic decisions as subsidiary means in the determination of custom, for instance Judges Weiss and Finlay in the *S.S. Lotus* case[34] and Judge Moore in the *S.S. Lotus* and *Mavrommatis Palestine Concessions* cases.[35] These examples suggest that the Court may have considered those domestic decisions during the deliberation process.

[33] *Ibid.*, Dissenting Opinion of Judge Altamira, at pp. 96–99.

[34] *Ibid.*, Disssenting Opinion of Judge Weiss, at p. 47, and Dissenting Opinion of Lord Finlay, at pp. 53–55 and p. 57 (note in particular, at pp. 53–54: "The case seems to me clear on principle, but there is also authority which points to the same conclusion. In the *Franconia* case (*R. v. Keyn*, 1877, 2 Ex. Div. 63), it was argued for the Crown that there was jurisdiction in the English Courts to try a charge of manslaughter on the very ground which we are now considering … The decision of course proceeded upon the view which the English Court took of the international law on the point, but it was international law they had to apply. The decision is not binding upon this Court but it must be regarded as of great weight and cannot be brushed aside as turning merely on a point of English municipal law.").

[35] *Ibid.*, Dissenting Opinion of Judge Moore, at pp. 68–69, at pp. 71–83, and at pp. 85–89 (note in particular, at p. 74: "international tribunals, whether permanent or temporary, sitting in judgment between independent States, are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries"); *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, *P.C.I.J. Series A*, No. 2, Dissenting Opinion of Judge Moore, at p. 57.

Chapter III

International Court of Justice

18. Of all 667 orders, judgments and advisory opinions issued by the International Court of Justice from 31 July 1947 to 31 December 2015, 64 either explicitly discussed or applied customary international law.[36] It is apparent from such a record that the Court has considered and applied customary international law increasingly over

[36] *Corfu Channel case*, Judgment of April, 9th, 1949, *I.C.J. Reports 1949*, p. 4, at p. 22 and p. 28; *Colombian-Peruvian asylum case*, Judgment of November 20th, 1950, *I.C.J. Reports 1950*, p. 266, at p. 274 and pp. 276–278; *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at pp. 23–24; *Fisheries Case*, Judgment of December 18th, 1951, *I.C.J. Reports 1951*, p. 116, at p. 131 and p. 139; *Nottebohm case (Preliminary Objection)*, Judgment of November 18th, 1953, *I.C.J. Reports 1953*, p. 111, at pp. 119–120; *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; *Nottebohm Case (second phase)* (see footnote 16 above), at pp. 21–22; *Interhandel Case* (see footnote 9 above), at p. 27; *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6, at p. 39 and pp. 43–44; *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at pp. 28–46, paras. 37–82; *Barcelona Traction, Light and Power Company*, Limited Judgment, *I.C.J. Reports 1970*, p. 3, at p. 46, paras. 87–88; *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, paras. 52–53, at pp. 46–48, paras. 94 and 96–97; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 175, at pp. 191–198, paras. 41–60; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 3, at pp. 22–29, paras. 49–68; *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 12, at pp. 31–35, paras. 54–65; *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 24, para. 45, at pp. 30–31, para. 62, and at p. 40, para. 86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 18, at pp. 45–49, paras. 42–48; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246, at pp. 288–295, paras. 79–96, and at pp. 297–300, paras. 106–114; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, at pp. 29–34, paras. 26–34, at pp. 38–40, paras. 45–48, and at pp. 55–56, para. 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see footnote 15 above), at p. 27, para. 34, at pp. 92–115, paras. 172–220, at p. 126, paras. 245–247, and at p. 133, paras. 263–265; *Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554, at pp. 564–568, paras. 19–30; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, *I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57; *Elettronica Sicula S.p.A. (ELSI)* (see footnote 9 above), at pp. 42–43, paras. 50–51, and at pp. 66–67, paras. 110–111; *Arbitral Award of 31 July 1989*, Judgment, *I.C.J. Reports 1991*, p. 53, at pp. 68–70, paras. 46–48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, Judgment, *I.C.J. Reports 1992*, p. 351, at pp. 386–390, paras. 41–46; *Maritime Delimitation in the Area* (see footnote 15 above), at pp. 58–59, paras. 46–48, and at pp. 62–63, paras. 55–56; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6, at pp. 21–22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1994*, p. 112, at pp. 125–126, para. 40; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1995*, p. 6, at p. 18, para. 33; *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 240, para. 26, at p. 245, paras. 41–42, at p. 247, para. 52, and at pp. 253–263, paras. 64–97; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 803, at p. 812, para. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at pp. 38–39, para. 46, at pp. 40–41, para. 51, at pp. 64–65, para. 104, at pp. 66–67, paras. 109–110, at pp. 71–72, para. 123, and at p. 81, para. 152; *Difference Relating to Immunity from Legal Process* (see footnote 9 above), at pp. 87–88, para. 62; *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 9 above), at p. 1059, para. 18; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at p. 91, para. 167, at pp. 93–94, paras. 174–176, at p. 97, para. 185, at pp. 100–101, para. 201, at pp. 101–102, para. 205, and at p. 111, para. 229; *LaGrand (Germany v. United States of America)* (see footnote 9 above), at pp. 501–502, paras. 99–101; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at pp. 20–25, paras. 51–59; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 303, at pp. 429–430, paras. 263–264; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 625, at pp. 645–646, para. 37; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), at pp. 110–111, para. 36; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment* (see footnote 14 above), at pp. 182–183, paras. 41–43, at pp. 186–187, para. 51, at pp. 196–197, para. 74, and at p. 198, para. 76; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), at p. 48, para. 83, and at p. 59, paras. 119–120; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), at p. 167, para. 78, at pp. 171–172, paras. 86–89, at p. 174, para. 94, at p. 182,

time. This is to be contrasted with the relatively rare discussion of customary international law by its predecessor.

Observation 5

In the identification of customary international law, the International Court of Justice occasionally referred to decisions of national courts as forms of evidence of State practice or, less frequently, of acceptance as law (*opinio juris*).

Observation 6

When the International Court of Justice referred to decisions of national courts as evidence of State practice or acceptance as law (*opinio juris*), such reference was often made in conjunction with other forms of evidence of customary international law such as legislative acts or treaty provisions.

19. References to domestic judicial decisions can be found in 13 of the 64 decisions in which the International Court of Justice discussed or applied customary international law.[37] In 10 of these decisions, such references are not made in connection with the identification of customary international law.[38] In three cases, decisions of national courts are considered as forms of evidence of State practice or acceptance as law (*opinio juris*).[39]

20. Reference to decisions of national courts as forms of acceptance as law (*opinio juris*) was first made by the International Court of Justice in the *Nottebohm* case, without reference to specific decisions and in the context of considering practice and *opinio juris* as a whole. In that case, which dealt with the requirements for the exercise of diplomatic protection, the Court had to identify which customary international law rules applied to the opposability to third States of the acquisition of nationality by naturalization. In so doing, the Court considered the practice of "the courts of third States" and deemed this and other forms of State practice (such as domestic laws) as "manifest[ing] the view of these States".[40] A similar reference was also made, more recently, in the case concerning *Jurisdictional Immunities of the State*, where the Court referred to "the jurisprudence of a number of national courts" to establish the existence of *opinio juris*.[41]

21. Two cases referred to decisions of national courts in the assessment of State practice. In the *Arrest Warrant* case, when discussing the existence of an exception to immunity in case of war crimes or crimes against humanity,

para. 117, at pp. 194–195, para. 140, at pp. 197–198, paras. 150–152, and at p. 199, paras. 156–157; *Frontier Dispute (Benin/Niger)*, Judgment, *I.C.J. Reports 2005*, p. 90, at pp. 108–110, paras. 23–27, and at pp. 120–121, paras. 45–47; *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. 226–227, paras. 162–164, at pp. 229–230, para. 172, at p. 242, paras. 213–214, at pp. 243–244, para. 217, at p. 244, para. 219, at pp. 251–252, para. 244, at p. 256, para. 257, at p. 257, para. 259, and at pp. 275–276, paras. 329 and 333; *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, at pp. 31–33, paras. 64–70, at p. 35, para. 78, and at pp. 51–52, para. 125; *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. 202–206, paras. 385–395, and at pp. 207–211, paras. 398–407, and at pp. 216–217, paras. 419–420, and at pp. 232–234, paras. 459–462; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, *Judgment* (see footnote 11 above), at pp. 599–600, paras. 39 and 42, at p. 606, para. 64, and at pp. 614–616, paras. 86–94; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659, at pp. 706–707, paras. 151–154; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 219, para. 112, at pp. 231–232, para. 153, and at p. 238, para. 174; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 213, at p. 237, para. 47, and at pp. 265–266, paras. 140–144; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 46, paras. 64–65, at pp. 55–56, para. 101, at p. 60, para. 121, at p. 67, para. 145, and at pp. 82–83, para. 204; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010*, p. 403, at pp. 436–439, paras. 79–84; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2011*, p. 70, at pp. 125–126, paras. 131 and 133; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), at p. 120, para. 50, at pp. 122–135, paras. 54–79, at pp. 136–142, paras. 83–97, at pp. 146–148, paras. 113–118, and at p. 153, para. 137; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *I.C.J. Reports 2012*, p. 324, at p. 331, para. 13; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 444–445, para. 54, at p. 456, para. 97, at p. 457, para. 99, at p. 460, para. 113, and at p. 461, para. 121; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, p. 624, at p. 645, para. 37, at p. 666, paras. 114–118, at pp. 673–674, paras. 137–139, at p. 690, para. 177, at pp. 692–693, para. 182, and at p. 707, para. 227; *Frontier Dispute (Burkina Faso/Niger)*, Judgment, *I.C.J. Reports 2013*, p. 44, at pp. 73–74, paras. 62–63; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, *I.C.J. Reports 2013*, p. 398, at pp. 403–404, para. 19; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, p. 3, at p. 28, para. 57, at pp. 45–47, paras. 112–117, and at p. 65, para. 179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 9 above)/, pp. 46–47, 49–50, 52–53, 56, 61, 64, paras. 87–88, 95, 98, 104–105, 115, 128–129, and 138; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 665, at p. 705, para. 101, at pp. 706–708, paras. 104 and 106, at pp.711–712, para. 118, at p. 720, para. 153, at pp. 721–722, para. 157, at p. 724, para. 168, and at p. 726, para. 174.

[37] *Fisheries Case* (see previous footnote),p. 134; *Nottebohm Case (Second Phase)* (see footnote 16 above), p. 22; *Interhandel Case* (see footnote 9 above), p. 18; *Elettronica Sicula S.p.A. (ELSI)* (see footnote 9 above); *Difference Relating to Immunity from Legal Process* (see footnote 9 above); *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 9 above), p. 1066, para. 33; *LaGrand (Germany v. United States of America)* (see footnote 9 above), p. 476, paras. 18–19; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above); *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), p. 61, para. 127; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), pp. 176–177, para. 100; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see previous footnote), p. 425, para. 55; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening* (see footnote 10 above), pp. 122–148, paras. 55–120.

[38] See para. 4 above.

[39] *Nottebohm Case (second phase)* (see footnote 16 above), p. 22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 123, para. 55, p. 127, para. 64, pp. 131–135, paras. 71–77, and p. 148, para. 118.

[40] *Nottebohm Case (second phase)* (see footnote 16 above), p. 22.

[41] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 135, para. 77.

the International Court of Justice recalled the parties' arguments based on the decisions of courts in the United Kingdom and France, and then stated:

> The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[42]

It is noteworthy that, in this context, the Court highlighted the decisions of "national higher courts" as State practice.

22. In the *Jurisdictional Immunities* case, the International Court of Justice had to determine whether certain exceptions to State immunity had emerged as customary international law. In so doing, the Court first noted that judgments of national courts would be relevant to its task:

> In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention.[43]

It then went on to mention several national judicial decisions as State practice in relation to the so-called "territorial tort exception",[44] the immunity for acts of armed forces,[45] and the alleged exception to immunity in the case of grave breaches of the law of armed conflict.[46]

Observation 7

In the case law of the International Court of Justice, decisions of national courts have constituted particularly relevant forms of evidence of rules of customary international law in subject areas which are closely linked with domestic law provisions, or which require implementation by national courts.

23. In all three judgments by the International Court of Justice in which decisions of national courts were relied upon as State practice, such decisions were especially relevant to the identification of customary international law by reason of the subject matter of the customary rule being identified: issues of nationality are primarily the domain of domestic law, and the immunity of States and their officials before national courts is a rule of international law which, by definition, finds application before such courts. This point was illustrated by Judge Keith in his separate opinion in the *Jurisdictional Immunities* case:

> I do of course appreciate that it is unusual in the practice of this Court and its predecessor to draw on the decisions of national courts. But, as appears from the Judgment in this case, the Court, for good reason, does give such decisions a major role. In this area of law it is such decisions, along with the reaction, or not, of the foreign State involved, which provide many instances of State practice.[47]

Observation 8

The International Court of Justice has never explicitly excluded the possibility that decisions of national courts may constitute "judicial decisions" under Article 38, paragraph 1 (d), of its Statute.

Observation 9

The International Court of Justice has never explicitly referred to decisions of national courts as subsidiary means for the determination of customary international law under Article 38, paragraph 1 (d), of its Statute.

24. The International Court of Justice has never pronounced in the abstract on whether the reference to judicial decisions in Article 38, paragraph 1 (*d*), of its Statute excluded decisions by domestic courts. In its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court buttressed its finding of that there is a "fundamental principle of international law that international law prevails over domestic law" by relying on "judicial decision[s]" as subsidiary means, but then referred only to an international arbitration award and a decision of its predecessor, and not to decisions of national courts.[48] In the absence of a clear statement by the Court as to why it did not refer to any domestic court decisions to draw such a conclusion, it is difficult to infer that such choice implied a general exclusion of decisions of national courts from the realm of Article 38, paragraph 1 (*d*), of its Statute, especially in the light of the use of domestic court references by individual judges.

25. In none of the 64 decisions in which the International Court of Justice discussed or applied customary international law did the Court explicitly rely upon decisions of national courts as subsidiary means for the identification of customary international law under Article 38, paragraph 1 (*d*), of its Statute. This needs to be assessed against the background of the rarity of references by the Court to any subsidiary means other than its own previous decisions, those of its predecessor, or arbitral decisions.[49]

26. It is to be noted, however, that in the *Jurisdictional Immunities* case, the International Court of Justice appeared to have referred in one passage to decisions

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[42] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58.

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 123, para. 55.

[44] *Ibid.*, p. 127, para. 64.

[45] *Ibid.*, pp. 131–135, paras. 72–77.

[46] *Ibid.*, pp. 136–138, paras. 83–88.

[47] *Ibid.*, p. 162, para. 4 (Separate Opinion of Judge Keith).

[48] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* (see footnote 36 above), pp. 34–35, para. 57.

[49] See in particular, *Land, Island and Maritime Frontier Dispute* (footnote 36 above), pp. 593–594, para. 394; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), p. 179, para. 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 36 above), *inter alia* at p. 92, para. 119, pp. 121–122, para. 188, p. 126, para. 198; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p. 12, at p. 69, para. 176, and and p. 93, para. 263; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment (see footnote 36 above), p. 331, para. 13.

of national courts as subsidiary means of identification of customary law, together with other subsidiary means such as judgments of the European Court of Human Rights. When discussing whether the *jus cogens* nature of humanitarian law rules would preclude rules on State immunity from applying, the Court held that no conflict between *jus cogens* and State immunity existed because procedural rules on immunity did not bear upon the question of the legality of the conduct, nor did such *jus cogens* status confer jurisdiction to a court where it did not exist.[50] It then confirmed its own interpretation by reference to certain domestic decisions, as well as decisions of the European Court of Human Rights.[51] However, it is unclear whether the Court employed those decisions as subsidiary means or as State practice. The subsequent reference to State practice in the form of legislation, as well as the observation that the courts in Italy were the only ones to follow a certain interpretation, may suggest that these cases, too, were being employed by the Court as forms of State practice in the determination of customary international law, and not as subsidiary means.

27. Accordingly, although the possibility was never excluded as a matter of principle, there seems to be no clear precedent in the case law of the Court for decisions of national courts to be referred to explicitly as subsidiary means for the determination of rules of customary international law under Article 38, paragraph 1 (*d*), of the Statute of the Court.

Observation 10

Individual opinions of judges of the International Court of Justice have occasionally referred to decisions of national courts, both as State practice and as subsidiary means in the determination of customary international law.

28. Individual opinions of judges made reference to decisions of national courts in 20 of the 64 decisions in which the International Court of Justice discussed or applied customary international law.[52] While some of these references fall beyond the remit of the present memorandum,[53] others were used as evidence of State practice or as subsidiary means in the identification of customary international law.

29. Examples of the use of decisions of national courts as evidence of State practice may be found in the individual opinions attached to the *Arrest Warrant* and *Jurisdictional Immunities* judgments, where judges employed decisions of national courts as State practice in the same manner as the International Court of Justice.[54] But in

[50] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 140–141, paras. 92–95.

[51] *Ibid.*, pp. 141–142, para. 96: "In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270; ILR, vol. 129, p. 629), Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; ILR, vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang v. Jiang*, High Court, [2007] *NZAR*, p. 420; ILR, vol. 141, p. 702) and Greece (*Margellos*, Special Supreme Court, ILR, vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani v. United Kingdom* and *Kalogeropoulou and Others v. Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French Cour de cassation of 9 March 2011 in *La Réunion aérienne v. Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The Cour de cassation in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70–71 above, has limited immunity in cases where violations of *jus cogens* are alleged".

[52] *Fisheries Case* (see footnote 36 above), pp. 160–161 (Dissenting Opinion of Sir Arnold McNair); *North Sea Continental Shelf* (see footnote 36 above), p. 107 (Separate Opinion of Judge Fouad Ammoun); *United States Diplomatic and Consular Staff in Tehran* (see footnote 36 above), p. 63 (Dissenting Opinion of Judge Tarazi); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 36 above), p. 175, para. 31 (Dissenting Opinion of Judge Oda); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see footnote 15 above), p. 171 (Separate Opinion of Judge Lachs); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* (see footnote 36 above), p. 60 (Separate Opinion of Judge Shahabuddeen); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (see footnote 15 above), p. 205 (Separate Opinion of Judge Shahabuddeen) and p. 220 (Separate Opinion of Judge Weeramantry); *East Timor (Portugal v. Australia)* (see footnote 36 above), pp. 211–212 (Dissenting Opinion of Judge Weeramantry); *Legality of the Threat or Use of Nuclear Weapons* (see footnote 36 above), p. 292 (Separate Opinion of Judge Guillaume), pp. 400–402 (Dissenting Opinion of Judge Shahabuddeen), and pp. 439 and 486 (Dissenting Opinion of Judge Weeramantry); *Difference Relating to Immunity from Legal Process* (see footnote 9 above), p. 94 (Separate Opinion of Vice-President Weeramantry); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 40–42 (Separate Opinion of President Guillaume), pp. 69–70 and pp. 88–89 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), p. 125 (Separate Opinion of Judge *ad hoc* Bula-Bula), and pp. 140, 144, 155–156, 161, 165–166, 171–172 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert); *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), at p. 123 (Dissenting Opinion by Judge *ad hoc* De Cara); *Oil Platforms (Islamic Republic of Iran v. United States of America)* (see footnote 14 above), pp. 354–358 (Separate Opinion of Judge Simma); *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), p. 110 (Separate Opinion of Judge *ad hoc* Sepúlveda); *Legal Consequences of the Construction of a Wall* (see footnote 13 above), p. 229 (Separate Opinion of Judge Kooijmans) and p. 236 (Separate Opinion of Judge Al-Khasawneh); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (see footnote 36 above), p. 89 (Separate Opinion of Judge *ad hoc* Dugard); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 36 above), p. 391 (Dissenting Opinion of Judge *ad hoc* Mahiou); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 36 above), p. 293 (Declaration of Judge *ad hoc* Guillaume); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 36 above), p. 474 (Dissenting Opinion of Judge Koroma) and pp. 623–624 (Separate Opinion of Judge Yusuf); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 162–164 and 171 (Separate Opinion of Judge Keith), pp. 215 and 234 (Dissenting Opinion of Judge Cançado Trindade), p. 304 (Dissenting Opinion of Judge Yusuf), and pp. 313–321 (Dissenting Opinion of Judge *ad hoc* Gaja).

[53] See paragraph 4 above.

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 40–42 (Separate Opinion of President Guillaume), pp. 69–70 and pp. 88–89 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), p. 125 (Separate Opinion of Judge *ad hoc* Bula-Bula), and pp. 140, 144, 155–156, 161, 165–166, 171–172 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 162–164, at p. 171 (Separate Opinion of Judge Keith), pp. 215 and 234 (Dissenting Opinion of Judge Cançado Trindade), p. 304 (Dissenting Opinion of Judge Yusuf), and pp. 313–321 (Dissenting Opinion of Judge *ad hoc* Gaja).

some cases, individual judges employed cases of national courts to illustrate State practice even when the Court itself did not explicitly do so. For instance, Judge Oda in his dissenting opinion in the *Continental Shelf* case referred to a domestic arbitration to explain the practice of the United Kingdom,[55] and Vice-President Weeramantry in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* referred to the jurisprudence of domestic courts as State practice concerning immunity.[56] These examples may suggest that the Court itself, while not explicitly relying upon these domestic cases, might have still considered them during the deliberation process.

30. Individual judges have also made direct reference to decisions of national courts as subsidiary means in the identification of rules of law, including customary international law.[57] An explicit reference to domestic judicial decisions as being relevant for the determination of customary international law under Article 38, paragraph 1 *(d)*, of the Statute of the International Court of Justice is made in Judge Shahabuddeen's dissent in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, whereby he stated that a decision by a Tokyo District Court had to be considered as the only available relevant precedent, which "[t]hough not of course binding … ranks as a judicial decision under Article 38, paragraph 1 (*d*), of the Statute of the Court; it qualifies for consideration".[58] Furthermore, despite the absence of any reference to the judgment of the Tokyo District Court decision in the Court's advisory opinion, both Judge Guillaume and Judge Weeramantry also referred to it in their individual opinions.[59]

[55] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 36 above), p. 175, para. 31 (Dissenting Opinion of Judge Oda).

[56] *Difference Relating to Immunity from Legal Process* (see footnote 9 above), p. 94 (Separate Opinion of Vice-President Weeramantry).

[57] See, for instance, *Fisheries Case* (see footnote 36 above), pp. 160–161 (Dissenting Opinion of Sir Arnold McNair); *North Sea Continental Shelf* (see footnote 36 above), p. 107 (Separate Opinion of Judge Fouad Ammoun); and *United States Diplomatic and Consular Staff in Tehran* (see footnote 36 above), p. 63 (Dissenting Opinion of Judge Tarazi).

[58] In his view, departure from the conclusions reached therein had to be explained by the Court. *Legality of the Threat or Use of Nuclear Weapons* (see footnote 36 above), pp. 400–401 (Dissenting Opinion of Judge Shahabuddeen); *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), p. 123 (Dissenting Opinion of Judge *ad hoc* De Cara); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (see footnote 36 above), p. 89 (Separate Opinion of Judge *ad hoc* Dugard); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 36 above), p. 474 (Dissenting Opinion of Judge Koroma) and pp. 623–624 (Separate Opinion of Judge Yusuf).

[59] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume) and p. 439 (Dissenting Opinion of Judge Weeramantry).

Chapter IV

International Tribunal for the Law of the Sea

Observation 11

The International Tribunal for the Law of the Sea has not referred to decisions of national courts in the context of the identification of customary international law.

31. Of all the 80 orders, judgments and advisory opinions issued by the International Tribunal for the Law of the Sea from 13 November 1997 to 31 December 2015, four made reference to customary international law.[60]

32. The International Tribunal for the Law of the Sea explicitly considered Article 38 of the Statute of the International Court of Justice, to which article 74, paragraph 1, and article 83, paragraph 1 of the United Nations Convention on the Law of the Sea refer, when identifying the customary international law of maritime delimitation in the *Bay of Bengal* case. On that occasion, the Tribunal considered that Article 38, paragraph 1 (*d*), referred to decisions of international courts and tribunals, without any mention of national courts.[61] However, the specific purpose of the statement was to justify the reliance of the Tribunal on an arbitral award, without indicating a general position on the relevance of decisions of national courts.[62]

33. Overall, no references were found to decisions of national courts in the identification of customary international law.

Observation 12

Individual opinions of judges of the International Tribunal for the Law of the Sea have at times referred

[60] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at p. 110, para. 81; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at p. 25, para. 92; *"Tomimaru" (Japan v. Russian Federation)*, Prompt Release, Judgment, *ITLOS Reports 2005–2007*, p. 74, at p. 94, para. 63; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at p. 28, para. 57, at p. 47, para. 135, at p. 50, para. 145, at pp. 50–51, paras. 147–148, at p. 56, para. 169, at p. 58, para. 178, at pp. 59–60, paras. 182–183, at p. 62, para. 194, at pp. 65–66, paras. 209–211, at p. 75, and at p. 77.

[61] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 4, at pp. 55–56, paras. 183–184: "Decisions of international courts and tribunals, referred to in Article 38 of the Statute of the [International Court of Justice], are also of particular importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention. In this regard, the Tribunal concurs with the statement in the Arbitral Award of 11 April 2006 that: 'In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation' (*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, RIAA, Vol. XXVII, p. 147, at pp. 210–211, para. 223)."

[62] *Ibid.*, pp. 55–56, paras. 183–184.

to decisions of national courts as subsidiary means for the identification of rules of international law.

34. References to decisions of national courts can be found in separate and dissenting opinions of judges of the International Tribunal for the Law of the Sea, in the context of the identification of customary international law and procedural rules concerning evidence. In order to determine "general international law" on the status of a warship that had been authorized by the coastal State to enter territorial waters, Judge Rao made reference, in his separate opinion in the *ARA Libertad* case, to the *Schooner Exchange* judgment by the United States Supreme Court as a subsidiary means for the determination of rules of law, together with an academic writing "to the same effect".[63] Other references to decisions of national courts were made by judges in the context of the identification of procedural rules concerning evidence.[64] Such references indicate that, for those judges at least, decisions of national courts were relevant as subsidiary means for the identification of the three main categories of sources of international law listed under Article 38, paragraph 1 (*a*) to (*c*).

[63] *"ARA Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, *ITLOS Reports 2012*, p. 332, Separate Opinion of Judge Chandrasekhara Rao, at pp. 360–361, paras. 10–11.

[64] See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (footnote 61 above), Dissenting Opinion of Judge Lucky, p. 256; *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, p. 4, Separate Opinion of Judge Lucky, at p. 189–190, para. 53, and Dissenting Opinion of Judge *ad hoc* Sérvulo Correia, at pp. 382–385, para. 20.

Chapter V

World Trade Organization Appellate Body

Observation 13

The World Trade Organization Appellate Body has not referred to decisions of national courts in the identification of customary international law.

35. Of the 139 WTO Appellate Body reports issued from 29 April 1996 to 31 December 2015, 42 mentioned or applied customary international law.[65] The vast majority of those references concerned the application of "customary rules of interpretation of public international law", which the Appellate Body deemed to have been codified in the Vienna Convention on the Law of Treaties.[66] Others concerned good faith as a "principle of general international law",[67] or issues of State responsibility.[68] In none was reference made to decisions of national courts as State practice, evidence of acceptance as law (*opinio juris*), or as a subsidiary means in the identification of customary international law.

[65] As indicated above in paragraph 3, World Trade Organization panel reports and arbitrators' reports have not been considered for the purpose of the present memorandum, since the panels and arbitrators are not standing bodies like the Appellate Body, but *ad hoc* mechanisms established upon request of a complaining party.

[66] See WTO, Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, at p. 17; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages (Japan—Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97, at pp. 10–11; Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US—Carbon Steel)*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779, at para. 61; Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US—Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571, at para. 59; Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology (US—Continued Zeroing)*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291, at para. 267.

[67] Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations" (US—FSC)*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619, at p. 56, para. 166; Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US—Hot-Rolled Steel)*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, at p. 38, para. 101; Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute (US—Continued Suspension)*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507, at para. 278.

[68] Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US—Cotton Yarn)*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027, at para. 120; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US—Line Pipe)*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403, at para. 259; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties On Certain Products From China (US—Anti-Dumping and Countervailing Duties (China))*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869, at para. 309.

Chapter VI

International Tribunal for the Former Yugoslavia

36. Article 1 of the Statute of the International Tribunal for the Former Yugoslavia provides that the Tribunal has the power to "prosecute persons responsible for serious violations of international humanitarian law".[69] In his report regarding the establishment of the Tribunal, which was later fully endorsed by the Security Council, the

[69] On 3 May 1993, the Secretary-General presented a report to the Security Council pursuant to paragraph 2 of Security Council resolution 808 (1993) regarding the establishment of an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/24704). On 25 May 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted resolution 827 (1993), establishing the International Tribunal for the Former Yugoslavia on the basis of that report.

Secretary-General indicated that the Tribunal would only be applying existing international humanitarian law rules which were beyond any doubt part of customary international law, so that the *nullum crimen sine lege* principle would be respected and no question would arise concerning the adherence of some but not all States to specific international humanitarian law conventions.[70] In the *Vasiljević* case, the Trial Chamber confirmed that the Statute of the International Tribunal for the Former Yugoslavia[71] was not intended to create new criminal offences and that the "Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed".[72] Customary international law is thus a significant source of law for the Tribunal. Out of 81 judgments delivered by the Tribunal until 1 December 2015, 49 referred to decisions of national courts in the context of the identification of customary international law.[73]

Observation 14

In the identification of customary international law, the International Tribunal for the Former Yugoslavia occasionally referred to decisions of national courts as forms of evidence of the two constitutive elements of customary international law, although it only sometimes qualified any given decision as being either State practice or evidence of acceptance as law (*opinio juris*) specifically.

37. The International Tribunal for the Former Yugoslavia has explicitly endorsed the two-element approach to the identification of customary international law, and has occasionally used decisions of national courts as pertinent forms of evidence of each element. In the *Hadžihasanović and Kubura* case, the Trial Chamber emphasized that to prove the existence of a customary rule, the two constituent elements of the custom must be established, namely, the existence of sufficiently consistent practices (material element), and the conviction of States that they are bound by this uncodified practice, as they are by a rule of positive law (mental element).[74]

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[70] *Ibid.*, paras. 29 and 33. The report emphasized that "[w]hile there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law"; it went on to indicate that the treaties which could without doubt be deemed to reflect customary international humanitarian law were the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Charter annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis; the Convention on the Prevention and Punishment of the Crime of Genocide; and the Geneva Conventions for the protection of war victims.

[71] Statute of the International Tribunal for the Former Yugoslavia, Security Council resolution 827 (1993), 25 May 1993, annex, art. 5 (see S/25704, annex).

[72] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 198. See also *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, *Judicial Reports 1997*, vol. I, p. 2, at para. 654; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 141.

[73] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see previous footnote); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, *Judicial Reports 1998*, vol. II, p. 951; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, *Judicial Reports 1998*, vol. I, p. 467; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, *Judicial Reports 1999*, p. 512; *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above); *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, *Judicial Reports 1999*, p. 399; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, *Judicial Reports 2000*, vol. II, p. 1399; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, *Judicial Reports 2000*, vol. I, p. 556; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002; *Vasiljević* (see previous footnote); *Prosecutor v. Mladen Naletilić aka "TUTA" and Vinko Martinović, aka "ŠTELA"*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, Appeals Chamber, 17 September 2003; *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgment, Trial Chamber II, 17 October 2003; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T,Judgment and Opinion, Trial Chamber I, 5 December 2003; *Krstić*, Judgment, Case No. IT-98-33-A (see footnote 13 above); *Blaškić*, Case No. IT-95-14-A (see previous footnote); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14-/2-A, Judgment, Appeals Chamber, 17 December 2004; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, Trial Chamber I, Section A, 17 January 2005; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber II, 31 January 2005; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment, Trial Chamber I, Section A, 16 November 2005; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgment, Trial Chamber, 15 March 2006; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgment, Trial Chamber II, 30 June 2006; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgment, Trial Chamber I, 27 September 2006; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgment, Appeals Chamber, 3 April 2007; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgment, Appeals Chamber, 16 October 2007; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, Trial Chamber II, 10 July 2008; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Judgment, Trial Chamber I, 15 September 2008; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment, Appeals Chamber, 8 October 2008; *Prosecutor v. Milan Milutinović* et al., Case No. IT-05-87-T, Judgment, Trial Chamber, 26 February 2009; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment, Appeals Chamber, 19 May 2010; *Prosecutor v. Vujadin Popović* et al., Case No. IT-05-88-T, Judgment, Trial Chamber II, 10 June 2010; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Judgment, Trial Chamber II, 23 February 2011; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment,Trial Chamber I, 15 April 2011; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Judgment, Trial Chamber I, 6 September 2011; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgment, Trial Chamber II, 12 December 2012; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Judgment, Appeals Chamber, 28 February 2013; *Prosecutor v. Nikola Šainović* et al. (former *Milutinović* et al.), Case No. IT-05-87-A, Judgment, Appeals Chamber, 23 January 2014; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgment, Appeals Chamber, 27 January 2014. The present memorandum only deals with judgments pronounced by the Trial and Appeals Chambers of the International Tribunal for the Former Yugoslavia on the merits of the case. It does not cover judgments delivered in cases where plea agreements had been entered, judgments of contempt cases, and sentencing decisions.

[74] *Hadžihasanović and Kubura* (footnote 73 above), paras. 255–257, at para. 254. Attention should be drawn to the fact that the Trial Chamber first turned to the 2005 International Committee of the Red Cross study on customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, *Rules*, Cambridge, Cambridge University Press, 2005). As

It added that, considering States' judicial practice, "State practice seems to be more than divided, and would even tend to suggest that they have no obligation to prosecute war crimes solely on the basis of international humanitarian law".[75] The Trial Chamber further proceeded with an examination of a series of decisions of national courts.[76] In relation to *opinio juris*, the Trial Chamber concluded that

> it can be inferred from the absence of sufficiently consistent practice that a majority of States do not consider themselves bound under international law to prosecute and try grave breaches of international humanitarian law solely on the basis of international criminal law.[77]

38. On certain occasions, the Chambers of the International Tribunal for the Former Yugoslavia have explicitly qualified decisions of national courts as State practice.[78] In other cases, however, the Chambers did not qualify such decisions as State practice or *opinio juris*. In the *Tadić* case, for instance, a Trial Chamber clarified that decisions of national courts, together with national legislation, treaty provisions and the Charter of the International Military Tribunal, established "the basis in customary international law for both individual responsibility and of participation in the various ways provided by article 7 of the Statute".[79] In some cases, the Chambers have relied directly on national legislation and decisions of national courts to reach a finding on the existence or content of customary rules.[80]

Observation 15

When the International Tribunal for the Former Yugoslavia referred to decisions of national courts as evidence of the two constitutive elements of customary international law, such reference was often made in conjunction with other forms of evidence such as legislative acts or treaty provisions.

39. References to decisions of national courts were often complemented by other forms of evidence, such as legislative acts or treaty provisions, in order to demonstrate the existence of a customary rule or to establish when the process of formation of a customary rule was completed.[81] For example, in the *Halilović* case, a Trial Chamber analysed the historical context of the nature of command responsibility as a form of individual criminal responsibility, stating that it "emerged in the post World War II era in national war crimes legislation, as well as in some post World War II case law".[82] The Trial Chamber first surveyed national legislation[83] and subsequently resorted to decisions of national courts,[84] thereby noting that "the post World War II case law was not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility".[85] The Trial Chamber concluded that the concept of command responsibility was only "codified" with the adoption of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).[86]

Observation 16

In the case law of the International Tribunal for the Former Yugoslavia, decisions of national courts have constituted particularly relevant forms of evidence of customary rules of international criminal law, a subject area that has partly developed from domestic legislation and decisions of national courts.

40. It appears from the case law of the International Tribunal for the Former Yugoslavia that customary rules pertaining to international criminal law have often emerged from the State practice and acceptance as law (*opinio juris*) embodied in decisions of national courts. The Appeals Chamber judgment in the *Tadić* case is an illustration of such a marked reliance on national courts in this area of the law.[87] The Appeals Chamber stated that, given the absence in the Statute of the International Tribunal for the Former Yugoslavia of the objective and subjective elements of collective criminality, it was necessary to turn to customary international law to identify those elements and that "[c]ustomary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation".[88] In particular, the Chamber relied on decisions of national courts as evidence of State practice when it held that "[i]n the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation". This led the Appeals Chamber to conclude that

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this study was silent on the matter, the Chamber decided to look into State practice and *opinio juris*.

[75] *Hadžihasanović and Kubura* (footnote 73 above), para. 255.

[76] *Ibid.*, paras. 256–257.

[77] *Ibid.*, para. 258.

[78] See, for example: *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (footnote 72 above), paras. 665–669; *Tadić*, Case No. IT-94-1-A, Judgment (footnote 18 above), para. 94; *Jelisić* (footnote 73 above), para. 61; *Halilović*, Case No. IT-01-48-T, Judgment, Trial Chamber I, Section A (footnote 73 above), paras. 82–83 (when the Chamber first looked into the "post World War II jurisprudence", in the context of prevention of commission of crimes by commanders, to then turn to the codification of command responsibility and the existence of a preventive duty, the International Committee of the Red Cross commentary to Additional Protocol I, and the International Tribunal for the Former Yugoslavia's own jurisprudence) and para. 91; *Hadžihasanović and Kubura* (footnote 73 above), para. 255; *Milutinović* (footnote 73 above), para. 197, footnote 356; *Šainović* (footnote 73 above), paras. 1622–1646.

[79] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above), para. 669 (see also paras. 665–669).

[80] See *Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber (see footnote 73 above), paras. 130–131 (when discussing the definition of the crime of rape); *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber (see footnote 73 above), para. 66, footnote 73 (after analysing national legislation and case law, the Chamber held that "[f]urther evidence of the unsettled nature of State *opinio juris* and practice … is evidenced by the controversial negotiations as late as 1999 by State delegates to the Working Group on the Elements of Crimes for the Rome Statute."); *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), paras. 43–47.

[81] See, for instance, *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), para. 290; *Blaškić*, Case No. IT-95-14-T, Trial Chamber (footnote 73 above), paras. 316–332; *Galić*, Case No. IT-98-29-A, Appeals Chamber (footnote 73 above), paras. 92–97; and *Šainović* (footnote 73 above), paras. 1626–1646.

[82] *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), para. 42.

[83] *Ibid.*, para. 43.

[84] *Ibid.*, paras. 44–47.

[85] *Ibid.*, para. 48.

[86] *Ibid.*, paras. 49–54.

[87] *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), paras. 194–226.

[88] *Ibid.*, para. 194.

the consistency and cogency of the case law and the treaties referred to … as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.[89]

Observation 17

The International Tribunal for the Former Yugoslavia has indicated in general terms that decisions of national courts are relevant as subsidiary means for the identification of rules of law in the meaning of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

Observation 18

The International Tribunal for the Former Yugoslavia has frequently relied on decisions of national courts as a particularly relevant subsidiary means for the determination of the existence or content of rules of international criminal law.

Observation 19

The International Tribunal for the Former Yugoslavia has emphasized the primacy of international judicial decisions over decisions of national courts as subsidiary means for the identification of rules of law. Chambers have gradually reduced recourse to decisions of national courts over time, as more decisions of other international criminal courts and tribunals became available.

41. The International Tribunal for the Former Yugoslavia has affirmed that it would have recourse to "judicial decisions" as subsidiary means for the determination of rules of law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.[90] It also held that decisions of national courts could be used for this purpose, but emphasized the primary importance of international judicial decisions. In *Kupreškić* et al., the Trial Chamber held that judicial decisions

> should only be used as "subsidiary means for the determination of rules of law" (to use the expression in Article 38 (1) (*d*) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law) … [since] … judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes … [and] … the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law… [I]nternational criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.[91]

42. In its case law, decisions of national courts have frequently been relied upon by the International Tribunal for the Former Yugoslavia as subsidiary means to determine a rule of law. For example, in the *Tadić* case,[92] the Trial Chamber had recourse to decisions of national courts on a number of issues,[93] and employed them as subsidiary means for the definition of "civilian population" and of "crimes against humanity".[94] As to "civilian population", the Trial Chamber expressly referred to national case law as being "instructive" because the relevant court applied "national legislation" which "defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter", and it was thus relevant for a contemporary analysis of customary international law.[95] When discussing the definition of crimes against humanity, the Trial Chamber stated that, as

> the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences.[96]

The Trial Chamber proceeded to analyse a previous decision of the Tribunal, a report of the Commission and one decision of the United States Court of Appeals for the Second Circuit to reach its conclusion on the matter.[97] Similarly, in cases subsequent to *Tadić*, the Chambers often relied on the authority of decisions of national courts in conjunction with other subsidiary means.[98] A

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[89] *Ibid.*, paras. 225–226.

[90] "[R]ecourse would be had to the various sources of international law as listed in Article 38 of the Statute of the [International Court of Justice], namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as judicial decisions and the writings of jurists. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system." *Delalić*, Case No. IT-96-21-T (see footnote 73 above), para. 414. See also *Furundžija*, Case No. IT-95-17/1-T, Trial Chamber (footnote 73 above), para. 196, where the Chamber stated that the pronouncements of the British military courts for the trials of war criminals were "less helpful in establishing rules of international law" as the law applied was domestic.

[91] *Kupreškić* (see footnote 73 above), paras. 540–542.

[92] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above).

[93] *Ibid.*, paras. 638–643, 650–655, 657–658, 669, 678–687, 694 and 696.

[94] *Ibid*. The Trial Chamber started by clarifying that neither the Statute of the International Tribunal for the Former Yugoslavia, nor the Secretary-General's report on the International Tribunal for the Former Yugoslavia, provides guidance on the definition of "civilian" (para. 637). As a consequence, the Chamber made use of treaty provisions, decisions of national courts, United Nations documents, and a decision from a Trial Chamber of the Tribunal in another case, to reach a finding on the meaning of "civilian" (paras. 638–643).

[95] *Ibid.*, para. 642. The national case law in question refers to the *Barbie* case by the Criminal Chamber of the French Court of Cassation: France, *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Cour de Cassation, *Barbie Case*, ILR, vol. 100 (1988), p. 330.

[96] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above), para. 654.

[97] *Ibid.*, paras. 654–655.

[98] See, for example: *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), paras. 255–270; *Hadžihasanović and Kubura* (footnote 73 above), para. 188, footnote 318; *Orić* (footnote 73 above), para. 304, footnotes 860–861, and para. 588, footnotes 1579–1581; *Jelisić* (footnote 73 above), para. 68; *Blaškić*, Case No. IT-95-14-T, Trial Chamber (footnote 73 above), paras. 221, 223–224, 229–230; *Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber (see footnote 73 above), para. 123; *Krnojelac*, Case No. IT-97-25-A, Appeals

clear example of this can be found in the *Kunarac* case.[99] The Trial Chamber discussed the definition of "enslavement" by looking into "various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law", as enslavement is not defined in the Statute of the International Tribunal for the Former Yugoslavia.[100] The Trial Chamber resorted to treaty provisions,[101] international, regional and national case law,[102] and reports of the Commission.[103]

43. In the specific context of international criminal law, a particular type of domestic judicial decision was especially relevant. As the first international criminal tribunal established since the Nuremberg and Tokyo international military tribunals, the International Tribunal for the Former Yugoslavia had few decisions of international criminal courts to rely on in deciding the first cases that it had to adjudicate. An important judicial source of information, bearing considerable authority for the Tribunal, were decisions emanating from courts established in Germany under Control Council Law No. 10, dealing with cases involving crimes committed during the Second World War. Although handed down by domestic courts, those decisions were taken in application of international law, and in particular customary international law. In the *Furundžija* case, for instance, the Trial Chamber indicated the criteria for the appreciation of the relevance of decisions of domestic courts in the following terms:

> For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.[104]

Therefore, various Chambers of the International Tribunal for the Former Yugoslavia have frequently referred, in general, to "the jurisprudence from World War II trials" or to "the post-World War II jurisprudence" as authority for the purpose of establishing the existence, and especially the precise content, of customary rules of international criminal law.[105] They constituted, at the time, the only authoritative judicial pronouncements pertaining to the application of international humanitarian law in the context of a criminal trial. With the development of its own jurisprudence, the Tribunal has increasingly relied more on its own case law, or that of the International Criminal Tribunal for Rwanda, and correspondingly references to decisions of national courts, as subsidiary means, have become less frequent.

Chamber (footnote 73 above), para. 96; *Stakić*, Case No. IT-97-24-A, Appeals Chamber (footnote 73 above), paras. 290–300, 315; *Simić* (footnote 73 above), para. 102, footnote 186; *Blagojević and Jokić* (footnote 73 above), para. 624, footnote 2027, paras. 646, 664; *Strugar*, Case No. IT-01-42-T, Trial Chamber II (footnote 73 above), paras. 363–364; *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), para. 60, footnote 143, and para. 63, footnote 149; *Brđanin* (footnote 73 above), paras. 393–404, and 410; *Delić* (footnote 73 above), paras. 73–74; *Popović* (footnote 73 above), para. 807, footnote 2911; *Đorđević* Trial Chamber II (footnote 73 above), para. 1771; and *Perišić*, Appeals Chamber (footnote 73 above), para. 44, footnote 115.

[99] *Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber (see footnote 73 above). See also *Krnojelac*, Case No. IT-97-25-T, Trial Chamber II (footnote 73 above), para. 58, footnote 197 (the Chamber listed "authorities" supporting its finding regarding customary international law, which in its turn included the Charter of the International Military Tribunal, international and national case law, and Commission documents), and para. 474, footnote 1429.

[100] *Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber (see footnote 73 above), para. 518.

[101] *Ibid*., paras. 519–522, 528–533 and 536.

[102] *Ibid*., paras. 523–527 and 534–535.

[103] *Ibid*., para. 537.

[104] *Furundžija*, Case No. IT-95-17/1-T, Trial Chamber (footnote 73 above), para. 194.

[105] See, for instance: *Kvočka* (footnote 73 above), para. 186; *Hadžihasanović and Kubura* (footnote 73 above), paras. 255–261; *Brđanin* (footnote 73 above), para. 415.

Chapter VII

International Criminal Tribunal for Rwanda

Observation 20

In the identification of customary international law, the International Criminal Tribunal for Rwanda has rarely referred to decisions of national courts as forms of evidence of State practice or of acceptance as law (*opinio juris*).

Observation 21

In the identification of customary international law, the International Criminal Tribunal for Rwanda referred to decisions of national courts as subsidiary means for the determination of rules of law, albeit less frequently than it referred to its own case law and that of the International Tribunal for the Former Yugoslavia.

44. Article 1 of the Statute of the International Criminal Tribunal for Rwanda[106] provided that the tribunal would "have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda or Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994". As to the applicable law, the Tribunal had a slightly expanded jurisdiction compared to the International Tribunal for the Former Yugoslavia. The Security Council, which established the Tribunal not on the basis of a draft statute prepared by the Secretary-General, but through negotiation among Council members, "included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime".[107] Nevertheless, in the *Akayesu* case, a Trial Chamber clarified:

[106] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994), 8 November 1994, annex, art. 3.

[107] Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), document S/1995/134, 13 February 1995, para. 12.

> Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the [International Tribunal for the Former Yugoslavia], by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the [International Tribunal for the Former Yugoslavia], during which the … Secretary-General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt part* of customary law.[108]

Of a total of 85 judgments issued by the International Criminal Tribunal for Rwanda and analysed for the purposes of this memorandum, 12 referred to decisions of national courts in the context of the identification of customary international law.[109]

45. The International Criminal Tribunal for Rwanda case law at times employed decisions of national courts for the interpretation and clarification of modes of individual criminal responsibility,[110] of elements of crimes,[111] and of the scope and meaning of crimes.[112] For instance, several references to decisions of national courts were made by the Trial Chamber in the *Akayesu* case, which was the first trial judgment it delivered.[113] In that case, on a few occasions, the Chamber resorted solely to decisions of national courts to reach its finding,[114] while on others it relied on international instruments, international jurisprudence and national laws, in addition to decisions of national courts.[115]

46. The cases subsequent to *Akayesu* turned to decisions of national courts sparingly. For example, decisions of national courts were employed as evidence of State practice in the *Bogosora and Nsengiyumva* case.[116] In the *Bagilishema* case, both the Trial and the Appeals Chambers used decisions of national courts as subsidiary means for the determination of rules of law.[117]

47. The use of decisions of national courts as subsidiary means was slightly more frequent in the case law of the International Criminal Tribunal for Rwanda. In some cases, the Chambers analysed decisions of national courts in conjunction with different forms of evidence to either make a finding or reach a conclusion on the interpretation, scope and meaning of a certain provision. In *Musema*, within the context of superior responsibility, the Trial Chamber took into consideration the jurisprudence of the International Tribunal for the Former Yugoslavia and of the Nürnberg and Tokyo tribunals, writings of jurists, and decisions of national courts.[118] In *Nzabonimana*, the Chamber used decisions of national courts, jurisprudence of the International Criminal Tribunal for Rwanda, a report of the Commission, and writings of jurists when discussing the meaning of "public incitement" in relation to genocide.[119] On other occasions, the Chambers resorted solely to decisions of national courts together with jurisprudence of the International Tribunal for the Former

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[108] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, vol. I, para. 605.

[109] *Akayesu* (see previous footnote); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment, Trial Chamber I, 27 January 2000, *Reports of Orders, Decisions and Judgements 2000*, vol. II; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, available from https://unictr.irmct.org/en/cases/ictr-95-1a; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgment, Appeals Chamber, 3 July 2002, available from https://unictr.irmct.org/en/cases/ictr-95-1a; *Prosecutor v. Ferdinand Nahimana, John-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, Trial Chamber I, 3 December 2003, available from https://unictr.irmct.org/en/cases/ictr-99-52; *Prosecutor v. Sylvestre Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, Appeals Chamber 7 July 2006, *Reports of Orders, Decisions and Judgements 2006*, vol. I, p. 983; *Prosecutor v. Ferdinand Nahimana, John-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment, Appeals Chamber, 28 November 2007, available from https://unictr.irmct.org/en/cases/ictr-99-52; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgment, Appeals Chamber, 12 March 2008, available from https://unictr.irmct.org/en/cases/ictr-01-66; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgment, Trial Chamber III, 2 December 2008, available from https://unictr.irmct.org/en/cases/ictr-01-72; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-T, Judgment and Sentence, Trial Chamber I, 5 July 2010, available from https://unictr.irmct.org/en/cases/ictr-97-36a; *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, Case No. ICTR-98-41-A, Judgment, Appeals Chamber, 14 December 2011, available from https://unictr.irmct.org/en/cases/ictr-98-41; and *Callixte Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgment, Appeals Chamber, 29 September 2014, available from https://unictr.irmct.org/en/cases/ictr-98-44d. The present memorandum only covers judgments pronounced by the International Criminal Tribunal for Rwanda Trial and Appeals Chambers on the merits of the case before 31 December 2015. It does not cover judgments delivered in cases where plea agreements had been entered, judgments of contempt cases, and sentencing decisions. Additionally, the memorandum is restricted exclusively to the use of national decisions by the Trial Chambers and Appeals Chambers on matters of customary international law. The use of national decisions for the purposes of general principles of law and procedural questions does not fall within its scope.

[110] *Akayesu* (see footnote 108 above), paras. 556 and 633; *Musema*, paras. 142 and 270–274; *Bagilishema*, Trial Chamber I (see previous footnote), para. 37, footnote 32, para. 44, and para. 50, footnote 55; *Bagilishema*, Appeals Chamber (see previous footnote), para. 35, footnote 50; *Nahimana*, Trial Chamber I (see previous footnote), para. 1045; *Munyakazi* (see previous footnote), para. 430, footnote 866.

[111] *Akayesu* (see footnote 108 above), paras. 502–504, 534, 539–548 and 584, footnote 153; *Bagilishema*, Trial Chamber I (see footnote 109 above), para. 34, footnote 30; *Nahimana*, Appeals Chamber (see footnote 109 above), para. 896, footnote 2027, and para. 898, footnotes 2030–2031; *Gacumbitsi* (see footnote 109 above), para. 60, footnote 145; *Seromba* (see footnote 109 above), para. 161, footnote 389.

[112] *Akayesu* (see footnote 108 above), paras. 567–576; *Nahimana*, Appeals Chamber (see footnote 109 above), para. 692, footnote 1657; *Nzabonimana* (see footnote 109 above), para. 125, footnote 372.

[113] *Akayesu* (see footnote 108 above), paras. 502–504, 534, 539–548, 556, 567–576 and 584, footnote 153, and para. 633.

[114] *Ibid.*, paras. 502–504, and para. 584.

[115] *Ibid.*, paras. 525–548, 549–562, 563–577 and 630–634.

[116] *Bagosora and Nsengiyumva* (see footnote 109 above), para. 729, footnote 1680. When discussing the issue of the criminalization of acts degrading the dignity of the corpse or interfering with a corpse, the Chamber stated that "any review of customary international law regarding this issue would need to take into account the large number of jurisdictions that criminalise degrading the dignity of or interfering with corpses". The Chamber proceeded to quote a number of pieces of national legislation and, finally, added that "in several trials following the Second World War, accused were convicted on charges of mutilating dead bodies".

[117] *Bagilishema*, Trial Chamber I (see footnote 109 above), para. 34, footnote 30, para. 37, footnote 32, para. 44, para. 50, footnote 55, paras. 142–143, para. 1012, footnote 1188; *Bagilishema*, Appeals Chamber (see footnote 109 above), para. 35, footnote 50.

[118] *Musema* (see footnote 109 above), paras. 127–148. See also paragraphs 264–275, where the Chamber discussed the class of perpetrators of crimes belonging to the armed forces and resorted to the jurisprudence of the International Criminal Tribunal for Rwanda, the Tokyo and Nuremberg tribunals, and decisions of national courts.

[119] *Nzabonimana* (see footnote 109 above), paras. 125–127.

Yugoslavia to reach a finding,[120] or only to decisions of national courts to interpret a provision.[121]

[120] *Bagilishema*, Trial Chamber I (see footnote 109 above), paras. 34 and 44–46.

[121] *Akayesu* (see footnote 108 above), paras. 502–504.

Chapter VIII

International Criminal Court

Observation 22

In the identification of customary international law, the International Criminal Court has referred both to decisions of international courts and tribunals, and to decisions of national courts as subsidiary means for the determination of rules of law.

48. As only one judgment in the case law of the International Criminal Court was deemed relevant for the purposes of this memorandum,[122] it would be premature to draw general observations from it. Instead, some general remarks may be made regarding the judgment in question, which was delivered by the Appeals Chamber in the *Lubanga* case.[123] On this occasion, national decisions were used by the Appeals Chamber when discussing the standard of foreseeability of events in relation to the common plan necessary for co-perpetration.[124] While national decisions were cited in footnotes supporting the Chamber's assertion that the standard of foreseeability was a virtual certainty, no explanation of their role was given by the Chamber. In addition to decisions of national courts, the Chamber used the case law of the International Criminal Court and other subsidiary means for the determination of rules of law, such as the case law of the International Tribunal for the Former Yugoslavia and writings of jurists on the subject.[125] It may accordingly be inferred that the Chamber used national decisions in this case as subsidiary means for the determination of rules of law.

[122] The memorandum only deals with judgments pronounced by the International Criminal Court Trial Chambers and Appeals Chamber on the merits of the case. It does not cover sentencing decisions and decisions on the confirmation of the charges before trial. Consequently, a total of five judgments were analysed, out of which one was deemed relevant and four were deemed not relevant for the purposes of the study. The relevant jurisprudence comprises judgments pronounced by the Chambers of the International Criminal Court up to 31 December 2015.

[123] *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 A5, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014.

[124] *Ibid*., para. 447, footnotes 827–828.

[125] *Ibid*., paras. 445–449.

Chapter IX

General observations

Observation 23

In the identification of customary international law, decisions of national courts may be referred to for two distinct purposes: as forms of evidence of the constitutive elements of rules of customary international law, or as subsidiary means for the determination of such rules.

49. Decisions of national courts have two general functions in the determination of customary international law. First, they constitute an important form of evidence, among others, that a certain practice of a State exists or that it is accepted as law (*opinio juris*) under Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice; indeed, since national courts are State organs, their decisions may at times directly constitute State practice or be an expression of acceptance as law (*opinio juris*). Second, decisions of national courts may be among the "judicial decisions" referred to as subsidiary means for the determination of rules of law, including customary international law, in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

50. This dual nature of decisions of national courts is reflected in the decisions of international courts and tribunals analysed above. While international courts and tribunals have primarily referred to decisions of national courts as State practice or evidence of acceptance as law (*opinio juris*) of specific States in order to establish that customary international law has emerged, some courts and tribunals, most notably international criminal tribunals, have also referred to them as subsidiary means to confirm the existence of a rule that has already been deemed to have emerged.

Observation 24

Decisions of national courts are regularly referred to by international courts and tribunals in the assessment of the two constitutive elements of rules of customary international law, particularly with reference to those areas of international law that are more closely linked with domestic law.

51. Decisions of national courts constitute a form of evidence, among others, for the determination of the existence of a general practice that it is accepted as law (*opinio juris*). International courts and tribunals have employed decisions of national courts in this context by referring to them in conjunction with other elements, such as domestic law or administrative practice, in order to

assess the practice of a specific State, and in conjunction with other elements, such as positions taken by Governments, in order to assess the existence of acceptance as law (*opinio juris*) of those States. When considering decisions of national courts for such purposes, international courts and tribunals have relied particularly on decisions of the highest national courts whenever available. Such decisions often bear a particular significance with respect to legislation since international courts and tribunals generally do not engage in an interpretation of domestic legislation, but rely on the interpretation given by the courts responsible for the application of that law.

52. When referring to decisions of national courts as evidence of State practice or acceptance as law (*opinio juris*), international courts and tribunals have often engaged in a quantitative analysis of relevant decisions, and on the variety of States from which they emanate, rather than the details of the line of argument of each. In this regard, the decisions considered are often those that have been relied upon by the parties appearing before the deciding international court or tribunal. Furthermore, in evaluating the balance of available decisions, international courts and tribunals generally conduct an overall assessment, so that general inconsistency between jurisdictions may lead to the conclusion that a certain rule does not exist or has not yet fully emerged.

53. Decisions of national courts have been especially relied upon as State practice or acceptance as law (*opinio juris*) when establishing the existence of customary international law pertaining to certain domains of international law—such as immunity from jurisdiction, criminal law and diplomatic protection—because of the special relevance of national judicial practice to those specific domains.

Observation 25

Findings on rules of customary international law made by national courts have been referred to by international courts and tribunals as subsidiary means for the determination of the existence or content of such rules.

54. In the application of customary international law, decisions of national courts may also serve as a subsidiary means to confirm the finding on the existence or scope of a given rule of customary international law by an international court or tribunal without proceeding to an assessment *de novo* of overall State practice or acceptance as law (*opinio juris*). In this regard, it is to be noted that some international courts and tribunals, as well as judges of the International Court of Justice in their individual opinions, have construed the term "judicial decisions" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice as encompassing decisions of national courts. In addition, no instance was found in which international courts or tribunals excluded the possibility that decisions of national courts may have such a subsidiary function under Article 38, paragraph 1 (*d*), of the Statute.

55. It follows that decisions of national courts may be considered "subsidiary means for the determination of rules of law", including rules of customary international law. However, it is not clear that all subsidiary means mentioned in Article 38, paragraph 1 (*d*), of the Statute have equal authority. In the case law analysed in the present memorandum, decisions of national courts were referred to less often and approached with more caution than decisions emanating from international courts and tribunals. Furthermore, subsidiary reliance on decisions of national courts occurred mostly with reference to questions that had not been the object of developed case law at the international level, where no international judicial decisions existed, or with reference to subject areas where domestic judicial practice was especially relevant. This was especially true in the early case law of the International Tribunal for the Former Yugoslavia: as international case law developed over time, reliance on decisions of national courts diminished.

56. When decisions of national courts are relied upon by international courts and tribunals as subsidiary means, it is the decision itself that is considered by the deciding court or tribunal, rather than the position of the national court within the domestic legal system. Thus, a decision of a district court dealing with issues of international law similar to those under consideration by the deciding court or tribunal is not necessarily less relevant as a subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the Court than a decision of a higher court from a different legal system. The authority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

[Agenda item 7]

DOCUMENT A/CN.4/700

Third report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur*

[*Original: English*]
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Multilateral instruments cited in the present report

	Source
Hague Convention Relative to the Laying of Automatic Submarine Contact Mines: Convention VIII (The Hague, 18 October 1907)	J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915, p. 100.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
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)	*Ibid*., No. 970, pp. 31 *et seq*.
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.
Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949)	*Ibid*., No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid*., No. 973, pp. 287 *et seq*.
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.
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid*., No. 17513, p. 609.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (Geneva, 8 December 2005)	*Ibid*., vol. 2404, No. 43425, p. 261.
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.
Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (London, 19 June 1951)	*Ibid*., vol. 199, No. 2678, p. 67.
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), as amended by the Agreements of 21 October 1971 and 18 March 1993	*Ibid.*, vol. 481, No. 6986, p. 329.
International Convention for the Prevention of Pollution of the Sea by Oil (London, 12 May 1954)	*Ibid.*, vol. 327, No. 4714, p. 3.
Convention on the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 450, No. 6465, p. 11.
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 559, No. 8164, p. 285.
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	*Ibid.*, vol. 956, No. 13706, p. 251.
Additional Protocol to the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 28 January 1964)	*Ibid.*
Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 (Paris, 16 November 1982)	*Ibid*., vol. 1519, No. 13706, p. 329.
Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (Paris, 12 February 2004)	*Official Journal of the European Union*, L 97, 1 April 2004, p. 55.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	*Ibid*., vol. 1063, No. 16197, p. 265.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14688, p. 171.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D..C., 1 July 1968)	*Ibid*., vol. 729, No. 10485, p. 161.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid*., vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	*Ibid*., vol. 973, No. 14097, p. 3.
Convention on Special Missions (New York, 8 December 1969)	*Ibid*., vol. 1400, No. 23431, p. 231.

	Source
Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971)	*Ibid*., vol. 996, No. 14583, p. 245.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971)	*Ibid*., vol. 1110, No. 17146, p. 57. As amended by the Protocol to the above-mentioned Convention (London, 19 November 1976), *ibid.*, vol. 1862, No. 17146, p. 509, and Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (London, 27 November 1992), *ibid*., vol. 1953, No. 17146, p. 330.
Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972)	*Ibid*., vol. 1037, No. 15511, p. 151.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972)	*Ibid*., vol. 1046, No. 15749, p. 120.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	*Ibid*., vol. 993, No. 14537, p. 243.
International Convention for the Prevention of Pollution from Ships, 1973 ("MARPOL Convention") (London, 2 November 1973)	*Ibid*., vol. 1340, No. 22484, p. 184.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	*Ibid*., vol. 1035, No. 15410, p. 167.
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. See also A/CONF.67/16, p. 207.
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.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	*Ibid*., vol. 1946, No. 33356, p. 3.
Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979)	*Ibid*., vol. 1651, No. 28395, p. 333.
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 (Geneva, 10 October 1980)	*Ibid*., vol. 1342, No. 22495, p. 137.
Protocol on Non-Detectable Fragments (Protocol I) (Geneva, 10 October 1980)	*Ibid.*
Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (Geneva, 10 October 1980) and Protocol II as amended on 3 May 1996, annexed to the Convention (Geneva, 3 May 1996)	*Ibid*., Protocol II as amended on 3 May 1996 is reproduced in *ibid.*, vol. 2048, No. 22495, p. 93.
Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (Geneva, 10 October 1980)	*Ibid*., vol. 1342, No. 22495, p. 137.
Amendment 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 (Geneva, 21 December 2001)	*Ibid*., vol. 2260, No. 22495, p. 82.
Protocol on Explosive Remnants of War (Protocol V)	*Ibid.*, vol. 2399, No. 22495, p. 100.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 24 November 1986)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2, Cambridge, Grotius, 1991, p. 372. See also ILM, vol. 26 (1987), p. 41.
Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region (Noumea, 25 November 1986)	ILM, vol. 26 (1987), p. 59.
Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Noumea, 25 November 1986)	*Ibid.*, p. 65.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989)	United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.
Convention concerning Indigenous and Tribal Peoples in Independent Countries (Indigenous and Tribal Peoples Convention, 1989 (No. 169)) (Geneva, 27 June 1989)	*Ibid.*, vol. 1650, No. 28383, p. 383.

	Source
Convention on the Rights of the Child (New York, 20 November 1989)	*Ibid.*, vol. 1577, No. 27531, p. 3.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	*Ibid*., vol. 1989, No. 34028, p. 309.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992)	*Ibid*., vol. 2099, No. 36495, p. 195.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid*., vol. 1771, No. 30822, p. 107.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid*., vol. 1760, No. 30619, p. 79.
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, Japan, 29 October 2010)	UNEP, document UNEP/CBD/COP/10/27, annex, decision X/1, annex I.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, 13 January 1993)	United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.
Agreement establishing the South Pacific Regional Environment Programme (Apia, 16 June 1993)	*Ibid*., vol. 1982, No. 33912, p. 3.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *Treaty Series*, No. 150.
Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa (Paris, 14 October 1994)	United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3.
Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 10 June 1995)	UNEP/Mediterranean Action Plan, *Mediterranean Action Plan Phase II and Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols*, Athens, 1995, p. 40.
Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention) (Waigani, 16 September 1995)	United Nations, *Treaty Series*, vol. 2161, No. 37758, p. 91.
Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	A/50/1027, annex.
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.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997)	*Ibid.*, vol. 2056, No. 35597, p. 211.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, 25 June 1998)	*Ibid.*, vol. 2161, No. 37770, p. 447.
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.
Revised Protocol on Shared Watercourses in the Southern African Development Community (Windhoek, 7 August 2000)	S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments*, Rome, FAO/UNESCO, 2005, p. 102. See also ILM, vol. 40, No. 2 (March 2001), p. 321.
Agreement between Eritrea and Ethiopia for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in Both Countries (Algiers, 12 December 2000)	United Nations, *Treaty Series*, vol. 2138, No. 37274, p. 93.
Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001)	*Ibid*., vol. 2256, No. 40214, p. 119.
African Convention on the Conservation of Nature and Natural Resources (Maputo, 11 July 2003)	*International Environmental Law: Multilateral Treaties*, W. E. Burhenne (ed.), vol. IX, The Hague, Kluwer Law International, 1997, p. 52.
Convention on Cluster Munitions (Dublin, 30 May 2008)	United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39.
Minamata Convention on Mercury (Kumamoto, 10 October 2013)	*Ibid.*, No. 54669 (volume number has yet to be determined). Available from https://treaties.un.org.
Paris Agreement (Paris, 12 December 2015)	*Ibid.*, No. 54113 (volume number has yet to be determined). Available from https://treaties.un.org.

Works cited in the present report

Abouali, Gamal

"Natural resources under occupation: the status of Palestinian water under international law", *Pace International Law Review*, vol. 10 (1998), pp. 411–574.

Aust, Anthony

Modern Treaty Law and Practice, 2nd ed. Cambridge University Press, 2007.

Benvenisti, Eyal

"Water conflicts during the occupation of Iraq", AJIL, vol. 97 (2003), pp. 860–872.

Bloomfield, Lincoln P., Jr.

"Detritus of conflict: the U.S. approach to the humanitarian problem posed by landmines and other hazardous remnants of war", *Seton Hall Journal of Diplomacy and International Relations*, vol. 4 (2003), pp. 27–41.

Blum, Gabriella

"Remnants of war", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. I. Oxford, Oxford University Press. Available from http://opil.ouplaw.com.

Boothby, William H.

Weapons and the Law of Armed Conflict. Oxford, Oxford University Press, 2009.

Boutruche, Théo

"Le statut de l'eau en droit international humanitaire", *Revue internationale de la Croix-Rouge*, vol. 82 (2000) pp. 887–916.

Droege, Cordula, and Marie-Louise 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. 21–53.

Ebbesson, Jonas

"Principle 10: Public participation", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*. Oxford, Oxford University Press, 2015, pp. 287–310.

Falk, Richard A.

"Environmental warfare and ecocide—facts, appraisal, and proposals", *Bulletin of Peace Proposals*, vol. 4 (1973), pp. 80–96.

Fauchald, Ole Kristian, David Hunter and Wang Xi, eds.

Yearbook of International Environmental Law, vol. 19 (2008). Oxford, Oxford University Press, 2009.

Freeland, Steven

Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court. Cambridge, Intersentia, 2015.

Gordon, Kathryn, and Joachim Pohl

"Environmental concerns in international investment agreements: a survey", *OECD Working Papers on International Investment*, January 2011.

Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds.

Customary International Humanitarian Law, vol. 1: *Rules*. Cambridge, ICRC and Cambridge University Press, 2005.

Hough, Peter

"Defending nature: the evolution of the international legal restriction of military ecocide", *The Global Community Yearbook of International Law and Jurisprudence*, vol. I (2014), pp. 137–152.

Hulme, Karen

War Torn Environment: Interpreting the Legal Threshold. Leiden, Martinus Nijhoff, 2004.

International Committee of the Red Cross

Water and War: ICRC Response. Geneva, ICRC, 2009.

Jensen, David, and Silja Halle, eds.

Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law. Nairobi, UNEP, 2009.

Jensen, David, and Steve Lonergan, eds.

Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding. Abingdon, Oxon, Earthscan, 2012.

Johnson, Giff

Nuclear Past, Unclear Future. Majuro, Micronitor News and Printing Company, 2009.

Jorgensen, Nikolai

Water and War: Symposium on Water in Armed Conflicts (Montreux, 21–23 November 1994). Geneva, ICRC, 1995.

"The protection of freshwater in armed conflict", *Journal of International Law and International Relations*, vol. 3 (2007), pp. 57–96.

Lung, Wan Pun

"Pre-conflict military activities: environmental obligations and responsibilities of States", *Chinese Journal of International Law*, vol. 14 (2015) pp. 465–496.

Mensah, Thomas A.

"Environmental damages under the Law of the Sea Convention", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*. Cambridge, Cambridge University Press, 2000, pp. 226–249.

Miggiani, Mark Anthony

"War remnants: a case study in the progressive development of international law", thesis, Institut universitaire de hautes études internationales, 1988.

Mitchell, Ronald B.

"International environmental agreements: a survey of their features, formation, and effects", *Annual Review of Environment and Resources*, vol. 28 (2003), pp. 429–461.

Murphy, Sean D., Won Kidane and Thomas R. Snider

Litigating War: Arbitration of Civil Injury by the Eritrea–Ethiopia Claims Commission. New York, Oxford University Press, 2013.

Oviedo, Gonzalo, Luisa Maffi and Peter Bille Larsen

Indigenous and Traditional Peoples of the World and Ecoregion Conservation: An Integrated Approach to Conserving the World's Biological and Cultural Diversity. Gland, World Wide Fund for Nature, 2000. Available from https://wwf.panda.org/wwf_news/?3781/Indigenous-and-Traditional-Peoples-of-the-World-And-Ecoregion-Conservation-An-Integrated-Approach-to-Conserving-the-worlds-Biological-and-Cultural-Diversity-English.

PAX

Amidst the Debris … A Desktop Study on the Environmental and Public Health Impact of Syria's Conflict. Utrecht, PAX, 2015. Available from www.paxforpeace.nl/stay-informed/news/amidst-the-debris-environmental-impact-of-conflict-in-syria-could-be-disastrous.

Payne, Cymie R., and Peter H. Sand, eds.

Gulf War Reparations and the UN Compensation Commission: Environmental Liability. Oxford, Oxford University Press, 2011.

Ramsar Convention Secretariat

The Ramsar Convention Manual: A Guide to the Convention on Wetlands (Ramsar, Iran, 1971), 6th ed. Gland, 2013. Available from www.ramsar.org/sites/default/files/documents/library/manual6-2013-e.pdf.

Rieu-Clarke, Alistair, Ruby Moynihan and Bjørn-Oliver Magsig

UN Watercourses Convention User's Guide. Dundee, International Hydrological Programme-Hydrology for the Environment, Life and Policy Centre for Water Law, Policy and Science, 2012

Roch, Philippe, and Franz Xaver Perrez

"International environmental governance: the strive towards a comprehensive, coherent, effective and efficient international environmental regime", *Colorado Journal of International Environmental Law and Policy*, vol. 16 (2005), pp. 1–25.

Sari, Aurel

"Status of forces and status of mission agreements under the ESDP: the EU's evolving practice", EJIL, vol. 19 (2008), pp. 67–100.

Shelton, Dinah, and Isabelle Cutting

"If you break it, do you own it? Legal consequences of harm from military activities", *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246.

Stahn, Carsten, and Jann K. Kleffner, eds.

Jus Post Bellum*: Towards a Law of Transition from Conflict to Peace*. The Hague, T.M.C. Asser Press, 2008.

Stahn, Carsten, Jens Iverson and Jennifer S. Easterday, eds.

Jus Post Bellum*: Mapping the Normative Foundations*. Oxford, Oxford University Press, 2014.

Tignino, Mara

"Water in times of armed conflict", *in* International Bureau of the Permanent Court of Arbitration, ed., *Resolution of International Water Disputes: Papers Emanating from the Sixth PCA International Law Seminar, November, 8, 2002*. The Hague, Kluwer Law International, 2003, pp. 319–350.

"Reflections on the legal regime of water during armed conflicts", Paper presented at the Fifth Pan-European International Relations Conference, The Hague, 9–11 September 2004. Available from www.afes-press.de/pdf/Hague/Tignino_LegalRegime_Water.pdf.

"Water security in times of armed conflicts", *in* Hans Günter Brauch *et al.* (eds.), *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concepts*. Berlin, Springer, 2009, pp. 763–778.

"Water, international peace, and security", *International Review of the Red Cross*, vol. 92 (2010), pp. 647–674.

L'eau et la guerre: éléments pour un régime juridique. Brussels, Bruylant, 2011.

"The right to water and sanitation in post-conflict peacebuilding", *Water International*, vol. 36 (2011), pp. 241–248.

"The right to water and sanitation in post-conflict legal mechanisms: an emerging regime?", *in* Erika Weinthal, Jessica Troell and Mikiyasu Nakayama, eds., *Water and Post-Conflict Peacebuilding*. Abingdon, Earthscan, 2014, pp. 383–402.

United Nations Economic Commission for Europe

The Aarhus Convention: An Implementation Guide (United Nations publication, Sales No. E.13.II.E.3). Available from www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

United Nations Environment Programme

Addressing the Role of Natural Resources in Conflict and Peacebuilding: A Summary of Progress from UNEP's Environmental Cooperation for Peacebuilding Programme, 2008–2015. Nairobi, UNEP, 2015. Available from www.unep.org/resources/publication/addressing-role-natural-resources-conflict-and-peacebuilding.

United Nations Environment Programme *et al.*

Women and Natural Resources: Unlocking the Peacebuilding Potential. 2013. Available from www.unep.org/resources/report/women-and-natural-resources-unlocking-peace-building-potential.

United Nations Institute for Training and Research and Libyan Institute for International Relations

Remnants of War, UNITAR/CR/26. New York, 1983.

Unruh, Jon, and Rhodri C. Williams, eds.

Land and Post-Conflict Peacebuilding. Abingdon, Earthscan, 2013.

Vialle, Anne-Cecile *et al.*

"Peace through justice: international tribunals and accountability for wartime environmental damage", *in* Carl Bruch, Carroll Muffett and Sandra S. Nichols, eds., *Governance, Natural Resources, and Post-Conflict Peacebuilding*, Abingdon, Earthscan, 2016, p. 665–718.

Vöneky, Silja

"Peacetime environmental law as a basis of State responsibility for environmental damage caused by war", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 190–225.

Waleij, Annica, and Birgitta Liljedahl

"The gap between buzz words and excellent performance: the environmental footprint of military and civilian actors in crises and conflict settings", report FOI-R-4246-SE (2016).

Weinthal, Erika, Jessica Troell, and Mikiyasu Nakayama, eds.

Water and Post-Conflict Peacebuilding. Abingdon, Oxon, Earthscan, 2014.

Westing, Arthur H.

Explosive Remnants of War: Mitigating the Environmental Effects. London, Taylor and Francis, 1985.

"Herbicides in warfare: the case of Indochina", *in* Philippe Bourdeau *et al.*, eds., *Ecotoxology and Climate*, Chichester, John Wiley and Sons, 1989, pp. 337–357.

Zemmali, Ameur

"The protection of water in times of armed conflict", *International Review of the Red Cross*, No. 308 (1995), pp. 550–564.

"The right to water in times of armed conflict", *in* Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie, eds., *Making the Voice of Humanity Heard*, Leiden, Martinus Nijhoff, 2004, pp. 307–318.

Introduction

1. At its sixty-fifth session, in 2013, the International Law Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and appointed Marie G. Jacobsson as Special Rapporteur for the topic.[1]

2. The topic was included in the long-term programme of work in 2011. Consideration of the topic proceeded to informal consultations that began during the sixty-fourth session of the Commission, in 2012, and continued at the sixty-fifth session, in 2013, when the Commission held more substantive informal consultations. Those initial consultations offered members of the Commission an

[1] *Yearbook … 2013*, vol. II (Part Two), p. 72, para. 131.

opportunity to reflect and comment on the road ahead. The Special Rapporteur presented a preliminary report at the sixty-sixth session, in 2014,[2] on the basis of which the Commission held a general debate.[3]

3. The Special Rapporteur presented her second report at the Commission's sixty-seventh session, in 2015.[4] The aim of the second report was to identify existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflicts. The Commission held a general debate on the basis of the report and decided to refer the draft principles contained in the report to the Drafting Committee, with the understanding that the provision on "use of terms" was referred for the purpose of facilitating discussions and would be left pending by the Drafting Committee at that stage.[5] The Drafting Committee examined the draft principles and provisionally adopted a draft text containing provisions on the scope and purpose of the draft principles, as well as six draft principles. The Commission was not requested to act on the draft principles, as they had been presented for informational purposes only.[6] The Commission took note of the draft introductory provisions and draft principles as presented by the Drafting Committee. It was anticipated that commentaries to the draft principles would be considered at the next session.[7]

4. The present report contains a brief summary of the debates held by the Commission in 2015 and by the Sixth Committee of the General Assembly during its seventieth session (2015). It also summarizes the responses from States with respect to specific issues that were identified by the Commission as being of particular interest.

[2] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/674.

[3] *Yearbook … 2014*, vol. II (Part Two), pp. 154 *et seq.*, paras. 192–213.

[4] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685.

[5] *Ibid.*, vol. II (Part Two), p. 64, para. 133. For a more comprehensive presentation of the debate, see *Yearbook … 2014*., vol. I, 3227th to 3231st meetings.

[6] The text as provisionally adopted by the Drafting Committee is reproduced in *Yearbook … 2015*, vol. II (Part Two), p. 64, para. 134, footnote 372.

[7] *Yearbook … 2015*, vol. II (Part Two), p. 64, para. 134.

Chapter I

General overview and developments concerning the topic

A. Purpose of the report

5. The main focus of the present report is to identify rules applicable in post-conflict situations.[8] It addresses legal aspects related to remnants of war and other environmental challenges. It also includes proposals on post-conflict measures, access to and sharing of information, and post-conflict environmental assessments and reviews. However, the report is not strictly limited to the post-conflict phase. In order to get an overview of the topic it will also address preventive measures, as only one draft principle thus far has been suggested with respect to that phase.[9] The report also includes a draft principle on the rights of indigenous peoples.

6. The report therefore consists of three chapters. The first chapter summarizes the consultations in the Commission and reflects views expressed by States in the Sixth Committee at the seventieth session of the General Assembly. It also contains a substantive summary of the responses from States as a result of the invitation by the Commission to submit additional information.

7. The second chapter addresses rules of particular relevance applicable in post-conflict situations. It starts with general observations that include discussions on areas of law that are of particular relevance for the topic, such as the application of particular treaties on environmental law, and the rights of indigenous peoples. It also includes a section on access to and sharing of information, including the general obligation to cooperate.

8. The third chapter is a brief analysis of the three phases of the work conducted thus far. It also includes suggestions for the future programme of work.

9. The annex contains nine additional draft principles proposed by the Special Rapporteur.

Method and sources

10. The work on this topic continues to operate on the assumption that the law of armed conflict is *lex specialis*. It follows that the law of armed conflict takes precedence over or possibly coexists with other rules of international law.[10] In order to limit the discussions to this conventional legal postulation, the Special Rapporteur has decided not to address the ongoing academic discussions on the concept of *jus post bellum*. The legal-political discussion on this concept is wider than positive law and has a clear connection to just war theories.[11]

11. The more political dimensions of post-conflict peacebuilding are not discussed in the present report. If such a line were not drawn, this topic would have no temporal ending. As a consequence, matters relating to reconstruction and institution-building and strategies for the foundation for sustainable development and financing are considered to be beyond the scope of this topic.[12]

[8] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 230–231.

[9] See footnote 6 above.

[10] See, for example, *Yearbook … 2014*, vol. II (Part One), document A/CN.4/674, paras. 5–6.

[11] *Jus post bellum* is the focus of a major academic project at Leiden University and much research material is available from its webpage, www.universiteitleiden.nl. See also Stahn, Easterday and Iverson, *Jus Post Bellum: Mapping the Normative Foundations*, and Stahn and Kleffner, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*.

[12] See www.un.org/peacebuilding/.

12. Managing land and water are two of the most important areas in the peacebuilding phase. These two areas almost deserve to become an agenda item of their own. It would take this topic too far to address these matters within the post-armed conflict phase beyond the immediate end of hostilities.[13] The protection of water in relation to armed conflict is not specifically addressed in the present report, as the report aims to examine the protection of the environment in relation to armed conflict more generally. Although the protection of water in relation to armed conflicts thus falls outside the scope of the report, it is an increasingly important topic which perhaps deserves the attention of the Commission in its own right.[14]

13. The work of the United Nations Environment Programme (UNEP) in strengthening national environmental management capacity in States affected by conflicts and disasters is critical for the understanding of post-conflict measures. UNEP has been called upon by the United Nations system and Member States to conduct impartial assessments of the environmental consequences of armed conflict. It has assessed the environmental aspects of armed conflicts and crises in numerous situations and has become increasingly involved in post-conflict situations.[15]

14. As has been the case in the previous reports, the present report contains information on State practice based on the information received from States directly. Such information has been obtained through States' responses to questions posed by the Commission and their statements on the topic in the Sixth Committee of the General Assembly. In addition, the information has been obtained through official websites of States and relevant organizations. Such information is of a primary source character. Although such information is not comprehensive, it provides important information of relevance to the topic.

15. Obtaining State practice and practice of non-State actors in non-international armed conflict remains challenging.[16] In the second report, the Special Rapporteur therefore took the view that such information is certainly of interest even if it does not constitute "State practice" in the legal sense of the word. At the same time it was noted that the Commission's discussions in 2014 on the topic "Identification of customary international law" revealed a clear tendency within the Commission not to include practice by non-State actors as part of the concept of customary international law.[17] The Special Rapporteur also reported the difficulties in obtaining information on practice by non-State actors. Yet some members of the Commission advised the Special Rapporteur not to refrain from examining such practice and to take it into account.[18] It was argued that the decision not to address the practice of non-State actors in the context of the topic "Identification of customary international law" should not prejudice the work on the present topic. In the Special Rapporteur's summary of the debate, it was recalled that attempts had been made to find such practice, but that it had been very difficult to find. The reason is that those actors that carry the knowledge of the practice of non-State actors are prevented from revealing the source of their knowledge and even the content of the practice. Very few examples are publicly available.[19] This is the case also with the information underpinning the present report—albeit with one important exception, namely, peace agreements.

16. The report also contains a section on relevant case law from primarily international and regional courts.

17. Some States and members of the Commission have referred to protection of the environment in situations of occupation. It should be recalled that situations of occupation can vary greatly in length, from very short-term occupation lasting only a few days to long-term occupations lasting several years. Long-term situations of occupation are of particular relevance when the protection of the environment is considered. The decisions of numerous courts and tribunals confirm that the protection of property during belligerent occupation has indeed been applied in an environmental context.[20] Although the rele-

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[13] For an excellent description of issues faced during the management of land and water in the peacebuilding phase, see Weinthal, Troell and Nakayama, *Water and Post-Conflict Peacebuilding* and Unruh and Williams, *Land and Post-Conflict Peacebuilding*.

[14] See Tignino, "The right to water and sanitation in post-conflict peacebuilding"; Tignino, "Water, international peace and security"; Tignino, *L'eau et la guerre: éléments pour un régime juridique*; Tignino, "Water security in times of armed conflicts"; Tignino, "Water in times of armed conflict"; Tignino, "The right to water and sanitation in post-conflict legal mechanisms: an emerging regime?"; Tignino, "Reflections on the legal regime of water during armed conflicts"; Abouali, "Natural resources under occupation: the status of Palestinian water under international law"; Benvenisti, "Water conflicts during the occupation of Iraq"; Boutruche, "Le statut de l'eau en droit international humanitaire"; ICRC, *Water and War: ICRC Response*; Jorgensen, "The protection of freshwater in armed conflict"; ICRC, *Water and War: Symposium on Water in Armed Conflicts (Montreux, 21–23 November 1994)*; Zemmali, "The protection of water in times of armed conflict"; Zemmali, "The right to water in times of armed conflict".

[15] There is a link between the UNEP Environmental Cooperation for Peacebuilding programme and peacebuilding, in that the programme has been helping the United Nations system and Member States understand and address the role of the environment and natural resources in conflict and peacebuilding, but this will not be addressed in the present report.

[16] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 8–9.

[17] *Ibid.*, para. 8.

[18] See, for example, *Yearbook … 2015*, vol. I, 3265th meeting, p. 163, para. 68 (Mr. Tladi).

[19] *Ibid.*, 3269th meeting, pp. 192–193, para. 41 (Special Rapporteur).

[20] There are numerous cases dealing with this issue. For but a few examples, see generally *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168; *Prosecutor v. Hermann Wilhelm Göring et al., Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nuremberg, 1947); *Prosecutor v. E.W. Bohle et al., Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, vol. XIV (Washington, D.C., United States Government Printing Office, 1952); *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Judgment, Case No. IT-98-34-T, Trial Chamber, International Tribunal for the Former Yugoslavia, 31 March 2003; United States, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1023–27 (W.D. Wash. 2005), affirmed in 503 F.3d 974 (9th Cir. 2007). See also the reports of the Panel of Commissioners appointed by the Governing Council of the United Nations Claims Commission, contained in documents S/AC.26/2001/16, S/AC.26/2002/26, S/AC.26/2003/31, S/AC.26/2004/16, S/AC.26/2004/17 and S/AC.26/2005/10. As noted in the second report of the Special Rapporteur (*Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 74), the relevance of environmental considerations in relation to situations of occupation can also be seen in the military manual of the United Kingdom, which prohibits the extensive destruction of the natural environment unless it is justified by military necessity. See United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004 ed.), para. 11.91. Available from www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

vance of situations of occupation to the topic is noted, it is not specifically addressed in the present report, as the report aims to examine the protection of the environment in relation to armed conflicts in the post-conflict phase only. Although it is important to note that situations of occupation do often extend beyond the cessation of active military hostilities and that they may have implications for private property rights, situations of occupation are not only confined to the post-conflict phase of armed conflict. Compensation for breaches of the law of occupation may be linked to both compensation for a breach of a *jus ad bellum* rule and a rule that is connected with the obligation of the occupying power. There is a close correlation to private property rights. While not explicitly dealt with in the present report, the protection of the environment in situations of occupation remains relevant to the topic.

18. The connection between the legal protection of natural resources and of the natural environment is partly addressed since States have made the connection in their statements in the Sixth Committee and reportedly in their national legislations and regulations.

19. The marine environment is specifically addressed since it poses somewhat different legal challenges than the land domain. This is partly due to the miscellaneous legal status of the sea, ranging from internal waters to the high seas. The legal protection of the marine environment is in reality weak, and belligerents cannot be held accountable for having been engaged in lawful military operations (*jus ad bellum*) unless they have violated the law of armed conflict (*jus in bello*). Hence, it is difficult to invoke liability and State responsibility. Yet remedial and restorative measures may need to be undertaken to ensure that remnants of war (e.g. explosive and chemical remnants, leaking wrecks) do not continue to destroy the marine environment and threaten the safety of human beings using the environment. International cooperation is essential.

20. As is the case with previous reports, direct references to literature are strictly limited. A more extensive list of literature that has been consulted is found in annex II to the Special Rapporteur's second report.[21] References to comments and analyses by authors that have contributed to the doctrine will be made in future commentaries.

B. Consultations in the Commission at its sixty-seventh session

21. At its sixty-seventh session, in 2015, the Commission held a general debate on the basis of the second report submitted by the Special Rapporteur. This debate is summarized in the 2015 report of the Commission.[22] The short recapitulation of the debate below focuses on views expressed which are of particular relevance to the scope of the present report.

22. Members of the Commission generally reiterated the importance of the topic. A number of members acknowledged the decision to focus the second report on the law of armed conflict. Nonetheless, the discussions also centred on the importance of addressing the continued applicability of international environmental law, international human rights law and other relevant treaties/bodies of law. It was stated that such a review should be based on the Commission's 2011 articles on the effects of armed conflicts on treaties.[23] Some members considered such an analysis central to the topic and suggested that it could contribute to avoiding legal gaps in environmental protection in relation to armed conflicts.

23. The methodology of the work was also discussed, with several members referencing the practice of non-State actors as an important source of guidance, and suggesting that this practice should be further studied and analysed.

24. While some members believed that draft articles might be a more pertinent outcome of the Commission's work on the topic, there was broad support for the development of draft principles. In terms of the overall structure of the principles, members were generally of the view that the principles should be structured according to the three temporal phases, while acknowledging that strict dividing lines between the three phases would not be feasible. Specifically regarding the terminology of the draft principles, some members considered that the draft principles should have headings and be phrased in less absolute terms, replacing "shall" with "should". There was also substantial discussion regarding the terms "environment" and "natural environment". In essence, members acknowledged the importance of ensuring uniformity, regardless of which term was chosen.

25. Discussions were held on the limitation of the scope of the topic. There was broad support for addressing non-international armed conflicts as part of the topic. Some members nevertheless cautioned about the difficulty of locating sufficient practice and customary international law in this respect. Different aspects of the human environment, cultural heritage, natural heritage zones and cultural aspects pertaining to the topic were discussed. While some members were of the view that the exploitation of natural resources was not directly related to the scope of the topic, it was noted that the human rights implications of extraction and other actions relating to natural resources might be pertinent to address.

26. Suggestions were also made regarding the scope, use of terms and purpose of the draft principles, as outlined in the preamble. Several members were of the view that the scope and use of terms should be included in the operative text rather than the preamble, with a number of members suggesting that the purpose should also be added to the operative text. Moreover, a number of members were of the opinion that the term "preventive and restorative measures" was too restrictive.

27. Several members suggested that a provision on use of terms was needed to clarify the scope of the draft

[21] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685.

[22] See *Yearbook … 2015*, vol. II (Part Two), pp. 66–70, paras. 141–170. For a more comprehensive presentation of the debate, see *ibid.*, vol. I, 3264th to 3269th meetings.

[23] General Assembly resolution 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in the *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

principles overall. It was acknowledged that the delineations of the terms "environment" and "armed conflict", as tentatively outlined by the Special Rapporteur, were to be considered "working definitions" for the purposes of this topic. A number of members found the formulation of the term "the environment" to be too broad in this context, and suggested that the formulation be limited to the environment as relevant to situations of armed conflict. Regarding the formulation of the term "armed conflict", several members supported it as being broad enough to cover non-international armed conflicts, noting that such conflicts, while increasingly common and damaging to the environment, often prove challenging to regulate. It was also noted that terms from an instrument dealing with peacetime situations could not simply be transposed to situations of armed conflict.

28. Concerning specific draft principles as proposed by the Special Rapporteur, the possibility of the environment representing civilian or military objectives was given particular attention. Several members suggested that the principle be modified to reflect that no part of the environment be made the objective of an attack, unless and until it becomes a military objective.

29. A number of members supported including references to ensuring the strongest possible protection of the environment through fundamental principles and rules of international humanitarian law, whereas other members cautioned against it. In that context, it was observed that environmental considerations were considered to be of different standing in *jus in bello* and *jus ad bellum*, respectively. It was also noted that the role of environmental considerations when assessing proportionality and necessity should be examined.

30. While the prohibition of reprisals against the natural environment was welcomed and supported by a large number of members, its status under customary international law was called into question by others.

31. On the suggestion to establish protected zones of major ecological importance, members sought to clarify the practical and normative effects of designating such sites. The possible effects of unilateral declarations of such zones were discussed, as were the question of whether the principle should cover both natural and cultural heritage sites, and the potential role of cultural considerations in designating such sites. It was also suggested that a separate draft principle could be added on nuclear-weapon-free zones. It was stated that provisions on zones of major ecological importance should apply to all three temporal phases.

32. To supplement the principles proposed by the Special Rapporteur, members suggested including draft principles on topics such as specific principles reflecting the prohibition against causing widespread, long-term and severe damage to the natural environment, specific weapons and training and dissemination requirements, as well as considering special regimes such as indigenous rights.

33. It was suggested that the third report should include proposals on how international organizations can contribute to the legal protection of the environment and on protection of the environment through a duty of cooperation or sharing of information. The intention of the Special Rapporteur to address the issue of occupation in her third report was welcomed. On a general level, it was observed that consideration should be given to the extent to which the final outcome of the work on the topic could constitute progressive development and contribute to the development of *lex ferenda*.

34. A number of members specifically welcomed the intention of the Special Rapporteur to continue her collaboration with regional organizations and international entities, such as UNEP, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Committee of the Red Cross (ICRC). It was also suggested that the third report should contain an outline of the draft principles envisioned, so as to facilitate future work on the topic. In addition, there was widespread agreement that it would be helpful if States continued to provide examples of domestic and regional legislation and case law.

C. Debate in the Sixth Committee of the General Assembly at its seventieth session

35. Some 35 States addressed the topic during the seventieth session of the General Assembly, based on the report of the Commission on the work of its sixty-seventh session in 2015.[24]

36. Several States addressed the six draft principles as provisionally adopted by the Drafting Committee. Four States confined their comments largely to the five draft principles originally proposed by the Special Rapporteur.[25] It was noted that the upcoming commentaries to the draft principles were an integral part of the project that would assist in the continued analysis.[26]

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[24] Austria (A/C.6/70/SR.24, paras. 66–70), Belarus (*ibid.*, paras. 15–16), China (A/C.6/70/SR.22, para. 74), Croatia (A/C.6/70/SR.24, paras. 86–89), Cuba (*ibid.*, para. 10), Czech Republic (*ibid.*, para. 45), El Salvador (*ibid.*, paras. 96–97), France (A/C.6/70/SR.20, para. 22), Greece (A/C.6/70/SR.24, paras. 2–4), Indonesia (A/C.6/70/SR.23, para. 30), Iran (Islamic Republic of) (A/C.6/70/SR.25, paras. 2–9), Israel (*ibid.*, paras. 77–78), Italy (A/C.6/70/SR.22, paras. 116–120), Japan (A/C.6/70/SR.25, paras. 30–31), Lebanon (A/C.6/70/SR.24, paras. 58–60), Malaysia (A/C.6/70/SR.25, paras. 47–49), Mexico (*ibid.*, para. 103), Netherlands (A/C.6/70/SR.24, paras. 28–31), New Zealand (A/C.6/70/SR.25, paras. 101–102), Norway, on behalf of the Nordic States (A/C.6/70/SR.23, paras. 106–107), Palau (A/C.6/70/SR.25, paras. 26–28), Poland (*ibid.*, paras. 18–19), Portugal (A/C.6/70/SR.24, paras. 78–80), Republic of Korea (A/C.6/70/SR.25, para. 82), Singapore (A/C.6/70/SR.23, paras. 121–124), Slovenia (A/C.6/70/SR.24, paras. 39–41), Spain (A/C.6/70/SR.25, para. 109), Switzerland (*ibid.*, paras. 96–98), United Kingdom of Great Britain and Northern Ireland (A/C.6/70/SR.24, paras. 21–22), United States of America (A/C.6/70/SR.25, paras. 63–68) and Viet Nam (A/C.6/70/SR.25, paras. 40–42). Full statements are on file with the Secretariat; the present report will nonetheless as often as possible refer to the summary records of the debate, as is the standard practice of the Commission.

[25] Belarus (A/C.6/70/SR.24, para. 16), Slovenia (*ibid.*, paras. 40–41), Italy (statement of 6 November 2015, 22nd meeting of the Sixth Committee, seventieth session of the General Assembly) and Malaysia (statement of 11 November 2015, 25th meeting of the Sixth Committee, seventieth session of the General Assembly).

[26] Indonesia (A/C.6/70/SR.23, para. 30), Italy (statement of 6 November 2015, 22nd meeting of the Sixth Committee, seventieth session of the General Assembly), Malaysia (A/C.6/70/SR.25, para. 49) and Republic of Korea (*ibid.*, para. 82).

37. The majority of the statements provided by States underlined the importance of the topic.[27] It was stated that protection of the environment was considered a common concern for humanity.[28] Some States also raised the protection of the marine environment in particular.[29] It was also suggested that, since the environment serves the population, safeguarding it is important as a means of protecting human health and promoting sustainability.[30]

38. A number of States expressed support for the temporal approach undertaken by the Special Rapporteur.[31] One State expressed doubts about the feasibility of the selected approach[32] and some concern was raised over the uncertainty of the direction of the topic.[33] It was suggested that the Commission should avoid addressing concurrent application, during armed conflict, of bodies of international law other than international humanitarian law,[34] and that the Commission should focus on analysing how international humanitarian law relates to the environment.[35] A number of delegations reiterated the significance of not seeking to revise the law of armed conflict.[36]

39. It was suggested that the effects of armed conflict on environmental agreements could be examined, as well as the *lex specialis* character of the law of armed conflict.[37] A number of States spoke of addressing the intersections between the law of armed conflict and environmental law, and encouraged the Special Rapporteur to further analyse the applicability of relevant rules and principles of international environmental law in this context.[38] Rule 44 of the 2005 ICRC study on customary international humanitarian law,[39] the duty of care provided for in article 55 of Additional Protocol I to the Geneva Conventions and the no-harm rule and the precautionary principle under environmental law were mentioned specifically in this context.[40] While one State suggested that the intersection between human rights and humanitarian law should be analysed,[41] others cautioned about the implications of addressing human rights as part of the topic.[42]

40. Regarding the scope, some States raised concerns regarding the inclusion of non-international armed conflicts.[43] Nonetheless, several States were of the view that both categories should be addressed.[44] It was suggested that the differences between non-international and international armed conflicts should be reflected in developing a methodology for the topic.[45] The view was also expressed that situations falling short of non-international armed conflict, such as internal disturbances and tensions, should not be addressed within the scope of the present topic.[46]

41. States expressed various views regarding whether and how to address cultural heritage and areas of cultural importance[47] and natural resources.[48] Some States suggested that specific weapons and the effects of such weapons on the environment should be addressed within the scope of the topic,[49] whereas others suggested that this subject matter should be excluded.[50] Some States explicitly underlined the importance of addressing the consequences of the use of nuclear weapons.[51] Rehabilitation efforts, toxic remnants of war and depleted uranium[52] were highlighted as important aspects of the topic.[53] It was considered that rules and principles on distinction, proportionality, military necessity and precautions in attack, as referred to in the draft principles, were particularly relevant for the topic.[54] It was suggested that the relationship between the protection of the environment and

[27] Belarus (A/C.6/70/SR.24, para. 15), Cuba (*ibid.*, para. 10), El Salvador (statement of 10 November 2015, 24th meeting of the Sixth Committee, seventieth session of the General Assembly), Indonesia (statement of the 9 November 2015, 23rd meeting of the Sixth Committee, seventieth session of the General Assembly), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 2), Lebanon (A/C.6/70/SR.24, paras. 58–59), Mexico (A/C.6/70/SR.25, para. 103), New Zealand (A/C.6/70/SR.25, para. 101), Norway, on behalf of the Nordic States (A/C.6/70/SR.23, para. 106), Palau (A/C.6/70/SR.25, para. 26), Poland (*ibid.*, para. 18), Portugal (A/C.6/70/SR.24, para. 78) and Slovenia (A/C.6/70/SR.24, para. 39).

[28] Cuba (A/C.6/70/SR.24, para. 10), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 2), and New Zealand (*ibid.*, para. 101).

[29] Iran (Islamic Republic of) (A/C.6/70/SR.25, paras. 6–7), Lebanon (A/C.6/70/SR.24, para. 58) and Palau (A/C.6/70/SR.25, para. 28).

[30] Israel (statement of 11 November 2015, 25th meeting of the Sixth Committee, seventieth session of the General Assembly).

[31] El Salvador (A/C.6/70/SR.24, para. 96), Italy (A/C.6/70/SR.22, para. 116) and Lebanon (A/C.6/70/SR.24, para. 60).

[32] Spain (A/C.6/70/SR.25, para. 109).

[33] Czech Republic (A/C.6/70/SR.24, para. 45), United States (A/C.6/70/SR.25, para. 63) and Spain (*ibid.*, para. 109).

[34] United States (*ibid.*, para. 64).

[35] Israel (*ibid.*, para. 77), Japan (*ibid.*, para. 30), Singapore (A/C.6/70/SR.23, para. 121) and United Kingdom (A/C.6/70/SR.24, para. 21).

[36] Croatia (A/C.6/70/SR.24, para. 86), Singapore (A/C.6/70/SR.23, para. 121) and United Kingdom (A/C.6/70/SR.24, para. 21).

[37] Italy (A/C.6/70/SR.22, para. 117).

[38] Austria (A/C.6/70/SR.24, para. 66), Belarus (A/C.6/70/SR.24, para. 15), Croatia (A/C.6/70/SR.24, para. 86), Greece (A/C.6/70/SR.24, paras. 2–3), Italy (A/C.6/70/SR.22, para. 117), Lebanon (A/C.6/70/SR.24, para. 59), Poland (A/C.6/70/SR.25, para. 18) and Slovenia (A/C.6/70/SR.24, para. 39).

[39] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules*.

[40] Greece (A/C.6/70/SR.24, paras. 2–3).

[41] Italy (A/C.6/70/SR.22, para. 117).

[42] Austria (A/C.6/70/SR.24, para. 66), Belarus (A/C.6/70/SR.24, para. 15), Singapore (A/C.6/70/SR.23, para. 121) and United Kingdom (A/C.6/70/SR.24, para. 21).

[43] China (A/C.6/70/SR.22, para. 74), Republic of Korea (A/C.6/70/SR.25, para. 82) and Viet Nam (A/C.6/70/SR.25, para. 41).

[44] Austria (A/C.6/70/SR.24, para. 70), Croatia (A/C.6/70/SR.24, para. 86), El Salvador (A/C.6/70/SR.24, para. 96), Italy (A/C.6/70/SR.22, para. 118), Lebanon (A/C.6/70/SR.24, para. 60), New Zealand (A/C.6/70/SR.25, para. 101), Portugal (A/C.6/70/SR.24, paras. 78–79), Slovenia (A/C.6/70/SR.24, para. 40) and Switzerland (A/C.6/70/SR.25, para. 98).

[45] France (A/C.6/70/SR.20, para. 22).

[46] Croatia (A/C.6/70/SR.24, para. 86) and United Kingdom (A/C.6/70/SR.24, para. 22).

[47] Croatia (A/C.6/70/SR.24, para. 87), Israel (A/C.6/70/SR.25, para. 77), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 8), United Kingdom (A/C.6/70/SR.24, para. 22) and United States (A/C.6/70/SR.25, para. 66).

[48] Israel (A/C.6/70/SR.25, para. 77), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 9) and United Kingdom (A/C.6/70/SR.24, para. 22).

[49] Austria (A/C.6/70/SR.24, para. 67), Iran (Islamic Republic of) (A/C.6/70/SR.25, paras. 2–3) and Mexico (A/C.6/70/SR.25, para. 103).

[50] Israel (A/C.6/70/SR.25, para. 77) and United Kingdom (A/C.6/70/SR.24, para. 22).

[51] Austria (A/C.6/70/SR.24, para. 67), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 3) and Mexico (A/C.6/70/SR.25, para. 103).

[52] Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 3).

[53] Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 5) and Viet Nam (A/C.6/70/SR.25, para. 42).

[54] Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 2), Mexico (A/C.6/70/SR.25, para. 103) and Norway, on behalf of the Nordic States (A/C.6/70/SR.23, para. 106).

military necessity, as well as the practical application of such a principle, should be examined.[55]

42. In addition, it was suggested that issues relating to different thresholds of environmental harm could be considered.[56] The connection to sustainable development and related treaties was referenced specifically.[57] It was also suggested that the draft principles should explore environmental impact assessments for deploying weaponry[58] and the need to protect the marine environment.[59] The view was further expressed that, while the draft principles should focus on general rules and standards, the commentary should also explore regulated methods of warfare, such as incendiary weapons and attacks against works or installations containing dangerous forces.[60]

43. Different preferences were voiced regarding the use of the terms "natural environment"[61] and "environment"[62] in the draft principles. Some States expressed no preference, but simply noted that one alternative should be chosen and applied consistently for the sake of coherence.[63] The view was expressed that it was not possible to merely transpose definitions or provisions from an instrument dealing with peacetime situations to situations of armed conflict, or *vice versa*.[64] It was also noted that it was important to ensure that the definition chosen was compatible with the norms of international humanitarian law and international environmental law.[65]

44. Regarding the term "armed conflict", some States proposed that the existing definition in international humanitarian law be used,[66] while it was also suggested that the working definitions be maintained for the time being.[67] It was also stated that defining the term would complicate the work of the Commission and could risk unintentionally lowering the protection of the natural environment in armed conflict and related threshold of applicability of international humanitarian law.[68] It was also recommended that the Commission add a separate provision with definitions of various terms,[69] as was the case in article 2 of the 2001 articles on prevention of transboundary harm from hazardous activities.[70]

45. Regarding the draft principles as provisionally adopted by the Drafting Committee[71] in general, some States were of the view that they were phrased in too absolute terms and went beyond what they considered to be a reflection of customary international law.[72] The view was also expressed that a draft principle on the duty of States to protect the environment in relation to armed conflict through national legislative measures might be an important addition.[73]

46. Several States underlined the importance of and the need for addressing preventive[74] and remedial measures.[75] It was suggested that both preventive and remedial measures should be defined in the commentary.[76] In addition, some States mentioned reparation and compensation for the post-conflict phase.[77] The need for cooperation was also referenced,[78] as was the SIDS [Small Island Developing States] Accelerated Modalities of Action (SAMOA) Pathway (Samoa Pathway).[79]

47. Draft principle II-1 was addressed by several States, with a number of States highlighting in particular that the environment should not be classified as civilian in nature[80] or as a civilian object.[81]

48. While a number of States expressed their support for examining the issues addressed in draft principles II-2 and II-3,[82] it was also suggested that these principles could be merged and focus on the application of the laws of armed conflict to the environment.[83] In addition, a number of States asked for further clarifications and provided drafting suggestions, including regarding the practical application of the term "environmental considerations".[84]

49. Several States supported the inclusion of draft principle II-4, on the prohibition of reprisals.[85] Some States

[55] Netherlands (A/C.6/70/SR.24, para. 29).

[56] Greece (A/C.6/70/SR.24, para. 3).

[57] Lebanon (A/C.6/70/SR.24, para. 59) and Palau (A/C.6/70/SR.25, para. 26).

[58] Viet Nam (A/C.6/70/SR.25, para. 40).

[59] Palau (A/C.6/70/SR.25, para. 28).

[60] Greece (A/C.6/70/SR.24, para. 4).

[61] Republic of Korea (A/C.6/70/SR.25, para. 82) and United States (A/C.6/70/SR.25, para. 68).

[62] Italy (A/C.6/70/SR.22, para. 118).

[63] France (A/C.6/70/SR.20, para. 22) and Lebanon (A/C.6/70/SR.24, para. 60).

[64] El Salvador (A/C.6/70/SR.24, para. 96) and Malaysia (A/C.6/70/SR.25, para. 48).

[65] Mexico (A/C.6/70/SR.25, para. 103).

[66] Austria (A/C.6/70/SR.24, para. 66) and Croatia (A/C.6/70/SR.24, para. 87).

[67] New Zealand (A/C.6/70/SR.25, para. 101).

[68] Netherlands (A/C.6/70/SR.24, para. 28).

[69] Greece (statement of 10 November 2015, 24th meeting of the Sixth Committee, seventieth session of the General Assembly).

[70] General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.

[71] *Yearbook … 2015*, vol. II (Part Two), para. 134, footnote 372.

[72] Israel (A/C.6/70/SR.25, para. 77), Singapore (A/C.6/70/SR.23, para. 122), United Kingdom (A/C.6/70/SR.24, para. 21) and United States (A/C.6/70/SR.25, para. 63).

[73] Croatia (A/C.6/70/SR.24, para. 89).

[74] Greece (A/C.6/70/SR.24, para. 3), Slovenia (A/C.6/70/SR.24, para. 40), Viet Nam (A/C.6/70/SR.25, paras. 40–42) and Republic of Korea (A/C.6/70/SR.25, para. 82).

[75] Greece (A/C.6/70/SR.24, para. 3), Lebanon (A/C.6/70/SR.24, para. 60), Republic of Korea (A/C.6/70/SR.25, para. 82), and Viet Nam (A/C.6/70/SR.25, paras. 40–42).

[76] Greece (A/C.6/70/SR.24, para. 3).

[77] Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 5), New Zealand (A/C.6/70/SR.25, para. 102) and Viet Nam (A/C.6/70/SR.25, para. 42).

[78] Palau (A/C.6/70/SR.25, para. 27).

[79] Palau (A/C.6/70/SR.25, para. 27). For the Samoa Pathway, see General Assembly resolution 69/15 of 14 November 2014, annex.

[80] Netherlands (A/C.6/70/SR.24, para. 30), Slovenia (A/C.6/70/SR.24, para. 40–41) and Croatia (A/C.6/70/SR.24, para. 88).

[81] Belarus (A/C.6/70/SR.24, para. 16), El Salvador (A/C.6/70/SR.24, para. 96), Netherlands (A/C.6/70/SR.24, para. 30), Slovenia (A/C.6/70/SR.24, paras. 40–41) and United Kingdom (A/C.6/70/SR.24, para. 21).

[82] Norway, on behalf of the Nordic States (A/C.6/70/SR.23, para. 107), Italy (statement of 6 November 2015, 22nd meeting of the Sixth Committee, seventieth session of the General Assembly).

[83] Austria (statement of 10 November 2015, 24th meeting of the Sixth Committee, seventieth session of the General Assembly).

[84] Israel (A/C.6/70/SR.25, para. 78), Netherlands (A/C.6/70/SR.24, para. 29) and United States (A/C.6/70/SR.25, para. 68).

[85] Austria (A/C.6/70/SR.24, para. 70), Italy (A/C.6/70/SR.22, para. 120), Norway, on behalf of the Nordic States (A/C.6/70/SR.23,

were of the view that the status of such a prohibition under customary international law was uncertain, or that such status had not been established.[86]

50. The issue of protected zones was referenced by a large number of States. A number of States were of the view that the protection of such areas was an important aspect of protecting the environment in relation to armed conflicts.[87] Some States raised questions concerning the possible nature of and legal sources establishing such areas,[88] as well as the connection between protected zones and other areas established by related regimes under international law, such as demilitarized zones.[89] A concern was also expressed that draft principle II-5 might lower the protection afforded in draft principle II-1 by requiring that the area be of major environmental and cultural importance.[90] Some States sought to clarify what effect the designation of protected zones would have on third States, and that States not parties to the agreement would not be bound by it.[91] Different views were voiced regarding whether or not such zones should include areas of cultural importance.[92]

51. While a number of States had a preference for keeping the format of draft principles or guidelines,[93] it was also suggested that draft articles or draft conclusions might be more pertinent.[94] The view was also expressed that the present format should be without prejudice to the possibility of the choice of a different format to be taken in due course.[95] Some States simply referred to the "draft principles" without any further comment. It was also noted that the topic might have an important element of progressive development, in line with article 1 of the Commission's statute.[96]

52. During the debate, a number of States offered examples of national and regional practice in the form of, for example, legislation, case law and military manuals.[97] They also shared their experiences of environmental consequences of armed conflicts.[98] The Special Rapporteur remains grateful for those helpful comments and encourages other States to provide such examples of national practice for the purposes of the work of the Commission on this topic.

D. Responses to specific issues on which comments would be of particular interest to the Commission

53. In its report on the work of its sixty-seventh session, in accordance with established practice, the Commission sought information on specific issues on which comments would be of particular interest to it.[99] The request partly repeated the invitation contained in the report on its sixty-sixth session.[100] The Commission also sought "information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict", including but not limited to "national legislation and regulations; military manuals, standard operating procedures, rules of engagement or status of forces agreements applicable during international operations; or environmental management policies covering defence-related activities".[101] The Commission underlined that it would, in particular, be interested in instruments related to preventive and remedial measures.[102]

54. The following States responded to the Commission's request: the Lebanon, Federated States of Micronesia, the Netherlands, Paraguay, Slovenia, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

Lebanon

55. The submission of Lebanon contains five annexed documents, four of which directly address the "Oil slick on Lebanese shores". In addition, Lebanon notes that it is a State party to Additional Protocol I to the Geneva Conventions, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and

para. 107), New Zealand (A/C.6/70/SR.25, para. 102) and Switzerland, (A/C.6/70/SR.25, para. 97).

[86] Israel (A/C.6/70/SR.25, para. 78), Italy (A/C.6/70/SR.22, para. 120), Singapore (A/C.6/70/SR.23, para. 122), United Kingdom (A/C.6/70/SR.24, para. 21) and United States, (A/C.6/70/SR.25, para. 63).

[87] Belarus (A/C.6/70/SR.24, para. 16), Croatia (A/C.6/70/SR.24, para. 88), El Salvador (A/C.6/70/SR.24, para. 97), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 4), Italy (A/C.6/70/SR.22, para. 120), Lebanon (A/C.6/70/SR.24, para. 60), Norway, on behalf of the Nordic States (A/C.6/70/SR.23, para. 107), Singapore, (A/C.6/70/SR.23, para. 123) and Switzerland (A/C.6/70/SR.25, para. 98).

[88] Japan (A/C.6/70/SR.25, para. 31) and Lebanon (A/C.6/70/SR.24, para. 60).

[89] Austria (A/C.6/70/SR.24, para. 68), Croatia (A/C.6/70/SR.24, para. 88), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 4), Italy (statement of 6 November 2015, 22nd meeting of the Sixth Committee, seventieth session of the General Assembly), Singapore (A/C.6/70/SR.23, para. 123), Switzerland (A/C.6/70/SR.25, para. 98) and United Kingdom (A/C.6/70/SR.24, para. 21).

[90] Netherlands (A/C.6/70/SR.24, para. 31).

[91] Statement by Austria to the Sixth Committee, seventieth session, 10 November 2015 and United States (A/C.6/70/SR.25, paras. 65–66).

[92] Italy (A/C.6/70/SR.22, para. 120) and United States (A/C.6/70/SR.25, para. 66).

[93] Netherlands (A/C.6/70/SR.24, para. 28), Singapore (A/C.6/70/SR.23, para. 124) and United Kingdom (A/C.6/70/SR.24, para. 21).

[94] Poland (A/C.6/70/SR.25, para. 19).

[95] Italy (A/C.6/70/SR.22, para. 116).

[96] Belarus (A/C.6/70/SR.24, para. 16) and Portugal (A/C.6/70/SR.24, para. 78).

[97] Croatia (A/C.6/70/SR.24, para. 89), Cuba (A/C.6/70/SR.24, para. 10), Czech Republic (A/C.6/70/SR.24, para. 45), Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 4), Lebanon (A/C.6/70/SR.24, para. 59), New Zealand (A/C.6/70/SR.25, para. 102) and Palau (A/C.6/70/SR.25, para. 27).

[98] Iran (Islamic Republic of) (A/C.6/70/SR.25, para. 7), Lebanon (A/C.6/70/SR.24, para. 58) and Palau (A/C.6/70/SR.25, para. 26).

[99] *Yearbook … 2015*, vol. II (Part Two), paras. 25 and 27.

[100] *Ibid.*, para. 27: "The Commission would appreciate being provided by States with information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

(*a*) treaties, including relevant regional or bilateral treaties;

(*b*) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties; and

(*c*) case law in which international or domestic environmental law was applied to disputes in relation to armed conflict."

The following States submitted information in 2015: Austria, Belgium, Cuba, Czech Republic, Finland, Germany, Peru, Republic of Korea, Spain and United Kingdom of Great Britain and Northern Ireland. See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 29–60.

[101] *Yearbook … 2015*, vol. II (Part Two), para. 28.

[102] *Ibid.*

on their Destruction and the Convention on Cluster Munitions. Lebanon is also a party to the United Nations Convention on the Law of the Sea, and considers article 192 to be of particular relevance.[103] The Government of Lebanon adopted a national mine action policy in 2007, according to which the Government "shall take full responsibility for the humanitarian, socio-economic and environmental impact caused by these devices and shall rid Lebanon from the impact associated with these devices in an expeditious and efficient manner in line with international standards and mine action best practices".[104]

56. The documentation provided by Lebanon revealed the following: In the aftermath of the marine oil spill caused by the destruction of the oil storage tanks at the Jiyeh electric power plant by the Israeli Air Force in 2006, several United Nations agencies and other international, regional and national organizations were involved in assessing the implications of the oil spill.[105] The oil spill consisted in the release of approximately 15,000 tons of fuel oil into the Mediterranean Sea, which contaminated about 150 km of the coastline of Lebanon and of the Syrian Arab Republic.[106] The General Assembly has adopted a yearly resolution on the topic of "Oil slick on Lebanese shores" since its sixty-first session.[107]

57. A number of the resolutions and subsequent reports of the Secretary-General speak to the work undertaken by the United Nations Compensation Commission. In this context, it has been suggested to use certain cases of claims as guidance for the oil slick in terms of measuring and quantifying damage and determining a payable amount of compensation.[108]

58. In its resolution 68/206, the General Assembly requested the Secretary-General to urge agencies and bodies of the United Nations to undertake further studies to measure and quantify the environmental damage sustained by Lebanon and by neighbouring countries.[109] This resulted in a study commissioned by the United Nations Development Programme (UNDP). The study concluded that previous studies undertaken by international and national agencies, such as the International Union for the Conservation of Nature, the World Bank, UNEP and the Food and Agricultural Organization of the United Nations, constituted a solid basis for the measurement and quantification of the environmental damage caused to Lebanon by the oil spill.[110] The study, issued in August 2014, quantified the environmental damage caused by the oil spill at US$ 856.4 million (as at mid-2014).[111]

59. In his 2015 report on the subject, referenced in annex III of the submission of Lebanon, the Secretary-General notes that "there are no further relevant findings available in relation to the environmental impacts sustained by Lebanon and neighbouring countries, beyond the assessments of the environmental impact on the area affected by the oil slick that have been presented to the General Assembly in the corresponding reports of the Secretary-General".[112] It is further noted in this context that UNEP "has indicated that the scientific viability of gathering additional insights through further studies on environmental impacts is limited".[113] Nonetheless, the UNDP report of 2014 suggests that "periodical surveys should be conducted and relevant reports made on the newly manifested ecological injury".[114]

60. The documentation provided by Lebanon also refers to General Assembly resolution 69/212, which notes that "the oil slick has heavily polluted the shores of Lebanon and partially polluted Syrian shores and consequently has had serious implications for livelihoods and the economy of Lebanon, owing to the adverse implications for natural resources, biodiversity, fisheries and tourism, and for human health in the country".[115]

Federated States of Micronesia

61. The Federated States of Micronesia submitted an extensive and substantive contribution in which it emphasizes the importance of protecting the marine environment. It indicates that the hundreds of islands that make up the Federated States of Micronesia have a long history of being theatres of war and staging grounds for military activities, particularly in the prelude to and during the Second World War. Wrecks of military ships and aircraft, as well as hulking weaponry and unexploded ordnance, litter the land and sea of the Federated States of Micronesia. For example, there are 60 military wrecks in the Chuuk Lagoon, in an area that is only 65 kilometres wide, and these wrecks retain large caches of oil that have reportedly begun leaking. A further example is a military vessel in the Ulithi Atoll which has leaked oil into the water space of the Atoll, "resulting of millions of dollars of environmental damage and disrupting the maritime food supply of the inhabitants of Ulithi". It is against this background that the Federated States of Micronesia expresses its keen interest in the present topic.[116]

62. The Federated States of Micronesia supports the temporal approach as used by the Special Rapporteur, and notes that the obligations of belligerents—potential and actual—under international law in relation to the protection of the environment span all three phases identified by the Special Rapporteur. It is observed that armed conflicts do not occur in a vacuum, that planning for a conflict often inflicts serious harm on natural environments, and that the post-conflict phase is not usually devoid of negative

[103] Note verbale dated 29 January 2016 from the Permanent Mission of Lebanon to the United Nations addressed to the Secretariat, p. 1.

[104] *Ibid.*, p. 5.

[105] A/69/313, paras. 4 and 5.

[106] *Ibid.*, para. 4.

[107] Note verbale (see footnote 103 above), p. 1.

[108] See, for example, General Assembly resolution 67/201 of 21 December 2012, paras. 6 and 7, and resolution 66/192 of 22 December 2011, para. 6, as well as A/68/544, paras. 18–19.

[109] General Assembly resolution 68/206 of 20 December 2013, para. 5.

[110] Note verbale (see footnote 103 above); see also UNDP, "Report on the Measurement and Quantification of the Environmental Damage of the Oil Spill on Lebanon", July 2014, para. 44.

[111] *Ibid.*, para. 46.

[112] A/70/291, para. 6.

[113] *Ibid.*

[114] UNDP Report (see footnote 110 above), para. 45.

[115] General Assembly resolution 69/212 of 19 December 2014, para. 3.

[116] Note verbale dated 29 January 2016 from the Permanent Mission of the Federated States of Micronesia to the United Nations addressed to the Secretariat, para. 1.

consequences for the environment. In general, the Federated States of Micronesia supports the working definitions for the terms "armed conflict" and "environment". Regarding weapons, the Federated States of Micronesia accepts the current preference of the Special Rapporteur not to focus on specific weapons, with the understanding that the Commission's consideration of the topic encompasses "any and all types of weapons that may be utilized in an armed conflict".[117]

63. Moreover, the Federated States of Micronesia strongly underlines the need for the Commission to consider the connections between protection of the environment and the safeguarding of cultural heritage, particularly that of indigenous peoples. Specifically, the indigenous population of the Federated States of Micronesia is of the view that linkages between the environment and cultural integrity are important. It is submitted that "belligerents have legal obligations to ensure that they protect all facets of life that depend on the environment, including cultural heritage and practice".[118]

64. The Federated States of Micronesia is a party to a number of relevant multilateral and regional conventions, including Additional Protocol I to the Geneva Conventions. It subscribes fully to the prohibitions in articles 35 and 55 and takes the view that the "[i]ntentional destruction of the natural environment for military gain is a type of total warfare that is abhorrent under international law, particularly in situations where populations depend on that natural environment for survival".[119]

65. The Federated States of Micronesia is a party to a number of disarmament treaties (the Treaty on the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Comprehensive Nuclear-Test-Ban Treaty) "that (at least indirectly) protect the environment in relation to armed conflicts". Insofar as the obligation to protect the environment in relation to armed conflicts encompasses multiple temporal phases, the Federated States of Micronesia views the testing, proliferation and deployment of weapons covered under the aforementioned instruments as violations of those obligations.[120]

66. The Federated States of Micronesia lists a number of universal and regional treaties to which it is a party and which it views as being directly or indirectly applicable in relation to armed conflicts. They include the United Nations Convention on the Law of the Sea; the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (hereainafter, "Noumea Convention") and two of the protocols thereto, the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping and the Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (hereinafter, "Basel Convention"); the Convention on Biological Diversity; the Agreement establishing the South Pacific Regional Environment Programme; the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention); and the Stockholm Convention on Persistent Organic Pollutants.[121]

67. In its submission, the Federated States of Micronesia explains its stance on a number of international rules and principles relating to the protection of the marine environment in relation to armed conflict,[122] including regarding hazardous wastes. The Federated States of Micronesia is of the view that "hazardous wastes" produced as a result of the military activities of parties to the Basel Convention are subject to the obligations and conditions of the Convention, regardless of whether the waste is produced before, during or after armed hostilities.[123] Moreover, the Waigani Convention should be understood to be applicable to the management of hazardous wastes discharged by military vessels and military activities into the Convention area before, during and after military activities and hostilities.[124]

68. The Federated States of Micronesia refers to one of the central principles contained in article 3 of the Convention on Biological Diversity, namely that its Contracting Parties have the responsibility to ensure that activities "within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". This no-harm principle applies in relation to armed conflicts, including during the build-up to actual military hostilities and after those hostilities have ended. This principle may be implemented through designating protected areas where special conservation measures are undertaken to protect biodiversity. In the aftermath of armed conflicts, Contracting Parties to the Convention on Biological Diversity can rehabilitate and restore ecosystems degraded by the conflict. Article 8 (*a*) of the Convention should be interpreted as including the possibility of protecting areas and zones of particular interest in connection with armed conflict and hostilities.[125] The Federated States of Micronesia also notes that the provisions of the Convention on Biological Diversity shall not affect the existing rights and obligations of Contracting Parties under other international agreements, except in accordance with article 22, paragraph 1, "where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity". This prioritization persists during all three phases of armed conflict, including during the build-up to and aftermath of actual hostilities.[126]

[117] *Ibid.*, paras. 2–4.

[118] *Ibid.*, para. 5.

[119] *Ibid.*, para. 7.

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

[121] *Ibid.*, para. 9. With respect to the United Nations Convention on the Law of the Sea, the Federated States of Micronesia underlines the importance of the rule of due regard in *ibid*., para. 10.

[122] *Ibid.*, paras. 10–17.

[123] *Ibid*., para. 10. As an example, the Federated States of Micronesia cites military vessels with intact and inflammable fuel caches that are decommissioned and subject to scrapping.

[124] *Ibid*., para. 17.

[125] See Convention on Biological Diversity, art. 8 (*a*), which establishes a system of protected areas or areas where special measures need to be taken to conserve biological diversity.

[126] Note verbale (see footnote 116 above), para. 12.

69. Regarding the Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region , the Federated States of Micronesia is of the view that the Protocol "applies to pollution incidents involving military vessels and military activities in the Convention area whether prior to, during or in the aftermath of actual military hostilities".[127] The importance of provisions of the Protocol that relate to mutual assistance and operational measures is emphasized, as they relate to reparations and remedial measures more broadly.

70. In addition, the Federated States of Micronesia is of the view that the obligations to cooperate and to prevent, reduce and control pollution caused by discharge of vessels under the Noumea Convention are applicable to military vessels discharging pollutants in the area covered by the Convention. This applicability remains prior to, during and in the aftermath of military hostilities, and it includes pollution emergencies in the Convention area.[128] In connection with the Noumea Convention, the Federated States of Micronesia also submitted that the parties to the Agreement establishing the South Pacific Regional Environment Programme are obligated to work through the Secretariat of the Pacific Regional Environment Programme to address any impacts on the environment caused by military activities in the area covered by the Agreement. Such actions include, but are not limited to, measures to manage and prevent different types of pollution in environments stemming from discharges by military vessels. Currently, the Secretariat is developing a regional strategy to address marine pollution from Second World War ships. The Federated States of Micronesia notes the importance of international cooperation in this regard.[129]

71. In its submission, the Federated States of Micronesia states that obligations in the Stockholm Convention on Persistent Organic Pollutants are considered to be applicable to its parties during all temporal phases of an armed conflict. Thus, a party to the Convention engaged in an armed conflict cannot produce or use any of the persistent organic pollutants during an armed conflict, with the exception of limited and exempted purposes and uses. Moreover, such usage must be undertaken in an environmentally sound manner which protects human health and the natural environment.[130]

72. The Federated States of Micronesia refers to international declarations and other high-level outcomes such as the Rio Declaration on Environment and Development (Rio Declaration),[131] the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States[132] and the Samoa Pathway. The latter documents contain paragraphs that "strongly encourage (if not obligate) [small island developing States] like the [Federated States of Micronesia] and flag States of sunken vessels to work on bilateral bases to address oil leaks from those vessels into the marine and coastal environments of affected [small island developing States]".[133]

73. In accordance with the Federated States of Micronesia Environmental Protection Act—originally adopted in 1982 and amended to its current form in 2012—there may be some restrictions on such an effort by the Federated States of Micronesia regarding certain military activities, such as seeking civil relief for environmental harms caused by warships. That does not mean that the Federated States of Micronesia cannot take steps to ensure that its foreign affairs actions relating to armed conflict do not undermine the efforts to protect the country's natural environment. Even if the Federated States of Micronesia was barred from seeking civil relief for the environmental harms caused by certain military vessels, the Federated States of Micronesia states that "the State that flags/owns those vessels remains obligated under international law to address the environmental harms caused by those vessels in the [Federated States of Micronesia]".[134]

74. The Federated States of Micronesia explains in detail the so-called Compact of Free Association with the United States of America, concluded in 1986 and amended in 2003.[135] The Compact contains both an obligation of the United States to defend the Federated States of Micronesia and its people from an attack or the threat of an attack, as well as an option to establish and use military areas and facilities subject to the terms of a separate agreement referred to in the Compact.[136] The Compact allows the United States to conduct operations necessary to its responsibilities in the territory of the Federated States of Micronesia. The two parties have concluded a status of forces agreement which further regulates the activities of the United States. That agreement provides the Federated States of Micronesia with the ability to seek damage and other reparations from the United States for the defence and security-related activities of United States armed forces in the Federated States of Micronesia. The status of forces agreement "does limit such claims to those arising from 'non-combat activities' of United States armed forces".[137] Such claims "arguably apply to military activities conducted in preparation for, and/or in the aftermath of, actual combat hostilities, especially (but not limited to) activities involving aircraft, vessels, and vehicles of the [United States] armed forces".[138]

75. The Compact's carefully chosen language controlling the use, storage, disposal and movement of radioactive, toxic chemicals and biological weapons and materials by the United States in the Federated States of Micronesia "attempts to strike a balance between the military security and defence objectives of the [United States] on the one

[127] *Ibid*., para. 15.

[128] *Ibid*., para. 14.

[129] *Ibid*., para. 16.

[130] *Ibid.*, para. 13.

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

[132] *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, 10–14 January 2005* (United Nations publication, Sales No. E.05.II.A.4 and corrigendum), chap. I, resolution 1, annex II.

[133] Note verbale (see footnote 116 above), para. 19.

[134] *Ibid.*, para. 30.

[135] *Ibid.*, paras. 20–30.

[136] *Ibid.*, para. 20.

[137] *Ibid.*, paras. 22–23.

[138] *Ibid.*, para. 23.

hand, and the health and safety of the [Federated States of Micronesia] public on the other".[139]

76. In its submission, the Federated States of Micronesia describes United States Public Law 92-32, the Micronesian Claims Act, which provides for compensation for losses incurred during and immediately following the Second World War by the inhabitants of the Pacific islands that comprised the Trust Territory of the Pacific Islands. In the view of the Federated States of Micronesia, the Act "constituted State practice in relation to the provision of compensation to address destructive impacts on natural environments from armed conflicts".[140] The United States provided compensation *ex gratia*, but at the same time the compensation was "intended to help discharge the [United States'] 'responsibility for the welfare of the Micronesian peoples as the administering authority of the [Trust Territory of the Pacific Islands]',which was a legitimate and legal responsibility of the United States with regard to the lingering after-effects of Second World War hostilities (albeit separate from a legal compensation to provide reparations for war damages)".[141] Even if the United States under the Act would provide compensation for those damages as a function of its administrative responsibilities to provide for the welfare of inhabitants of the Trust Territory rather than out of a legal obligation to provide reparations for war damages, "such compensation would still constitute a form of legal obligation, regardless of the administrative nature of its provision, and the compensation would still be in relation to the environmental harms arising from World War II hostilities between the [United States] and Japan".[142]

Netherlands

77. In its submission, the Netherlands indicates that it is not a State party to any regional or bilateral treaties which regulate the protection of the environment in relation to armed conflict.[143]

78. Some of the Netherlands' national legislation is of relevance to the topic. Any national legislation that regulates the protection of the environment is, in principle, also applicable to its Armed Forces, but exceptions can be made to such application.[144] For example, article 9.2.1.5 of the Environmental Management Act "sets out an integrated approach to environmental management in the Netherlands and provides the legal framework by defining the roles of national, provincial or regional, and municipal government".[145] However, article 9.2.1.5 of the Act also provides an exception to its application: some of the prohibitions and obligations provided in terms of the Act may be excluded if it is in the interest of national defence. Such exceptions can, however, only be made through implementing legislation or by Royal Decree.[146] The Environmental Management Act is the only national legislation of the Netherlands concerning the protection of the environment which makes specific reference to a situation of armed conflict.[147] Title 17.2 of the Act regulates the "taking of certain measures in case of environmental damage or the imminent threat thereof" and article 17.8 (*a*) (1) "excludes from the scope of application of this title environmental damage or the imminent threat thereof as a result of an act of war, hostilities, civil war or insurrection".[148]

79. In addition, the Netherlands states that "intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated, when committed in an international armed conflict" is a crime under Netherlands criminal law.[149]

80. No case law currently exists in which environmental law was applied by Netherlands courts to disputes relating to armed conflict.[150]

81. Regarding instruments aimed at protecting the environment, the Netherlands indicates that numerous documents used by its armed forces make reference to the protection of the environment. Both the Netherlands military manual, which is used by all military personnel, and the manual for military law, which is used at the military academy, include the environment as one of the protected elements during armed conflict.[151] The *Manual on International Humanitarian Law* is a relevant instrument because it discusses the protection of the environment in detail.[152]

82. Environmental considerations are also taken into account when determining whether new weapons or means or methods of warfare conform with international humanitarian law, in terms of article 36 of Additional Protocol I to the Geneva Conventions.[153]

83. Lastly, the Netherlands is not a party to any status of forces agreements which specifically include rules regulating the protection of the environment in relation to armed conflict, and it does not consider the protection of the environment in the context of international humanitarian law to be an appropriate subject for such treaties.[154]

Paraguay

84. Paraguay observes that it is a party to Additional Protocol I to the 1949 Geneva Conventions, and that this instrument was translated into domestic law through Act

[139] *Ibid.*, para. 27.

[140] *Ibid.*, para. 31.

[141] *Ibid.*

[142] *Ibid.*

[143] Note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, first para.

[144] *Ibid.*, second para.

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.*

[148] *Ibid.*

[149] *Ibid.*, third para. (see Netherlands, International Crimes Act, art. 5 (5)(*b*)).

[150] *Ibid.*, fourth para.

[151] *Ibid.*, fifth para.

[152] *Ibid.* The Netherlands notes that this is a generic manual which "focuses on specific rules of international humanitarian law, rather than on preventive and remedial measures".

[153] *Ibid.*

[154] *Ibid.*

No. 28 in 1990.[155] The provisions prohibiting different means and methods of warfare that may cause widespread, long-term and severe harm to the environment are mentioned specifically in this context, as is the prohibition against reprisals attacking the natural environment. The national white paper on military defence, as adopted by the National Defence Council on 7 October 1999, contains a number of provisions that are pertinent to the topic, including an obligation to ensure protection and conservation of the environment. Perfecting the defence of the environment was specifically listed as one of the ways of realizing the overall objectives of national defence.[156] In addition, the environment was listed as one of the most important national interests to be defended by the State, in accordance with article 8 of the Constitution of Paraguay. Moreover, the white paper contains a dedicated section on control of the environment (*control del medio ambiente*), in which obligations to protect the environment are outlined.

Slovenia

85. Slovenia has ratified all key instruments of international humanitarian law and international law of armed conflict, including Additional Protocol I to the Geneva Conventions.[157] Moreover, members of the Slovenian Armed Forces have disciplinary responsibility, criminal liability and liability for damages under the Defence Act.[158] No case law currently exists in Slovenia on violations of environmental legislation arising from military activities.[159]

86. Moreover, Slovenia provided examples of provisions that specifically address the conduct of the Slovenian Armed Forces in relation to environmental protection, such as provisions on environmental training of members of the Slovenian Armed Forces, cooperation on the implementation of environmental protection measures in international operations and missions,[160] and a general provision on environmental awareness.[161] Systematic military education and training on environmental protection, and specific information about environmental protection prior to the departure of units deployed for crisis response operations, were listed as additional means to ensure environmental protection. Slovenia has also implemented the relevant North Atlantic Treaty Organization (NATO) standards and policies on environmental protection.[162]

Spain

87. Spain reported that it is a party to treaties on the protection of cultural property in the event of armed conflict. Spanish environmental legislation contains a reference to armed conflicts in Act No. 26/2007 on environmental liability.[163] The Act, which regulates the responsibility of operators to prevent, avoid and remedy environmental damage, excludes environmental damage resulting from an armed conflict from its scope of application.[164] Spain notes that the provision does not specify whether such conflicts are international or non-international.[165] Article 610 of the Spanish Penal Code moreover provides that:

> Anyone who, in the context of an armed conflict, uses or orders the use of methods or means of combat that are prohibited or are intended to cause unnecessary suffering or superfluous injury, or that are designed to or can reasonably be expected to cause excessive, lasting and serious damage to the natural environment, thus compromising the health or survival of the population, or who orders that no quarter shall be given, shall be penalized with a term of imprisonment of 10 to 15 years, without prejudice to the penalty imposed for the resulting damage.[166]

88. However protection of the environment in relation to armed conflict has not been the subject of any ruling by the Spanish judicial bodies on Act No. 26/2007, article 610 of the Penal Code, or any other instrument.[167]

Switzerland

89. Switzerland is a party to the 1949 Geneva Conventions, the three Additional Protocols thereto, and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (hereinafter, "Environmental Modification Convention"). Switzerland also recognizes the obligations stemming from customary international law, notably those pertaining to international humanitarian law. Switzerland welcomes the work by the Commission on this topic, as it could serve to reinforce the protection of the environment in times of armed conflict. Switzerland notes that the environment should be afforded the same protection that is afforded to civilian objects under international humanitarian law. International humanitarian law provides a valuable basis which should be adequately reflected in the elaboration of new and specific protection regimes. Regarding the applicability of international environmental law, Switzerland considers treaties of international environmental law to continue to apply during armed conflict. Switzerland encourages the Commission to include details on applicable law as part of the commentaries, and notes that the mandate of the Commission comprises the progressive development of international law.[168]

90. The general obligations to protect the environment in a domestic context stem from the Federal Act on the Protection of the Environment of 1983.[169] The law addresses numerous major themes related to environmental protection, namely protection against dangerous substances, waste management and remediation of polluted sites. The framework legislation stipulates fundamental rules,

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[155] Note verbale dated 19 January 2016 from the Permanent Mission of Paraguay to the United Nations addressed to the Secretariat, p. 1.

[156] National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay*, 7 October 1999, para. I (A). Available from www.mdn.gov.py/application/files/1114/4242/5025/Politica_de_Defensa.pdf.

[157] Note verbale dated 26 January 2016 from the Permanent Mission of Slovenia to the United Nations addressed to the Secretariat, p. 1.

[158] Defence Act, *Official Gazette of the Republic of Slovenia*, No. 103/04, official consolidated text, arts. 4 and 48.

[159] Note verbale (see footnote 157 above), p. 1.

[160] Rules of Service in the Slovenian Armed Forces, item 210.

[161] Service in Slovenian Armed Forces Act, *Official Gazette*, Nos. 68/07 and 58/08, ZSPJS-I, art. 17.

[162] Note verbale (see footnote 163 above), pp. 2–3.

[163] Note verbale dated 17 February 2016 from the Permanent Mission of Spain to the United Nations addressed to the Secretariat, p. 1.

[164] Act No. 26/2007 of 23 October 2007 on environmental liability, *Official Gazette*, No. 255, 24 October 2007, art. 3.

[165] Note verbale (see footnote 163 above), p. 2.

[166] Spanish Penal Code (Organic Law No. 10/1995 of 23 November, *Official Gazette*, No. 281, 24 November 1995), art. 610.

[167] Note verbale (see footnote 157 above), p. 2.

[168] Note verbale of 2016 from the Permanent Mission of Switzerland to the United Nations addressed to the Secretariat, pp. 1–2.

[169] Loi fédérale du 7 Octobre 1983 sur la protection de l'environnement (LPE, RS 814.01). Available from www.admin.ch/opc/en/classified-compilation/19830267/index.html.

while more detailed provisions, such as specific standards or requirements, can be found in specific ordinances and related materials on the respective topic. In a situation of armed conflict, the law remains operational in principle and should be respected.[170] In addition, other aspects of environmental protection, such as the protection of water,[171] forests,[172] nature and the countryside,[173] are dealt with in specific laws.

91. Switzerland also comments on the proposed draft principles. Regarding the scope of the principles, Switzerland stresses the significance of the draft principle for both international and non-international armed conflicts, and drew attention also to the relevance of the obligations stemming from the Environmental Modification Convention, including the obligation to refrain from using any modification techniques which may have long-term, severe or damaging effects on the environment.[174]

92. In connection with draft principles II-2 and II-3, Switzerland emphasizes that the principle of military necessity does not allow for derogations from the existing rules of international humanitarian law, as the rules of international humanitarian law themselves strike a balance between military necessity and the principle of humanity. Therefore, the principles of military necessity and proportionality could not be invoked to justify damage to the environment.[175]

93. Switzerland supports the proposed draft principle prohibiting reprisals against the natural environment (draft principle II-4), as provisionally adopted by the Drafting Committee.[176] As regards the draft principle on protected zones, Switzerland takes note with interest of the proposal and suggests that the proposed regime on protected zones be compared with similar regimes establishing other protected areas, and that it could be helpful to examine potential synergies between them.[177]

94. Switzerland also refers to the possibility of individual criminal responsibility in accordance with the Rome Statute of the International Criminal Court, and comments on the connection between the protection of installations containing dangerous forces and protection of objects indispensable to the survival of the civilian population, on the one hand, and the protection of the environment, on the other.[178]

United Kingdom of Great Britain and Northern Ireland

95. In its submission, the United Kingdom notes that multilateral environmental agreements are generally silent on questions concerning the protection of the environment in relation to armed conflict, but that these issues are, however, expressly addressed in its *Manual of the Law of Armed Conflict* within the framework of international humanitarian law.[179]

96. The United Kingdom also draws attention to examples that can be found in the context of the Basel Convention where waste is exported and there is therefore a question about compliance by the receiving State with its obligations under the Convention. The Kosovo Force entered into a bilateral agreement with Germany to export waste there.[180] Similarly, the United Kingdom states that it "received some chemical waste precursors from Syria in 2014 … No bilateral agreement was entered into because the [United Kingdom] applied an exemption set out in the [European Union] Regulation implementing the Convention." The United Kingdom observes that in practice, the receipt of the waste was handled in the usual way, but with the Ministry of Defence of the United Kingdom rather than Syrian authorities completing the documentation. The United Kingdom notes that: "The imperative was to safely destroy the chemicals, but in a way that would protect the environment. Given the difficulties for the Syrian authorities to comply, the United Kingdom found a way to comply with the notification regime controlling transboundary movements of hazardous waste. Once the chemical waste was here, the United Kingdom made sure that proper environmental controls were applied."[181]

[170] Note verbale (see footnote 168 above), pp. 1–2.

[171] Federal Act on the Protection of Waters (Loi fédérale sur la protection des eaux), art. 5. Available from www.admin.ch/opc/en/classified-compilation/19910022/index.html.

[172] Federal Act on Forest (Loi fédérale sur les forêts), art. 15. Available from www.admin.ch/opc/en/classified-compilation/19910255/index.html

[173] Federal Act on the Protection of Nature and Cultural Heritage (Loi fédérale sur la protection de la nature et du paysage), art. 11. Available from www.admin.ch/opc/en/classified-compilation/19660144/index.html.

[174] Note verbale (see footnote 168 above), pp. 2–3.

[175] *Ibid*., p. 3.

[176] *Ibid*., p. 2.

[177] *Ibid*., p. 3.

[178] *Ibid*., p. 4.

[179] Note verbale dated 24 March 2016 from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General. For *The Joint Service Manual of the Law of Armed Conflict*, see footnote 20 above.

[180] See www.basel.int/Portals/4/Basel%20Convention/docs/article11/germany-kosovo.pdf.

[181] Note verbale (see footnote 179 above), p. 2.

Chapter II

Rules of particular relevance applicable in postconflict situations

A. General observations

97. The first (preliminary) report on the protection of the environment in relation to armed conflicts did not contain any draft principles. The Special Rapporteur considered that producing draft principles would be premature, since that report provided an introductory overview of the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). The report therefore did not address measures to be taken during or after armed conflict *per se*, even though preparatory acts necessary to implement such measures

may need to be undertaken prior to the outbreak of an armed conflict.[182]

98. Preventive measures and reparative measures are interlinked. It may therefore be useful to return to some aspects of preventive measures in the present report. Although the focus of the report is on measures taken after an armed conflict, it is useful to see the connection between the pre-conflict and post-conflict phases.

99. The preventive measures addressed in the present report are primarily measures with direct connections to armed conflict. For reasons stated in the previous report,[183] it is not possible to go through every single environmental treaty obligation in order to assess its applicability during armed conflict. The preliminary report therefore identified general principles of international environmental law that continue to apply in situations of armed conflict. It is to be reiterated that the law of armed conflict is *lex specialis*, but at the same time this area of international law continuously develops and this development is informed by the development of other areas of international law.

1. Applicability of peacetime agreements, including references from practice of international organizations

100. It has been proposed that the Special Rapporteur should analyse environmental treaties in order to examine whether or not they continue to apply also during armed conflict.[184] Given the vast number of multilateral environmental agreements in existence, it would be a challenging task to analyse each and every one of them. The growth of environmental treaties since the end of the nineteenth century has been described as "mushrooming".[185] In one article the total number of treaties worldwide is said to be over 500.[186] Another claims the number to be over 700 for multilateral agreements and over 1,000 for bilateral treaties, conventions, protocols and amendments.[187] Needless to say, it is not possible to examine them all in the context of the present report.

101. The Commission decided not to proceed with such an analysis during its work on the effects of armed conflicts on treaties, and the Special Rapporteur has found no convincing reason to use a different methodology in the work on the present topic. Needless to say, the applicability of multilateral environmental agreements is only a question of concern during the active hostilities themselves. Fewer (if any) problems will occur that are of relevance to the present topic in the pre-conflict and post-conflict phases.

102. The result of the Commission's work on the effects of armed conflict on treaties remains valid for the present topic.[188] The Commission recognized that international law applicable during an armed conflict may well go beyond the law of armed conflict. That work takes, as its starting point, the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.[189] It is worth recalling article 3, which sets out the general principle that:

"The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

"(*a*) as between States parties to the conflict;

"(*b*) as between a State party to the conflict and a State that is not."

103. The Commission stated that article 3 is of overriding significance, and that it establishes the general principle of legal stability and continuity.[190] At the same time, the Commission made it clear that: "Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply."[191] The Commission furthermore adopted article 6, which lists factors that may indicate whether a treaty is susceptible to termination, withdrawal or suspension. Relevant factors in ascertaining this include the nature of the treaty and, in particular, its subject matter.[192] An indicative list of such treaties is found in the annex to the draft articles. It is explained in the commentary that the provision "establishes a link to the annex which contains an indicative list of categories of treaties involving an implication that they continue in operation, in whole or

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[182] *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 49.

[183] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685.

[184] *Ibid.*, vol. II (Part Two), para. 142.

[185] Roch and Perrez, "International environmental governance: the strive towards a comprehensive, coherent, effective and efficient international environmental regime", pp. 5–6.

[186] *Ibid.*, p. 6.

[187] Mitchell, "International environmental agreements: a survey of their features, formation, and effects", p. 430.

[188] Articles on the effects of armed conflicts on treaties, General Assembly resolution 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), paras. 100–101.

[189] *Yearbook … 2011*, vol. II (Part Two), para. 100, art. 3.

[190] The Commission explained in the commentary to article 3 (para. (1) of the commentary to art. 3 of the articles on the effects of armed conflicts on treaties, *ibid.*, para. 101, at p. 111) that it "consciously decided not to adopt an affirmative formulation establishing a presumption of continuity, out of concern that such an approach would not necessarily reflect the prevailing position under international law, and because it implied a reorientation of the draft articles from providing for situations where treaties are assumed to continue, to attempting to indicate situations when such a presumption of continuity would not apply. The Commission was of the view that such a reorientation would be too complex and fraught with risks of unanticipated *a contrario* interpretations. It considered that the net effect of the present approach of seeking merely to dispel any assumption of discontinuity, together with several indications of when treaties are assumed to continue, was to strengthen the stability of treaty relations."

[191] Art. 4 of the articles on the effects of armed conflicts on treaties, *ibid.*, para. 100. The Commission decided not to include the qualifier "expressly", *inter alia*, because "such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication through the application of articles 6 and 7" (para. (2) of the commentary to art. 4, *ibid.*, para. 101, at p. 112).

[192] Art. 6 of the articles on the effects of armed conflicts on treaties, *ibid.*, para. 100, which reads:

"In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

"(*a*) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

"(*b*) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement."

in part, during armed conflict".[193] A further indication of this is that commentaries are attached to each category of treaties.[194]

104. Among the treaties listed in the commentaries to the annex we find treaties such as the Convention for the Protection of the World Cultural and Natural Heritage (hereinafter, "World Heritage Convention"), the African Convention on the Conservation of Nature and Natural Resources and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (hereinafter, "Ramsar Convention").

105. The World Heritage Convention is one of the most important global conventions applicable also in times of armed conflict. The Convention was discussed in the previous report.[195] In accordance with article 6, paragraph 3, of the Convention, each Party "undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage" of another Party (i.e., the objects and sites defined earlier in the Convention). The World Heritage Committee has the mandate to include objects and areas on the List of World Heritage in Danger. This is a special list of objects and areas which require major operations and for which assistance has been requested under the Convention. Many of the areas listed are in conflict zones.

106. The Ramsar Convention allows a Contracting Party to delete or restrict the boundaries of a wetland already included in the List of Wetlands of International Importance, established under the Convention, because of "urgent national interests" (art. 2, para. 5). Such deletions or restrictions should be compensated for by the designation of another wetland with similar habitat values, either in the same area or elsewhere, as a Ramsar Site (art. 4, para. 2).[196]

107. The revised version of the African Convention on the Conservation of Nature and Natural Resources directly regulates military and hostile activities in article XV. Not only does it include measures to be taken during an armed conflict, but also ones that should be taken before and after an armed conflict.[197] The original version of the Convention did not include references to military hostilities. The revised version of the Convention is not yet in force, but it nevertheless serves as an example of how States have chosen to address the protection of the environment in relation to armed conflicts.[198]

108. The Convention contains strong wording with respect to the parties' obligations before and during armed conflict. It is particularly notable that the parties undertake to "refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested or transferred". The formulation is stronger than the wording of the equivalent article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions. In addition to covering the employment of certain means and measures of combat, it also covers the threat to employ such means and measures. Furthermore, it has replaced the cumulative requirement (widespread, long-term *and* severe damage to the environment) with a non-cumulative one (widespread, long-term *or* severe harm to the environment). It thus mirrors the formulation of the obligation in the Environmental Modification Convention, and also contains a prohibition on reprisals against the natural environment. Of particular relevance to the present report is the new undertaking by the parties to restore and rehabilitate areas damaged in the course of armed conflicts.[199] Finally, the Convention imposes an obligation on the parties to cooperate "to establish and further develop and implement rules and measures to protect the environment during armed conflicts".[200] The Convention does not make a distinction between international and non-international armed conflict.

109. Article 29 of the Convention on the Law of the Non-navigational Uses of International Watercourses deals with international watercourses and installations in times of armed conflict.[201] It provides that such watercourses and related installations, facilities and other works "shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules". Furthermore, article 31 obliges States parties to "cooperate in good faith with the other watercourse States with a view to providing as much information as possible" in terms of information and data vital to national security.

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[193] Commentary to art. 7 of the articles on the effects of armed conflicts on treaties, *ibid.*, para. 101, at p. 114.

[194] Art. 7 of the articles on the effects of armed conflicts on treaties, *ibid.*, para. 100, and the annex to the articles (which contains the indicative list of treaties referred to in article 7), *ibid.*

[195] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 224–228, for example. See also the List of World Heritage in Danger, established pursuant to article 11, paragraph 4, of the World Heritage Convention.

[196] Only a handful of boundary restrictions have occurred; see, for example, Ramsar Convention Secretariat, *The Ramsar Convention Manual…*, p. 51.

[197] Article XV of the Convention on military and hostile activities reads:

"1. The Parties shall:

"(*a*) take every practical measure, during periods of armed conflict, to protect the environment against harm;

"(*b*) refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested or transferred;

"(*c*) refrain from using the destruction or modification of the environment as a means of combat or reprisal;

"(*d*) undertake to restore and rehabilitate areas damaged in the course of armed conflicts.

"2. The Parties shall cooperate to establish and further develop and implement rules and measures to protect the environment during armed conflicts."

[198] This Convention was ratified by 13 States (as at the beginning of 2016). A total of 15 States must ratify it for it to enter into force, see https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources.

[199] Art. XV, para. 1 (*d*).

[200] Art. XV, para. 2.

[201] See also the references to the Convention in *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, paras. 97–101.

2. Post-conflict liability

110. A number of liability conventions explicitly exempt damage caused by acts of war or armed conflict.[202] The fact that such liability is exempted cannot lead to the automatic conclusion that the application of the conventions *per se* are limited to peacetime.[203]

111. Other conventions contain sovereign immunity clauses, or explicitly exclude certain actors. This is often the case with conventions regulating law of the sea matters, such as the United Nations Convention on the Law of the Sea.[204] Article 32 stipulates that nothing in the Convention shall affect the immunities of warships and government ships operated for non-commercial purposes. Even if a warship or a government ship enjoys immunities, it does not necessarily follow that the flag State can be absolved from its obligation to follow the rules in the Convention.[205] Explicit provisions are often included to make clear that certain provisions are not meant to apply to warships or certain other vessels or aircraft. A prominent example is article 236 of that Convention, which deals with sovereign immunity.[206]

112. Similar provisions are found in the International Convention for the Prevention of Pollution from Ships[207] and the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (hereinafter, "Barcelona Convention").[208] The implications of obligations are not always apparent. At the same time, it should be noted that the International Maritime Organization (IMO) invoked the Barcelona Convention as a basis for providing assistance to Lebanon following the bombing of the facility at Jiyeh, which had caused an extensive oil spill in the Mediterranean Sea.[209]

113. Some conventions contain explicit provisions on the right of the State party to suspend, in whole or in part, the operation of a particular convention in case of war or other hostilities. The International Convention for the Prevention of Pollution of the Sea by Oil and the London Dumping Convention serve as examples.[210] Nonetheless, States are sometimes obliged to give notice of the suspension (see, for example, the former Convention) or to consult with other Parties and IMO.[211]

114. A number of treaties are simply silent on the issue of their applicability in armed conflict. Such treaties include the Convention on Biological Diversity, the Nagoya Protocol, the Aarhus Convention, the United Nations

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[202] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, art. 8, subpara. (*a*), under which the operator is not liable under the Convention if he proves that the damages were "caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character"; International Convention on Civil Liability for Oil Pollution Damage, art. III, para. 2: "No liability for pollution damage shall attach to the owner if he proves that the damage: (*a*) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character"; Vienna Convention on Civil Liability for Nuclear Damage, art. IV, para. 3 (*a*): "No liability under this Convention shall attach to an operator for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection"; Convention on Third Party Liability in the Field of Nuclear Energy , art. 9: "The operator shall not be liable for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, or insurrection". The reservations, as amended by the Additional Protocol to the Convention of 1964, made by Austria and Germany in annex I to the Convention are notable, stating a "[r]eservation of the right to provide, in respect of nuclear incidents occurring in the Federal Republic of Germany and in the Republic of Austria respectively, that the operator shall be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or a grave natural disaster of an exceptional character". In addition, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage excludes compensation for damages resulting from armed conflict in its article 4, para. 2. Jensen and Halle, *Protection of the Environment during Armed Conflict* ..., p. 39, note that "this limitation prevented the use of the Fund in responding to the oil spill at Jiyeh, Lebanon in 2006".

[203] See, for example, Vöneky, "Peacetime environmental law as a basis of State responsibility for environmental damage caused by war", p. 198: "[I]nternational conventions establishing civil liability regimes exempt damage caused by measures and means of warfare. Nevertheless, this does not mean that the applicability of these conventions during armed conflicts is *per se* excluded, as their application is not limited to peacetime but to nonmilitary conduct only."

[204] United Nations Convention on the Law of the Sea . See also references in *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 181, footnotes 243; para. 198, footnote 267; para. 214, footnote 281; para. 217, footnote 287; and para. 221.

[205] See also *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 88, footnote 112, referring to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (hereinafter, "London Dumping Convention"), art. VII, para. 4. Provisions providing for exemptions are of another legal character than provisions providing for immunity.

[206] United Nations Convention on the Law of the Sea, art. 236: "The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention."

[207] The International Convention for the Prevention of Pollution from Ships contains a similar clause in article 3, paragraph 3, which acknowledges that the Convention "shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention."

[208] Convention for the Protection of the Mediterranean Sea against Pollution. The 1995 amended Convention contains a similar sovereignty immunity clause in article 3, paragraph 5, which excludes the possibility of any effects on "the sovereign immunity of warships or other ships owned or operated by a State while engaged in government noncommercial service. However, each Contracting Party shall ensure that its vessels and aircraft, entitled to sovereign immunity under international law, act in a manner consistent with this Protocol."

[209] Jensen and Halle, *Protection of the Environment during Armed Conflict* … (see footnote 202 above), p. 36. See also Fauchald, Hunter and Xi, *Yearbook of International Environmental Law*, p. 23 and footnotes 114 and 115.

[210] International Convention for the Prevention of Pollution of the Sea by Oil, art. XIX, para. 1: "In case of war or other hostilities, a Contracting Government which considers that it is affected, whether as a belligerent or as a neutral, may suspend the operation of the whole or any part of the present Convention in respect of all or any of its territories. The suspending Government shall immediately give notice of any such suspension to the Bureau."; London Dumping Convention, art. V, para. 2: possibility to deviate if obtaining special permit due to "emergencies, posing unacceptable risk relating to human health and admitting no other feasible solution". See also references in *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 88, footnote 112.

[211] London Dumping Convention, art. V, para. 2: "the Party shall consult any other country or countries that are likely to be affected and the Organization which, after consulting other Parties, and international organizations as appropriate, shall, in accordance with article XIV promptly recommend to the Party the most appropriate procedures to adopt."

Framework Convention on Climate Change, the Convention to Combat Desertification, the Convention on International Trade in Endangered Species, the Basel Convention and the Convention on the Conservation of Migratory Species of Wild Animals.[212]

3. International investment agreements (including bilateral investment treaties) and environmental protection

115. It can be argued that international investment agreements are covered under article 5 and the related annex of the articles on the effects of armed conflicts on treaties as treaties that are likely applicable in times of armed conflict. In particular, they may fall within the category of "treaties of friendship, commerce and navigation and agreements concerning private rights".[213] The commentaries to the draft articles note that the "use of the category of human rights protection may be viewed as a natural extension of the status accorded to treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties",[214] and that "treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad" may also fall within the category as "agreements concerning private rights".[215]

Moreover, the memorandum compiled by the Secretariat in 2005 observes that the friendship, commerce and navigation treaties "were viewed as being in force during and after armed conflict in the overwhelming majority of cases outlined" and references the statement by Aust that "[t]reaties like investment protection agreements may not be suspended, given that their purpose is the mutual protection of nationals of the parties".[216]

116. Another compelling argument that international investment agreements continue to apply during armed conflict relates to the "full safety and security" provisions that most of these agreements contain, which provide for the protection of investments during situations of, for example, armed conflict (and thus indicate that the instrument would not cease to apply at the outbreak of such a conflict).

117. In a 2011 study of international investment agreements concluded by the Organization for Economic Cooperation and Development (OECD) countries, it was noted that 66 of such agreements contained provisions on the protection of the environment as a concern of both parties.[217] It was also noted that the frequency of such provisions in newly concluded agreements had increased greatly over the last decade. In terms of the substance of environmental protection in those provisions, the environmental concerns were nonetheless found to be surprisingly generic, which led the OECD analysts to suspect a "limited exchange between the investment and environmental policy communities".[218]

118. The increasing number of provisions on environmental protection in bilateral investment treaties by States across all regions serves as an interesting indicator of State practice relating to environmental protection. It is particularly interesting that certain States have a very high percentage of agreements that include clauses on environmental concern, particularly the following five countries (listed in order of percentage of international investment agreements that contained provisions for environmental protection in 2011): Canada, Japan, Mexico, New Zealand and the United States. For instance, the latest iteration of the United States model treaty in 2012 contains numerous provisions on environmental protection, including, for example, references to the "control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto".[219]

119. Sometimes States choose to include a provision reserving policy space to regulate on environmental matters.[220]

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[212] Convention on Biological Diversity (although there are possible indications of applicability in article 3 and in article 14 regarding the obligation, as far as possible, to notify the potentially affected States of any grave danger to biodiversity; see also references in *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 165, footnote 226, and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 48 (contribution of Peru)); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (although note the possible indication of applicability in article 4); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (see also reference in *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 100, footnote 123); United Nations Framework Convention on Climate Change (see also reference in *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 48 (contribution of Peru)); Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa, United Nations (simply has a standard clause noting that the "provisions of this Convention shall not affect the rights and obligations of any Party deriving from a bilateral, regional or international agreement into which it has entered prior to the entry into force of this Convention for it": art. 8, para. 2); Convention on International Trade in Endangered Species of Wild Fauna and Flora(see also reference in *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 48 (contribution of Peru)); Basel Convention (art. 4, para. 12, notes that the Convention shall not "affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments") (see also reference in *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 66 (contribution of Romania)); Convention on the Conservation of Migratory Species of Wild Animals (art. III, para. 4 (*b*): "Parties that are Range States of a migratory species listed in Appendix I shall endeavour … to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species").

[213] Subpara. (*e*) of the annex to the articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), para. 100, at p. 108.

[214] Para. (48) of the commentary to the annex to the articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), para. 101, at p. 126.

[215] Para. (69), *ibid.*, at p. 129.

[216] "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat, document A/CN.4/550 and Corr.1–2 (available from the website of the Commission, documents of the fifty-seventh session; the final text will be published as an addendum to *Yearbook … 2005*, vol. II (Part One)), para. 74 and footnote 267; also, Aust, *Modern Treaty Law and Practice*, p. 244.

[217] Gordon and Pohl, "Environmental concerns in international investment agreements: a survey", p. 5.

[218] *Ibid.*, p. 6.

[219] United States Model Bilateral Investment Treaty (2012), art. 12, para. 4 (*b*). Available from https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. See also, for example, art. 8, para. 3 (*c*).

[220] Gordon and Pohl, "Environmental concerns in international investment agreements", p. 6. See also Lung, "Pre-conflict military activities", *Chinese Journal of International Law*, vol. 14 (2015).

120. Thus, a number of international investment agreements contain explicit provisions on environmental protection and/or provisions ensuring policy space for additional protection of the environment when foreign investments are involved.[221] International investment agreements may consequently provide additional incentives for States to protect the environment in peacetime and in times of armed conflict. It should be noted in this context that the commentary to the articles on the effects of armed conflicts on treaties observes that applicability is mainly a question regarding individual provisions, rather than the instrument as a whole, and references the case of *Clark v. Allen*, where the Supreme Court of the United States noted that the outbreak of a conflict does not necessarily suspend or abrogate treaty provisions, rather than referring to treaties or instruments as a whole.[222]

4. Indigenous peoples

121. As emphasized in previous reports,[223] indigenous peoples have a special relationship with their land. This is of particular importance since 95 per cent of the top 200 areas with the greatest and most threatened biodiversity are indigenous territories.[224]

122. The special relationship between indigenous peoples and the natural environment has been recognized, protected and upheld by instruments such as the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples.[225] In addition, there is extensive case law of the Inter-American Court of Human Rights which demonstrates that the land and territories of indigenous peoples must be protected, regardless of whether or not they are owned.[226] The case law of the Court builds primarily, but not exclusively, on article 21 of the American Convention on Human Rights (Pact of San José), which protects the close relationship between indigenous peoples and their lands, as well as with the natural resources on their ancestral territories, and the intangible elements arising from them.[227]

123. For instance, in *Río Negro Massacres v. Guatemala*, the Court held that

> 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.[228]

124. A large part of legislation and case law on the connection between indigenous peoples and the environment relate to participation in issues relating to their land and territories. Participatory rights of indigenous peoples are also outlined in ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which requires that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned",[229] and in article 23 of the Pact of San José, which has been interpreted by the Court as allowing indigenous peoples to participate through "their own institutions and according to their values, practices, customs and forms of organization".[230]

125. In addition, 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".[231] States are also required to confirm that any restrictions on indigenous and tribal peoples' property rights (such as the granting of concessions on their territories) still preserve, protect and guarantee the special relationship that they have with their ancestral lands and do not endanger their survival.

126. Certain national legislation provides interesting examples of State practice on the duty to consult and to seek the free, prior and informed consent of indigenous and local communities. For instance, the legislation of the Philippines provides for the right to free, prior and informed consent in a number of provisions, including section 58 of Republic Act No. 8371, which provides that the "consent of the [indigenous communities] should be arrived at in accordance with its customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent", when maintaining, managing and developing "[a]ncestral domains or portions thereof, which are found to be necessary for critical

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[221] As also noted by Wan Pun Lung, "Pre-conflict military activities …". Regarding environmental policy space in international investment agreements, see also Åsa Romson, "Environmental policy space and international investment law", PhD thesis, Stockholm University, 2012.

[222] Para. (33) of the commentary to the annex of the articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), para. 101, at pp. 124–125.

[223] See, for example, *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, paras. 164–166, and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 224. The issue has also been addressed in oral presentations by the Special Rapporteur.

[224] *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 164. See also Oviedo, Maffi and Larsen, *Indigenous and Traditional Peoples of the World and Ecoregion Conservation …*.

[225] United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex); ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which revised the Indigenous and Tribal Populations Convention (No. 107), 1957. The reports of the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on human rights and the environment (previously the independent expert on human rights and the environment) provide a good overview of the rights of indigenous peoples in connection with the environment and natural resources.

[226] See also *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 117.

[227] For example, ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169). See also the reference in *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 166.

[228] *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Case No. C-250, Inter-American Court of Human Rights, 4 September 2012, para. 177. As observed in *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 117, footnote 160, the Court makes a cross-reference to the *Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs)*, Series C, No. 125, 17 June 2005, para. 135, and the *Case of Chitay Nech et al. v. Guatemala, Judgment*, Series C, No. 212, 25 May 2010, para. 147. See also, *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Judgment (Preliminary Objections, Merits, Reparations and Costs)*, Series C, No. 270, 20 November 2013, paras. 346, 352, 354, 356 and 459.

[229] ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 4, para. 1.

[230] *Case of Yatama v. Nicaragua*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 127, 23 June 2005, para. 225.

[231] *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, para. 134.

watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by appropriate agencies with the full participation of the [indigenous communities] concerned".[232]

127. The traditional knowledge of indigenous peoples on the usage of natural resources of the environment has also been emphasized by article 8 (*j*) of the Convention on Biological Diversity and in the Nagoya Protocol thereto, which includes specific references to indigenous and local communities. For example, article 5, paragraph 2, of the Protocol stipulates that:

> Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

128. Traditional knowledge and usage of the environment can also contribute to education, as referenced, for example, in Expert Mechanism advice No. 1 (2009) on the right of indigenous peoples to education.[233] The document notes that the right of indigenous peoples to education is a "holistic concept incorporating mental, physical, spiritual, cultural and environmental dimensions".[234] This provides an interesting parallel to article 29, paragraph 1 (*e*), of the Convention on the Rights of the Child, which stipulates that "States Parties agree that the education of the child shall be directed to: … The development of respect for the natural environment".

129. The following draft principle is proposed:

"*Draft principle IV-1. Rights of indigenous peoples*

"1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.

"2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands."

5. Access to and sharing of information and obligation to cooperate

130. "Access to information" and "sharing of information" have been subject to an increasing number of international agreements in recent decades. Both concepts are closely connected to the duty to cooperate, since they often rely on cooperation for their effective implementation. It is well known that the Commission has long had its focus on the meaning and extent of these aspects. Various provisions on sharing of information can be found in conventions that have been adopted on the basis of the work of the Commission.[235] The same is the case with the "duty to cooperate" and several conventions also contain provisions on cooperation based on the work of the Commission.[236] Moreover, there are numerous provisions relating to the sharing of information[237] *and* cooperation[238] in texts that the Commission has developed.

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[232] Philippines, Republic Act No. 8371 of 29 October 1997, which aims to "recognize, protect and promote the rights of indigenous cultural communities/indigenous peoples, creating a national commission on indigenous peoples, establishing implementing mechanisms, appropriating funds therefor, and for other purposes". Available from www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/.

[233] See A/HRC/12/33, annex.

[234] *Ibid.*, para. 3.

[235] Vienna Convention on Consular Relations, arts. 5 (*c*) and 37; Convention on Special Missions, art. 11, para. 1 (*f*); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, arts. 4 (*b*), 5 and 11; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, arts. 15, para. 1 (*e*), and 47; Convention on the Law of the Nonnavigational Uses of International Watercourses, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

[236] Convention on the High Seas, arts. 12, para. 2, 14 and 25, para. 2; Convention on Fishing and Conservation of the Living Resources of the High Seas, arts. 1, para. 2, and preambular para. 2; Convention on Special Missions, preambular para. 2; Vienna Convention on the Law of Treaties, preambular paras. 2 and 7; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 4 and preambular paras. 1 and 2; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, arts. 6 (*g*), 7 (*c*) and 76 and preambular paras. 2 and 4; Vienna Convention on Succession of States in respect of Treaties, preambular para. 5; Vienna Convention on Succession of States in respect of State Property, Archives and Debts, art. 28, para. 4, and preambular para. 5; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, preambular para. 9; Convention on the Law of the Nonnavigational Uses of International Watercourses, arts. 5, para. 2, 6, para. 2, 8, 14, 23, 25, para. 1, 28, paras. 3 and 4, 30 and 31 and preambular para. 6.

[237] Articles on nationality of natural persons in relation to the succession of States, General Assembly resolution 55/153 of 12 December 2000, annex (the draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47–48), art. 18; articles on the prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex (the draft articles and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98), arts. 8, 12–14 and 17; principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, General Assembly resolution 61/36 of 4 December 2006, annex (the draft principles and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 66–67), principle 5; articles on the law of transboundary aquifers, General Assembly resolution 63/124 of 11 December 2008, annex (the draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54), arts. 8, 13, 15, 17 and 19.

[238] Draft convention on the elimination of future statelessness, second preambular para., *Yearbook … 1954*, document A/2693, vol. II, p. 143; Model Rules on Arbitral Procedure, art. 18, para. 2, *Yearbook … 1958*, vol. II, document A/3859, para. 22, at p. 85; draft statute for an International Criminal Court, 1994, arts. 26, para. 2 (*e*), 44, para. 2, 51, 53, para. 1, 56 and first preambular para., *Yearbook … 1994*, vol. II (Part Two), para. 91, at pp. 26 *et seq.*; articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex (the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77), art. 41, para. 1; articles on the prevention of transboundary harm from hazardous activities, arts. 4, 14, 16 and preambular para. 5; principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, principles 5 (*c*) and 8, para. 3; articles on the law of transboundary aquifers, 2008, arts. 7, 11, para. 2, 16, 17, para. 2 (*b*), 17, para. 4, 19 and preambular paras. 8 and 10; conclusions on the reservations dialogue, art. 9, *Yearbook … 2011*, vol. II (Part Two), annex to the Guide to Practice on Reservations to Treaties, para. 75, at pp. 37–38; articles on the responsibility of international organizations, General Assembly resolution 66/100 of 9 December 2011, annex (the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook …2011*, vol. II (Part Two), paras. 87–88), art. 42, para. 1; draft articles on the protection of persons in the event of disasters adopted on first reading, *Yearbook … 2014*, vol. II (Part Two), para. 55, arts. 8 to 10.

131. The duty to cooperate is often referred to as a well-established principle of international law, including through the work of the Commission.[239] Since it is not the aim of the present report to repeat what the Commission has already done in this area, but rather to build upon it, the Special Rapporteur starts from the assumption that "[t]he duty to cooperate is well established as a principle of international law and can be found in numerous international instruments", as it has recently been formulated.[240]

132. As will be shown below, States involved in an armed conflict are obliged to record and share information with the Protecting Power even during the armed conflict, for example on missing persons and on identity cards, just to give a few examples.[241] They are also obliged to record the laying of mines and share information in order to clear landmines and explosive remnants of war. The latter obligations have become more and more stringent with every new treaty.[242]

133. However, obligations to provide access to and to share information go beyond the relatively limited regulations in the law of armed conflict. The obligations have become crucial also in other areas of international law. This is a reflection of new realities, including the trend of increasing international cooperation. Unless States and organizations have access to data and are willing to share this information with other relevant actors, the outcome of international cooperation will be limited. Access to and sharing of information is cost-effective. But more importantly, access to information is part of human rights. An overarching right to information can be found in the Universal Declaration of Human Rights[243] and in the International Covenant on Civil and Political Rights.[244] A right to environmental information has also been developed within the context of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as exemplified in the case of *Guerra and Others v. Italy*, where the European Court of Human Rights decided that the plaintiffs had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy).[245] The implementation guide to the Aarhus Convention correspondingly notes that "[i]n the past few years, access to information has also gained increasing recognition as a human right, implicit in the right to freedom of expression guaranteed by a number of global and regional treaties".[246] Furthermore, access to reliable information about the environment is critical for its protection, and for proving liability in terms of damages.

134. It is evident that the access to and sharing of information on the territory of a foreign State rests on the consent of that State, either through its consent to be bound by an international agreement or through the granting of permission on a case-by-case basis. This is also one of the reasons that some Conventions have provisions which regulate security and defence concerns.

135. Since the Convention on Environmental Impact Assessment in a Transboundary Context has already been mentioned at some length in the preliminary report in 2014, it will not be addressed extensively in this context.[247] However, regarding environmental impact assessments, it is worth mentioning that a recent decision by the International Court of Justice in the joined cases between Costa Rica and Nicaragua has widened the scope from that provided in the case of *Pulp Mills on the River Uruguay*.[248] According to the Court, environmental impact assessments have to be done in connection to any activity that may be potentially harmful, and not just industrial activities, as was the case in *Pulp Mills on the River Uruguay*.[249]

136. The requirement to collect information and data pertaining to the environment can be found in numerous sources of international law, both at the global and regional levels. As the applicability of these agreements has already been discussed on a more general level, the following section will focus on some of the substantive obligations outlined in these agreements as they pertain to collecting and sharing environmental information.

137. The Aarhus Convention was of pivotal importance when it was concluded in 1998. The reason is that the Convention "grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation".[250]

138. The Aarhus Convention defines "environmental information" as any information pertaining to the state of elements of the environment, to factors affecting or likely to affect elements of the environment, and to the state of human health and safety insofar as it may be affected by these elements (art. 2, para. 3). It further stipulates that parties must "make such [environmental] information available to the public, within the framework of national legislation". Such a right of citizens necessarily entails a duty for States to collect such environmental information

[239] See, for example, para. (1) of the commentary to draft article 8 of the draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading (*Yearbook … 2014*, vol. II (Part Two), para. 56, at p. 72).

[240] *Ibid.*

[241] Additional Protocol I to the Geneva Conventions, art. 33; Geneva Convention I, art. 16; Geneva Convention IV, art. 137; Geneva Convention II, arts. 19 and 42; Geneva Convention III, art. 23.

[242] See chap. II, sect. D, of the present report.

[243] General Assembly resolution 217 A (III) of 10 December 1948, art. 19.

[244] See International Covenant on Civil and Political Rights, arts. 19 (freedom of expression) and 25 (right to take part in public affairs).

[245] *Guerra and Others v. Italy* [GC], No. 14967/89, ECHR 1998.

[246] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, p. 76.

[247] See *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 150.

[248] Joined Cases concerning *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)*, Merits, Judgment, *I.C.J Reports 2015*. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at para. 204: "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".

[249] *Certain Activities carried out by Nicaragua* (see previous footnote), para 104.

[250] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, p. 15. The Convention has 47 parties, including the European Union.

for the purposes of making it available to the public if and when requested to do so (art. 4).

139. Other conventions also regulate the exchange of information between the parties thereto. These include, for example, the Convention on Biological Diversity[251] and the Convention on Combating Desertification.[252] Further examples include the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[253] and the Stockholm Convention on Persistent Organic Pollutants,[254] both of which contain provisions on access to information. Similarly, the Minamata Convention on Mercury stipulates that parties shall "promote and facilitate" access to such information.[255]

140. A number of soft law documents also address the issue of information, more or less explicitly. These include the Action Plan for the Human Environment,[256] the Rio Declaration[257] and the Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation).[258]

141. The outcome document of the 2012 United Nations Conference on Sustainable Development, entitled, "The future we want", echoes the importance of access to information: "We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development".[259]

142. Scholars have linked the obligation to collect and gather environmental information to the principle of precaution and the duty of care of the natural environment under article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions, remarking that "[t]he principle of precaution therefore imposes certain duties of precaution on belligerent parties to take measures to protect the natural environment. In this respect advance information gathering is crucial".[260] Hulme makes a similar suggestion, noting that the environment cannot be sufficiently protected without intelligence gathering, and notes that this intelligence gathering "undeniably … resembles the concept of environmental impact assessments (EIA) as utilised in environmental law".[261]

143. Having access to relevant information on the environment is also necessary to justify how a military decision that has been made complies with the obligations under the rule of military necessity. As noted by the recent United States *Law of War Manual*, the available environmental information in turn affects military necessity, in that "[t]he limited and unreliable nature of information available during war has influenced the development of the law of war. For example, it affects how the principle of military necessity is applied".[262] The manual also notes

[251] Convention on Biological Diversity, arts. 14 and 17.

[252] Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; see, for example, article 16 (also article 19), which calls for parties to make information on desertification "fully, openly and promptly available".

[253] See the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15.

[254] Stockholm Convention on Persistent Organic Pollutants, art. 10.

[255] Minamata Convention on Mercury, art. 18. It could also be noted in this context that the United Nations Framework Convention on Climate Change addresses access to information in article 6, noting that the Parties shall: "Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: […] public access to information on climate change and its effects". The recently concluded Paris Agreement similarly addresses access to information in numerous paragraphs and articles, for example, as part of the responsibility for States to provide intended nationally determined contributions in article 4, paragraph 8, of the Agreement, and more generally regarding climate change education and public access to information in article 12.

[256] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.II.A.14), part one, chap. II, p. 6, at p. 8, recommendation 7 (*a*). Although the Stockholm Declaration did not address access to information as such, the Action Plan recommended that Governments and the Secretary-General "provide equal possibilities for everybody […] by ensuring access to relevant means and information, to influence their own environment by themselves".

[257] Principle 10 of the Rio Declaration (see footnote 131 above) states that "[a]t the national level, each individual shall have appropriate access to information that is held by public authorities, including information on hazardous materials and activities in their communities" and calls upon States to "facilitate and encourage public awareness and participation by making information widely available". . The 2015 Oxford Commentary on the Rio Declaration provides that even though the principle is crafted so as to avoid including the term "right", "it is reasonably impossible for a State to properly comply with Principle 10 without granting, in some sense, rights to access to information", cf. Jonas Ebbesson, "Principle 10: Public Participation", at p. 291: "Although Principle 10 is carefully drafted so as not to include the term 'right', it is reasonably impossible for a State to properly comply with Principle 10 without granting, in some sense, rights to access to information". The Commentary also notes that access to information is the element of Principle 10 that is most frequently addressed in environmental agreements, see *ibid*., p. 293: "Among the elements of Principle 10, public access to information is most widely provided for in environmental agreements. The information to be made publicly available and the opportunities for public participation to be provided depend on the scope and purpose of agreement itself."

[258] Building on the commitments in the Stockholm Declaration and the Rio Declaration, the Johannesburg Plan of Implementation committed States to "[e]nsure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters", and facilitate access to information regarding water resources and management, and to "[p]rovide affordable local access to information to improve monitoring and early warning related to desertification and drought". See Plan of Implementation of the World Summit on Sustainable Development, *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (A/CONF.199/20), chap. I, resolution 2, annex, paras. 128 and 41 (*e*), respectively. See also, for example, paras. 112 and 164. In 2002, the International Law Association published its New Delhi Declaration of Principles of International Law Relating to Sustainable Development, which includes access to information as one of seven core principles, and concedes that public participation "requires a right of access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality". See International Law Association, New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2 April 2002), resolution 3/2002, annex, principle 5.2, *Reports of the Seventieth Conference, Held in New Delhi, 2–6 April 2002* (London, 2002), p. 22.

[259] See General Assembly resolution 66/288, annex, para. 43.

[260] Droege and Tougas, "The protection of the natural environment in armed conflict—Existing rules and need for further legal protection", p. 34.

[261] Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, p. 82.

[262] United States, Department of Defense, *Law of War Manual* (2015), pp. 17–18.

that this "limited and unreliable nature of information […] is recognized in the law of war's standards for how persons are to assess information".[263]

144. As regards the practice of international organizations on this topic, it is worth recalling that the UNEP 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.[264]

145. The Environmental Policy for United Nations Field Missions stipulates that peacekeeping missions shall assign an environmental officer to provide environmental information relevant to the operations of the mission and promote awareness of environmental issues. The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information which can in fact be disseminated—and thus is not classified.[265] In a similar vein, the NATO military guidelines on environmental protection contain a standard concerning the "exchange of information on [environmental protection] procedures, standards [and] concerns".[266] In addition, the 1992 ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a paragraph on the protection of organizations.[267] This could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment",[268] for instance by using modern technology to gather data through civil society organizations and individuals, as reflected in a recent report on the Syrian Arab Republic.[269]

146. In the case before the International Court of Justice between the Democratic Republic of the Congo and Uganda, one of the challenges related to the lack of data necessary to prove environmental harm and damage caused in connection to a violation of the prohibition against attacking installations containing dangerous forces.[270] Such a lack of information was also mentioned in the final report to the Prosecutor of the International Tribunal for the Former Yugoslavia by the committee established to review the NATO military operations during the Balkan wars.[271] Efforts to gather reliable information would be more manageable if the information was less fragmented and could be collected in a more systematic fashion. Improving the expediency of justice would benefit both the claimant and defendant in such cases. The evidence required is naturally closely related to the definition of harm, both in terms of what is required to meet the threshold as defined in the Rome Statute, the Environmental Modification Convention and other international instruments, as well as any requirements for necessity that may not meet that threshold, but which still needs to be balanced against the different interests.

147. Regarding "environmental damage" generally, it has been noted that there is no commonly accepted definition of what such damage entails.[272] The definition of the concept naturally affects the standard of proof, and the amount and quality of data that is needed.

148. The Convention on the Law of the Non-navigational Uses of International Watercourses, which entered into force in August 2014, stipulates that State parties shall cooperate in good faith in order to achieve adequate protection of an international watercourse (art. 8). The Convention also requires parties to provide prior notification and exchange information with regard to any planned measure that might significantly harm other transboundary watercourse States (art. 12). Importantly, the Convention requires parties to cooperate in good faith also regarding information that is vital for national security and defence (art. 31).[273]

149. A breach of this duty to share information and to notify other parties of any activities and measures that may affect the watercourses, can, in accordance with the general principles of international law, enable other parties to claim damages, in accordance with international tort law.[274]

150. The joint mechanisms and commissions provide an additional example of possibilities for cooperation and trust-building in the context of shared resources.[275] Improving water governance has been used as a tool for mitigating tension and hostilities in several different contexts, such as, for example in Afghanistan, Liberia and Nigeria.[276] One commission that may serve as a prom-

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[263] *Ibid.*, p. 18.

[264] See UNEP Guidance Note, "Integrating Environment in Post-Conflict Needs Assessments" (Geneva, 2009). Available from https://www.unep.org/resources/report/integrating-environment-post-conflict-needs-assessments-unep-guidance-note..

[265] See *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* (A/C.5/69/18), chap. 9, annex I, paras. 22–23 and 32–34.

[266] NATO Military Principles and Policies for Environmental Protection, MC 469/1, para. 8 (*a*) (5) on information exchange.

[267] See A/49/323, annex, guideline 19, referring to the Fourth Geneva Convention, art. 63, para. 2, and Additional Protocol I, arts. 61–67.

[268] *Ibid.*

[269] See PAX, *Amidst the Debris* …. It should be noted that ICRC guideline 19 refers to "pursuant to special agreements between the parties" or "permission granted by one of them".

[270] See, for example, application instituting proceeding filed in the Registry of the Court on 23 June 1999 in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 1999, General List No. 116 pp. 15 and 17.

[271] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 2000), paras. 22 and 24. Available from www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf. See also Tignino, "Water, international peace, and security", p. 662.

[272] Cf. Vialle *et al*., "Peace through justice: international tribunals and accountability for wartime environmental damage", p. 685.

[273] References to these obligations were also made in the preliminary report, see *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 100.

[274] Cf., for example, Rieu-Clarke, Moynihan and Magsig, *UN Watercourses Convention User's Guide*, p. 134: "The legal effect of a breach of the duty to notify can be deduced from general principles of international law, e.g. a state might be liable under the principles of international tort law for the damage caused to co-riparians by its failure to transmit relevant data and information."

[275] Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 8–9.

[276] See, for example, Weinthal, Troell and Nakayama, *Water and Post-Conflict Peacebuilding*. See also Alec Crawford, David Jensen and Carl Bruch, "Policy brief: 4: Water and post-conflict peacebuilding", 2014.

ising example is the Lake Victoria Basin Commission, which is supported by the East African Community. The Commission describes its function as "to promote, facilitate and coordinate activities of different actors towards sustainable development and poverty eradication of the Lake Victoria Basin", and maintains an aquatic biodiversity database to that end.[277] The Revised Protocol on Shared Watercourses in the Southern African Development Community has been mentioned as another useful example that may serve as a role model for others.[278] The Protocol requires the Parties to "exchange available information and data regarding the hydrological, hydro geological, water quality, meteorological and environmental condition of shared watercourses" (art. 3, para. 6) and more generally "individually and, where appropriate, jointly, protect and preserve the ecosystems of a shared watercourse" (art. 4, para. 2 (*a*)).

151. In conclusion, it can be seen that the importance of baseline studies and information has been repeatedly emphasized in numerous consultations between the Special Rapporteur and States, and in consultations with international organizations. As mentioned above, providing such information would also be important for determining military necessity and assessing environmental damage in the aftermath of conflicts. Military manuals and handbooks would be valuable in this regard and could also facilitate discussions on these issues. It would also be useful to draw on the experience and resources already existing within international organizations.[279] At times, armed forces may already have access to such data and information—or at least be able to retrieve it without incurring high costs.[280]

152. The following draft principle on access to and sharing of information is therefore proposed:

"*Draft principle III-5. Access to and sharing of information*

"In order to enhance the protection of the environment in relation to armed conflicts, States and international organizations shall grant access to and share information in accordance with their obligations under international law."

B. Practice of States and international organizations

153. The present section addresses certain forms of practice of States and international organizations which have not been included previously in the present report. It is often difficult to divide this practice between practice that relates to the planning of an operation, for example, and practice that relates to the termination of an operation. Therefore, some references to preparatory measures are included in the present section. This serves the purpose of showing the relatively new approach that States and international organizations have taken so as to prevent and mitigate environmental harm.

1. Peace agreements

154. Modern peace agreements often contain provisions on the protection or management of the environment and associated natural resources. Such provisions may range from a mere encouragement or obligation to cooperate, to provisions which set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws. Regulations on natural resources and the sharing of communal resources are often prominent. Provisions on environmental protection are common in agreements that aim to end non-international armed conflicts, and there seem to be few agreements where such provisions are entirely absent. Most of the examples referred to below are peace agreements between a Government and a non-State actor.

155. There are several examples of modern peace agreements that regulate the distribution of responsibility for matters relating to the environment. The 1992 Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) prescribes 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".[281] The 1998 Northern Ireland Peace Agreement (the Good Friday Agreement) is another example. It consists of an agreement reached in the multiparty negotiations and stipulates that agricultural, environmental, aquaculture and marine matters may be included in areas for North-South cooperation.[282] It also prescribes that the Government of the United Kingdom will make rapid progress with "a new regional development strategy for Northern Ireland…. protecting and enhancing the environment".[283] The 1999 Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) contains an interim Constitution which prescribes which authorities are responsible for the protection of the environment.[284] According to the interim Constitution, the Assembly is responsible for protecting the environment where inter-communal issues are involved, while the communes are responsible for protecting the communal environment.[285]

[277] See the International Water Governance website for more information: www.internationalwatersgovernance.com/lake-victoria-basin-commission-and-the-lake-victoria-fisheries-organization.html.

[278] Communications between the Stockholm International Water Institute and the Special Rapporteur. For more information about the Protocol, see the text of the Revised Protocol on Shared Watercourses.

[279] Cf. International Law and Policy Institute, *"Protection of the Environment in Times of Armed Conflict", Report from the Expert Meeting on Protection of the Environment in times of Armed Conflict, Helsinki, 14–15 September 2015*, para. 2.3.4: "It was emphasized that the military offers an opportunity of implementation as including the protection of the environment in military frameworks can have huge reverberating effects into the system without a lot of costs. The time is ripe to work on the military and the cultural norms. One possible concrete measure may be to add a negative for all World Heritage sites into targeting databases."

[280] *Ibid.*, para. 2.3.4.

[281] 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. Further regulations are found in annex II, art. 13.

[282] Northern Ireland Peace Agreement (Good Friday Agreement) (Belfast, 10 April 1998), annex II. Available from https://peacemaker.un.org/uk-ireland-good-friday98.

[283] *Ibid.*, p. 20.

[284] See S/1999/648, annex.

[285] *Ibid.*, pp. 14 and 25.

The 2000 Arusha Peace and Reconciliation Agreement for Burundi[286] 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".[287] 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".[288]

156. The 2003 Final Act of the Inter-Congolese Political Negotiations (Sun City Agreement) encompasses numerous references to the protection of the environment and its natural resources.[289] This includes a specific resolution "[r]elating to disputes over the reconstruction of the environment destroyed by war".[290] In considering the damage caused to the ecosystems and the living environment in the Democratic Republic of the Congo by the presence of a huge number of Rwandan refugees in 1994, as well as the wars of 1996–1997 and 1998, the resolution requested and recommended

> [t]he establishment of a special *ad hoc* Commission of Inquiry within the transitional Parliament, if necessary with the participation of national and international experts, with a view to identifying destroyed sites, assessing the extent of the damage, apportioning responsibility, identifying perpetrators and victims and determining the nature and level of compensation and reparation.[291]

The resolution further requested and recommended that the international community recognize "the state of destruction of the environment in the Democratic Republic of Congo as a disaster of world-wide proportions".[292] Resolution 23 of the Final Act is devoted entirely to the setting up of an emergency programme for the environment.[293]

157. The 2005 Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army contains several provisions on the management and sustainable use of natural resources. It specifically provides that the National and State Governments shall have concurrent legislative and executive competencies with respect to environmental management, conservation and protection.[294]

158. The 2006 Darfur Peace Agreement is clearly focused on three aspects: wealth sharing, the need to address environmental degradation and the implementation of principles of sustainable development.[295] This includes the development, management and planning of land and natural resources.[296] The 2008 Juba Peace Agreements include the Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army/Movement.[297] The section on economic and social development of north and north-eastern Uganda addresses the significant environmental degradation that has been caused by the conflict in these areas and holds that "measures shall be taken to restore and manage the environment sustainably".[298]

159. There are also agreements that regulate the management of natural resources without referring to environmental protection as such. For example, the 1999 Lomé Peace Agreement regulates strategic mineral resources.[299]

160. These examples clearly show that environmental considerations have become an accepted part of peace agreements. The following draft principle is therefore proposed:

"Draft principle III-1. Peace agreements

"Parties to a conflict are encouraged to settle matters relating to the restoration and protection of the environment damaged by the armed conflict in their peace agreements."

2. Status of forces and status of mission agreements

161. The term "status of forces agreement" refers to an agreement concluded between a host State and a foreign State which is stationing military forces in the territory of the host State. Status of forces agreements somewhat resemble lease agreements.[300] Provisions concerning environmental matters are rarely included in status of forces

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[286] Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), Protocol III, p. 62, art. 12, para. 3 (*e*), and Protocol IV, p. 81, art. 8 (*h*). Available from http://peacemaker.un.org/node/1207.

[287] *Ibid.*, Protocol III, p. 62, art. 12, para. 3 (*e*).

[288] *Ibid.*, Protocol IV, p. 81, art. 8 (*h*).

[289] These are contained in its 36 binding resolutions annexed to the Final Act. See Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from http://peacemaker.un.org/drc-suncity-agreement2003.

[290] *Ibid.*, Resolution No: DIC/CEF/03, pp. 40–41.

[291] *Ibid.*, p. 41.

[292] *Ibid.*

[293] *Ibid.*, Resolution No: DIC/CHSC/03, pp. 62–65. The Congolese authorities were requested to establish this programme in order to rehabilitate flora and fauna, especially in national parks, reserves, and other protected sites; secure national parks, reserves, and all other protected sites; clean up the urban and rural environment; fight against erosion and landslides; restore the ecology and ecosystems by more efficient management of population migration; return illegally exported species and protect endangered species; preserve medicinal flora with which the Democratic Republic of the Congo is exceptionally richly endowed, and demine affected rural areas.

[294] See 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 and Naivasha, Kenya, 20 July 2002, 25 September 2003, 7 January 2004, 26 May 2004 and 31 December 2004), available from https://peacemaker.un.org/node/1369, chap. V, p. 71. Other examples can be found in 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" (at para. 1.10). Further regulations on oil resources are found in *ibid*., paras. 3.1.1 and 4.

[295] Darfur Peace Agreement (Abuja, 5 May 2006), available from https://peacemaker.un.org/node/535, chap. 2, at p. 21, art. 17, para. 107 (*g*) and (*h*).

[296] *Ibid.*, at p. 30, art. 20.

[297] Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army/Movement, (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf.

[298] *Ibid.*, p. 10, para. 14.6.

[299] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), S/1999/777, annex, art. VII.

[300] Shelton and Cutting, "If you break it, do you own it? …", p. 225.

agreements. At the same time, it should be noted that many status of forces/status of mission agreements include an obligation to respect local laws. Status of forces agreements cover a specified period of time, which ranges from short-term and rather temporary stationing to long-term stationing. Older status of forces agreements often contain exemptions, for example on responsibility for clean-up after withdrawal. This is likely to change to reflect that the foreign State has the responsibility to properly restore the environment once the base area is left or once the agreement terminates. An interesting example is the agreement between Germany and other NATO States, which not only makes it clear that German environmental law is applicable to all activities on German installations, but also explicitly regulates environmental damage claims.[301] The Australian status of forces agreement contains a similar provision.[302] Another good example, though wider than a status of forces agreement, is the new agreement between the United States and the Philippines, called the Enhanced Defense Cooperation Agreement,[303] which was concluded in 2014. Unlike the previous agreement from 1947, it contains environmental and human health regulations.[304] The United States-Philippine agreement is a relevant agreement in many respects. The environmental provisions in this agreement focus on the prevention of environmental damage. In addition to the provisions on applicable laws and standards, it also provides for a review process. The status of mission agreement under the European Security and Defence Policy makes several references to environmental obligations.[305] A further indication that environmental factors are being taken into consideration when concluding status of forces agreements is the fact that the United States and Japan recently signed the Environmental Clarification of Status of Forces Agreement, which supplements the United States-Japan status of forces agreement and contains stricter environmental standards.[306] Another relevant example is the United States-Iraq agreement, which contained an explicit provision on the protection of the environment, providing that:

> Both Parties shall implement this Agreement in a manner consistent with protecting the natural environment and human health and safety. The United States reaffirms its commitment to respecting applicable Iraqi environmental laws, regulations, and standards in the course of executing its policies for the purposes of implementing this Agreement.[307]

States and international organizations have not directly provided the Special Rapporteur with information on their status of mission or status of forces agreements. However, many of the agreements are available through public channels.

"Draft principle I-3. Status of forces and status of mission agreements

"States and international organizations are encouraged to include provisions on environmental regulations and responsibilities in their status of forces or status of mission agreements. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures."

3. Resolutions of the Security Council

162. The Security Council has continued to address the protection of the environment and natural resources in relation to armed conflict in its resolutions. The practice of the Security Council up to 31 December 2014 was described in the second report.[308] The present subsection is therefore limited to the practice of the Security Council from 1 January 2015 until 2 March 2016.[309]

163. Of the 76 resolutions adopted during this period, many continued to address the illicit trade, exploitation and smuggling of natural resources, as well as wildlife poaching. The connection between such acts and their threat to international peace and security is made clear through various formulations.[310] The Council continued to stress the importance of effective management of natural resources for the prospect of sustainable peace and security.[311] None of the resolutions adopted in 2015 address the protection of the environment as such. However, there is often an intermediary stage of explicitly identified threats to international peace and security, as those just mentioned above, and the protection of the environment.

164. Many resolutions continue to address non-State actors, albeit without reference to their status under international law.[312]

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[301] 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.

[302] Agreement Concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55, at art. 12, para. 7 (*e*) (i).

[303] Agreement between the Philippines and the United States, (Quezon City, 28 April 2014), available from www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/.

[304] Shelton and Cutting, "If you break it, do you own it? …", pp. 227–228.

[305] Sari, "Status of forces and status of mission agreements under the ESDP …". Article 9 of the *Concordia* status of forces agreement provides a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See *ibid.*, at p. 89.

[306] For a press release on the agreement, see Lisa Ferninando, "U.S., Japan sign environmental clarification of status of forces agreement", 28 September 2015. Available from www.pacom.mil/Media/News/tabid/5693/Article/620843/us-japan-sign-environmental-clarification-of-status-of-forces-agreement.aspx. See supplement to the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, United States-Japan (*United States Treaties and Other International Agreements*, vol. 11 (U.S. Printing Office, Washington, D.C., 1960), p. 1652, *Treaties and Other International Acts Series* (Washington, D.C.), No. 4510).

[307] 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), available from www.peaceagreements.org/masterdocument/1577, art. 8.

[308] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 83–84. For the resolutions adopted in the context of the unlawful invasion and occupation of Kuwait by Iraqand the subsequent establishment of the United Nations Compensation Commission, see chap. II, section B, of the present report.

[309] As of 1 January 2015, the Security Council had adopted a total of 2,195 resolutions, of which 242 (or 11 per cent) addressed natural resources in some manner. See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 79.

[310] See, for example, Security Council resolutions 2196 (2015), 2198 (2015), 2217 (2015), 2237 (2015), 2253 (2015) and 2262 (2016).

[311] See, for example, Security Council resolutions 2210 (2015), 2220 (2015), 2237 (2015), 2239 (2015) and 2198 (2015).

[312] See, for example, Security Council resolutions 2196 (2015), 2211 (2015), 2217 (2015) and 2262 (2016).

165. The Security Council has frequently addressed the role of natural resources in fuelling and financing terrorist acts and acts by non-State actors.[313] This follows the practice referred to in the second report. However, this practice is not included in the present subsection since it falls outside the scope of the present topic. It should also be added that the Security Council has passed several resolutions which address the importance of clearing landmines.

166. In conclusion, the resolutions adopted between 1 January 2015 and 2 March 2016 follow a previously established pattern, as described in the second report.

4. The United Nations and its specialized agencies and programmes

167. Many of the departments, funds and programmes of the United Nations and its specialized agencies are involved in post-conflict measures which have a bearing on the environment or that aim at rebuilding and restoring damaged environments. As referred to in the preliminary report, the Secretary-General has created the so-called "Greening the Blue" initiative, which aims to function as an in-house environmental sustainable management programme.[314]

168. The Report of the High-level Independent Panel on Peace Operations provides that "[t]he impact and positive presence of [peacekeeping] missions should also be enhanced by better communications, both globally and locally, and improving the Organization's commitment to environmental impact".[315] The Secretary-General responded to this call by, *inter alia*, appointing a Special Adviser on Environment and Peace Operations in September 2015.

169. As noted in the 2014 preliminary report by the Special Rapporteur, the Department of Peacekeeping Operations and the Department of Field Support have developed a joint environmental policy for their operations, including obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements.[316] The policy refers to treaties and instruments such as the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), the World Charter for Nature,[317] the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity and the Ramsar Convention as standards that the mission considers when establishing its environmental objectives and procedures. Moreover, the policy notes that international environmental treaties, environmental norms and standards agreed at the United Nations provide practical information for the mission to establish minimum standards to achieve its environmental objectives. In addition, the policy contains references to energy, water and waste management, wild animals and plants, and the management of cultural and historical resources.[318]

170. The environmental impact of an international peace operation stretches from the planning phase through the entire operative part of the operation. It also carries over to the post-operation phase. The optimal goal is that the international operation should leave no negative environmental footprints at all. This is what differentiates it from a situation in which a State is engaged in an international or noninternational armed conflict, as an armed conflict will always leave environmental footprints, some of which will be more negative than others.

171. The situation is different when an international organization operates under a mandate from the Security Council or upon the invitation of a State. On the one hand, the organization is expected to meet not only the obligations under international law, but also the policy standards that have been developed by the various branches of the organization. On the other hand, international operations require cooperation with both internal and external actors that have different goals and capabilities. States that contribute to an international operation may have a variety of environmental standards.

172. The mere presence of multiple actors (e.g. peacekeepers, humanitarian agencies, displaced persons and the local population) places pressure on the environment. The cumulative effects and strains on a fragile environment may be considerable. At the same time, it is more or less impossible to allocate legal responsibility and liability for a deteriorated environment, resulting in a situation where "[n]obody is accountable for the cumulative environmental footprint".[319]

173. Thus, it is suggested that two draft principles should specifically address how States and organizations involved in peace operations could recognize and remediate the negative environmental effects of such operations; one pertains to prevention and another to reviews at the conclusion of a peace operation.

"*Draft principle I-4. Peace operations*

"States and organizations involved in peace operations shall consider the impacts of those operations on the environment and take all necessary measures to prevent, mitigate and remediate the negative environmental consequences thereof.

"*Draft principle III-2. Post-conflict environmental assessments and reviews*

"[…]"

"2. Reviews at the conclusion of peace operations should identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment, in an effort to mitigate or remedy those detrimental effects in future operations."

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[313] See, for example, Security Council resolutions 2198 (2015), 2199 (2015), 2210 (2015), 2213 (2015), 2233 (2015), 2249 (2015), 2253 (2015) and 2255 (2015).

[314] See *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 44.

[315] *Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people*, contained in document A/70/95-S/2015/446, summary.

[316] See *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 43.

[317] General Assembly resolution 37/7 of 28 October 1982, annex.

[318] See https://operationalsupport.un.org/en/our-approach.

[319] Waleij and Liljedahl, "The gap between buzz words and excellent performance …", p. 23.

5. United Nations Environment Programme

174. Since 1999, UNEP has been involved in field-based environmental assessments and efforts to strengthen the national environmental management capacity in States affected by conflicts and disasters. This implies, for example, determining environmental impacts from conflicts and risks for human health, livelihoods and security. Since the work of UNEP is critical for the understanding of post-conflict environmental measures, it is necessary to refer briefly to the mandate of UNEP and to illustrate its work.

175. UNEP has a general mandate to promote international cooperation in the field of the environment, to recommend, as appropriate, policies to that end, and to provide general policy guidance for the direction and coordination of the environmental programmes within the United Nations system.[320] This mandate has evolved in accordance with the resolutions of the Governing Council and the recently established United Nations Environment Assembly.[321] The mandate includes furthering the development of international environmental law aiming at sustainable development and advancing the implementation of agreed international norms and policies.[322] It was a UNEP report that recommended that the Commission should examine the existing international law relating to the protection of the environment during armed conflict and recommend how it could be clarified, codified and expanded.[323]

176. In addition, UNEP has a mandate to "[s]tudy the feasibility of developing legal mechanisms for mitigating damage caused by military activities".[324] Relevant issues include the removal of military hardware that harms the environment and the restoration of elements of the environment which have been damaged by military activities.[325] UNEP is also encouraged to collaborate with UNESCO and other international organizations "for the protection of certain designated areas of natural and cultural heritage in times of armed conflict".[326]

177. UNEP has been called upon by the United Nations system and Member States to conduct impartial assessments of the environmental consequences of armed conflict. The first assignment for UNEP in this area was to determine the extent of the damage and risks to human health from the Kosovo conflict in 1999. The Secretary-General requested UNEP and the United Nations Human Settlements Programme (UN-HABITAT) to jointly undertake an independent and scientific assessment of the environmental and human settlement impacts. The assessment focused on five main conflict-related impacts: pollution from bombed industrial sites, damage to the Danube River, damage to protected areas and biodiversity, impacts on human settlements and the use of depleted uranium weapons. The assessment also considered the existing legal and institutional framework for environmental management, as well as national capacity for implementation and enforcement.

178. To conduct the assessment, UNEP established the Balkans Task Force.[327] A series of field missions was conducted with mobile laboratories which were used to analyse field samples, supplemented by remote sensing and geographic information system (GIS) analysis. The final UNEP report detailed the environmental impacts of the conflict together with recommendations for addressing risks and building governance capacity.[328]

179. Following the establishment of the Disasters and Conflicts subprogramme, UNEP now works in four overarching areas. First, upon requests from national Governments, UNEP conducts post-conflict environmental assessments by employing in-depth fieldwork, laboratory analysis and state-of-the-art technology. In addition to the environmental assessment of the Kosovo conflict, the organization has assessed the environmental aspects of armed conflicts and crises in numerous situations, including those involving Afghanistan, the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, the Dominican Republic, Haiti, Iraq, Lebanon, Liberia, Nigeria, Rwanda, Sierra Leone, Somalia, the Sudan, and the Ukraine, and the Occupied Palestinian Territories.[329] The assessments identify major environmental impacts from the armed conflicts and provide independent

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[320] General Assembly resolution 2997 (XXVII) of 15 December 1972, chap. I, para. 2 (*a*)–(*b*).

[321] It should be noted here that in 2013, the Governing Council was given universal membership and renamed the United Nations Environment Assembly, to reflect the expanded role for UNEP following the United Nations Conference on Sustainable Development, which was held in 2012. See General Assembly resolution 67/251 of 13 March 2013. See also Assembly resolution 67/213 of 21 December 2012, paras. 4 (*a*)–(*b*), regarding the expanded role of UNEP and universal membership of the Governing Council following the United Nations Conference on Sustainable Development.

[322] Decision 19/1 of 7 February 1997 on the Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme in UNEP, Proceedings of the Governing Council at its nineteenth session (UNEP/GC.19/34, annex I), p. 52, at annex to the decision, p. 55, para. 3 (*b*)–(*c*).

[323] Cf. the syllabus of the topic contained in the report of the Commission on its sixty-third session, *Yearbook … 2011*, vol. II (Part Two), annex V, para. 23, and *Yearbook … 2014*, vol. II (Part One), A/CN.4/674, para. 8. See also Jensen and Halle, *Protecting the Environment During Armed Conflict …*, p. 53. The report was a joint product of UNEP and the Environmental Law Institute.

[324] UNEP, Fourth Programme for the Development and Periodic Review of Environmental Law, Note by the Executive Director (UNEP/GC/25/INF/15), annex, p. 20. This mandate stems from the Montevideo Programme IV, "Fourth Programme for the Development and Periodic Review of Environmental Law", Governing Council decision 25/11 in *United Nations Environment Programme, Report of the Governing Council, Twenty-fifth session (16–20 February 2009), General Assembly Official Records, Sixty-fourth Session, Supplement No. 25* (A/64/25(SUPP)), annex I. The Montevideo Programmes for the Development and Periodic Review of Environmental Law have served as the basis for UNEP activities relating to environmental law since 1982. The Montevideo Programme IV contains a specific section on the protection of the environment in relation to military activities, with the objective to "reduce or mitigate the potentially harmful effects of military activities on the environment and to encourage a positive role for the military sector in environmental protection". See UNEP/GC/25/INF/15, p. 19.

[325] For general information on the Montevideo Programme, see www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-2.

[326] UNEP/GC/25/INF/15 (see footnote 324 above), p. 20. See also UNEP/Env.Law/MTV4/MR/1/5, para. 160.

[327] The Balkans Task Force consisted of international experts from six United Nations agencies, 19 countries and 26 scientific institutions and non-governmental organizations, as well as local advisers.

[328] UNEP, "The Kosovo conflict: consequences for the environment and human settlements" (1999). Available from https://wedocs.unep.org/handle/20.500.11822/8433.

[329] See the information on the UNEP website regarding post-crisis environmental recovery, at www.unep.org/explore-topics/disasters-conflicts.

technical recommendations to national authorities on how risks can be addressed and national environmental management capacity can be built. Second, UNEP manages post-crisis environmental recovery through field-based project offices, whose aim is to "support long-term stability and sustainable development in conflict and disaster-affected countries".[330] Third, the Environmental Cooperation for Peacebuilding programme has been helping the United Nations system and Member States understand and address the role of the environment and natural resources in conflict and peacebuilding, for example by building a global evidence base, developing a joint policy analysis across the United Nations system and facilitating the application of good practices in the field.[331] The fourth area is disaster risk reduction,[332] which will not be addressed here as it falls outside the core scope of the topic.

180. There is often a lack of reliable neutral and technical information on environmental conditions during and after armed conflict, even though such information is particularly vital in the immediate aftermath of an armed conflict (for example, baseline data to assist remediation, restoration and recovery efforts).[333] The work of the Disasters and Conflicts subprogramme serves to mitigate this information shortage by providing technical information and advice on issues such as resource mediation, extractive industries and gender-responsive resource governance, in addition to conducting post-conflict environmental assessments upon request from the Government in question. Among other projects, UNEP has partnered with the World Bank at the request of the Group of Seven Plus (g7+) of fragile and conflict-affected States[334] to address this information gap in conflict-affected States. One of the initiatives is developing an open data platform for the extractive sector. This platform will consolidate authoritative extractive data into a single platform, offer open data licences for users and assist community consultations and participatory monitoring of benefits sharing agreements and environmental performance.[335]

181. UNEP continues to build capacity in matters relating to the environment, natural resources and conflict, for example through the recent guide on best practices for mediators on resource-sensitive dispute resolution[336] and the report entitled *Women and Natural Resources: Unlocking the Peacebuilding Potential*, which demonstrates the connections between mitigating environmental degradation, equitable access to essential resources and women's empowerment.[337]

182. While the recommendations of post-conflict environmental assessments are not legally binding, it is clear that the technical information and advice provided by UNEP has had an impact. For instance, following the findings of the UNEP assessment of the Kosovo conflict, environmental needs were included in the three humanitarian appeals from 2000 to 2002. In Afghanistan, the findings of the environmental assessment were reflected in the national recovery plan (Securing Afghanistan's Future) and in the common country assessment and the United Nations Development Assistance Framework, with natural resource management and rehabilitation listed as a major priority for reconstruction and development throughout.[338] States should be encouraged to continue to collaborate with and make use of the expertise of UNEP in environmental assessment and protection in the aftermath of armed conflicts.

183. At its second session, held in Nairobi from 23 to 27 May 2016, the United Nations Environment Assembly adopted a resolution on protection of the environment in areas affected by armed conflict, in which it stressed "the critical importance of protecting the environment at all times, especially during armed conflict, and of its restoration in the post-conflict period".[339] The Assembly called on all Member States to implement applicable international law related to the protection of the environment in situations of armed conflict and to consider consenting to be bound by relevant international agreements. States were also urged "to take all appropriate measures to ensure compliance with the relevant international obligations under international humanitarian law".[340] The Assembly requests the Executive Director of UNEP "to continue interaction with the International Law Commission, *inter alia*, by providing relevant information to the Commission at its request in support of its work pertaining to the protection of the environment in relation to armed conflict".[341]

184. The resolution of the United Nations Environment Assembly is the first of its kind since the resolutions on the protection of the environment were adopted in the General Assembly in the 1990s.[342] The resolution is important for several reasons. The basic thrust of the

[330] See www.unep.org/explore-topics/disasters-conflicts/.

[331] See UNEP, *Addressing the Role of Natural Resources in Conflict and Peacebuilding* ….

[332] See the UNEP website for information on disaster risk reduction, at www.unep.org/explore-topics/disasters-conflicts/what-we-do/risk-reduction.

[333] See, for example, Jensen and Lonergan, *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, pp. 127–128. A recent outcome report from an expert meeting in Helsinki on the protection of the environment in times of armed conflicts recommended that UNEP should devote dedicated and systematic attention to follow-up measures after environmental assessments in terms of addressing acute environmental risks and preventing further humanitarian impacts. See International Law and Policy Institute, *"Protection of the Environment in Times of Armed Conflict"* (see footnote 279 above), chap. 4.3.

[334] The g7+ is an international, inter-governmental organization that exists to provide a collective voice for countries affected by conflict, to forge pathways out of fragility and conflict, and to enable peer learning on how to achieve resilience and support between member countries (*Understanding and Improving Engagement with Civil Society in UN Peacekeeping: From Policy To Practice*, p. 15: United Nations publication, 2017). More information is available from the g7+ website, www.g7plus.org.

[335] See the Map X information materials, Map X, "Mapping and assessing the performance of extractive industries", available from https://wedocs.unep.org/handle/20.500.11822/14217.

[336] United Nations Environment Programme *et al.*, *Women and Natural Resources* ….

[337] *Ibid.*, p. 15.

[338] See, for example, Jensen and Lonergan, *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, pp. 26–27 (regarding Kosovo) and p. 31 (regarding Afghanistan).

[339] United Nations Environment Assembly resolution 2/15 on protection of the environment in areas affected by armed conflict, para. 1. See *Report of the second session of the United Nations Environment Assembly of the United Nations Environment Programme, Nairobi, 23–27 May 2016*, annex.

[340] *Ibid.*, para. 3.

[341] *Ibid.*, para. 10.

[342] See *Yearbook … 2011*, vol. II (Part Two), annex V, paras. 10–12.

resolution is to encourage States to recognize the importance of safeguarding the natural environment in times of armed conflict for future generations (i.e. an intergenerational approach). It also stresses the relevance of international law in all phases of armed conflict and the importance of cooperation between States and between States and international organizations. The Executive Director of UNEP is requested to continue to provide enhanced assistance to States affected by armed conflict and States in post-conflict situations, and to report back to the Environment Assembly as soon as possible.

185. Even though the resolution is not legally binding, it may have important practical implications since it stresses international cooperation and also contains a clear directive to the Executive Director with respect to the future work of the organization.

186. Thus, it is suggested that a draft principle be included which specifically addresses how States and organizations involved in post-conflict operations should cooperate on these issues. The draft principle could read as follows:

"*Draft principle III-2. Post-conflict environmental assessments and reviews*

"1. States and former parties to an armed conflict are encouraged to cooperate between themselves and with relevant international organizations in order to carry out post-conflict environmental assessments and recovery measures.

"[…]"

C. Legal cases and judgments

187. As stated before, the international jurisprudence on the protection of the environment in relation to armed conflict is not all that extensive, but it does exist. A comprehensive review of the jurisprudence of international and regional courts and tribunals was presented in the second report.[343] That analysis aimed to identify existing case law that either (*a*) applied provisions of international humanitarian treaty law that directly or indirectly protects the environment during times of armed conflict or (*b*) considered, explicitly or implicitly, that there is a connection between armed conflict and the protection of the environment. In addition, cases relating to the situation of peoples and civilian populations were reviewed.

188. The present report contains a review of relevant jurisprudence of international, regional and national courts and tribunals in order to identify cases in which provisions of international law that (directly or indirectly) protect the environment in the aftermath of armed conflict were applied or discussed.

189. The review focuses on cases considering restoration and remediation of areas of major environmental importance; environmental damages for harm resulting directly or indirectly from military activities; and effects on, and references to, provisions on human rights and the rights of indigenous peoples as a result of environmental degradation in the aftermath of armed conflict, particularly in connection to remediation and restoration efforts.

190. The analysis primarily includes a thorough review of judgments and advisory opinions rendered by the following international courts and tribunals: the International Court of Justice, the Permanent Court of International Justice, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone. The jurisprudence of three regional courts has also been studied, namely, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights and the European Court of Human Rights. As the jurisprudence of the European Court of Human Rights is extensive, a selection had to be made in order to limit the review to the most pertinent cases. In addition to the jurisprudence of the courts mentioned above, the review considers relevant jurisprudence of the International Military Tribunal and the United Nations War Crimes Commission. Cases adjudicated by the domestic courts of the France, Italy, the United Kingdom and the United States were also reviewed.[344] The review also considers selected reports by the Governing Council of the United Nations Compensation Commission, certain aspects of the legal implications of the nuclear testing in the Pacific and cases heard by the Eritrea–Ethiopia Claims Commission.

191. No relevant case law from the Permanent Court of International Justice, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone or the African Court on Human and Peoples' Rights was found.

192. In this regard, it is worth noting that the statutes of a number of international tribunals give them the power to prosecute crimes against property and/or the environment.[345] However, the penalties that these tribunals are

[343] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 92–119.

[344] However, no relevant case law of French, Italian or United Kingdom courts was found.

[345] See, for example, art. 8 of the Rome Statute ("1. The Court shall have jurisdiction in respect of war crimes …. 2. For the purpose of this Statute, "war crimes" means: … (*b*) … (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."); art. 3 of the Statute of the International Tribunal for the Former Yugoslavia, Security Council resolution 827 (1993) of 25 May 1993, annex, ("The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include … (*b*) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (*c*) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (*d*) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (*e*) plunder of public or private property."); art. 6 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available from www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended

(*Continued on next page.*)

entitled to impose are largely limited to imprisonment (as opposed to, for example, remediation), which may explain why they rarely consider the issue of environmental protection after armed conflict.[346]

193. As underlined in the second report of the Special Rapporteur, it is difficult to make a distinction between the protection of the environment as such and the protection of natural objects in the natural environment and natural resources.[347] The fact that "the environment" can be "property" of a person or a group of persons makes it difficult to clearly distinguish between the two. Furthermore, there is often a close link between human rights and the right of ownership to land and resources.

1. Jurisprudence of international courts

194. In the case concerning *Armed Activities on the Territory of the Congo*, one of the issues that the International Court of Justice had to decide was whether or not Uganda had violated the sovereignty of the Democratic Republic of the Congo by illegally exploiting its natural resources. The Court ultimately found that it had ample evidence that members of the Uganda People's Defence Force (UPDF) had looted, plundered and exploited the natural resources of the Democratic Republic of the Congo and held that Uganda was internationally responsible for those acts and thus had an obligation to make reparation.[348] Regarding reparations, the Court ruled that: "[F]ailing agreement between the Parties, the question of reparation due … shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case."[349] On 9 July 2015, the Court decided to resume the proceedings with regard to the question of reparations, and fixed the time limits for the filing of written pleadings. This phase of the proceedings is still ongoing.

195. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice found that the construction of the wall caused serious repercussions for agricultural production.[350] The Court found that reparations had to be made.[351] The Court went on to reiterate the finding of the Court in the *Factory at Chorzów* case that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[352] The Court ultimately concluded that:

> Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.[353]

2. Jurisprudence of regional human rights courts

196. The Inter-American Court of Human Rights has been active in addressing claims relating to violations of human rights and the rights of indigenous peoples as a result of environmental degradation in the aftermath of armed conflict. The case of *Plan de Sánchez Massacre v. Guatemala* concerned the massacre of 268 members of the indigenous Mayan community and the destruction of their homes and property at the village of Plan de Sánchez, which was carried out by members of the Guatemalan Army and civil collaborators who participated under the protection of the army.[354] Some of the evidence given in the case indicated that, as a result of the property damage during the attacks, the soil in the area became less productive and the community struggled to harvest and sell their crops.[355]

197. In the *Ituango Massacres v. Colombia* case, the Court held that:

(*Footnote 345 continued.*)

("The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions …: … destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly …"); and art. 5 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, Treaty Series, vol. 2178, No. 38342, p. 137, p. 145 (hereinafter "Statute of the Special Court for Sierra Leone") ("The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law: … *b*. Offences relating to the wanton destruction of property …: i. Setting fire to dwelling-houses …; ii. Setting fire to public buildings … [and] … other buildings"). On the other hand, this is not the case for the statute of the International Criminal Tribunal for Rwanda, whose jurisprudence discussed the destruction of property only for the purpose of establishing the crime of genocide (see, for example, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgment and Sentence, Cases No. ICTR-96-10-T and ICTR-96-17-T, Trial Chamber, 21 February 2003, paras. 334 and 365.

[346] See, for example, art. 77 of the Rome Statute ("[T]he Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (*a*) Imprisonment for a specified number of years …; or (*b*) A term of life imprisonment … 2. In addition to imprisonment, the Court may order: (*a*) A fine under the criteria provided for in the Rules of Procedure and Evidence; (*b*) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime"); art. 24 of the Statute of the International Tribunal for the Former Yugoslavia ("The penalty imposed by the Trial Chamber shall be limited to imprisonment. … In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."); and art. 19 of the Statute of the Special Court for Sierra Leone ("The Trial Chamber shall impose upon a convicted person … imprisonment for a specified number of years. … In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.").

[347] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 96.

[348] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (see footnote 20 above), at paras. 242, 245 and 250.

[349] *Ibid.*, at pp. 281–282.

[350] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 190, para. 133.

[351] *Ibid.*, at p. 198, para. 152.

[352] *Ibid.* See *Factory at Chorzów,* Claim for Indemnity, Merits, Judgment No. 13, 13 September 1928, *P.C.I.J., Series A*, No. 17, p. 47.

[353] *Legal Consequences of the Construction of a Wall*, p. 198, para. 153.

[354] *Plan de Sánchez Massacre v. Guatemala, Judgment (Reparations)*, Series C, No. 116, 19 November 2004, paras. 2, 73, 74 and 80.

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

> [S]etting fire to the houses in El Aro constituted a grave violation of an object that was essential to the population. The purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla in Colombia …. Therefore, the effect of the destruction of the homes was the loss, not only of material possessions, but also of the social frame of reference of the inhabitants, some of whom had lived in the village all their lives. In addition to constituting an important financial loss, the destruction of their homes caused the inhabitants to lose their most basic living conditions; this means that the violation of the right to property in this case is particularly grave. … Based on the above, this Court considers that the theft of the livestock and the destruction of the homes by the paramilitary group, perpetrated with the direct collaboration of State agents, constitute a grave deprivation of the use and enjoyment of property.[356]

Regarding compensation, the Court held that although many victims were displaced after their property was destroyed by the paramilitary groups, the Court "will not establish compensation for pecuniary damage in favor of the persons who lost their homes and those who were displaced, because this damage will be repaired by other non-pecuniary forms of reparation".[357]

198. The case of *Xákmok Kásek Indigenous Community v. Paraguay* is relevant to the present report even though it does not deal with a situation of armed conflict. Members of the Xákmok Kásek, an indigenous community in Paraguay, brought a claim against the State before the Inter-American Court of Human Rights to reclaim ancestral land which had since become privately owned. The Court comprehensively discussed the rights to indigenous property and the harm that can be done to a people as a result of environmentally adverse activities.[358] The Court consistently stressed the importance of the relationship between indigenous people and their land, and ultimately held that Paraguay had violated, *inter alia*, the right to collective property of the community.[359] The Court held that Paraguay had to return the land and also to pay compensation. To the extent that ownership of land becomes an issue in an armed conflict scenario, the language used in this case could prove useful in understanding the legal relationship of indigenous or other peoples to any piece of land in question.

199. The case of *Río Negro Massacres v. Guatemala* concerned the massacre, destruction and burning of property of the community of Río Negro. The Court addressed the impact on indigenous communities regarding the destruction of their natural resources. The Court noted the special relationship that indigenous peoples have with their land and held that "Guatemala is responsible for the violation of Article 22 (1) of the American Convention, in relation to Article 1 (1) thereof, to the detriment of the survivors of the Río Negro massacres".[360] On the basis of this and other violations, the Court ordered damage compensation in favour of the victims.

200. In the *Massacres of El Mozote and neighboring locations v. El Salvador* case, the Inter-American Court of Human Rights held that:

> [T]he destruction and arson by the Armed Forces of the homes of the inhabitants of the village of El Mozote, the canton of La Joya, the villages of Ranchería, Los Toriles and Jocote Amarillo and the canton of Cerro Pando, as well as the possessions that were inside them, in addition to being a violation of the use and enjoyment of property, also constitute an abusive and arbitrary interference in their private life and home … Consequently, the Court finds that the Salvadoran State failed to comply with the prohibition of arbitrary or abusive interference with private life and home.[361]

Based, *inter alia*, on this and other findings, the Court ordered that the State must implement "a social development program in favor of the victims in this case" and that "[i]n order to contribute to the reparation of the victims who were forcibly displaced from their communities of origin … the State must guarantee adequate conditions so that the displaced victims can return to their communities of origin permanently, if they so wish".[362]

201. *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* is the final relevant case of the Inter-American Court of Human Rights. In this case, the Court interpreted the right to property of members of indigenous peoples and noted that "Article 21 of the Convention protects the close ties that indigenous and other tribal peoples or communities … have to their land, as well as to the natural resources of the ancestral territories and the incorporeal elements related to them".[363] The Court further held that, due to this "intrinsic connection that the members of the indigenous and tribal peoples have to their territory, the protection of the right to the ownership, use and enjoyment of this territory is necessary to ensure their survival".[364]

202. The Court ultimately found that:

> [T]he exploitation of the collective property of the communities of the Cacarica River basin was carried out illegally; furthermore, there is evidence that the authorities failed to protect the right to collective property even though they were aware, because of several on-site visits, of the illegal exploitation that was underway. In this regard, the domestic administrative or judicial remedies were not effective to rectify this situation.[365]

The indigenous community had suffered harm as a result, which was especially severe because of the special relationship that they have with their land.[366] The Court ordered the State to restore the use, enjoyment and possession of the territories of the indigenous people and to provide certain guarantees to them.[367]

203. The European Court of Human Rights has been active in dealing with cases where compensation was claimed for damage to property, including land. In the case

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[356] *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 148, 1 July 2006, paras. 182–183.

[357] *Ibid.*, para. 375.

[358] *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), Series C, No. 214, 24 August 2010, paras. 282–284 and 321.

[359] *Ibid.*, paras. 85, 86, 112, 113, 281 and 315–325.

[360] *Río Negro Massacres v. Guatemala* (see footnote 228 above), para. 184.

[361] *Massacres of El Mozote and nearby places v. El Salvador*, Judgment (Merits, Reparations and Costs), Series C, No. 252, 25 October 2012, para. 182. See also para. 195.

[362] *Ibid.*, paras. 338, 339 and 345.

[363] *Afro-Descendant Communities* (see footnote 228 above), para. 346. See also paras. 352 and 354.

[364] *Ibid.*, para. 346.

[365] *Ibid.*, para. 356.

[366] *Ibid.*, para. 459.

[367] *Ibid.*, paras. 459–461.

of *Akdivar and others v. Turkey*, the applicants claimed, *inter alia*, compensation for the losses incurred as a result of the destruction of their houses by the security forces which forced them to abandon their village. The applicants claimed pecuniary damage in respect of the loss of houses, cultivated land, household property and livestock. The Court held that:

> [A]n award should be made in respect of the houses for which a record exists based on the surface area noted by the experts at the base rate per square metre proposed by them. The Court also considers it appropriate to make an award in respect of the remaining houses. However, due to the absence of evidence which substantiates the size of these properties any calculation must inevitably involve a degree of speculation.[368]

204. The case of *Selçuk and Asker v. Turkey* concerned the burning of houses by security forces in south-east Turkey. The applicants claimed pecuniary damages in respect of the loss of their houses, cultivated land, household property, livestock and a mill. They also claimed that an award should be made in respect of the cost of alternative accommodation. The case is noteworthy as the Court awarded both pecuniary and non-pecuniary damages.[369]

205. In the case of *Esmukhambetov and Others v. Russia*, the applicants sought pecuniary and non-pecuniary damage for damage caused when an aerial strike hit the village of Kogi, killing several people and destroying houses, livestock and crops. The Court addressed the practical issues that the applicants were faced with to obtain documents relating to their destroyed property and considered "it appropriate to award the applicants equal amounts on an equitable basis, taking into account information on the average prices of the relevant items of property at the material time."[370] However, the claim regarding compensation for plots of land was rejected due to lack of evidence.[371] The applicants were also awarded non-pecuniary damages.[372]

3. Jurisprudence of international criminal tribunals

206. Some cases decided by international criminal tribunals are also relevant to the present report, for example the cases of *Prosecutor v. Naser Orić, Prosecutor v. Milan Martić* and *Prosecutor v. Ante Gotovina et al.* of the International Tribunal for the Former Yugoslavia. While these cases do not discuss the protection of the environment after armed conflict, they do discuss the rule that damage and destruction that occurs after fighting has ceased cannot be justified by the principle of military necessity.[373] Several examples of acts committed during armed conflict which resulted in long-term effects on the environment following the termination of the conflict were heard in the International Military Tribunal case of *Prosecutor v. Göring et al.*[374]

4. Jurisprudence of domestic courts

207. Domestic courts in the United States have dealt with the issue of restoration and remediation of areas of environmental importance. In *United States v. Shell Oil*, oil companies which had been engaged in the production of high-octane aviation fuel during the Second World War dumped acid waste by-products at a site in California beginning in June 1942. Aviation fuel was critical for the war effort, and the Government of the United States actively supervised its production. In the 1990s, the site was cleaned, and the Federal Government sued the oil companies that had dumped the acid waste to recover the cost of the clean-up. The companies alleged that the dumping had occurred in response to an "act of war" against the United States. The District Court rejected the oil companies' argument that they were exempt from liability on the ground that the contamination was caused by an "act of war," but held that the oil companies were not liable for the clean-up costs. The Court of Appeals affirmed this.[375]

208. There is also jurisprudence from United States courts which deals with environmental damages for harm resulting from military activities. The *Agent Orange* case involved claims by Vietnamese nationals and an organization for damages allegedly done to them and their land by the United States use of Agent Orange and other herbicides during the Viet Nam war from 1965 to 1971. The Court dismissed the case, holding that there was no basis for any of the claims of the plaintiffs. Notably, the Court held that Agent Orange was not considered a poison under international law at the time of its use by the United States.[376]

209. The Court of Appeals affirmed the judgment above in the case of *Vietnam Association for Victims of Agent Orange v. Dow Chem. Co.*, ultimately denying that the defendants could have been held liable for the damages caused to the environment by Agent Orange. A further review of the case confirmed this decision. The plaintiffs filed a petition to the United States Supreme Court to hear the case. On 2 March 2009, the Supreme Court denied *certiorari*, and refused to reconsider the ruling by the Court of Appeals.[377]

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[368] *Akdivar and Others v. Turkey* (Article 50), 1 April 1998, ECHR 1998 II, paras. 18–19. See also the cases of *Menteş and Others v. Turkey* (Article 50), 24 July 1998, *Reports of Judgments and Decisions* 1998-IV; and *Orhan v. Turkey*, No. 25656/94, 18 June 2002.

[369] *Selçuk and Asker v. Turkey*, 24 April 2008, ECHR 1998-II, paras. 106, 118 and 119.

[370] *Esmukhambetov and Others v. Russia*, No. 23445/03, European Court of Human Rights, 29 March 2011, paras. 206 and 208–211.

[371] *Ibid.*, paras. 208–211.

[372] *Ibid.*, paras. 214–216.

[373] *Prosecutor v. Naser Orić*, Judgment, Case No. IT-03-68-T, Trial Chamber, 30 June 2006, para. 588; *Prosecutor v. Milan Martić*, Judgment, Case No. IT-95-11-T, Trial Chamber, 12 *June* 2007, para. 93; *Prosecutor v. Ante Gotovina et al.*, Judgment (Volume II of II), Case No. IT0690-T, Trial Chamber, 15 April 2011, para. 1766. See also Case No. IT-98-34-T, *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Štela"*, Judgment, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 589, where the Tribunal stated that "The destruction was not justified by military necessity as it occurred … after the actual shelling had ceased".

[374] *Prosecutor v. Hermann Wilhelm Göring et al.* (see footnote 20 above), pp. 58–60, 239–240 and 297.

[375] United States, *United States v. Shell Oil Co.*, United States Court of Appeals, Ninth Circuit, 294 F.3d 1045, 1060 (9th Cir. 2002).

[376] United States, *Vietnam Association for Victims of Agent Orange/Dioxin et al. v. Dow Chemical Co. et al.* (District Court for the Eastern District of New York) Memorandum, Order and Judgment of 28 *March* 2005, 373 F. Supp. 2d 7 (2005), affirmed in Court of Appeals for the Second Circuit Decision of 22 *February* 2008, 517 F.3d 76 (2008), pp. 186, 119–124, 127–130, 132, 134, 138.

[377] United States, *Vietnam Association for Victims of Agent Orange v. Dow Chemical Company*, Court of Appeals, Second Circuit (see previous footnote).

210. It is worth noting that the United States has contributed to the efforts to remediate the environmental damage and health problems caused by Agent Orange since 2007.[378] Notably, funds have been allocated to the United States Agency for International Development to remediate the damage. This has been done through projects which aim to decontaminate "dioxin hotspots" such as the area of the Danang Airport Environmental Remediation Project and other areas such as the Bien Hoa airbase.[379] There are also numerous disability programmes run by the United States Agency for International Development in areas which were contaminated by Agent Orange.[380]

211. The case of *Corrie v. Caterpillar, Inc.* dealt with the situation following Israeli occupation of the West Bank and Gaza Strip, during which the Israeli Defense Force utilized Caterpillar bulldozers to demolish homes within the Palestinian territories. Seventeen members of the plaintiffs' families were killed or injured in the course of these demolitions. Ultimately, the court dismissed the case.[381] The appeal against the decision was also denied.[382]

212. There is also jurisprudence of United States courts that deals with claims in which it has been argued that environmental degradation in the aftermath of armed conflict constituted violations of human rights and of the rights of indigenous peoples. In the case of *Beanal v. Freeport-McMoran, Inc.*, an Indonesian tribal leader brought suit against two United States corporations related to their operation of an open-pit copper, gold and silver mine in Indonesia. The case came before the court on the defendants' motion to dismiss the claims. Although there does not appear to have been sustained conflict in this case, the plaintiff did allege that defendants' security guards "in conjunction with third parties" had engaged in arbitrary arrest and detention, torture and destruction of property.[383] Although the court initially found that the plaintiff had standing to bring environmental claims,[384] the court ultimately dismissed the environmental claims because the United States Alien Tort Statue did not provide a sufficient basis on which to bring them.[385] The decision was taken on appeal where it was upheld.[386]

5. The nuclear testing in the Marshall Islands: compensation claims commission and the cases brought to the court in the United States

213. During the period from 30 June 1946 to 18 August 1958, the United States conducted 67 nuclear tests in the Marshall Islands.[387] The nuclear tests led to compensation claims and legal processes both in the United States and in the Marshall Islands. The claims are characterized as war and post-war claims by the United Nations.[388]

214. Shortly after the first tests, the Marshall, Caroline and Mariana island chains became a strategic trust territory under the United Nations, administered by the United States pursuant to an agreement between the Security Council and the United States.[389] The trusteeship was terminated in 1990 and the Marshall Islands became a Member of the United Nations in 1991.

215. In order to discharge its obligations, the Administering Authority was entitled to, *inter alia*, establish naval, military and air bases on the territories.[390] The responsibilities of the Administering Authority included the obligation to "protect the health of the inhabitants" and to "protect the inhabitants against the loss of their lands and resources".[391] The effects of the testing programme were considerable and included the annihilation of some islands and vaporization of portions of others; permanent resettlement with substantial relocation hardships to some inhabitants; exposure of some inhabitants to high levels of radiation; and widespread contamination from radioactivity that has rendered some islands unusable by humans for indefinite future periods.[392] The Trusteeship Council was well aware of the effects on land and human beings.[393] After the so-called Bravo test in 1954, over 100 elected leaders from more than 10 atolls in the Marshall Islands requested that that the experiments be ceased immediately, or at least that all precautionary measures be taken. The Trusteeship Council responded by supporting the continuing testing, albeit with safety precautions. A similar request was made two years later, in 1956, this time with an added request that the Bikini and Enewetak people be compensated.[394] Later the same year, the United States made the first compensation, paid in cash and in

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[378] See United States, Congressional Research Service, "U.S. Agent Orange/Dioxin Assistance to Vietnam", 13 November 2015

[379] *Ibid.*, pp. 10 and 13.

[380] *Ibid.*, p. 12.

[381] United States, *Corrie v. Caterpillar, Inc.* (see footnote 20 above), pp. 8 and 16.

[382] United States, Court of Appeals, Ninth Circuit, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007), para. 982.

[383] United States, *Beanal v. Freeport-McMoran, Inc.*, District Court for the Eastern District of Louisiana, 969 F. Supp. 362, 368–69 (E.D. La. 1997) affirmed in *Beanal v. Freeport-McMoran, Inc.*, Court of Appeals, Fifth Circuit, 197 F.3d 161 (5th Cir. 1999), 197 F.3d 161 (5th Cir. 1999), p. 369.

[384] *Ibid.*, p. 368.

[385] *Ibid.*, pp. 370 and 383–384.

[386] United States, *Beanal v. Freeport-McMoran, Inc.*, Court of Appeals, Fifth Circuit (see footnote 383 above).

[387] The tests took place at Bikini and Enewetak Atoll. Nuclear Claims Tribunal *Report to the Nitijela of the Republic of the Marshall Islands, Fiscal Year 1992*, appendix A. The Bravo test that took place at Bikini on 1 March 1954 was the largest hydrogen bomb ever exploded at the time by the United States. The fallout cloud was considerable and affected also other atolls and islands, such as Rongelap and Utrik.

[388] *Yearbook of the United Nations* (1982) Part One, sect. 3, chap. II at p. 1280. The *Yearbooks of the United Nations* are available from http://unyearbook.un.org.

[389] Prior to the Second World War the islands were held by Japan under a mandate arising from the League of Nations. During the Second World War they came under occupational control by the United States. By its resolution 21 (1947) of 2 April 1947, the Security Council designated the islands formerly held by Japan under mandate as a strategic area and placed them under the Trusteeship System established in the Charter of the United Nations.

[390] Security Council resolution 21 (1947), art. 5, para. 1.

[391] *Ibid.*, art. 6, paras. 3 and 2, respectively.

[392] United States, *People of Bikini, ex rel. Kili/Bikini/Ejit Local Gov. Council v. United States*, 77 Federal Claims Court 744, 749 (2007), affirmed in Court of Appeals for the Second Circuit decision of 29 January 2009, 554 F.3d 996 (Fed. Cir. 2009), at p. 749.

[393] This is evidenced by the records in the *Yearbook of the United Nations*, see, for example, *Yearbook of the United Nations* (1954), Part One, sect. III, chap. IV, p. 359 (Operation of the International Trusteeship System).

[394] See *Yearbook of the United Nations* (1956), Part One, sect. 3, chap. IV, p. 365.

a trust fund.[395] The Trusteeship Council reaffirmed an earlier resolution on the 1954 tests and recommended that all necessary measures be taken to guard against any danger, to settle forthwith all justified claims by the inhabitants of Bikini and Enewetak relating to their displacement from their islands in connection with the nuclear tests, and to compensate families which might have to be temporarily evacuated for any losses which might result from further nuclear weapons tests.[396] Subsequent to decisions by the United States Congress, further compensation was paid. A special trust fund of $6 million was established in 1978 for the Bikini people. This was to be followed by other trust funds for compensation and resettlement. The United States also took measures to clean up and rehabilitate Enewetak.

216. The Bikini people filed the first class-action lawsuit against the United States Government in 1981. In addition, several thousand Marshall Islanders filed individual lawsuits (compensation for personal injuries). These lawsuits were dismissed by the United States Court of Claims Judge Kenneth Harkins in 1987.[397] The facts as found by Judge Harkins were later adopted and restated in later Court cases.[398]

217. It should be recalled that the so-called Compact of Free Association between the Marshall Island and the United States came into effect in 1986.[399] The Compact contains a special section on compensation for nuclear testing, section 177, according to which the Government of the United States accepts responsibility for compensation owed to the citizens of the Marshall Islands for loss or damage to property and person resulting from the nuclear testing programme. It was agreed that the United States would provide compensation for "the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise". The Nuclear Claims Tribunal was set up for this purpose in 1987.[400] The Tribunal functions under the laws of the Marshall Islands and deals with three main categories of claims: personal injury claims, property damage claims (for example, loss of use of land, environmental restoration) and losses due to hardship.

218. In 2006, Marshall Islanders with land rights on Bikini Atoll brought another class-action suit against the United States alleging a Fifth Amendment taking of Plaintiff's claims, a breach of fiduciary duties and obligations and a breach of implied-in-fact contracts arising from post-Second World War testing of thermonuclear bombs. The *People of Bikini* case, which has been described as a "resurrection" of the proceedings heard before the Court in the 1980s, was brought before the United States Court because the Nuclear Claims Tribunal was unable to pay the full amount of the damages it awarded.[401] The case addressed land rights and property rights of the Marshall Islanders. Ultimately, the Federal Circuit Court found that it was unable to reach the merits of the case, and the case was dismissed.

6. United Nations Compensation Commission

219. Reports of the Governing Council of the United Nations Compensation Commission are also relevant here.[402] The Commission was established by the Security Council as a subsidiary organ of the Council in 1991 to process claims and pay compensation for losses resulting from the preceding invasion and occupation of Kuwait by Iraq.[403] The Council reaffirmed that "Iraq … is liable under international law for any direct loss, 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".[404]

220. The responsibility of Iraq under international law for these losses was reaffirmed in the Security Council resolutions establishing the Commission. The Commission was designed not to be a "court or arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims".[405] The Commission functions under the authority of the Security Council.[406]

221. The Commission received approximately 2.69 million claims seeking approximately $352.5 billion in compensation for death, injury, loss of or damage to property,

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[395] US$ 25,000 in cash and US$ 300,000 in a trust fund for the Bikini Islanders. The United States has provided information on the total amount of compensation, which is entitled "The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands" and is available from https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands/.

[396] *Yearbook of the United Nations* (see footnote 394 above), p. 365.

[397] Johnson, *Nuclear Past, Unclear Future*, pp. 20 and 23; United States, *People of Bikini*, Federal Claims Court (see footnote 392 above), p. 748.

[398] United States, *People of Bikini*, Federal Claims Court (see footnote 392 above) pp. 748–749.

[399] The Compact was amended in 2004. Compact of Free Association Amendments Act of 2003, Pub. L. No. 108–188, 117 Stat. 2720; Embassy of the Republic of the Marshall Islands, Compact, as Amended, Now Implemented (May 4, 2004). Similar compacts of free association were concluded between the Federated States of Micronesia and the United States and between Palau and the United States.

[400] Compact of Free Association, sect. 177 (*b*)-(*c*).

[401] United States, *People of Bikini*, Federal Claims Court (see footnote 392 above) pp. 744–745 and 748.

[402] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, para. 81.

[403] Information on the United Nations Compensation Commission is available from www.uncc.ch/home. For an overview of the work of the Commission, see Payne and Sand, *Gulf War Reparations and the UN Compensation Commission* ….

[404] Security Council resolution 687 (1991), sect. E, para. 16.

[405] Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991), S/22559, para. 20. This implies that the liability was due to the violation by Iraq of the *jus ad bellum* rule rather than violations of *jus in bello* rules. Security Council resolution 692 (1991), paragraph 3, established the Commission in accordance with section I of the Secretary-General's report (which includes para. 4. but not para. 20).

[406] The Commission is comprised of a Governing Council, panels of commissioners and a secretariat. The Governing Council is the policymaking organ of the Commission and its membership is the same as that of the Security Council (of which the Commission is a subsidiary body). The claims were resolved by panels, each of which was composed of three commissioners. The commissioners that dealt with these claims were independent experts in various fields, ranging from law, accountancy, loss adjustment, insurance to engineering. Technical experts and consultants assisted the panels in the verification and valuation of the claims.

commercial claims and claims for environmental damage resulting from the unlawful invasion and occupation of Kuwait in 1990–1991 by Iraq. The Commission awarded a total of $52.4 billion (equalling 15 per cent of the compensation sought) to 100 Governments and international organizations in relation to 1.5 million successful claims.[407] The resolution of such a significant number of claims with such a large asserted value over such a short period has no precedent in the history of international claims resolution.

222. In its five reports regarding so-called "F4" claims, the Panel of Commissioners recommended that compensation be paid for a variety of claims under the following seven categories: transport and dispersion of pollution; damage to cultural heritage; damage to marine and coastal resources; damage to terrestrial resources (including agricultural and wetland resources); damage to groundwater resources; departure of persons from Iraq or Kuwait; and damage to public health.

223. Many of the reports of the Panel of Commissioners are of interest for the present report. In the report concerning the first instalment of "F4" claims,[408] the Panel responded to the following issue raised by Iraq: "Can the costs of research programmes, studies and procedures for the monitoring and assessment of environmental damage and depletion of natural resources qualify as 'environmental damage and depletion of natural resources' …?"[409] The Panel noted that: "The monitoring and assessment claims present special problems in that they are being reviewed before decisions have been taken on the compensability of any substantive claims … Thus, the claims are being reviewed at a point where it may not have been established that environmental damage or depletion of natural resources occurred as a result of Iraq's invasion and occupation of Kuwait."[410] The Panel further noted that "the purpose of monitoring and assessment is to enable a claimant to develop evidence to establish whether environmental damage has occurred and to quantify the extent of the resulting loss".[411] The Panel also provided considerations for determining whether to compensate for monitoring and assessment activities.[412]

224. In the report concerning the second instalment of "F4" claims,[413] the Commission found that:

> Iraq is not exonerated from liability for loss or damage that resulted directly from the invasion and occupation simply because other factors might have contributed to the loss or damage. Whether or not any environmental damage or loss for which compensation is claimed was a direct result of Iraq's invasion and occupation of Kuwait will depend on the evidence presented in relation to each particular loss or damage.[414]

The Commission awarded compensatory damages.[415]

225. In the report concerning the third instalment of "F4" claims,[416] the Panel addressed the claim by Kuwait that, as a result of Iraqi forces' detonation of oil wells, more than 1 billion barrels of crude oil had been released into the environment and ignited and burned for many months, which contaminated the soil, buildings and damaged aquifers. Part of the damage to the aquifers was a result of the attempt by Kuwait to put out the fires by using seawater, after the occupation. In addition, desert soil and vegetation were severely disrupted by construction of military fortifications, laying and clearance of mines and movement of military vehicles and personnel. The Panel found that Iraq was liable for damages to compensate Kuwait for remediation measures for each of the claims of Kuwait.[417] The Panel found that the environmental damage was a direct result of Iraq's invasion and occupation of Kuwait and that certain programs Kuwait proposed to remediate the damage were reasonable.[418]

226. Saudi Arabia claimed that it suffered damage to its shoreline as a result of oil barrels intentionally being released into the Persian Gulf and as a result of contaminants being released from oil wells, in addition to other releases of oil. Iraq argued that the damage to the shoreline was not solely attributable to the events in 1991, but rather as a result of oil released well after the Iraqi occupation of Kuwait ended.[419] The Panel found that "damage from oil contamination to the shoreline between the Kuwait border and Abu Ali constitutes environmental damage directly resulting from Iraq's invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment".[420]

227. In the report concerning part one of the fourth instalment of "F4" claims,[421] the Panel held that:

> Iraq is not exonerated from liability for loss or damage simply because other factors might have contributed to the loss or damage. Whether or not any environmental damage or loss for which compensation is claimed was a direct result of Iraq's invasion and occupation of Kuwait

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[407] See the website of the Commission at www.uncc.ch and www.uncc.ch/summary-awards.

[408] Report and recommendations made by the Panel of Commissioners concerning the first instalment of "F4" claims, S/AC.26/2001/16. The first instalment of "F4" claims included 107 claims for monitoring and assessment of environmental damage, depletion of natural resources, monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks.

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

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

[411] *Ibid.*, para. 30.

[412] *Ibid.*, para. 31.

[413] Report and recommendations made by the Panel of Commissioners concerning the second instalment of "F4" claims, S/AC.26/2002/26. The second "F4" instalment consisted of claims for expenses incurred for measures to abate and prevent environmental damage, to clean and restore the environment, to monitor and assess environmental damage and to monitor public health risks alleged to have resulted from the invasion and occupation of Kuwait by Iraq.

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

[415] *Ibid.*, paras. 66–72, 96–98, 107–117, 160 and 178.

[416] Report and recommendations made by the Panel of Commissioners concerning the third instalment of "F4" claims, S/AC.26/2003/31. The claims in the third "F4" instalment were for expenses resulting from measures already taken or to be undertaken in the future to clean and restore environment alleged to have been damaged as a direct result of the invasion and occupation of Kuwait by Iraq.

[417] *Ibid.*, paras. 74, 98 and 99.

[418] *Ibid.*, paras. 36, 38, 60 and 167.

[419] *Ibid.*, paras. 169–192.

[420] *Ibid.*, para. 178.

[421] Report and recommendations made by the Panel of Commissioners concerning the part one of the fourth instalment of "F4" claims, S/AC.26/2004/16. The claims in the fourth "F4" instalment were for expenses resulting from measures already taken or to be undertaken to clean and restore environment alleged to have been damaged as a direct result of the invasion and occupation of Kuwait by Iraq.

will depend on the evidence presented in relation to each particular loss or damage … Where the evidence shows that damage resulted directly from Iraq's invasion and occupation of Kuwait but that other factors have contributed to the damage for which compensation is claimed, due account has been taken of the contribution from such other factors in order to determine the level of compensation that is appropriate for the portion of the damage which is directly attributable to Iraq's invasion and occupation of Kuwait.[422]

The Commission awarded compensatory damages.[423]

228. In the report concerning part two of the fourth instalment of "F4" claims, the Panel stated that:

Where the evidence shows that damage resulted directly from Iraq's invasion and occupation of Kuwait but that other factors have contributed to the damage for which compensation is claimed, due account has been taken of the contribution from such other factors in order to determine the level of compensation that is appropriate for the portion of the damage which is directly attributable to Iraq's invasion and occupation of Kuwait.[424]

The Commission awarded compensatory damages.[425]

229. In the report concerning the fifth instalment of "F4" claims,[426] the Panel established the admissibility of claims for compensation arising from "pure environmental damage" (i.e., damage to natural resources without commercial value) and found that temporary loss of the use of such resources was compensable.[427] The Panel also established that Governments could claim damages for losses or expenses resulting from a damage to public health, in terms of adverse health effects on specific categories of residents or on the general population (and not only for "monitoring of public health" and "medical screenings").[428] The Panel also addressed Habitat Equivalency Analysis, which is a methodology that determines the nature and extent of compensatory restoration based upon the loss of ecological services that resources provided before they were damaged as a consequence of the war. The Panel found that:

[I]n each case where a claimant seeks an award to undertake compensatory restoration, the Panel has considered whether the claimant has sufficiently established that primary restoration has not or will not fully compensate for the losses. Compensation is recommended only where the evidence available shows that, even after primary restoration measures have been undertaken, there are, or there are likely to be, uncompensated losses.[429]

The Commission awarded compensatory damages.[430]

230. In sum it can be noted that in many cases, the Commission approved compensation for assessment and monitoring activities in order to determine the potential extent of damage under these categories. There were several distinctions of note in the reports. There was a clear difference between those countries immediately adjacent to the conflict zones in Iraq and Kuwait and countries that were not in the area of conflict. The Islamic Republic of Iran Kuwait and Saudi Arabia, for example, all were awarded compensation for claims of direct contact with pollutants released by Iraqi actions. The Syrian Arab Republic, on the other hand, made claims on the basis of contact with airborne pollutants that allegedly reached Syrian territory on the prevailing winds. The Commission rejected many of those claims, although it did award compensation to the Syrian Arab Republic to monitor the effect on public health of the oil fires in Kuwait.

231. All of the claims of Jordan in the first report concern the effect of refugees and displaced persons on the environment.[431] The Commission awarded compensation for all these claims, including for indirect damage to wetlands from water consumption by refugees.[432]

7. Eritrea–Ethiopia Claims Commission

232. Claims heard by the Eritrea–Ethiopia Claims Commission are relevant as far as they relate to reparations for environmental damage caused during armed conflict. The Algiers Agreement brought an end to the international armed conflict fought between Ethiopia and Eritrea from 1998 to 2000 and also established the Eritrea–Ethiopia Claims Commission.[433] The Commission had a mandate to:

decide through binding arbitration all claims for loss, damage or injury … (*a*) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (*b*) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[434]

233. It has been noted that the military operations conducted during the conflict, involving both combat and instances of occupation, resulted in extensive environmental damage to both States.[435] Eritrea did not claim for environmental damage before the Commission, but Ethiopia claimed over US$ 1 billion for the environmental damage which had been caused in various parts of the country.[436]

234. In the *Partial Award Central Front—Ethiopia's Claim 2*, the Commission held that there was insufficient evidence to support the claims for alleged environmental

[422] *Ibid.*, paras. 39–40.

[423] *Ibid.*, paras. 158–189, 247–299 and 301–319.

[424] Report and recommendations made by the Panel of Commissioners concerning the part two of the fourth instalment of "F4" claims, S/AC.26/2004/17, para. 36. As noted above, the claims in the fourth "F4" instalment were for expenses resulting from measures already taken or to be undertaken to clean and restore environment alleged to have been damaged as a direct result of the invasion and occupation of Kuwait by Iraq.

[425] *Ibid.*, paras. 58–131.

[426] Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims, S/AC.26/2005/10. The claims in the fifth "F4" instalment were for compensation for damage to or depletion of natural resources, including cultural heritage resources; measures to clean and restore damaged environment; and damage to public health.

[427] *Ibid.*, para. 57.

[428] *Ibid.*, para. 68 and 71.

[429] *Ibid.*, para. 82.

[430] *Ibid.*, paras. 102–118, 353–366 and 442–456.

[431] See S/AC.26/2001/16, chap. VI.

[432] *Ibid.*

[433] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers Agreement), art. 1. For more detail see Murphy, Kidane and Snider, *Litigating War* …, p. 1.

[434] Algiers Agreement, art. 5.

[435] Murphy, *Litigating War* …, p. 228.

[436] *Ibid.*, p. 228. See Eritrea–Ethiopia Claims Commission, *Partial Award Central Front—Ethiopia's Claim 2*, 28 April 2004, UNRIAA, vol. XXVI, pp. 155–194, at paras. 53 and 100; Eritrea–Ethiopia Claims Commission, *Final Award, Ethiopia's Damages Claims*, 17 August 2009, UNRIAA, vol. XXVI, pp. 631–770, at para. 422.

damage caused in the Mereb Lekhe Wereda areas.[437] It also rejected the claim of Ethiopia for alleged environmental damage caused in the Irob Wereda area, holding that: "The allegations and evidence of destruction of environmental resources also fall well below the standard of widespread and long-lasting environmental damage required for liability under international humanitarian law."[438]

235. In the *Final Award—Ethiopia's Damages Claims*, most of the environmental claims were related to the alleged loss of gum Arabic and resin plants but also included claims for the loss of trees and seedlings, and damage to terraces in Tigray.[439] Ethiopia also initially sought a claim related to a loss of wildlife, but this claim was withdrawn.[440] Ethiopia claimed that the environmental damage was a result of violations of *jus in bello* by Eritrea, and in the alternative that it was a result of a violation of the *jus ad bellum*.[441] Ultimately both arguments were rejected.[442] The Commission found that there was a lack of proof as neither the location of the allegedly damaged natural resources nor the circumstances of their destruction were identified.[443] The evidence presented also failed to address the possibility that Ethiopian forces or civilians could have played a role in the environmental damage caused during the armed conflict.[444] The Commission held that: "Taking account of the huge amount claimed, the lack of supporting evidence, the unanswered questions regarding the trees' location, and the manifold errors in calculating the claimed damages, Eritrea's *jus ad bellum* claim for environmental damage is dismissed".[445]

8. Concluding remarks

236. The case law based on damage and harm to the environment in relation to armed conflict relies on the availability of domestic law, international environmental peacetime agreements and—in recent years—also on international criminal law, primarily as set out in the Rome Statute. Other important examples come from *ad hoc* processes such as the United Nations Compensation Commission. This diverse pattern is likely to prevail for the foreseeable future, since there are few indications that States are willing to accept one comprehensive environmental crime such as "ecocide". While the concept of ecocide as a description of wilful extensive damage, destruction or loss of ecosystems has long been used, it has not been incorporated into international agreements.[446] The act of wilful destruction of the environment during the course of war, which has been described as "military ecocide",[447] is therefore also a term unlikely to be accepted by States.

237. It has also been proposed to incorporate "crimes against the environment" into the Rome Statute. The proponent discusses the *pro et con* arguments with respect to limiting the crime to the during armed conflict phase, and ultimately reaches the conclusion that attempting to cover also crimes outside the scope of armed conflict would "'stretch' the reach of the Court to situations beyond which it was principally designated to address".[448]

238. The following draft principle is therefore proposed:

"Draft principle I-1. Implementation and enforcement

"States should take all necessary steps to adopt effective legislative, administrative, judicial or other preventive measures to enhance the protection of the natural environment in relation to armed conflict, in conformity with international law."

D. Remnants of war

1. Remnants of war on land

239. Armed conflict has an impact on the natural environment, either as a direct result of various means and methods of warfare, or as an indirect consequence of the hostilities. The impact of armed conflict on the environment is often detrimental not only to the environment as such, but also to the health of the population that lives in the affected area. Also, military use of land outside the theatre of war may leave traces that are harmful and make the land unsuitable for future civilian use. Military bases may also have negative environmental effects, although this has not been regarded as a matter of concern for the territorial State and for the State that is leasing the base area until quite recently. Status of forces agreements seldom contain provisions on environmental management. While the affected environment may be an area under the sovereignty or control of a State, it can also be an area outside the exclusive jurisdiction of a State, such as the high seas or the international seabed.

240. There are a few examples of areas that are preserved rather than negatively affected in relation to armed conflict. On the rare occasions that such areas exist, they may even resemble a natural reserve—an environmentally protected area. This may be the case with areas that are exclusively used for military purposes, such as militarily restricted areas. One prominent example is the "demilitarized zone" between the Democratic People's Republic of Korea and the Republic of Korea, which is often said to be a paradise for wildlife and biodiversity.[449]

241. There are few legal rules that regulate the environmental consequences of armed conflict. The most developed rules are to be found in the context of explosive remnants of war.

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[437] *Ethiopia Partial Award* (see previous footnote), para. 52.

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

[439] *Ethiopia Final Award* (see footnote 436 above), para. 421. See also Murphy, *Litigating War* …, p. 228.

[440] *Ethiopia Final Award* (see footnote 436 above), para. 422. See also Murphy, *Litigating War* …, p. 228.

[441] Murphy, *Litigating War* …, p. 228; *Ethiopia Final Award* (see footnote 436 above), para. 421.

[442] Murphy, *Litigating War* …, p. 228. See *Ethiopia Final Award* (see footnote 437 above), para. 425. The environmental claims were also rejected in the Partial Award, see *Ethiopia Partial Award* (see footnote 437 above), paras. 53 and 100.

[443] *Ethiopia Final Award* (see footnote 436 above), para. 423.

[444] *Ibid.*

[445] *Ibid.*, para. 425.

[446] See, for example, Falk, "Environmental Warfare and Ecocide …"; Westing, "Herbicides in warfare: the case of Indochina". See also https://ecocidelaw.com/history/ for a useful overview of the history of the concept.

[447] Hough, "Defending nature …".

[448] Freeland, *Addressing the Intentional Destruction of the Environment* …, pp. 229–230.

[449] The "demilitarized zone" is not demilitarized in the ordinary sense of the word. The area is heavily fortified and littered with landmines.

242. It is worth recalling that there is no legal definition of "remnants of war". The term has been used in General Assembly resolutions without any attempt to define it. In an early report to UNEP, the expression is said to refer to a variety of relics, residual or devices not used or left behind at the cessation of active hostilities.[450] The author, Arthur H. Westing, considers that remnants of war include non-explosive devices, unexploded landmines, sea-mines and booby-traps, unexploded munitions, material such as barbed wire and sharp metal fragments, wreckage of tanks, vehicles and other military equipment, as well as sunken warships and downed aircraft.[451] The term has also been said to refer to "the residuum left in a territory after the end of an armed conflict".[452] It was not until 2003 that a partial definition was adopted, namely a definition of the term "explosive remnants of war". This definition will be taken up again later in the report.

243. The term "remnants" clearly indicates a physical object rather than a physical area. A "remnant" can be removed, at least theoretically. In the past it was therefore appropriate to speak in terms of material remnants of war, which was the term most commonly used at the time.

244. The issue of remnants of war was the focus of much attention during the 1970s. The General Assembly adopted several resolutions that addressed material remnants of war and their effect on the environment. At the time, the resolutions were connected to the use of landmines during the Second World War, as well as colonial wars and situations of foreign occupation. Issues of liability, responsibility and compensation were at the fore. The first resolution was adopted in 1975, when the Assembly requested the Governing Council of UNEP to undertake a study of the material remnants of wars, particularly mines, and their effect on the environment, and to submit a report to the General Assembly in 1976.[453] UNEP presented an interim report which the General Assembly took note of.[454] Hence, the focus was not so much on the effects of mines on humans, but rather the effects of mines on the environment and on land. This is not surprising given the context. Firstly, the United Nations Conference on the Human Environment had been held in 1972 and therefore served as a platform for further initiatives. Secondly, mines were not prohibited in themselves under the law of armed conflict, their use was only restricted.[455] Clearly, the extensive use of mines during the Second World War and the armed conflicts that followed shed light on the consequences of their use. States "which created this situation" were called "to compensate forthwith the countries in which such mines were placed for any material and moral damage suffered by them … and to take speedy measures to provide technical assistance for the removal of such mines"[456]. The situations in States such as Egypt, Libya, Malta and Viet Nam and some Eastern European States such as Poland were most often at the forefront of international attention.[457]

245. A second resolution was adopted in 1980.[458] It became clear that this was not a legally viable way to proceed, despite repeated attempts by the General Assembly.[459] The last resolution on "remnants of war" was adopted in 1985. The resolution requested the Secretary-General to submit a report on the implementation of the resolution. The report led to no further action since the General Assembly only took note of it.[460]

246. During the years that the General Assembly addressed the matter, the focus clearly steered away from remnants of war in general to landmines and the threats that they pose to development, life and property. The protection of the environment as such was sidelined in the debates and resolutions. The focus was particularly on mines, and there are limited indications that other types of remnants were also the focus of attention. The legal and political results were limited, not least owing to the connection made between responsibility and compensation.

247. The United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects took place nearly in parallel. The Conference led to the adoption of the Protocol on Mines, Booby-Traps and Other Devices (Protocol II), which was annexed to the Convention on Certain Conventional Weapons.[461] Article 9 of Protocol II, which deals with international cooperation in the removal of minefields, mines and booby-traps, was cautiously drafted. In

[450] Westing, *Explosive Remnants of War* …, appendix 8: Explosive remnants of conventional war: a report to UNEP, p. 118. The study focused primarily on unexploded mines and other unexploded munitions, i.e., potentially explosive remnants of war. A chronology of United Nations activities, from 1975–1984 with regard to the issue of explosive remnants of war, is found in appendix 2, *ibid.*, pp. 87–89.

[451] *Ibid.*, appendix 8, pp. 118–119.

[452] See Blum, "Remnants of war", para. 1.

[453] General Assembly resolution 3435 (XXX) of 9 December 1975, para. 5.

[454] General Assembly resolution 31/111 of 16 December 1976, para. 1.

[455] It is telling that the only convention that specifically addressed the mine weapon was the Hague Convention Relative to the Laying of Automatic Submarine Contact Mines: Convention VIII. The focus of that regulation is the protection of non-parties to the conflict and neutral shipping.

[456] General Assembly resolution 3435 (XXX), para. 4.

[457] For example, through the Symposium on Material Remnants of the Second World War in general and in Libya in particular, organized by the United Nations Institute for Training and Research (UNITAR) and the Libyan Institute for International Relations, held in Geneva from 28 April to 1 May 1981. See UNITAR and Libyan Institute for International Relations, *Remnants of War*. It is worth recalling that the decolonization of Libya was on the agenda of the General Assembly for many years. In this context, the Secretary-General was instructed in 1950 "to study the problem of war damages in connexion with the technical and financial assistance which Libya may request" (General Assembly resolution 389 (V) of 15 December 1950). The question of responsibility was also raised in the Council of Europe, see, for example, Miggiani, "War remnants: a case study in the progressive development of international law", p. 39, footnote 57.

[458] General Assembly resolution 35/71 of 5 December 1980.

[459] See General Assembly resolutions 36/188 of 17 December 1981, 37/215 of 20 December 1982, 38/162 of 19 December 1983, 39/167 of 17 December 1984 and 40/197 of 17 December 1985. None of the resolutions were adopted with consensus.

[460] General Assembly resolution 40/197, para. 3.

[461] See 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 (with Protocols I, II and III) (hereinafter, "Convention on Certain Conventional Weapons") and the Amendment to the Convention on Certain Conventional Weapons. For a brief recapitulation of the rules relating to mines, booby-traps and other devices, see Boothby, *Weapons and the Law of Armed Conflict*, pp. 155–194.

essence, it encouraged States to reach agreement.[462] The aim of the article is clearly to remove minefields or otherwise render them ineffective, regardless of whether or not they are legally placed. The issues of responsibility or liability are not mentioned.

248. The rather weak formulation was strengthened in the amended Protocol II of 1996. Article 10, which deals with the "[r]emoval of minefields, mined areas, mines, booby-traps and other devices and international cooperation", clearly places an obligation on States to clear, remove or destroy minefields. The article allocates responsibility (in the sense that it identifies who should take action) and, most importantly, lays the ground for cooperation between the parties and between parties and international organizations, and also encourages parties to reach agreements on technical and material assistance.[463]

249. In the view of many States and other commentators, the amended Protocol II was not sufficient. In the aftermath of the conflicts in Afghanistan, Cambodia and the former Yugoslavia, there was a growing concern over the humanitarian effects of landmines. The terms "humanitarian mine action" and "humanitarian demining" were coined.[464] The Protocol addressed various landmines. The international community recognized, slowly but surely, that the threats posed by anti-personnel landmines would remain. The initiatives to ban anti-personnel landmines led to the adoption of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in 1997 (hereinafter, "the Ottawa Convention"). The Ottawa Convention is the most instrumental treaty dealing with remnants of war, as it has contributed to the demining of States which have been heavily affected by anti-personnel landmines. It has been reported that at least 27 States have now completed all anti-personnel mine clearance on their territory.[465]

250. A few years later, in 2003, the Protocol on Explosive Remnants of War was adopted by the Meeting of States Parties to the Convention on Certain Conventional Weapons.[466] The Protocol entered into force in 2006 and has 87 State parties, including France, China, the Russian Federation and the United States.[467] With Protocol V came a definition of "explosive remnants of war", which clearly excluded mines from the definition.[468] Although the incentive behind the Protocol was the serious post-conflict humanitarian problems caused by explosive remnants of war, the aim was to conclude a "[p]rotocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of explosive remnants of war".[469]

251. Article 3 provides that "[e]ach High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control." Where a "user" of explosive ordnance, which has become explosive remnants of war, does not have control over the territory in question at the end of active hostilities, the "user" shall provide, where feasible, technical, financial, material or human resources assistance to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.[470] In accordance with article 5, Parties shall take "all feasible precautions in the territory under their control … to protect … civilian objects from the risks and effects of explosive remnants of war".[471]

252. In consenting to be bound by Protocol V, the United States declared that:

> It is the understanding of the United States of America that nothing in Protocol V would preclude future arrangements in connection with the settlement of armed conflicts, or assistance connected thereto, to allocate responsibilities under Article 3 in a manner that respects the essential spirit and purpose of Protocol V.[472]

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[462] Article 9 read: "After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance—including, in appropriate circumstances, joint operations—necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict."

[463] Article 10 reads:

"1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.

"2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.

"3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.

"4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities."

[464] See Bloomfield, "Detritus of conflict …", p. 27. See also the information available from the Halo Trust website at www.halotrust.org.

[465] Albania, Bhutan, Bulgaria, Burundi, the Congo, Costa Rica, Denmark, France (in Djibouti), the Gambia, Greece, Guatemala, Guinea-Bissau, Honduras, Hungary, Malawi, Montenegro, Mozambique, Nicaragua, Nigeria, Rwanda, Suriname, Swaziland, the former Yugoslav Republic of Macedonia, Tunisia, Uganda, the Bolivarian Republic of Venezuela and Zambia. Easily accessible information can be found on the website of the International Campaign to Ban Landmines: www.icbl.org/en-gb/finish-the-job/clear-mines/complete-mine-clearance.aspx. The organization further informs that El Salvador completed anti-personnel mine clearance in 1994 before the Ottawa Convention was adopted and that Germany confirmed in 2013 that the suspicion of anti-personnel mine contamination at a former military training ground had been lifted. Furthermore, Jordan declared completion of antipersonnel mine clearance in 2011, but since then it had continued to find antipersonnel mines on its territory. The reports from States on the national implementation of the Ottawa Convention can be found at www.un.org/disarmament/anti-personnel-landmines-convention/, under "Article 7 database". For the most recent resolution, see General Assembly resolution 70/55 of 7 December 2015.

[466] Protocol on Explosive Remnants of War (Protocol V). The Protocol is open to all States for consent to be bound in accordance with article 4 of the Convention.

[467] *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXVI, 2-d, available from https://treaties.un.org/pages/ParticipationStatus.aspx.

[468] See the definition in art. 2, para. 4, read together with paras. 2 and 3.

[469] Protocol V, preambular para. 2. Cf. *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 142–143.

[470] Protocol V, art. 3, para. 1.

[471] *Ibid.*, art. 5, para. 1.

[472] *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXVI, 2-d, depositary notification, understanding of the United States made upon consent to be bound, 21 January 2009.

253. Even if the focus of the regulations on landmines became more and more connected with the protection of human beings, it cannot be denied that the regulations have had direct implications for the protection of agricultural land and property, by making the land available for use. The obligation on parties to a conflict to remove or otherwise render landmines harmless to civilians at the end of active hostilities can be considered a rule of international customary law.[473] It may therefore seem puzzling that State practice, as reflected in the ICRC customary law study, takes environmental considerations into account in military manuals, national legislation and other national practice only to a limited extent. In this context, it should be noted that obligations to remove or render harmless landmines and other explosive remnants of war have the protection of civilians as their primary aim. States have therefore focused on that aim. At the same time, it should be recalled that any removal of landmines or explosive remnants of war after the armed conflict (a point in time which is not necessarily identical to that of the cessation of active hostilities) is subject to peacetime environmental national and international obligations.

254. The conventions and protocols discussed above do not apply retroactively, but they do give a clear indication of a more enlightened view on the risks emanating from explosive remnants of war.

"*Draft principle III-3. Remnants of war*

"1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps, explosive ordnance and other devices shall be cleared, removed, destroyed or maintained in accordance with obligations under international law.

"2. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities."

2. Remnants of war in the marine environment

255. Armed conflict may have long-lasting effects on the marine environment. There is increasing awareness of the environmental effects of armed conflict, in particular regarding chemical munitions dumped at sea and pollution from sunken vessels. The environmental threats and consequences from chemical munitions at sea have caused States and international and regional organizations to start addressing the matter.

256. With reference to the outcome of the United Nations Conference on the Human Environment, Agenda 21: Programme of Action for Sustainable Development[474] and the Johannesburg Plan of Implementation, the General Assembly has noted the importance of raising awareness of the environmental effects related to waste originating from chemical munitions dumped at sea.[475] In this context, the General Assembly has encouraged the "voluntary sharing of information on waste originating from chemical munitions dumped at sea through conferences, seminars, workshops, training courses and publications aimed at the general public and industry in order to reduce related risks".[476]

257. In its resolution 65/149, the General Assembly invited the Secretary-General to seek the views of Member States and relevant regional and international organizations on issues relating to the environmental effects related to waste originating from chemical munitions dumped at sea, as well as on possible modalities for international cooperation to assess and increase awareness of the issue, and to communicate such views to the General Assembly at its sixty-eighth session for further consideration (para. 3). In response to that request, the Secretary-General presented a report entitled "Cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea".[477]

258. A number of States and organizations responded to the request for information contained in General Assembly resolution 68/208, including the European Union, IMO, the World Health Organization and the Office for Disarmament Affairs of the United Nations. The responses revealed a growing concern over the environmental risks related to waste originating from chemical munitions dumped at sea. States and organizations had therefore taken measures so as to reduce the risks. This was mainly done through international or regional cooperation, but also through bilateral cooperation.

259. This is, in essence, also a reflection of the structure of the United Nations Convention on the Law of the Sea, since the Convention does not provide criteria for the assessment and recovery of compensation for damage, regardless of whether or not it is caused by a natural or juridical person or by a State.[478] It is also a reflection of the fact that there were no specific rules under the law of warfare that obliged States that had been engaged in an armed conflict to remove the chemical weapons or munitions which were dumped at the time. On the contrary, it was considered both legal and justifiable not to do so. The same was the case with sunken warships. No State would accept being responsible for an environmentally detrimental vessel that had come to rest at the bottom of the sea: neither the State that sunk it, nor the flag State. Depending on where the vessel was sunk, other States may also be effected, namely a coastal State. Today we may find

[473] Rule 83 in the ICRC customary law study, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law. Volume 1: Rules*. For practice conducted after 2005, see https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule83.

[474] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, Volume I: *Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 and Corr.1; United Nations publication, Sales No. E.93.I.8), p. 9.

[475] See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013.

[476] See General Assembly resolution 68/208, para. 4.

[477] A/68/258. Following the adoption of the resolution, an International Workshop on Environmental Effects Related to Waste Originating from Chemical Munitions Dumped at Sea was organized by Lithuania and Poland on 5 November 2012 and held in Gdynia, Poland. The aim was to advance the implementation of the resolution. The Secretary-General has been requested to submit a second report on this issue at the General Assembly's seventy-first session (see General Assembly resolution 68/208, para. 8).

[478] Mensah, "Environmental damages under the Law of the Sea Convention",p. 233.

chemical weapons, leaking vessels or hazardous waste in areas under the jurisdiction of a coastal State which was not involved in the armed conflict. In fact, the State may not even have existed at the time of the armed conflict.

260. During the course of the work on this topic, several States from the Pacific region raised the issue of leaking wrecks and dumped munitions. The environmental implication of wrecks from the Second World War and its aftermath is of increasing concern to many Pacific Island States.[479] In 2014, the General Assembly endorsed the Samoa Pathway, the outcome document of the third International Conference on Small Island Developing States.[480] The document recognizes "the concern that potential oil leaks from sunken State vessels have environmental implications for the marine and coastal ecosystems of small island developing States" and notes, *inter alia*, that "small island developing States and relevant vessel owners should continue to address the issue bilaterally on a case-by-case basis".[481] The problem of leaking vessels and remnant ammunition goes beyond the marine environment for many of the small island States, in that it affects the health and potential economic development of the States. Some of the main problems include the lack of baseline information and the unwillingness to share information. The latter may be due to security issues or simply lack of knowledge on the part of those who dumped or placed the material. The same is true for other regions of the world.

261. The present threat to the marine environment in the Pacific islands will have to be dealt with in a practical manner rather than a legal one. At the time of the dumping, there were no or few legal rules that prohibited dumping or other disposal of dangerous materials. Some of the Pacific islands now have to rely on cooperation with and financial contributions by other States.

262. It is, however, not only the Pacific islands that are affected. The problem with the remaining explosives and chemical weapons and substances is much larger. Other areas that are particularly affected include the Baltic Sea and the Skagerrak Strait, where quantities of waste[482] (often together with the vessel transporting the waste) were dumped after the Second World War by the Allied forces, which considered it an appropriate place to get rid of the substances that they had seized as occupying powers in Germany. Even if it was considered a lawful solution at the time of the dumping, the explosives and weapons are now seen in a different legal context. Fishermen in the region have from time to time encountered containers holding mustard gas or sea mines—most often well preserved owing to the brackish water in the region. What was then an area with the status of the high seas is now a well-delimited area where 10 States have exclusive economic zones and continental shelves. The munitions thus lie in areas that are heavily trafficked and subject to hydrotechnical projects, including submarine cables and pipelines, offshore wind farms and tunnels. States and operators are aware that the law applicable to such projects is the peacetime law (law of the sea, environmental law, but also European Union law and national legislation). The operative focus among States and enterprises is cooperation.

263. One such example is the Chemical Munitions Search and Assessment (CHEMSEA) project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union.[483] As a result of this project, most of the munitions have been located and mapped. The information is freely accessible for all and is of crucial importance to companies that need to make compulsory environmental assessments before proceeding with costly hydrotechnical investments. This work rests on at least two pillars: the work done by the Baltic Marine Environment Protection Commission (Helsinki Commission), which is the governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, and financing by the European Union. The issue has been seriously addressed by the Helsinki Commission since the early 1990s.[484]

264. The Pacific and Baltic Sea regions are certainly not the only regions affected. Other regions such as the Mediterranean, the Barents Sea, the Atlantic and the Black Sea are also affected by this issue.[485]

265. In addition to the obvious threat of remnants of war to the natural environment as such, at least two features stand out in the responses and in State practice. First, it seems as though States have chosen to address these threats as a matter of environmental cooperation rather than environmental liability or responsibility. Second, there is a strong connection between the environmental threats and human health. It is therefore suggested that a draft principle on remnants of war at sea reads as follows:

"*Draft principle III-4. Remnants of war at sea*

"1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.

"2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available."

[479] See, for example, the statement by Palau (A/C.6/70/SR.25, paras. 26–28) and the note verbale by the Federal States of Micronesia (footnote 116 above).

[480] General Assembly resolution 69/15 of 14 November 2014, annex. The General Assembly has also welcomed the Samoa Pathway and reaffirmed its commitment to work with small island developing States towards its full implementation in an annual resolution relating to the law of the sea; see General Assembly resolutions 69/245 of 29 December 2014, para. 281, and 70/235 of 23 December 2015, para. 294.

[481] General Assembly resolution 69/15, annex, para. 56: "Recognizing the concern that potential oil leaks from sunken State vessels have environmental implications for the marine and coastal ecosystems of small island developing States, and taking into account the sensitivities surrounding vessels that are marine graves, we note that small island developing States and relevant vessel owners should continue to address the issue bilaterally on a case-by-case basis."

[482] It has been calculated that at least 170,000 tons of chemical weapons were dumped in the Skagerrak Strait and at least 50,000 tons of chemical weapons were dumped in the Baltic Sea. It is assumed that these those dumped in the Baltic Sea contained roughly 15,000 tons of chemical warfare agents.

[483] See https://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea.

[484] See the Helsinki Commission website at www.helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions.

[485] The Helsinki Commission 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/.

Chapter III

Final remarks and future programme of work

266. The main findings of the three reports presented by the Special Rapporteur indicate that there exists a substantive collection of legal rules that enhances environmental protection in relation to armed conflict. However, if taken as a whole, this collection of laws is a blunt tool, since its various parts sometimes seem to work in parallel. A holistic approach to the implementation of this body of law seems to be lacking at times. In addition, there are no existing or developed tools or processes to encourage States, international organizations and other relevant actors to utilize the entire body of already applicable rules.

267. The research that has underpinned the three reports presented by the Special Rapporteur, the discussions in the Commission, the views expressed in the Sixth Committee and contacts with international organizations, shows that there is a clear link between the law applicable before the outbreak of an armed conflict and the law applicable after an armed conflict. This should not be seen as being so merely because it is the body of law applicable in peacetime situations. It is also because the law applicable in the pre-conflict and post-conflict phases acts as a bridge over situations of armed conflict. In addition, it is not always clear to what extent peacetime law exists in parallel with the law of armed conflict. Against this background, it is all the more noteworthy that States and international organizations are often one step ahead of their international legal obligations in that they have chosen to adopt legislation or other mechanisms to regulate the conduct of armed forces in a voluntary manner that serves the aim of protecting the environment.

268. This means that the law that is relevant for the protection of the environment in relation to armed conflict has continued to grow and mature through practice, *opinio juris*, case law and treaties. The role of international organizations such as the United Nations, UNEP and UNESCO in this context is considerable. Environmental considerations have become part of the mainstream, and this is particularly notable when one looks at how different the situation was a decade or more ago.

269. The three reports have attempted to give an overview of applicable law during the three temporal phases: before, during and after an armed conflict. For obvious reasons it has not been possible to cover all the important aspects, and the Special Rapporteur is of the view that some matters may deserve further elaboration. Such matters include environmental protection during the different phases of occupation, the responsibility of non-State actors and organized armed groups, and noninternational armed conflicts. The reluctance on the part of States and organizations to submit information on the practice of such armed groups should not discourage the Commission from studying these matters further. The examples in the present report on peace agreements serve as an indicator that further studies may be warranted.

270. An important element for the future work on this topic continues to be consultation and contact with international organizations and bodies such as the United Nations, UNEP, UNESCO, ICRC and relevant non-governmental organizations. It is likewise important to continue to actively seek the views of States.

Annex I

Protection of the environment in relation to armed conflicts: proposed draft principles

Part One

PREVENTIVE MEASURES

Draft principle I-1. Implementation and enforcement

States should take all necessary steps to adopt effective legislative, administrative, judicial or other preventive measures to enhance the protection of the natural environment in relation to armed conflict, in conformity with international law.

…….

Draft principle I-3. Status of forces and status of mission agreements

States and international organizations are encouraged to include provisions on environmental regulations and responsibilities in their status of forces or status of mission agreements. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Draft principle I-4. Peace operations

States and organizations involved in peace operations shall consider the impacts of those operations on the environment and take all necessary measures to prevent, mitigate and remediate the negative environmental consequences thereof.

…….

Part Three

DRAFT PRINCIPLES APPLICABLE AFTER AN ARMED CONFLICT

Draft principle III-1. Peace agreements

Parties to a conflict are encouraged to settle matters relating to the restoration and protection of the environment damaged by the armed conflict in their peace agreements.

Draft principle III-2. Post-conflict environmental assessments and reviews

1. States and former parties to an armed conflict are encouraged to cooperate between themselves and with relevant international organizations in order to carry out post-conflict environmental assessments and recovery measures.

2. Reviews at the conclusion of peace operations should identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment, in an effort to mitigate or remedy those detrimental effects in future operations.

Draft principle III-3. Remnants of war

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps, explosive ordnance and other devices shall be cleared, removed, destroyed or maintained in accordance with obligations under international law.

2. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

Draft principle III-4. Remnants of war at sea

1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.

2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available.

Draft principle III-5. Access to and sharing of information

In order to enhance the protection of the environment in relation to armed conflicts, States and international organizations shall grant access to and share information in accordance with their obligations under international law.

Part Four

[ADDITIONAL PRINCIPLES]

Draft principle IV-1. Rights of indigenous peoples

1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.

2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands.

Annex II

Select bibliography

Abouali, Gamal

"Natural resources under occupation: the status of Palestinian water under international law", *Pace International Law Review*, vol. 10 (1998), pp. 411–574.

Acconci, Pia, *et al.*, eds.

International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi. Brill/Nijhoff, forthcoming, 2017.

Ahlström, Christer

Demilitariserade och Neutraliserade Områden i Europa. Mariehamn, Åland Islands Fred Institute, 1995.

Ajibola, Bola

"Protection of the environment in times of armed conflict", *in* Najeeb Al-Nauimi and Richard Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 75–94.

Akande, Dapo

"Nuclear weapons, unclear law? Deciphering the *Nuclear Weapons* advisory opinion of the International Court", BYBIL, vol. 68, No. 1 (1997), pp. 165–217.

Al-Shaheen, Shaheen Ali, and Rashid Hamad al-Anzi

"Protection de l'environnement durant les conflits armés", *L'observateur des Nations Unies*, vol. 35 (2013), pp. 235–252.

Almond, Harry H., Jr.

"The use of the environment as an instrument of war", *Yearbook of International Environmental Law*, vol. 2 (1991), pp. 455–468.

Alston, Philip, Jason Morgan-Foster, and William Abresch

"The competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: extrajudicial executions in the 'War on Terror'", EJIL, vol. 19 (2008), pp. 183–209.

Anderson, Terry L., and J. Bishop Grewell

"The greening of foreign policy", *PERC Policy Series*, vol. 20 (2000).

Antoine, Philippe

"International humanitarian law and the protection of the environment in time of armed conflict", *International Review of the Red Cross*, vol. 32 (1992), pp. 517–537.

Anton, Donald K., and Dinah L. Shelton

Environmental Protection and Human Rights. Cambridge, Cambridge University Press, 2011.

Arraiza Navas, Fermín Luís, and Pedro J. Varela Fernández

"Vieques: prácticas de guerra, derechos humanos y ambiente", *Revista Jurídica Universidad de Puerto Rico*, vol. 70 (2001), pp. 209–233.

Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales

Problemas Internacionales del Medio Ambiente: VIII Jornadas, Barcelona, 2 a 5 de julio de 1984. Barcelona, Universidad Autónoma de Barcelona, 1985.

Aust, Anthony

Modern Treaty Law and Practice. Cambridge, Cambridge University Press, 2000.

Austin, Jay, and Carl E. Bruch, eds.

The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives. Cambridge, Cambridge University Press, 2000.

Bächler, Günther, and Kurt R. Spillman, eds.

Environmental Degradation as a Cause of War: Country Studies of External Experts, Chur-Zürich, Rüegger, 1996.

Baker, Betsy

"Legal protections for the environment in times of armed conflict", *Virginia Journal of International Law*, vol. 33 (1993), pp. 351–383.

Banerjee, Rishav

"Destruction of environment during an armed conflict and violation of international law: a legal analysis", *Asian Yearbook of International Law*, vol. 15 (2009), pp. 145–188.

Bannelier-Christakis, Karine

"Les enjeux de la guerre aérienne pour la protection de l'environnement: remarques à propos du Manual on International Law Applicable to Air and Missile Warfare", *in* Anne-Sophie Millet-Devalle, ed., *Guerre aérienne et droit international humanitaire*, Paris, Pedone, 2015, pp. 247 *et seq*.

"L'utopie de la 'guerre verte' : insuffisances et lacunes du régime de protection de l'environnement en temps de guerre", *in* Vincent Chetail, ed., *Permanence et mutation du droit des conflits armés*, Brussels, Bruylant, 2013, pp. 384–412.

Barboza, Julio

The Environment, Risk and Liability in International Law. Leiden, Martinus Nijhoff, 2011.

Barnes, Ashley, and Christopher Waters

"The Arctic environment and international humanitarian law", *Canadian Yearbook of International Law*, vol. 49 (2011), pp. 213–241.

Bassiouni, M. Cherif

"International crimes: *jus cogens* and *obligatio erga omnes*", *Law and Contemporary Problems*, vol. 59 (1996), pp. 63–74.

Benvenisti, Eyal

"Water conflicts during the occupation of Iraq", AJIL, vol. 97 (2003), pp. 860–872.

Bethlehem, Daniel

"The methodological framework of the study", *in* Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*. Cambridge, Cambridge University Press, 2007.

Birnie, Patricia, Alan Boyle, and Catherine Redgewell

International Law and the Environment. Oxford, Oxford University Press, 2009.

Björkholm, Mikaela, and Allan Rosas

Ålandsöarnas demilitarisering och neutralisering. Åbo, Åbo Akademi University Press, 1990.

Black, Cyril E., *et al.*

Neutralization and World Politics. Princeton, Princeton University Press, 1968.

Blattmann, Heidi

"Environmental damage from the Gulf war", *Swiss Review of World Affairs*, vol. 42 (1992), pp. 27–28.

Blishchenko, Igor P., and Vladimir P. Shavrov

"The legal basis of claims for damage to the environment resulting from military action", *Austrian Journal of Public and International Law*, vol. 40 (1989), pp. 29–45.

Blom, Esther, *et al.*, eds.

Nature in War: Biodiversity Conservation during Conflict. Leiden, Netherlands Commission for International Nature Protection, 2000.

Bloomfield, Lincoln P., Jr.

"Detritus of conflict: the U.S. approach to the humanitarian problem posed by landmines and other hazardous remnants of war", *Seton Hall Journal of Diplomacy and International Relations*, vol. 4 (2003), pp. 27–41.

Blum, Gabriella

"Remnants of war", *in Max Planck Encyclopaedia of Public International Law*, Oxford, Oxford University Press, 2010.

Bodansky, Daniel

Legal Regulation of the Effects of Military Activity on the Environment. Berlin, Erich Schmidt Verlag, 2003.

Bodansky, Daniel, Jutta Brunnée, and Ellen Hey

The Oxford Handbook on International Environmental Law. Oxford, Oxford University Press, 2007.

Boelart-Suominen, Sonja Ann Jozef

International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions during International Armed Conflict, Newport Paper, No. 15, Newport, Rhode Island, Naval War College, 2000.

Boisson de Chazournes, Laurence

Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives, United Nations World Water Assessment Programme, Paris, UNESCO, 2009.

Booley, Ashraf, and Letetia van der Poll

"In our common interest: liability and redress for damage caused to the natural environment during armed conflict", *Law, Democracy and Development*, vol. 15 (2011), pp. 90–129.

Boothby, William H.

Weapons and the Law of Armed Conflict. Oxford, Oxford University Press, 2009.

Bothe, Michael

"The protection of the environment in times of armed conflict: legal rules, uncertainty, deficiencies and possible developments", GYBIL, vol. 34 (1991), pp. 54–62.

"Environmental destruction as a method of warfare: do we need new law?", *Disarmament*, vol. 15 (1992), pp. 101–112.

"Protection of the environment in times of armed conflict", *in* Najeeb Al-Nauimi and Richard Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 75–104.

"The ethics, principles and objectives of protection of the environment in times of armed conflict", *in* Rosemary Rayfuse, ed., *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Leiden, Brill, 2014, pp. 91–108.

Bothe, Michael, *et al*.

Protection of the Environment in Times of Armed Conflict, Report to the Commission of the European Communities, SJ/110/85, 1985.

"International law protecting the environment during armed conflict: gaps and opportunities", *International Review of the Red Cross*, vol. 92 (2010), pp. 569–592.

Bothe, Michael, Karl Josef Partsch, and Waldemar A. Solf

New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 2nd ed. The Hague, Martinus Nijhoff, 2013.

Boutruche, Théo

"Le statut de l'eau en droit international humanitaire", *Revue internationale de la Croix-Rouge*, vol. 82 (2000), pp. 887–916.

Bouvier, Antoine

"La protection de l'environnement naturel en période de conflit armé", *Revue internationale de la Croix-Rouge*, vol. 73 (1991), pp. 599–611.

Brown Weiss, Edith Brown

International Law for a Water-Scarce World. Leiden, Martinus Nijhoff Publishers, 2013.

Bruch, Carl, *et al.*

Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa, 2nd ed. Washington, D.C., Environmental Law Institute, 2007.

"Post-conflict peace building and natural resources", *Yearbook of International Environmental Law*, vol. 19 (2008), pp. 58–96.

Bruch, Carl E., and Jay E. Austin, eds.

The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives. Cambridge, Cambridge University Press, 2000.

Bunker, Alice Louise

"Protection of the environment during armed conflict: one Gulf, two wars", *Review of European Community and International Environmental Law*, vol. 13 (2004), pp. 201–213.

Cañas Vargas, Eileen Alina

"Nuclear-weapon-free zones: the treaty of Tlatelolco and the proposal for a denuclearized Middle East", PhD thesis, Graduate Institute, Geneva, 2014.

Carnahan, Burrus M.

"The law of land mine warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons", *Military Law Review*, vol. 105 (1984), pp. 73–95.

"Protecting nuclear facilities from military attack: prospects after the Gulf War", AJIL, vol. 86, No. 3 (1992), pp. 524–541.

Caron, David D.

"Finding out what the oceans claim: the 1991 Gulf War, the marine environment, and the United Nations Compensation Commission", *in* David D. Caron and Harry N. Scheiber, eds., *Bringing New Law to Ocean Waters*, Leiden, Martinus Nijhoff, 2004, pp. 393–415.

Churchill, R. R., and A. V. Lowe

The Law of the Sea, 2nd ed. Manchester, Manchester University Press, 1988.

Clément, Etienne

"Le réexamen de la Convention de la Haye de 1954 pour la protection des biens culturels en cas de conflit armé", *in* Najeeb Al-Nauimi and Richard Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 133–150.

Condorelli, Luigi

"Nuclear weapons: a weighty matter for the International Court of Justice: *jura non novit curia*?", *International Review of the Red Cross*, vol. 37, No. 316 (1997), pp. 9–20.

Cortina Mendoza, Roxana, and Víctor Saco Chung

"La protección del medio ambiente en el derecho internacional humanitario", *Revista da Faculdade de Direito da UFMG*, vol. 51 (2007), pp. 255–277.

Crawford, Alec, David Jensen, Alec Crawford and Carl Bruch

"Water and post-conflict peacebuilding", Policy Brief, No. 4, *Environmental Peacebuilding* (2014).

Crawford, Alec, and Johannah Bernstein

MEAs, Conservation and Conflict: A Case Study of Virunga National Park, DRC. Winnipeg, International Institute for Sustainable Development, 2008.

Crawford, Emily

"Armed conflict, international", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. I, Oxford, Oxford University Press, 2012, pp. 612–626.

Cusato, Eliana

"The environmental impact of armed conflict and ex-post remedies: an assessment of Iraq's liability for environmental damage in the 1991 Gulf War" (forthcoming, on file with the Secretariat).

Dam-de Jong, Daniëlla A.

The role of informal normative processes in improving governance over natural resources in conflict-torn States, *Hague Journal on the Rule of Law*, vol. 7 (2015), pp. 219–241.

International Law and Governance of Natural Resources in Conflict and Post-Conflict Situation. Cambridge, Cambridge University Press, 2015.

"From engines for conflict into engines for sustainable development: the potential of international law to address predatory exploitation of natural resources in situations of internal armed conflict", *Nordic Journal of International Law*, vol. 82, No. 1 (2013), pp. 155–177.

"International law and resource plunder: the protection of natural resources during armed conflict", *Yearbook of International Environmental Law*, vol. 19, No. 1 (2008), pp. 27–57.

Das, Onita

Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective. Cheltenham, Edward Elgar, 2013.

"Environmental protection in armed conflict: filling the gaps with sustainable development", *Nordic Journal of International Law*, vol. 82 (2013), pp. 103–128.

D'Aspremont, Jean

"Towards an international law of brigandage: interpretative engineering for the regulation of natural resources exploitation", *Asian Journal of International Law*, vol. 3 (2013), pp. 1–24.

David, Eric

The Opinion of the International Court of Justice on the legality of the use of nuclear weapons, *International Review of the Red Cross*, vol. 37, No. 316 (1997), pp. 21–34.

Debonnet, Guy, and Kes Hillman-Smith

"Supporting protected areas in a time of political turmoil: the case of world heritage sites in the Democratic Republic of the Congo", *Parks*, vol. 14 (2004), pp. 9–16.

Delbrück, Jost

"Demilitarization", *Encyclopedia of Public International Law*, vol. 3 (1982), pp. 150–152.

Desch, Thomas

"Haftung für Umweltschäden im Krieg: einige Bemerkungen zu I. P. Blishchenko und V. Ph. Shavrov", *Austrian Journal of Public and International Law*, vol. 40 (1989), pp. 47–71.

Desgagné, Richard

"The prevention of environmental damage in time of armed conflict, proportionality and precautionary measures", *Yearbook of International Humanitarian Law*, vol. 3 (2000), pp. 109–129.

Diederich, Jr., Michael D.

" 'Law of war' and ecology, a proposal for a workable approach to protecting the environment through the law of war", *Military Law Review*, vol. 136 (1992), pp. 137–160.

Dienelt, Anne

"After the war is before the war, the environment, preventive IHL measures and their post-conflict impact", PhD thesis, University of Göttingen, 2014.

" 'After the war is before the war', the environment, preventive measures under international humanitarian law, and their post-conflict impact", *in* Carsten Stahn, Jens Iverson, and Jennifer Easterday, eds., *Environmental Protection and Transitions from Conflict to Peace*, Oxford, Oxford University Press (forthcoming), pp. 420–437.

Dinstein, Yoram

"The principle of proportionality", *in* Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen, eds., *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge, Cambridge University Press, 2013, pp. 72–85.

"Protection of the environment in international armed conflict", *Max Planck Yearbook of United Nations Law*, vol. 5, (2001), pp. 523–549.

War, Aggression and Self-Defence, 5th ed, Cambridge, Cambridge University Press, 2012.

"The laws of air, missile and nuclear warfare", *Israel Yearbook on Human Rights*, vol. 27 (1997), pp. 1–16.

Domínguez-Matés, Rosario

"Desafío para el derecho internacional humanitario, responsabilidad penal internacional del individuo por daños al medio ambiente durante un conflicto armado", *American University International Law Review*, vol. 20 (2004), pp. 43–69.

"New weaponry technologies and international humanitarian law, their consequences on the human being and the environment", *in* Pablo Antonio Fernández-Sánchez, ed., *The New Challenges of Humanitarian Law in Armed Conflicts, In Honour of Professor Juan Antonio Carrillo-Salcedo*, Leiden, Martinus Nijhoff, 2005, pp. 91–119.

Dorsey, Jessica, *et al.*

"Conference notes on protection of the environment in armed conflict, testing the adequacy of international law", The Hague, TMC Asser Instituut, 7 November 2011.

Dorsouma, Al-Hamandou, and Michel-André Bouchard

"Conflits armés et environnement: cadres, modalités, méthodes et rôle de l'évaluation environnementale", *Développement durable et territoires*, vol. 8 (2006).

Doswald-Beck, Louise, ed.

San Remo Manual on International Law Applicable to Armed Conflicts at Sea. International Institute of Humanitarian Law. Cambridge, Cambridge University Press, 1995.

"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, No. 316 (1997), pp. 35–55.

Human Rights in Times of Conflict and Terrorism. Oxford, Oxford University Press, 2011.

Douhan, Alena

"Liability for environmental damage", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. VI, Oxford, Oxford University Press, 2012, pp. 830–837.

Droege, Cordula, and Marie-Louise 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, No. 1 (2013), pp. 21–53.

DuBarry Huston, Meredith

"Wartime environmental damages: financing the clean-up", *University of Pennsylvania Journal of International Economic Law*, vol. 23, No. 4 (2002), pp. 899–929.

Ebbesson, Jonas

"Principle 10: Public participation", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*, Oxford, Oxford University Press, 2015.

Elias, Olufemi

"Environmental impact assessment", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010, pp. 227–242.

Eniang, Edem, Amleset Haile, and Teshale Yihdego

"Impacts of landmines on the environment and biodiversity", *Environmental Policy and Law*, vol. 37, No. 6 (2007), pp. 501–504.

Falk, Richard A.

"Environmental warfare and ecocide—facts, appraisal, and proposals", *Bulletin of Peace Proposals*, vol. 4 (1973), pp. 80–96.

"Environmental disruption by military means and international law", *in* Arthur H. Westing, ed., *Environmental Warfare: A Technical, Legal and Policy Appraisal*, London, Taylor and Francis, 1984, pp. 33–51.

"The inadequacy of the existing legal approach to environmental protection in wartime", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000.

Fauchald, Ole Kristian, David Hunter and Wang Xi, eds.

Yearbook of International Environmental Law, vol. 19 (2008). Oxford, Oxford University Press, 2009.

Feliciano, Florentino P.

"Marine pollution and spoliation of natural resources as war measures: a note on some international law problems in the Gulf War", *Houston Journal of International Law*, vol. 14 (1992), pp. 483–519.

Fenrick, W. J.

"The law applicable to targeting and proportionality after Operation Allied Force: a view from the outside", *Yearbook of International Humanitarian Law*, vol. 3 (2000), pp. 53–80.

Fischhaber, Hans-Bjoern

"Military concept on environmental protection and energy efficiency for EU-led military operations: real commitments or another 'paper tiger'?", *Energy Security Highlights*, vol. 10 (2012), pp. 22–24.

Fitzmaurice, Malgosia, David M. Ong, and Panos Merkouris, eds.

Research Handbook on International Environmental Law. Cheltenham, Edward Elgar, 2010.

Fleck, Dieter

"Current legal and policy issues", *in* Julie Dahlitz, ed., *Future Legal Restraints on Arms Proliferation: Arms Control and Disarmament Law* (United Nations publication, Sales No. GV.E.96.0.24), 1996, pp. 21–46.

"The protection of the environment in armed conflict: legal obligations in the absence of specific rules", *Nordic Journal of International Law*, vol. 82 (2013), pp. 7–20.

Freeland, Steven

Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court. Cambridge, Intersentia, 2015.

French, Duncan

"Sustainable development", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010.

Frigo, Manilio

"Cultural property v. cultural heritage: a 'battle of concepts' in international law?", *International Review of the Red Cross*, vol. 86, No. 854 (2004), pp. 367–378.

Fujita, Hisakazu

"The advisory opinion of the International Court of Justice on the legality of nuclear weapons", *International Review of the Red Cross*, vol. 37, No. 316 (1997), pp. 56–64.

Gardam, Judith G.

"Energy and the law of armed conflict", *Journal of Energy and Natural Resources Law*, vol. 15, No. 2 (1997), pp. 87–96.

Gasser, Hans-Peter

"For better protection of the natural environment in armed conflict: a proposal for action", AJIL, vol. 89 (1995), pp. 637–644.

Gehring, Réa

"La protection de l'environnement en période de conflit armé: que peut ou pourrait apporter la Cour pénale international", dissertation, University of Lausanne, 2001.

German Red Cross and Institute for International Law of Peace and Armed Conflict

"Informationsschriften", *Journal of International Law of Peace and Armed Conflict*, vol. 26 (2013), pp. 111–160.

Gill, Terry

"The *Nuclear Weapons* advisory opinion of the International Court of Justice and the fundamental distinction between the *jus ad bellum* and the *jus in bello*", *Leiden Journal of International Law*, vol. 12, No. 3 (1999), pp. 613–624.

Gillespie, Alexander

Conservation, Biodiversity and International Law. Cheltenham, Edward Elgar, 2011.

Gilman, Ryan

"Expanding environmental justice after war: the need for universal jurisdiction over environmental war crimes", *Colorado Journal of International Environmental Law and Policy*, vol. 22, No. 3 (2011), pp. 447–471.

Goldblat, Jozef

"The mitigation of environmental disruption by war: legal approaches", *in* Arthur H. Westing, ed., *Environmental Hazards of War: Releasing Dangerous Forces in an Industrialized World*, London, Sage, 1990, pp. 48–60.

"Legal protection of the environment against the effects of military activities", *Bulletin of Peace Proposals*, vol. 22, No. 4 (1991), pp. 399–406.

"Protection of the natural environment against the effects of military activities: legal implications", "Informationsschriften", *Humanitäres Völkerrecht*, vol. 3 (1992), pp. 133–136.

Gordon, Kathryn, and Joachim Pohl

"Environmental concerns in international investment agreements: a survey", *OECD Working Papers on International Investment*, January 2011.

Green, L. C.,

"The environment and the law of conventional warfare", *Canadian Yearbook of International Law*, vol. 29 (1991), pp. 222–237.

Greenwood, Christopher

"The twilight of the law of belligerent reprisals", *Netherlands Yearbook of International Law*, vol. 20 (1989), pp. 35–69.

"*Jus ad bellum* and *jus in bello* in the *Nuclear Weapons* Advisory Opinion", *in* Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 247–266.

"State responsibility and civil liability for environmental damages caused by military operations", *in* Richard J. Grunawalt, John E. King and Ronald S. McClain, eds., *Protection of the Environment During Armed Conflict*, Newport, Rhode Island, Naval War College, 1996, pp. 397–415.

Guarnacci, Emilia Schiavo

Conflictos armados y medio ambiente. Buenos Aires, Universidad de Salvador, 2006.

Guillard, David

Les armes de guerre et l'environnement naturel: essai d'étude juridique. Paris, Harmattan, 2006.

Hagmann, Tobias

"Confronting the concept of environmentally induced conflict", *Peace, Conflict and Development*, vol. 6 (2005), pp. 1–22.

Halle, Silja, ed.

From Conflict to Peacebuilding: The Role of Natural Resources and the Environment. Nairobi, UNEP, February 2009.

Halle, Silja, and David Jensen, eds.

Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations. Nairobi, UNEP, 2012.

Hampson, Françoise

"Other areas of customary law in relation to the Study", *in* Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2007, pp. 50–73.

Hannikainen, Lauri

"The continued validity of the demilitarised and neutralized status of the Åland Islands", *Heidelberg Journal of International Law*, vol. 54 (1994), pp. 614–651.

Harwell, Emily E.

"Building momentum and constituencies for peace: the role of natural resources in transitional justice and peacebuilding", *in* Carl Bruch, Carroll Muffet and Sandra S. Nichols, eds., *Governance, Natural Resources, and Post-conflict Peacebuilding*, Earthscan, 2016.

Hawley, T. M.

Against the Fires of Hell: The Environmental Disaster of the Gulf War. New York, Harcourt Brace Jovanovich, 1992.

Heintschel von Heinegg, Wolff, and Michael Donner

"New developments in the protection of the natural environment in naval armed conflicts", *in* Jost Delbrück, Rainer Hofmann and Andreas Zimmermann, eds., GYBIL, vol. 37, Berlin, Duncker and Humblot, 1994, pp. 281–302.

Henckaerts, Jean-Marie

"Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, vol. 87, No. 857 (2005), pp. 175–212.

"International legal mechanisms for determining liability for environmental damage under international humanitarian law", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 602–619.

Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds.

Customary International Humanitarian Law, vols. I and II, Cambridge, ICRC and Cambridge University Press, 2005.

Herczegh, Géza

"La protection de l'environnement naturel et le droit humanitaire", *in* Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, The Hague, Martinus Nijhoff Publishers, 1984, pp. 725–733.

Hough, Peter

"Defending nature: the evolution of the international legal restriction of military ecocide", *The Global Community Yearbook of International Law and Jurisprudence*, vol. I (2014), pp. 137–152.

Huang, Ling-Yee

"The 2006 Israeli-Lebanese conflict: a case study for protection of the environment in times of armed conflict", *Florida Journal of International Law*, vol. 20, No. 1 (2008), pp. 103–113.

Hourcle, Laurent R.

"Environmental law of war", *Vermont Law Review*, vol. 25, No. 3 (2001), pp. 653–693.

Hulme, Karen

War Torn Environment: Interpreting the Legal Threshold. Leiden, Martinus Nijhoff, 2004.

"Natural environment", *in* Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2007, pp. 204–237.

"Taking care to protect the environment against damage: a meaningless obligation?", *International Review of the Red Cross*, vol. 92, No. 879 (2010), pp. 675–691.

Ichim, Octavian

Just Satisfaction under the European Convention on Human Rights. Cambridge, Cambridge University Press, 2014.

International Law and Policy Institute

"Protection of the environment in times of armed conflict, Report from the Expert Meeting on Protection of the Environment in Times of Armed Conflict, 14–15 September 2015", Helsinki, International Law and Policy Institute, 2015.

"Protection of the natural environment in armed conflict: an empirical study", report 12/2014, Oslo, International Law and Policy Institute, 2014.

Jacobsson, Marie

"Protection of the environment and air and missile warfare: some reflections", *Israel Yearbook on Human Rights*, vol. 45 (2015), pp. 51–66.

Jensen, David

"Evaluating the impact of UNEP's post-conflict environmental assessments", *in* David Jensen and Steve Lonergan, eds., *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, Abingdon, Oxon, Earthscan, 2013.

Jensen, David, and Silja Halle, eds.

Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law. Nairobi, UNEP, 2009.

Jensen, David, and Steve Lonergan, eds.

Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding, Abingdon, Oxon, Earthscan, 2012.

Jensen, Eric Talbot

"The international law of environmental warfare: active and passive damage during times of armed conflict", *Vanderbilt Journal of Transnational Law*, vol. 38, No. 1 (2005), pp. 145–185.

Jensen, Eric Talbot, and James J. Teixeira, Jr.

"Prosecuting members of the U.S. military for wartime environmental crimes", *Georgetown International Environmental Law Review*, vol. 17, No. 4 (2005), pp. 651–671.

Jha, U. C.

Armed Conflict and Environmental Damage. New Delhi, Vij Books India, 2014.

Johnson, Giff

Nuclear Past, Unclear Future. Majuro, Micronitor, 2009.

Jorgensen, Nikolai

"The protection of freshwater in armed conflict", *Journal of International Law and International Relations*, vol. 3 (2007), pp. 57–96.

Joyner, Christopher C., and James T. Kirkhope

"The Persian Gulf war oil spill: reassessing the law of environmental protection and the law of armed conflict", *Case Western Reserve Journal of International Law*, vol. 24, No. 1 (1992), pp. 29–62.

Juste Ruiz, José

"Derecho de los conflictos armados y protección del medio ambiente", *in* Zlata Drnas de Clément, ed., *Estudios de derecho internacional en homenaje al profesor Ernesto J. Rey Caro*, vol. 2, Córdoba, Marcos Lerner, 2002, and *in* Juan Soroeta Liceras, ed., *Cursos de derechos humanos de Donostia-San Sebastián*, vol. 3, San Sebastián, Universidad del País Vasco, 2002.

Kabai, Michael

"An international call for moratorium on the use of depleted uranium in military weapons", *Journal of International Law of Peace and Armed Conflict*, vol. 26, No. 3 (2013), pp. 137–141.

Kalshoven, Frits

"Belligerent reprisals revisited", *Netherlands Yearbook of International Law*, vol. 21 (1990), pp. 43–80.

Belligerent Reprisals, 2nd ed., International Humanitarian Law Series, Leiden, Martinus Nijhoff, 2005.

Reflections on the Law of War: Collected Essays. Leiden, Martinus Nijhoff, 2007.

Karuru, Njeri, and Louise H. Yeung

"Integrating gender into post-conflict natural resource management", *in* Carl Bruch, Caroll Muffet and Sandra S. Nichols, eds., *Governance, Natural Resources, and Post-conflict Peacebuilding*, Earthscan, 2016, pp. 579–604.

Kearns, Brendan

"When bonobos meet guerillas: preserving biodiversity on the battlefield", *Georgetown International Environmental Law Review*, vol. 24, No. 2 (2012), pp. 123–168.

Kellman, Barry

"The Chemical Weapons Convention: a verification and enforcement model for determining legal responsibilities for environmental harm caused by war", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 579–601.

Kirchner, A.

"Environmental protection in time of armed conflict", *European Energy and Environmental Law Review*, vol. 9, No. 10 (2000), pp. 266–272.

Kiss, Alexandre

"International humanitarian law and the environment", *Environmental Policy and Law*, vol. 31, Nos. 4–5 (2001), pp. 223–231.

Knight, Danielle

"Conflict-environment: questions over accountability in Kosovo", Inter Press Service, 12 November 1999.

Knox, John H.

"Assessing the candidates for a global treaty on transboundary environmental impact assessment", *New York University Environmental Law Journal*, vol. 12, No. 1 (2003), pp. 153–168.

Kohen, Marcelo G.

"The notion of 'State survival' in international law", *in* Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 293–314.

Koppe, Erik V.

"The principle of ambituity and the prohibition against excessive collateral damage to the environment during armed conflict", *Nordic Journal of International Law*, vol. 82, No. 1 (2013), pp. 53–82.

The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict, Oxford, Hart Publishing, 2008.

Koroma, Abdul G

"Law of sustainable development in the jurisprudence of the International Court of Justice", *in* Jonas Ebbesson, *et al.*, eds., *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi*, Leiden, Brill Nijhoff, 2014, pp. 189–201.

Kress, Claus

"The International Court of Justice and the law of armed conflicts", *in* Christian J. Tams and James Sloan, eds., *The Development of International Law by the International Court of Justice*, Oxford, Oxford University Press, 2014, pp. 263–298.

Landel, Morgane

"Are aerial fumigations in the context of war in Colombia a violation of the rules of international humanitarian law?" *Transnational Law and Contemporary Problems*, vol. 19, No. 2 (2010), pp. 491–513.

Lanier-Graham, Susan D.

The Ecology of War: Environmental Impacts of Weaponry and Warfare. New York, Walker, 1993.

Lavaux, Stéphanie

"Degradación ambiental y conflictos armados: las conexiones", Documento de investigación, No. 7. Bogotá, Centro Editorial, Universidad del Rosario, 2004.

Lavieille, Jean-Marc

"Les activités militaires, la protection de l'environnement et le droit international", *Revue juridique de l'environnement*, vol. 4 (1992), pp. 421–452.

Lijnzaad, Liesbeth, and Gerard J. Tanja

"Protection of the environment in times of armed conflict: the Iraq–Kuwait War", *Netherlands International Law Review*, vol. 40, No. 2 (1993), pp. 169–199.

Lord, Janet E.

"Legal restraints in the use of landmines: humanitarian and environmental crisis", *California Western International Law Journal*, vol. 25, No. 2 (1995), pp. 311–355.

Low, Luan, and David Hodgkinson

"Compensation for wartime environmental damage: challenges to international law after the Gulf War", *Virginia Journal of International Law*, vol. 35, No. 2 (1995), pp. 405–483.

Lubell, Noam

"Challenges in applying human rights law to armed conflict", *International Review of the Red Cross*, vol. 87, No. 860 (2005), pp. 737–754.

Lujala, Päivi, and Siri Aas Rustad, eds.

High-value Natural Resources and Post-conflict Peacebuilding, Abingdon, Oxon, Earthscan, 2012.

Lundberg, Michael A.

"The plunder of natural resources during war: a war crime (?)", *Georgetown Journal of International Law*, vol. 39, No. 3 (2008), pp. 495–525.

Lung, Wan Pun

"Pre-conflict military activities: environmental obligations and responsibilities of States", *Chinese Journal of International Law*, vol. 14 (2015), pp. 465–496.

Mahfoudh, Haykel Ben

L'environnement, l'humanitaire et le droit international. Manouba, Tunisia, Centre de publication universitaire, 2010.

Mahmoudi, Said

"Foreign military activities in the Swedish economic zone", *International Journal of Marine and Coastal Law*, vol. 11, No. 3 (1996), pp. 365–386.

MAINETTI, Vittorio

"L'intérêt culturel internationalement protégé: contribution à l'étude du droit international de la culture", PhD thesis No. 881, Graduate Institute of International and Development Studies, 2011, pp. 73–138.

MAKHIJANI, Arjun, Howard HU, and Katherine YIH, eds.

Nuclear Wastelands: A Global Guide to Nuclear Weapons Production and its Health and Environmental Effects. Cambridge, Massachusetts, MIT Press, 1995.

MALVIYA, R. A.

"Laws of armed conflict and environmental protection: an analysis of their inter-relationship", *ISIL Year Book of International Humanitarian and Refugee Law*, vol. I (2001), New Delhi, Indian Society of International Law, 2001, pp. 72–93.

MARAUHN, Thilo, Georg NOLTE, and Andreas PAULUS

"Trends in international humanitarian law", *Human Rights Law Journal*, vol. 29 (2008), pp. 216–226.

MARAUHN, Thilo, and Zacharie F. NTOUBANDI

"Armed conflict, non-international", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. I, Oxford, Oxford University Press, 2012, pp. 626–636.

MARSH, Jeremy

"*Lex lata or lex ferenda*? Rule 45 of the ICRC study on customary international humanitarian law", *Military Law Review*, vol. 198 (2008), pp. 116–164.

MCCARTHY, Conor

Reparations and Victim Support in the International Criminal Court. Cambridge, Cambridge University Press, 2012.

MCCORMACK, Timothy L. H.

"An Australian perspective on the ICRC customary international humanitarian law study", *in* Anthony M. Helm, ed., *The Law of War in the 21st Century: Weaponry and the Use of Force*, Newport, Rhode Island, Naval War College, 2006, pp. 81–97.

MCNEILL, John H.

"Protection of the environment in times of armed conflict: environmental protection in military practice", *in* A.-C. Kiss and Johan G. Lammers, eds., *Hague Yearbook of International Law*, vol. 6 (1993), Dordrecht, Martinus Nijhoff, 1994, pp. 75–84.

MELVIN, Neil, and Ruben DE KONING

"Resources and armed conflict", in *SIPRI Yearbook 2011: Armaments, Disarmament and International Security*, Oxford, Oxford University Press, 2011, pp. 39–60.

MENSAH, Thomas A.

"Environmental damages under the Law of the Sea Convention", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 226–249.

"United Nations Compensation Commission (UNCC)", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. X, Oxford, Oxford University Press, 2012, pp. 302–311.

MÉSA, Rodolphe

"Protection de l'environnement et armes de combat: étude de droit international penal", *Revue trimestrielle des droits de l'homme*, vol. 85 (2011), pp. 43–57.

MIGGIANI, Mark Anthony

"War remnants: a case study in the progressive development of international law", thesis, Institut universitaire de hautes études internationales, 1988.

MILES, Cameron A.

"Content and enforcement", *in* Cameron A. Miles, *Provisional Measures before International Courts and Tribunals*, Cambridge, Cambridge University Press (forthcoming).

MITCHELL, Ronald B.

"International environmental agreements: a survey of their features, formation, and effects", *Annual Review of Environment and Resources*, vol. 28 (2003), pp. 429–461.

MOHR, Manfred and Alexander STÖCKER

Summary report of workshop: Exploring a Legal Framework for Toxic Remnants of War, Freie Universität Berlin, 22 June 2012.

MOLLARD-BANNELIER, Karine

La protection de l'environnement en temps de conflit armé. Paris, Pedone, 2001.

MOMTAZ, Djamchid

"Les règles relatives à la protection de l'environnement au cours des conflits armés à l'épreuve du conflit entre l'Irak et le Koweït", AFDI, vol. 37 (1991), pp. 203–219.

MONETA, Carlos J.

La Antartida en el sistema internacional del futuro. Buenos Aires, Grupo Editor Latinoamerícano, 1988.

MOUSSA, Jasmine

"Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law", *International Review of the Red Cross*, vol. 90, No. 872 (2008), pp. 963–990.

MÜLLERSON, Rein

"On the relationship between *jus ad bellum* and *jus in bello* in the General Assembly Advisory Opinion", *in* Laurence Boisson de Chazournes and Philippe Sands eds., *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 267–274.

MURPHY, Sean D., Won KIDANE, and Thomas R. SNIDER

Litigating War: Arbitration of Civil Injury by the Eritrea–Ethiopia Claims Commission. New York, Oxford University Press, 2013.

NAFZIGER, James A. R.

"UNESCO-centered management of international conflict over cultural property", *Hastings Law Journal*, vol. 27, No. 5 (1976), pp. 1051–1067.

NEVITT, Mark P.

"The commander in chief's authority to combat climate change", *Cardozo Law Review*, vol. 37, No. 437 (2015), pp. 437–502.

NYSTUEN, Gro, Stuart CASEY-MASLEN and Annie GOLDEN BERSAGEL, eds.

Nuclear Weapons under International Law. Cambridge, Cambridge University Press, 2014.

OKORODUDU-FUBARA, Margaret

"Oil in the Persian Gulf War: legal appraisal of an environmental warfare", *St. Mary's Law Journal*, vol. 23 (1992), pp. 123–219.

OKOWA, Phoebe

"Environmental justice in situations of armed conflict", *in* Jonas Ebbesson and Phoebe Okowa, eds., *Environmental Law and Justice in Context*, Cambridge, Cambridge University Press, 2009, pp. 231–252.

"Sovereignty contests and the protection of natural resources in conflict zones", *Current Legal Problems*, vol. 66 (2013), pp. 33–73.

"The legal framework for the protection of natural resources in situations of armed conflict", *in* Willem J. M. van Genugten, Michael P. Scharf and Sasha E. Radin, eds., *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference: 2007 Hague Joint Conference on Contemporary Issues of International Law*, The Hague, T. M. C. Asser, 2009.

OVIEDO, Gonzalo, Luisa MAFFI, and Peter Bille LARSEN

Indigenous and Traditional Peoples of the World and Ecoregion Conservation: An Integrated Approach to Conserving the World's Biological and Cultural Diversity, Gland, World Wide Fund for Nature, 2000.

Özerdem, Alpaslan and Rebecca Roberts, eds.

Challenging Post-conflict Environments: Sustainable Agriculture. Burlington, Vermont, Ashgate, 2012.

Oxman, Bernard H.

"Comment: developing the environmental law of armed conflict", *in* Richard J. Grunawalt, John E. King and Ronald S. McClain, eds., *Protection of the Environment during Armed Conflict*, Newport, Rhode Island, Naval War College, 1996, pp. 576–581.

Pantazopoulos, Stavros-Evdokimos

"Towards a coherent framework of transnational corporations' responsibility in international environmental law", *Yearbook of International Environmental Law*, vol. 24, No. 1 (2014), pp. 131–165.

Parsons, Rymn James

"The fight to save the planet: U.S. Armed Forces, 'greenkeeping', and enforcement of the law pertaining to environmental protection during armed conflict", *Georgetown International Environmental Law Review*, vol. 10, No. 2 (1998), pp. 441–500.

Pavoni, Riccardo

"Environmental rights, sustainable development, and investor-State case law: a critical appraisal", *in* Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni, eds., *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 525–556.

Payne, Cymie R.

"Defining the environment: environmental integrity", *in* Carsten Stahn, Jens Iverson and Jennifer Easterday, eds., *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices*, Oxford, Oxford University Press (forthcoming).

"Developments in the law of environmental reparations: a case study of the UN Compensation Commission", *in* Carsten Stahn, Jens Iverson, and Jennifer Easterday, eds., *Environmental Protection and Transitions from Conflict to Peace*, Oxford, Oxford University Press (forthcoming).

Payne, Cymie R., and Peter H. Sand, eds.

Gulf War Reparations and the UN Compensation Commission: Environmental Liability. Oxford, Oxford University Press, 2011.

Pejić, Jelena

"Status of armed conflict", *in* Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2007, pp. 77–100.

Perna, Laura

The Formation of the Treaty Law of Non-International Armed Conflicts. Leiden, Martinus Nijhoff, 2006.

Pertile, Marco

La relazione tra risorse naturali e conflitti armati nel diritto internazionale. Padua, CEDAM, 2012.

Peterson, Ines

"The natural environment in times of armed conflict: a concern for international war crimes law?", *Leiden Journal of International Law*, vol. 22, No. 2 (2009), pp. 325–343.

Pimiento Chamorro, Susana, and Edward Hammond

Addressing Environmental Modification in Post-Cold War Conflict: The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) and Related Agreements. Edmonds, Washington, Edmonds Institute, 2001.

Plant, Glen, ed.

Environmental Protection and the Law of War: A "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict. London, Belhaven Press, 1992.

"Legal aspects of marine pollution during the Gulf War", in *International Journal of Estuarine and Coastal Law*, vol. 7 (1992), pp. 217–231.

Plant, Roger

Land Rights and Minorities, Minority Rights Group International Report 94/2. London, Minority Rights Group, 1994.

Popović, Neil A. F.

"Humanitarian law, protection of the environment, and human rights", *Georgetown International Environmental Law Review*, vol. 8, No. 1 (1995), pp. 67–89.

Prawitz, Jan

"The concept of NWFZ with a comment on East Asia", *in* Joseph Rotblat and Michiji Konuma, eds., *Proceedings of the Forty-fifth Pugwash Conference on Science and World Affairs, Hiroshima, Japan, 23–29 July 1995: Towards a Nuclear-Weapon Free World*", Singapore, World Scientific, 1997, p. 651–669.

Prescott, Jody M.

"NATO gender mainstreaming and the feminist critique of the law of armed conflict", *The Georgetown Journal of Gender and the Law*, vol. XIV, No. 1 (2013), pp. 83–131.

Prescott, Michael

"How war affects treaties between belligerents: a case study of the Gulf War", *Emory International Law Review*, vol. 7, No. 1 (1993), pp. 197–231.

Program on Humanitarian Policy and Conflict Research, Harvard University

HPCR Manual on International Law Applicable to Air and Missile Warfare. Cambridge, Cambridge University Press, 2013.

Quénivet, Noëlle, and Shilan Shah-Davis, eds.

International Law and Armed Conflict: Challenges in the 21st Century. The Hague, T. M. C. Asser, 2010.

Quinn, John P., Richard T. Evans, and Michael J. Boock

"United States Navy development of operational-environmental doctrine", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 156–170.

Rayfuse, Rosemary

"Rethinking international law and the protection of the environment in relation to armed conflict", *in* Rosemary Rayfuse, ed., *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Leiden, Brill, 2014, pp. 1–10.

Reuveny, Rafael, Andreea S. Mihalache-O'Keef, and Quan Li

"The effect of warfare on the environment", *Journal of Peace Research*, vol. 47, No. 6 (2010), pp. 749–761.

Rich, Andy

"The environment: adequacy of protection in times of war", *Penn State Environmental Law Review*, vol. 12, No. 3 (2004), pp. 445–457.

Rieu-Clarke, Alistair, Ruby Moynihan and Bjørn-Oliver Magsig

United Nations Watercourses Convention User's Guide. Dundee, IHP-HELP (International Hydrological Programme-Hydrology for the Environment, Life and Policy) Centre for Water Law, Policy and Science, 2012.

Roach, Ashley J.

"Certain Conventional Weapons Convention: arms control or humanitarian law?", *Military Law Review*, vol. 105 (1984), pp. 3–72.

Robb, Cairo A. R., ed.

International Environmental Law Reports, vol. 3, *Human Rights and Environment*. Cambridge, Cambridge University Press, 2001.

Roberts, Adam

"The law of war and environmental damage", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 47–86.

Robinson, Nicholas

"International law and the destruction of nature in the Gulf War", *Environmental Policy and Law*, vol. 21 (1991), pp. 216–220.

Roch, Philippe, and Franz Xaver Perrez

"International environmental governance: the strive towards a comprehensive, coherent, effective and efficient international environmental regime", *Colorado Journal of International Environmental Law and Policy*, vol. 16 (2005), pp. 1–25.

Rogers, A. P. V.

Law on the Battlefield, 2nd ed. Manchester, Manchester University Press, 2004.

Romson, Åsa

"Environmental policy space and international investment law", PhD thesis, Stockholm University, 2012.

Roscini, Marco

"Protection of the natural environment in time of armed conflict", *in* Jahid Hossain Bhuiyan, Louise Doswald-Beck and Azizur Rahman Chowdhury, eds., *International Humanitarian Law: An Anthology*, Nagpur, LexisNexis Butterworths, 2009.

The cases against the nuclear weapons States, *ASIL Insights*, vol. 19 (2015).

Roselli, Carina

"Restoring Iraq's southern marshes: uncertainty in post-conflict Mesopotamia", dissertation, Vermont Law School, 20 December 2012.

"Bordering on desuetude: are Additional Protocol I's environmental provisions no longer serviceable?", 17 January 2013. The article is on file with the Special Rapporteur.

"At the intersection of human rights and the environment in Iraq's southern marshes", doctor juris thesis, Vermont Law School, 2014. The thesis is on file with the Special Rapporteur.

Ross, Marc A.

"Environmental warfare and the Persian Gulf War: possible remedies to combat intentional destruction of the environment", *Dickinson Journal of International Law*, vol. 10, No. 3 (1992), pp. 515–539.

Saalfeld, Michael

"Umweltschutz in bewaffneten Konflikten aus völkerrechtsgeschichtlicher Sicht", *Humanitäres Völkerrecht: Informationsschriften*, vol. 5, No. 1 (1992), pp. 23–32.

Sadeleer, Nicolas de

EU Environmental Law and the Internal Market. Oxford, Oxford University Press, 2014.

Sancin, Vasilka

"Peace operations and the protection of the environment", *in* Vasilka Sancin, ed., *International Environmental Law: Contemporary Concerns and Challenges—Papers Presented at the First Contemporary Challenges of International Environmental Law Conference, Ljubljana, June 28–29 2012*, Ljubljana, GV Založba, 2012, pp. 187–208.

Sancin, Vasilka, ed.

International Environmental Law: Contemporary Concerns and Challenges—Papers Presented at the First Contemporary Challenges of International Environmental Law Conference, Ljubljana, June 28–29 2012, Ljubljana, GV Založba, 2012.

Sand, Peter H.

"Compensation for environmental damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35, No. 6 (2005), pp. 244–249.

"Environmental dispute settlement and the experience of the UN Compensation Commission", *Japanese Yearbook of International Law*, vol. 54 (2011), pp. 151–189.

Sandoz, Yvez, Christophe Swinarski, and Bruno Zimmermann

Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August of 1949, Geneva, International Committee of the Red Cross and Martinus Nijhoff, 1987.

Sands, Philippe

"The Gulf war: environment as a weapon", *in* G. C. Denney and S. F. Bassuener, eds., *Proceedings of the 85th Annual Meeting of the American Society of International Law*, vol. 85, Washington, D.C., American Society of International Law, 1991.

"Liability for environmental damage and the report of the UNEP Working Group of Experts: introductory article by the Rapporteur", *in* Alexandre Timoshenko, ed., *Liability and Compensation for Environmental Damage: Compilation of Documents*, Nairobi, United Nations Environment Programme, 1998.

Sands, Philippe, and Jacqueline Peel

Principles of International Environmental Law, 3rd ed. Cambridge, Cambridge University Press, 2012.

Sari, Aurel

"Status of forces and status of mission agreements under the European Security and Defence Policy: the EU's evolving practice", EJIL, vol. 19, No. 1 (2008), pp. 67–100.

Schafer, Bernard K.

"The relationship between the international laws of armed conflict and environmental protection: the need to reevaluate what types of conduct are permissible during hostilities", *California Western International Law Journal*, vol. 19, No. 2 (1988–1989), pp. 287–325.

Schiefer, H. Bruno, ed.

Verifying Obligations Respecting Arms Control and the Environment: A Post-Gulf War Assessment—Final Report, Workshop on Verifying Obligations Respecting Arms Control and the Environment: A Post-Gulf War Assessment, Saskatoon, University of Saskatchewan, 1992.

Schmitt, Michael N., ed.

Tallinn Manual on the International Law Applicable to Cyber Warfare. Cambridge, Cambridge University Press, 2013.

Schmitt, Michael N.

"Green war: an assessment of the environmental law of international armed conflict", *Yale Journal of International Law*, vol. 22, No. 1 (1997), pp. 1–109.

"Humanitarian law and the environment", *Denver Journal of International Law and Policy*, vol. 28, No. 3 (2000), pp. 265–323.

"War and the environment: fault lines in the prescriptive landscape", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 87–136.

Schmitt, Michael N., Charles H. B. Garraway, and Yoram Dinstein

The Manual on the Law of Non-International Armed Conflict: With Commentary. San Remo, International Institute of Humanitarian Law, 2006.

Schwartz, Priscilla

"The polluter-pays principle", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar Publishing, 2010, pp. 243–257.

Scobbie, Iain

"The approach to customary law in the Study", *in* Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2007, pp. 15–49.

Shambaugh, James, Judy Oglethorpe, and Rebecca Ham

The Trampled Grass: Mitigating the Impacts of Armed Conflict on the Environment. Washington, D.C., Biodiversity Support Program, 2001.

Sharp, Walter

"The effective deterrence of environmental damage during armed conflict: a case analysis of the Persian Gulf War", *Military Law Review*, vol. 137 (1992), pp. 1–67.

Shelton, Dinah L., and Alexandre Charles Kiss

International Environmental Law, 3rd ed. New York, Transnational Publishers, 2004.

"Strict liability in international environmental law", *in* Tafsir Malick Ndiaye and Rüdiger Wolfrum, eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Leiden, Martinus Nijhoff, 2007, pp. 1131–1151.

Shelton, Dinah L. and Isabelle Cutting

"If you break it, do you own it? Legal consequences of harm from military activities", *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246.

Shraga, Daphna

"The Secretary-General's bulletin on the observance by United Nations forces of international humanitarian law: a decade later", *Israel Yearbook on Human Rights*, vol. 39 (2009), pp. 357–377.

Singh, A. P.

"Protection of environment during armed conflict: is a new frame of laws necessary?", *Journal of the Indian Law Institute*, vol. 52, Nos. 3–4 (2010), pp. 453–466.

Sjöstedt, Britta

"The role of multilateral environmental agreements in armed conflict: 'green-keeping' in Virunga Park—applying the UNESCO World Heritage Convention in the armed conflict of the Democratic Republic of the Congo", *Nordic Journal of International Law*, vol. 82, No. 1 (2013), pp. 129–153.

Smith, Tara

"Creating a framework for the prosecution of environmental crimes in international criminal law", *in* William A. Schabas, Yvonne McDermott and Niamh Hayes, eds., *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Farnham, Surrey, Ashgate, 2013.

Somer, Jonathan

"Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict", *International Review of the Red Cross*, vol. 89, No. 867 (2007), pp. 655–690.

Soons, Alfred H. A.

Marine Scientific Research and the Law of the Sea. The Hague, T. M. C. Asser Press, 1982.

Spieker, Heike

Völkergewohnheitsrechtlicher Schutz der natürlichen Umwelt im internationalen bewaffneten Konflikt, Bochum, UVB-Universitätsverlag Dr. N. Brockmeyer, 1992.

"The conduct of hostilities and the protection of the environment", *in* Andreas Fischer-Lescano *et al.*, eds., *Frieden in Freiheit—Peace in Liberty—Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag*, Zürich, Dike Verlag, 2008, pp. 741–768.

"Medical transportation", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. VII, Oxford, Oxford University Press, 2012, pp. 52–61.

Stahn, Carsten, and Jann K. Kleffner, eds.

Jus Post Bellum: *Towards a Law of Transition from Conflict to Peace*. The Hague, T. M. C. Asser, 2008.

Stahn, Carsten, Jennifer S. Easterday and Jens Iverson, eds.

Jus post bellum: *Mapping the Normative Foundations*. Oxford, Oxford University Press, 2014.

Stockins Abascal, Christine

"Protección del medio ambiente en los conflictos armados", dissertation, Pontificia Universidad Católica de Chile, 2009.

Subedi, Surya P.

Land and Maritime Zones of Peace in International Law. Oxford, Clarendon Press, 1996.

Tams, Christian J.

"The contentious jurisdiction of the Permanent Court", *in* Christian J. Tams and Malgosia Fitzmaurice, eds., *Legacies of the Permanent Court of International Justice*, Leiden, Martinus Nijhoff, 2013, pp. 9–39.

Tarasofsky, Richard G.

"Legal protection of the environment during international armed conflict", *Netherlands Yearbook of International Law*, vol. 24 (1993), pp. 17–79.

"Protecting specially important areas during international armed conflict: a critique of the IUCN draft convention on the prohibition of hostile military activities in internationally protected areas", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 567–578.

Thieffry, Patrick

Droit de l'environnement de l'Union europeenne, 2nd. ed. Brussels, Bruylant, 2011.

Thomas, Carson

"Advancing the legal protection of the environment in relation to armed conflict: Protocol I's threshold of impermissible environmental damage and alternatives", *Nordic Journal of International Law*, vol. 82, No. 1 (2013), pp. 83–103.

Ticehurst, Rupert

"The Martens Clause and the laws of armed conflict", *International Review of the Red Cross*, vol. 37, No. 317 (1997), pp. 125–134.

Tignino, Mara

"Water in times of armed conflict", *in* International Bureau of the Permanent Court of Arbitration, ed., *Resolution of International Water Disputes: Papers Emanating from the Sixth Permanent Court of Arbitration International Law Seminar, November 8, 2002*, The Hague, Kluwer Law International, 2003.

"Reflections on the legal regime of water during armed conflicts", presented at the Fifth Pan-European International Relations Conference, The Hague, 9–11 September 2004, available from www.afes-press.de/pdf/Hague/Tignino_LegalRegime_Water.pdf.

"Water security in times of armed conflicts", *in* Hans Günter Brauch *et al.*, eds., *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concepts*, Berlin, Springer, 2009, pp. 763–778.

"Water, international peace and security", *International Review of the Red Cross*, vol. 92 (2010), pp. 647–674.

"The right to water and sanitation in post-conflict peacebuilding", *Water International*, vol. 36 (2011), pp. 241–248.

L'eau et la guerre : éléments pour un régime juridique. Brussels, Bruylant, 2011.

"The right to water and sanitation in post-conflict legal mechanisms: an emerging regime?", *in* Erika Weinthal, Jessica Troell and Mikiyasu Nakayama, eds., *Water and Post-Conflict Peacebuilding*, Abingdon, Earthscan, 2014, pp. 383–402.

"Principle 23: The environment of oppressed peoples", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*, Oxford, Oxford University Press, 2015, pp. 557–568.

Tir, Jaroslav, and Douglas M. Stinnett

"Weathering climate change: can institutions mitigate international water conflict?", *Journal of Peace Research*, vol. 49, No. 1 (2012), pp. 211–225.

Tolentino, Amado S., Jr.

"Armed conflict and the environment: legal perspectives", *Philippine Law Journal*, vol. 81, No. 3 (2007), pp. 377–389.

"The law of armed conflict vis-à-vis the environment", *in* Budislav Vukas and Trpimir M. Šošić, eds., *International Law: New Actors, New Concepts—Continuing Dilemmas: Liber Amicorum Boidžar Bakotić*, Leiden, Martinus Nijhoff, 2010.

Toman, Jiří

The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, Signed on 14th May 1954 in The Hague, and on Other Instruments of International Law concerning such Protection. Aldershot, UNESCO Publishing, 1996.

Cultural Property in War: Improvement in Protection—Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Paris, UNESCO Publishing, 2009.

Trouwborst, Arie

Evolution and Status of the Precautionary Principle in International Law. The Hague, Kluwer Law International, 2002.

Tucker, Matthew L.

"Mitigating collateral damage to the natural environment in naval warfare: an examination of the Israeli naval blockade of 2006", *Naval Law Review*, vol. 57 (2009), pp. 161–201.

Türk, Helmut

"The negotiation of a new Geneva-style convention: a government lawyer's perspective", *in* Glen Plant, ed., *Environmental Protection and the Law of War: A "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict*, London, Belhaven Press, 1992, pp. 96–103.

United States, Congressional Research Initiative

"U.S. Agent Orange/dioxin assistance to Vietnam", Congressional Research Service, 13 November 2015.

Unruh, Jon, and Rhodri C. Williams, eds.

Land and Post-Conflict Peacebuilding. Abingdon, Earthscan, 2013.

Van der Vyver, Johan D.

"The environment: State sovereignty, human rights, and armed conflict", *Emory International Law Review*, vol. 23, No. 1 (2009), pp. 85–112.

Venturini, Gabriella

"Disasters and armed conflict", *in* Andrea de Guttry, Marco Gestri and Gabriella Venturini, eds., *International Disaster Response Law*, The Hague, T. M. C. Asser, 2012, pp. 251–266.

"International disaster response law in relation to other branches of international law", *in* Andrea de Guttry, Marco Gestri and Gabriella Venturini, eds., *International Disaster Response Law*, The Hague, T. M. C. Asser, 2012, pp. 45–64.

Verwey, Wil. D.

"Observations on the legal protection of the environment in times of international armed conflict", *in* A.-C. Kiss and J. G. Lammers, eds., *Hague Yearbook of International Law*, vol. 7 (1994), Dordrecht, Martinus Nijhoff, 1995, pp. 35–52.

"Protection of the environment in times of armed conflict: in search of a new legal perspective", *Leiden Journal of International Law*, vol. 8, No. 1 (1995), pp. 7–40.

Vialle, Anne-Cécile, *et al.*

"Peace through justice: International tribunals and accountability for wartime environmental damage", *in* Carl Bruch, Carroll Muffet and Sandra S. Nichols, eds., *Governance, Natural Resources, and Post-conflict Peacebuilding*, Abingdon, Earthscan, 2016, pp. 665–718.

Viikari, Lotta

The Environmental Element in Space Law: Assessing the Present and Charting the Future. Leiden, Martinus Nijhoff, 2008.

Viñuales, Jorge E.

"Cartographies imaginaires: observations sur la portée juridique du concept de 'regime special' en droit international", *Journal du droit international*, vol. 140, No. 2 (2013), pp. 405–425.

Voigt, Christina

Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law. Leiden, Martinus Nijhoff, 2009.

Vöneky, Silja

"A new shield for the environment: peacetime treaties as legal restraints of wartime damage", *Review of European Community and International Environmental Law*, vol. 9, No. 1 (2000), pp. 20–32.

"Peacetime environmental law as a basis of State responsibility for environmental damage caused by war", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 190–225.

Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten. Berlin, Springer, 2001.

Waleij, Annica and Birgitta Liljedahl

"The gap between buzz words and excellent performance: the environmental footprint of military and civilian actors in crises and conflict settings", report FOI-R-4246-SE (2016).

Walker, George K., ed.

Definitions for the Law of the Sea: Terms not Defined by the 1982 Convention. Leiden, Martinus Nijhoff Publishers, 2012.

Warner, Frederick

"The environmental consequences of the Gulf War", *Environment*, vol. 33, No. 5 (1991), pp. 7–26.

Weinthal, Erika, Jessica Troell and Mikiyasu Nakayama, eds.

Water and Post-Conflict Peacebuilding, Abingdon, Earthscan, 2014.

Weir, Doug

"Environmental mechanics: re-imagining post-conflict environmental assistance", Toxic Remnants of War Project, 2015.

Westing, Arthur H.

Ecological Consequences of the Second Indochina War. Stockholm, Almqvist and Wiksell International, 1976.

Warfare in a Fragile World: Military Impact on the Human Environment. London, Taylor and Francis, 1980.

Explosive Remnants of War: Mitigating the Environmental Effects. London, Taylor and Francis, 1985.

Global Resources and International Conflict: Environmental Factors in Strategic Policy and Action. Oxford, Oxford University Press, 1986.

"Herbicides in warfare: the case of Indochina", *in* Philippe Bordeau, and others, eds., *Ecotoxology and Climate*, Chichester, John Wiley and Sons, 1989, pp. 337–357.

"Protected natural areas and the military", *Environmental Conservation*, vol. 19 (1992), pp. 343–348.

"Constraints on environmental disruption during the Gulf War", *in* John O'Loughlin, Tom Mayer and Edward S. Greenberg, eds., *War and its Consequences: Lessons from the Persian Gulf Conflict*, New York, HarperCollins, 1994, pp. 77–84.

"In furtherance of environmental guidelines for armed forces during peace and war", *in* Jay E. Austin and Carl E. Bruch, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 171–182.

Arthur H. Westing: From Environmental to Comprehensive Security, SpringerBriefs on Pioneers in Science and Practice: Texts and Protocols, vol. 13, Hans Günter Brauch, ed., New York, Springer, 2013.

Pioneer on the Environmental Impact of War, SpringerBriefs on Pioneers in Science and Practice, vol. 1, Hans Günter Brauch, ed., New York, Springer, 2013.

Westing, Arthur H., ed.

Environmental Warfare: A Technical, Legal and Policy Appraisal. London, Taylor and Francis, 1984.

Environmental Hazards of War: Releasing Dangerous Forces in an Industrialized World. London, Sage, 1990.

Wilmshurst, Elizabeth, ed.

International Law and the Classification of Conflicts. Oxford, Oxford University Press, 2012.

Wilmshurst, Elizabeth, and Susan Breau, eds.

Perspectives on the ICRC Study on Customary International Humanitarian Law. Cambridge, Cambridge University Press, 2007.

Whittemore, Luke

"Intervention and post-conflict natural resource governance: lessons from Liberia", *Minnesota Journal of International Law*, vol. 17, No. 2 (2008), pp. 387–433.

Wyatt, Julian

"Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict", *International Review of the Red Cross*, vol. 92, No. 879 (2010), pp. 593–646.

Zemmali, Ameur

"La protection de l'environnement en période de conflit armé dans les normes humanitaires et l'action du Comité international de la Croix Rouge", *in* Najeeb Al-Nauimi and Richard Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 105–131.

"The protection of water in times of armed conflict", *International Review of the Red Cross*, No. 308 (1995), pp. 550–564.

"The right to water in times of armed conflict", *in* Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie, eds., *Making the Voice of Humanity Heard*, Leiden, Martinus Nijhoff, 2004, pp. 307–318.

PROTECTION OF THE ATMOSPHERE

[Agenda item 8]

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Third report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur*

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CONTENTS

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Multilateral instruments cited in the present report

	Source
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	*British and Foreign State Papers*, 1919, vol. CXII, London, HM Stationery Office, 1922, p. 1.
Constitution of the International Labour Organization (Versailles, 1919) (amended in 1922, 1945, 1946,1953, 1962 and 1972)	Available from the ILO website (www.ilo.org).
International Convention for the Regulation of Whaling (Washington, 2 December 1946)	United Nations, *Treaty Series*, vol. 161, No. 2124, p. 72.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	*Ibid.*, vol. 55, No. 814, p. 187.
International Convention for the High Seas Fisheries of the North Pacific Ocean (Tokyo, 9 May 1952)	*Ibid.*, vol. 205, No. 2770, p. 65.
Interim Convention on Conservation of North Pacific Fur Seals (Washington, 9 February 1957)	*Ibid.*, vol. 314, No. 4546, p. 105.
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 559, No. 8164, p. 285.
The Antarctic Treaty (Washington D.C., 1 December 1959)	*Ibid.*, vol. 402, No. 5778, p. 71.
Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991, and Stockholm, 17 June 2005 (Annex VI))	*Ibid.*, vol. 2941, Annex A, No. 5778, p. 3, and ILM, vol. 45 (January 2006), No. 1, p. 5. See also ILM, vol. 30 (November 1991), p. 1461.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972)	*Ibid.*, vol. 1046, No. 15749, p. 120.
1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996)	International Maritime Organization document LC/SM 1/6. See also ILM, vol. 36 (1997), pp. 7–26.
Convention on the Protection of the Environment (Stockholm, 19 February 1974)	United Nations, *Treaty Series*, vol. 1092, No. 16770, p. 279.
Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976)	*Ibid.*, vol. 1102, No. 16908, p. 27.
Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (Madrid, 14 October 1994)	UNEP, Final Act and Protocols, Conference of Plenipotentiaries on the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, Madrid, 13–14 October 1994, document UNEP(OCA)/MED IG.4/4, p. 48.

	Source
Protocol on Integrated Coastal Zone Management in the Mediterranean (Madrid, 21 January 2008)	UNEP, Final Act of the Conference of Plenipotentiaries on the Protocol on Integrated Coastal Zone Management in the Mediterranean, document UNEP(DEPI)/MED IG.18/4, p. 70.
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.
Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978)	*Ibid.*, vol. 1140, No. 17898, p. 133.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	*Ibid.*, vol. 1302, No. 21623, p. 217.
Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan, 23 March 1981)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (Cambridge, Grotius, 1991), p. 118.
Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima, 12 November 1981)	United Nations, *Treaty Series*, vol. 1648, No. 28325, p. 3. See also UNEP, Selected Multilateral Treaties in the Field of the Environment, vol. 2 (Cambridge, Grotius, 1991), p. 130.
Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden (Jeddah, 14 February 1982)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (Cambridge, Grotius, 1991), p. 144.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, Colombia, on 24 March 1983)	*Ibid.*, vol. 1506, No. 25974, p. 157.
Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi, 21 June 1985)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (Cambridge, Grotius, 1991), p. 324.
ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985)	*Ibid.*, p. 343.
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 24 November 1986)	*Ibid.*, p. 372. See also ILM, vol. XXVI (1987), p. 41.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	*Ibid.*, vol. 1522, No. 26369, p. 3. For the Copenhagen and Beijing amendments, see *ibid.*, vol. 1785, p. 517, and vol. 2173, p. 183, respectively. The consolidated version of the Protocol is reproduced in UNEP, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, 8th ed., 2009.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989)	United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	*Ibid.*, vol. 1989, No. 34028, p. 309. For the amendment of 27 February 2001, see the website of the United Nations Treaty Series, https://treaties.un.org, *Depositary, Status of Treaties*, chap. XXVII.
Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003)	*Ibid.*, vol. 2685, No. 34028, p. 140.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid.*, vol. 1771, No. 30822, p. 107.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	*Ibid.*, vol. 2303, No. 30822, p. 162.
Convention on the Protection and Use of Transboundary Watercourses and International Lake (Helsinki, 17 March 1992)	*Ibid.*, vol. 1936, No. 33207, p. 269. See also ILM, vol. 31, No. 6 (November 1992), p. 1312.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000)	*Ibid.*, vol. 2226, No. 30619, p. 208.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid.*, vols. 1867–1869, No. 31874.
Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Sofia, 29 June 1994)	*Official Journal of the European Communities*, vol. 52, No. L 342, p. 19.

	Source
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.
Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Chiang Rai, Thailand, 5 April 1995)	*Ibid.*, vol. 2069, No. 35844, p. 3.
Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 10 June 1995)	UNEP, Final Act of the Conference of Plenipotentiaries on the Amendments to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, document UNEP(OCA)/MED IG.6/7, resolution II, annex I.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Ibid.*, vol. 2999, No. 52106, p.77.
Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998)	*Ibid.*, vol. 2161, No. 37770, p. 447.
Revised Protocol on Shared Watercourses in the Southern African Development Community (Windhoek, 7 August 2000)	S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments*, Rome, FAO/UNESCO, 2005, p. 102. See also ILM, vol. 40, No. 2 (March 2001), p. 321.
Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001)	United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119.
ASEAN Agreement on Transboundary Haze Pollution (Kuala Lumpur, 10 June 2002)	UNEP, *Selected Texts of Legal Instruments in International Environmental Law*, Ardsley (New York), Transnational Publishers, 2005, p. 604.
Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev, 22 May 2003)	S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments*, Rome, FAO/UNESCO, 2005, p. 119.
Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran, 4 November 2003)	ILM, vol. 44 (January 2005), p. 1.
Protocol for the Protection of the Caspian Sea against Pollution from Land-Based Sources and Activities to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Moscow, 12 December 2012)	Text available from http://ecolex.org.
Protocol on Environmental Impact Assessment in a Transboundary Context to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Moscow, 20 July 2018)	Text available from http://tehranconvention.org.
Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi, 31 March 2010)	UNEP, Final Act of the Conference of the Plenipotentiaries for the Adoption of the Amended Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, document UNEP(DEPI)/EAF/CPP.6/10/Suppl., annex II.
Copenhagen Accord (Copenhagen, 30 March 2010)	Conference of the Parties to the United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009. Addendum: Part Two: Action taken by the Conference of the Parties at its fifteenth session (FCCC/CP/2009/11/Add.1), p. 5.
Paris Agreement (Paris, 12 December 2015)	United Nations, *Treaty Series*, vol. 3156, No. 54113, p. 259.

Works cited in the present report

Akbari, Hashem, Surabi Menon and Arthur Rosenfeld

"Global cooling: increasing world-wide urban albedos to offset CO_2", Climatic Change, vol. 94 (2009), pp. 275–286.

Akehurst, Michael

"Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25 (1976), pp. 801–825.

American Law Institute

Restatement of the Law (Third): the Foreign Relations Law of the United States, vol. 1. St. Paul, American Law Institute Publishers, 1987.

Anton, Donald K.

"Case Concerning Pulp Mills on the River Uruguay (*Argentina v Uruguay*) (Judgment) [2010], International Court of Justice, April 10, 2010, Australian International Law Journal, 2010", ANU College of Law Research Paper No. 10-84. Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705810.

Armeni, Chiara

"Global experimentalist governance, international law and climate change technologies", *International and Comparative Law Quarterly*, vol. 64 (2015), pp. 875–904.

Ayusawa, Iwao Frederick

International Labor Legislation. New York, Columbia University, 1920.

Bannelier, Karine

"Foundational judgment or constructive myth? The Court's decision as a precursor to international environmental law", *in* Karine Bannelier, Theodore Christakis and Sarah Heathcote, eds., *The ICJ and the Evolution of International Law: The Enduring Impact of the* Corfu Channel *Case*. Abingdon, Oxon, Routledge, 2012, pp. 242–255.

Barrett, Scott

"The incredible economics of geoengineering", *Environmental and Resource Economics*, vol. 39 (2008), pp. 45–54.

Barstow Magraw, Daniel, and Lisa D. Hawke

"Sustainable development", *in* Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2007, pp. 613–638.

Bates, Gerry

Environmental Law in Australia, 7th ed. Chatswood, New South Wales, Lexis Nexis Butterworths, 2010.

Bipartisan Policy Center's Task Force on Climate Remediation Research

"Geoengineering: A national strategic plan for research on the potential effectiveness, feasibility, and consequences of climate remediation technologies". 2011.

Birnie, Patricia, Alan Boyle and Catherine Redgwell, eds.

International Law and the Environment, 3rd ed. Oxford, Oxford University Press, 2009.

Blackstock, Jason J., and Jane C. S. Long

"The politics of geoengineering", *Science*, vol. 327 (2010), p. 527.

Boyle, Alan E.

"State responsibility for breach of obligations to protect the global environment", *in* William E. Butler, ed., *Control over Compliance with International Law*, Dordrecht, Martinus Nijhoff, 1991, pp. 69–82.

Boyle, Alan, and Christine Chinkin

The Making of International Law. Oxford, Oxford University Press, 2007.

Boyle, Alan, and David Freestone

International Law and Sustainable Development: Past Achievements and Future Challenges. Oxford, Oxford University Press, 1999.

Brown Weiss, Edith

"Opening the door to the environment and to future generations", *in* Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 338–353.

In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity. Tokyo, United Nations University Press, 1989.

"International responses to weather modification", *International Organization*, vol. 29 (1975), pp. 805–826.

Brunnée, Jutta

"*Sic utere tuo ut alienum non laedas*", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. IX. Oxford, Oxford University Press, 2012, pp. 188–192. Available from http://opil.ouplaw.com.

Caddy, J. F., and K.L. Cochrane

"A review of fisheries management past and present and some future perspectives for the third millennium", *Ocean and Coastal Management*, vol. 44 (2001), pp. 653–682.

Caldeira, Ken, and Lowell Wood

"Global and Arctic climate engineering: numerical model studies", *Philosophical Transactions of the Royal Society* (Series A), vol. 366 (2008), pp. 4039–4056.

Canadell, Josep G., and Michael R. Raupach

"Managing forests for climate change mitigation", *Science*, vol. 320 (2008), pp. 1456–1457.

Cançado Trindade, Antônio A.

"Principle 15: Precaution", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*. Oxford, Oxford University Press, 2015, pp. 403–428.

Craik, Neil

The International Law of Environmental Impact Assessment: Process, Substance and Integration. Cambridge, Cambridge University Press, 2008.

Crawford, James

Brownlie's Principles of Public International Law, 8th ed. Oxford, Oxford University Press, 2012.

Crutzen, Paul J.

"Albedo enhancement by stratospheric sulfur injections: a contribution to resolve a policy dilemma? An editorial essay", *Climatic Change*, vol. 77 (2006), pp. 211–219.

Cullet, Philippe

"Common but differentiated responsibilities", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010, pp. 161–181.

Davis, Ray J.

"The international law of the hydroscopic cycle: atmospheric water resources development and international law", *Natural Resources Journal*, vol. 31 (1991), pp. 11–44.

De Sadeleer, Nicolas

"The principles of prevention and precaution in international law: Two heads of the same coin?", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010, pp. 182–199.

Del Mar, Katherine

"The International Court of Justice and standards of proof", *in* Karine Bannelier, Theodore Christakis and Sarah Heathcote, eds., *The ICJ and the Evolution of International Law: The Enduring Impact of the* Corfu Channel *Case*, Abingdon, Oxon, Routledge, 2012, pp. 98–123.

Deng, Hua

"The evolution and implementation of environmental impact assessment in international law", *Sun Yat-Sen University Law Review*, vol. 13 (2015), pp. 129–148 (in Chinese).

Dupuy, Pierre-Marie

"Due diligence in the international law of liability", *in* OECD, *Legal Aspects of Transfrontier Pollution*, Paris, 1977.

"Reviewing the difficulties of codification: On Ago's classification of obligations of means and obligations of result in relation to State responsibility", EJIL, vol. 10 (1999), pp. 371–385.

Duvic-Paoli, Leslie-Anne, and Jorge E. Viñuales

"Principle 2: Prevention", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*, Oxford, Oxford University Press, 2015, pp. 107–138.

Edwards, Vanessa

"A review of the Court of Justice's case law in relation to waste and environmental impact assessment: 1992–2011", *Journal of Environmental Law*, vol. 25 (2013), pp. 515–530.

Elias, Olufemi

"Environmental impact assessment", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010, pp. 227–242.

Epiney, Astrid

"Environmental impact assessment", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. III, Oxford, Oxford University Press, 2012, pp. 580–592.

Fitzmaurice, Malgosia

"Responsibility and climate change", GYBIL, vol. 53 (2010), pp. 89–138.

Flannery, Brian P., *et al.*

"Geoengineering climate", *in* Robert G. Watts, ed., *Engineering Response to Global Climate Change: Planning a Research and Development Agenda*, Boca Raton, United States, CRC Press, 1997, pp. 379–428.

Francioni, Francesco

"Equity in international law", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. III, Oxford, Oxford University Press, 2012, pp. 632–642.

Franck, Thomas M.

Fairness in International Law and Institutions. Oxford, Clarendon Press, 1995.

French, Duncan

"Sustainable development", *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris, eds., *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar, 2010, pp. 51–68.

Fukasaka, Mariko

"Burdens of proof before international litigation: burden of proof and producing evidence (1)", *Sophia Law Review*, vol. 52 (2009), pp. 183–184 [in Japanese].

Gaja, Giorgio

"The concept of an injured State", *in* James Crawford, Alain Pellet and Simon Olleson, eds., *The Law of International Responsibility*, Oxford, Oxford University Press, 2010, pp. 941–948.

Galizzi, Paolo

"Air, atmosphere and climate change", *in* Shawkat Alam, *et al.*, eds., *Routledge Handbook of International Environmental Law*, London, Routledge, 2013, pp. 333–348.

Ginther, Konrad, and Paul J. I. M. de Waart

"Sustainable development as a matter of good governance: an introductory view", *in* Konrad Ginther, Erik Denters and Paul J. I. M. de Waart, eds., *Sustainable Development and Good Governance*, Dordrecht, Martinus Nijhoff, 1995, pp. 1–14.

Glasson, John, Riki Therivel and Andrew Chadwick

Introduction to Environmental Impact Assessment, 4th ed. Oxford, Routledge, 2013.

Goes, Marlos, Nancy Tuana and Klaus Keller

"The economics (or lack thereof) of aerosol geoengineering", *Climatic Change*, vol. 109 (2011), pp. 719–744.

Gray, Kevin R.

"International environmental impact assessment: Potential for a multilateral environmental agreement", *Colorado Journal of International Environmental Law and Policy*, vol. 11 (2000), pp. 83–128.

Grotius, Hugo

The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade (Mare Liberum), translated by Ralph Van Deman Magoffin. New York, Oxford University Press, 1916.

Hamilton, Clive

Earthmasters: The Dawn of the Age of Climate Engineering. London, Yale University Press, 2013.

Hamwey, Robert M.

"Active amplification of the terrestrial albedo to mitigate climate change: an exploratory study", *Mitigation and Adaptation Strategies for Global Change*, vol. 12 (2007), pp. 419–439.

Handl, Günther

Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy. The Hague, Kluwer Law International, 2001.

"Transboundary impacts", *in* Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental* Law, Oxford, Oxford University Press, 2007, pp. 531–549.

Hey, Ellen

"Common but differentiated responsibilities", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. II, Oxford, Oxford University Press, 2012, pp. 444–448.

Honkonen, Tuula

The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects. Alphen an den Rijn, Kluwer Law International, 2009.

Hossain, Kamal

"Evolving principles of sustainable development and good governance", *in* Konrad Ginther, Erik Denters and Paul J. I. M. de Waart, eds., Sustainable Development and Good Governance, Dordrecht, Martinus Nijhoff, 1995, pp. 15–22.

Hunter, David B.

"International environmental law: sources, principles and innovations", *in* Paul G. Harris, ed., Routledge Handbook of Global Environmental Politics, Oxford, Routledge, 2013, pp. 124–137.

International Law Association

"First report on due diligence in international law", *in* International Law Association, *Reports of Conferences, Report of the Seventy-sixth Conference, Held in Washington, D.C., August 2014*, vol. 76 (2014), pp. 947–985. Also available from www.ila-hq.org, *Study groups*.

International Union for Conservation of Nature and Natural Resources

World Conservation Strategy: Living Resource Conservation for Sustainable Development. Gland, 1980.

JANIS, M. W.

"Equity in international law", *in* Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. II, Amsterdam, North-Holland, 1995, pp. 109–113.

KAMMINGA, Menno T.

"Extraterritoriality", *in* Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. III, Oxford, Oxford University Press, 2012, pp. 1071–1077.

KEITH, David W.

"Geoengineering", *in* Andrew S. Goudie and David J. Cuff, eds., *Encyclopedia of Global Change: Environmental Change and Human Society*, vol. 1, Oxford, Oxford University Press, 2001, pp. 495–502.

KERSTEN, Charles M.

"Rethinking transboundary environmental impact assessment", *Yale Journal of International Law*, vol. 34 (2009), pp. 173–206.

KHESHGI, Haroon S.

"Sequestering atmospheric carbon dioxide by increasing ocean alkalinity", *Energy*, vol. 20 (1995), pp. 915–922.

KNOX, John H.

"The myth and reality of transboundary environmental impact assessment", AJIL, vol. 96 (2002), pp. 291–319.

"Assessing the candidates for a global treaty on transboundary environmental impact assessment", *New York University Environmental Law Journal*, vol. 12 (2003), pp. 153–168.

KOKOTT, Juliane

"Equity in international law", *in* Ferenc L. Tóth, ed., Fair Weather? Equity Concerns in Climate Change, London, Earthscan, 1999, pp. 173–192.

KUHN, Arthur K.

"The *Trail Smelter* arbitration—United States and Canada", AJIL, vol. 32 (1938), pp. 785–788, and vol. 35 (1941), pp. 665–666.

LANG, Winfried, ed.

Sustainable Development and International Law. London, Graham and Trotman, 1995.

LODE, Birgit, Philipp SCHÖNBERGER and Patrick TOUSSAINT

"Clean air for all by 2030? Air quality in the 2030 Agenda and in international law", *Review of European Community and International Environmental Law*, vol. 25 (2016), pp. 27–38.

LOWE, Vaughan

"Sustainable development and unsustainable arguments", *in* Alan Boyle and David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford, Oxford University Press, 1999, pp. 19–38.

MANN, F. A.

"The doctrine of jurisdiction in international law", *in* F. A. Mann, *Studies in International Law*, Oxford, Clarendon, 1973, pp. 1–139.

"The doctrine of international jurisdiction revisited after twenty years", *in* F. A. Mann, *Further Studies in International Law*, Oxford, Clarendon, 1990, pp. 1–83.

MCCAFFREY, Stephen C.

"Of paradoxes, precedents, and progeny: the *Trail Smelter* arbitration 65 years later", *in* Rebecca M. Bratspies and Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge, Cambridge University Press, 2006, pp. 34–45.

MENG, Werner

"Extraterritorial effects of administrative, judicial and legislative acts", *in* Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. II, Amsterdam, North-Holland, 1995, pp. 337–343.

METZ, Bert, *et al.*, eds.

Carbon Dioxide Capture and Storage. Intergovernmental Panel on Climate Change Special Report. Cambridge, Cambridge University Press, 2005.

MOLINARI, Claire

"Principle 3: From a right to development to intergenerational equity", *in* Jorge E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary*, Oxford, Oxford University Press, 2015, pp. 139–156.

MOORE, John Bassett

History and Digest of the International Arbitrations to Which the United States Has Been a Party. Washington, D.C., Government Publishing Office, 1898.

MURASE, Shinya

Economic Basis of International Law. Tokyo, Yuhikaku, 2001 [in Japanese].

International Law: An Integrative Perspective on Transboundary Issues. Tokyo, Sophia University Press, 2011.

International Lawmaking: Sources of International Law. Tokyo. Toshindo, 2002 (in Japanese). Also translated by Yihe Qin. Beijing, Chinese People's Public Safety University Press, 2012, pp. 172–182 (in Chinese).

OKUWAKI, Naoya

"The London Dumping Convention and ocean fertilization experiments: conflict of treaties surrounding technological development for CO_2 mitigation", *Jurist*, No. 1409 (2010), pp. 38–46 [in Japanese].

ORNSTEIN, Leonard, Igor ALEINOV and David RIND

"Irrigated afforestation of the Sahara and Australian Outback to end global warming", *Climatic Change*, vol. 97 (2009), pp. 409–437.

PARSON, Edward A.

"Climate engineering: challenges to international law and potential responses", *American Society of International Law Proceedings*, vol. 106 (2012), pp. 265–270.

PAYNE, Cymie R.

"Pulp Mills on the River Uruguay (Argentina v. Uruguay)", AJIL, vol. 105 (2011), pp. 94–101.

PETERS, Mary Sabina

"Minimize risk of carbon sequestration through environmental impact assessment and strategic environmental assessment", *European Energy and Environmental Law Review*, vol. 24 (2015), pp. 12–16.

PLAKOKEFALOS, Ilias

"Prevention obligations in international environmental law", *Yearbook of International Environmental Law*, vol. 23 (2012), pp. 3–43.

RAJAMANI, Lavanya

Differential Treatment in International Environmental Law. Oxford, Oxford University Press, 2006.

RASBAND, James, James SALZMAN and Mark SQUILLACE

Natural Resources Law and Policy, 2nd ed. New York, Foundation Press, 2009.

RAYNER, Steve, *et al.*,

"The Oxford principles", Climate Geoengineering Governance Working Paper, No. 1. University of Oxford, 2013.

READ, John E.

"The *Trail Smelter* dispute", *Canadian Yearbook of International Law*, vol. 1 (1963), pp. 213–229.

"The *Trail Smelter* dispute [abridged]", *in* Rebecca M. Bratspies and Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge, Cambridge University Press, 2006, pp. 27–33.

Reynolds, Jesse

"The international legal framework for climate engineering", working paper, Geoengineering Our Climate (Earthscan, 2015).

Richards, Kenneth R., and Carrie Stokes

"A review of forest carbon sequestration cost studies: a dozen years of research", *Climatic Change*, vol. 63 (2004), pp. 1–48.

Riddell, Anna, and Brendan Plant

Evidence before the International Court of Justice. London, British Institute of International and Comparative Law, 2009.

Robinson, Nicholas A.

"International trends in environmental impact assessment", *Boston College Environmental Affairs Law Review*, vol. 19 (1992), pp. 591–621.

Robock, Alan, Luke Oman and Georgiy L. Stenchikov

"Regional climate responses to geoengineering with tropical and Arctic SO_2 injections", *Journal of Geophysical Research*, vol. 113 (2008), pp. 1–15.

Romano, Cesare P. R., Karen J. Alter and Yuval Shany, eds.

The Oxford Handbook of International Adjudication. Oxford, Oxford University Press, 2014.

Roslycky, Lada L.

"Weather modification operations with transboundary effects: the technology, the activities and the rules", *Hague Yearbook of International Law*, vol. 16 (2003), pp. 3–40.

Sand, Peter H.

"Internationaler Umweltschutz und neue Rechtsfragen der Atmosphärennutzung", *Zeitschrift für Luftrecht und Weltraumrechtsfragen*, vol. 20 (1971), pp. 109–133.

Sandifer, Durward V.

Evidence before International Tribunals, rev. ed. Charlottesville, University Press of Virginia, 1975.

Sands, Philippe

Principles of International Environmental Law, 2nd ed. Cambridge, Cambridge University Press, 2003.

Sands, Philippe, and Jacqueline Peel

Principles of International Environmental Law, 3rd ed. Cambridge, Cambridge University Press, 2012.

Schrijver, Nico

"The evolution of sustainable development in international law: inception, meaning and status", *Collected Courses of the Hague Academy of International Law*, vol. 329 (2007), pp. 217–432.

Scott, Karen N.

"International law in the anthropocene: responding to the geoengineering challenge", *Michigan Journal of International Law*, vol. 34 (2013), pp. 309–358.

Selden, John

Of the Dominion, or, Ownership of the Sea (Mare Clausum), translated by M. Needham. New Jersey, Lawbook Exchange, 2004.

Shelton, Dinah

"Equity", *in* Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2007, pp. 639–662.

Shepherd, John, *et al*.,

Geoengineering the Climate: Science, Governance and Uncertainty. London, Royal Society, 2009.

Sohn, Louis B.

"The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, vol. 14 (1973), pp. 423–515.

Stephens, Jennie C.

"Carbon capture and storage", *in* Cutler J. Cleveland, ed., *Encyclopedia of Earth*. Washington, D.C., Environmental Information Coalition, National Council for Science and the Environment, 2009, updated 2012. Available from https://editors.eol.org/eoearth.

Stone, Christopher D.

"Common but differentiated responsibilities in international law", AJIL, vol. 98 (2004), pp. 276–301.

Taubenfeld, Howard J.

"International environmental law: air and outer space", *in* Ludwik A. Teclaff and Albert E. Utton, eds., *International Environmental Law.* New York, Praeger, 1974, pp. 187–198.

Taubenfeld, Rita F. and Howard J.Taubenfeld

"Some international implications of weather modification activities", *International Organization*, vol. 23 (1969), pp. 808–833.

Tilmes, Simone, Rolf Müller and Ross Salawitch

"The sensitivity of polar ozone depletion to proposed geoengineering schemes", *Science*, vol. 320 (2008), pp. 1201–1204.

Tladi, Dire

Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments. Pretoria, Pretoria University Law Press, 2007.

Trouwborst, Arie

Evolution and Status of the Precautionary Principle in International Law. The Hague, Kluwer Law International, 2002.

Urpelainen, Johannes

"Geoengineering and global warming: a strategic perspective", *International Environmental Agreements: Politics, Law and Economics*, vol. 12 (2012), pp. 375–389.

Valencia-Ospina, Eduardo

"Evidence before the International Court of Justice", *International Law Forum*, vol. 1 (1999), pp. 202–207.

Weil, Prosper

"L'équité dans la jurisprudence de la Cour Internationale de Justice: Un mystère en voie de dissipation?", *in* Vaughan Lowe and Malgosia Fitzmaurice, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp. 121–144.

Wiener, Jonathan B.

"Precaution", *in* Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2007, pp. 597–612.

"The rhetoric of precaution", *in* Wiener *et al*., eds., *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*, London, RFF Press, 2011, pp. 3–35.

World Commission on Environment and Development

Our Common Future. Oxford, Oxford University Press, 1987.

World Meteorological Organization

Second Report on the Advancement of Atmospheric Sciences and Their Application in the Light of Developments in Outer Space. Geneva, WMO Secretariat, 1963.

Xue, Hanqin

Transboundary Damage in International Law. Cambridge, Cambridge University Press, 2003.

Yamada, Chusei, *et al*.

"Regarding the *Southern Bluefin Tuna* case", *Jurist*, No. 1197 (2001), pp. 66 *et seq.* (in Japanese).

Yoshida, Osamu

The International Legal Régime for the Protection of the Stratospheric Ozone Layer. The Hague, Kluwer Law International, 2001.

Introduction

1. At its sixty-seventh session in 2015, the International Law Commission had before it the second report submitted by the Special Rapporteur on the topic of the protection of the atmosphere.[1] The report contained proposals for five draft guidelines regarding the use of terms, scope of the guidelines, common concern of humankind, general obligation of States and international cooperation.

2. The second report was considered by the Commission during its 3244th to 3249th meetings, held on 4 to 8 and 12 May 2015.[2] In addition, the Commission held an informal meeting in the form of a dialogue with scientists organized by the Special Rapporteur on 7 May 2015, which members of the Commission found useful and of which they were appreciative.[3]

3. The Commission decided to send to the Drafting Committee all the draft guidelines proposed by the Special Rapporteur, except draft guideline 4 on the general obligation of States to protect the atmosphere, which the Special Rapporteur did not ask to have considered by the Drafting Committee. When sending the draft guidelines to the Drafting Committee, the Commission also agreed that draft guideline 3 on the common concern of humankind be moved to the preambular section of the draft guidelines. The Drafting Committee recommended that the expression "common concern of humankind" should be changed to "pressing concern of the international community as a whole", and it was included in the preamble in that form. The Drafting Committee also recommended draft guideline 1 on the use of terms (namely, "atmosphere", "atmospheric pollution" and "atmospheric degradation"), draft guideline 2 on the scope, and draft guideline 5 on international cooperation for adoption by the Commission. The Commission provisionally adopted the preamble and the draft guidelines, with the commentaries thereto, at its sixty-seventh session.[4]

A. Debate held by the Sixth Committee of the General Assembly at its seventieth session

4. In November 2015, during the seventieth session of the General Assembly, the Sixth Committee considered the Special Rapporteur's second report and the work of the Commission on the topic. The delegations generally welcomed the work of the Commission,[5] while a few delegates remained sceptical.[6] Most delegations expressed their endorsement of the collaboration of the Commission with atmospheric scientists in pursuing the work on the topic.[7]

5. With regard to the concept of "common concern of humankind" proposed by the Special Rapporteur, most delegations expressed agreement with changing the term to the "pressing concern of the international community as a whole" and placing it in the preamble,[8] while other delegations preferred to retain the original term.[9] One delegation stated that, instead of "pressing concern", "[a] more positive signal would be sent by referring to the concept of 'care' rather than using words that expressed anxiety".[10] Regarding draft guideline 1, subparagraph (*b*), some delegations wondered whether the definition of "atmospheric pollution" should be restricted to activities having transboundary effects.[11] Some delegations also questioned whether it was appropriate to delete the word "energy" in the definition, in view of the fact that article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea explicitly referred to "energy" as a cause of pollution.[12] One delegation favoured inclusion of a reference to the significant adverse effects to living resources in draft guideline 1, subparagraph (*c*).[13] It was also suggested by another delegation that the word "global" be inserted before "atmospheric conditions"

[1] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681.

[2] *Ibid.*, vol. I, 3244th to 3249th meetings. See also *ibid.*, vol. II (Part Two), para. 48.

[3] The dialogue with scientists on the protection of the atmosphere was chaired by the Special Rapporteur. Prof. Øystein Hov (President, Commission of Atmospheric Sciences, World Meteorological Organization (WMO)) spoke on "Scientific aspects of the atmosphere: A General Overview", Mr. Peringe Grennfelt (Chair of the Working Group on Effects of the Convention on Longe-Range Transboundary Air Pollution, United Nations Economic Commission for Europe (UNECE)) on "Trans-continental transport of pollutants and their effects", Mr. Masa Nagai (Deputy Director, Division of Environmental Law and Conventions, United Nations Environment Programme (UNEP)) on "Pollutants affecting the global environment through the atmosphere", Mr. Christian Blondin (Director of Cabinet and External Relations Department, WMO) on "The role of the atmosphere in the global climate" and Ms. Jacqueline McGlade (Chief Scientist and Director, Division of Early Warning and Assessment, UNEP) on overall issues on atmospheric pollution and atmospheric degradation. Ms. Albena Karadjova (Secretary to the Convention on Long-Range Transboundary Air Pollution, UNECE) also spoke on the economic implication of transboundary atmospheric pollution. For a summary of the meeting, see Charles Wharton, "UN ILC's Dialogue with Scientists on the protection of the atmosphere" (on file with the Special Rapporteur).

[4] *Yearbook … 2015*, vol. II (Part Two), paras. 45–54.

[5] Algeria, A/C.6/70/SR.19, para. 34; Argentina, *ibid*., para. 42; Austria, A/C.6/70/SR.17, para. 81; Belarus, *ibid*., para. 68; China, A/C.6/70/SR.18, para. 17; El Salvador, *ibid*., para. 47; Finland (on behalf of the Nordic countries), A/C.6/70/SR.17, para. 36; France, A/C.6/70/SR.20, para. 15; Germany, A/C.6/70/SR.19, para. 12; Hungary, A/C.6/70/SR.21, para. 81; Israel, A/C.6/70/SR.18, para. 4; India, *ibid*., para. 29; Islamic Republic of Iran, *ibid.*, para. 32; Italy, A/C.6/70/SR.17, para. 57; Japan, A/C.6/70/SR.18, para. 25; Malaysia, A/C.6/70/SR.19, para. 10; Federated States of Micronesia, A/C.6/70/SR.18, para. 12; Philippines, A/C.6/70/SR.19, para. 15; Portugal, A/C.6/70/SR.19, para. 24; Republic of Korea, A/C.6/70/SR.18, para. 81; Romania, A/C.6/70/SR.17, para. 102; Singapore, *ibid.*, para. 46; Spain, A/C.6/70/SR.18, para. 63; South Africa, *ibid.*, para. 73; Sri Lanka, *ibid*., para. 40; Thailand, *ibid*., para. 67; Viet Nam, *ibid*., para. 78.

[6] Czech Republic, A/C.6/70/SR.17, para. 93; Russian Federation, A/C.6/70/SR.19, para. 5; Slovakia, *ibid*., para. 31; United Kingdom, A/C.6/70/SR.18, para. 10; United States, A/C.6/70/SR.19, para. 18.

[7] Belarus, A/C.6/70/SR.17, para. 68; Finland (on behalf of the Nordic countries), *ibid*., para. 36; Singapore, *ibid*., para. 46. Austria, for instance, welcomed "the dialogue which the Commission had had with scientists, thereby promoting a better understanding of the complex physical phenomena involved" (*ibid*., para. 81). One delegation, Slovakia, cautioned, however, that "such dialogues might sometimes give rise to misleading conclusions, especially in the case of topics in which many important elements were defined by physics or other natural sciences, and not by the law" (A/C.6/70/SR.19, para. 31).

[8] China, A/C.6/70/SR.18, para. 18; Finland (on behalf of the Nordic countries), A/C.6/70/SR.17, para. 37; France, A/C.6/70/SR.20, para. 15; Israel, A/C.6/70/SR.18, para. 4; Japan, *ibid*., para. 25; Republic of Korea, *ibid*., para. 81; Singapore, A/C.6/70/SR.17, para. 46; Spain, A/C.6/70/SR.18, para. 63; Sri Lanka, A/C.6/70/SR.18, para. 41.

[9] Federated States of Micronesia, A/C.6/70/SR.18, paras. 13–15; Germany, A/C.6/70/SR.19, para. 12; Portugal, *ibid*., para. 24.

[10] Belarus, A/C.6/70/SR.17, para. 70.

[11] Austria, *ibid*., para. 81; Finland (on behalf of the Nordic countries), *ibid*., para. 38; Spain, A/C.6/70/SR.18, para. 64.

[12] Austria, A/C.6/70/SR.17, para. 82; Spain, A/C.6/70/SR.18, para. 64.

[13] Romania, A/C.6/70/SR.17,. para. 102.

in the definition of "atmospheric degradation" in draft guideline 1, subparagraph (*c*) in order to "make it clear that the atmospheric degradation referred to was the alteration of atmospheric conditions to such an extent that they produced worldwide deleterious effects".[14]

6. With regard to draft guideline 2, delegations generally welcomed the fact that the scope of the guidelines was clearly delineated by it.[15] However, one delegation suggested that a "'without prejudice clause' would be more helpful and appropriate than the exclusion of specific substances from the project's scope."[16] It was stated by one delegation that, in view of the fact that "most health problems were caused by particulate matter, including black carbon and tropospheric ozone, … those pollutants should also be included in the scope of the draft guidelines", and that "[t]hought might be given to enlarging [the] scope [of the Convention on Long-range Transboundary Air Pollution] or even elaborating a new, global convention on air pollution."[17] With regard to the 2013 understanding,[18] one delegation expressed its belief that the reference to political negotiations was not necessary and should be removed from draft guideline 2 and from the general commentary.[19] Another delegation sought clarification of the logic behind the double-negative "do not deal with" followed by "but without prejudice to" in the understanding.[20]

7. Regarding draft guideline 5 on international cooperation, delegations generally supported it, together with the wording "as appropriate".[21] A few delegations noted, however, that the wording should be reconsidered.[22] Some States expressed the view that the scope of cooperation in guideline 5 was too limited[23] and should be expanded beyond scientific knowledge to "other areas, such as regulatory institutions and international emergency actions and communications" as well as to "promoting technical cooperation, such as the exchange of experiences and capacity building".[24] It was suggested that it might be possible to follow the provisions of the relevant draft articles of the Commission on the topic of prevention of transboundary harm.[25]

B. Information provided by Member States

8. In chapter III of its report on the work of its sixty-seventh session, the Commission indicated that it would welcome any information relevant to the topic.[26] Information on domestic legislation was received from Singapore on 30 January 2016.[27]

C. Recent developments

9. The United Nations summit for the adoption of the post-2015 development agenda was held from 25 to 27 September 2015 in New York and convened as a high-level plenary meeting of the General Assembly. It formally adopted the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development",[28] to guide the development of the international community over the next 15 years. As such, it called for action by all countries for all people in five areas of critical importance: people, planet, prosperity, peace and partnership. Throughout the summit, heads of State and government welcomed the 2030 Agenda for Sustainable Development and emphasized its transformative, universal and inclusive nature, its applicability to all countries and stakeholders and its motto of leaving no one behind.[29] The Agenda includes 17 Sustainable Development Goals with 169 associated targets,[30] covering a wide range of issues, including combating climate change, which are integrated and indivisible, to replace the Millennium Development Goals.[31]

10. At its twenty-first session, held in Paris from 30 November to 12 December 2015, the Conference of the Parties to the United Nations Framework Convention on Climate Change adopted the Paris Agreement under the Convention with no objections from the 196 parties,[32] which is regarded as a new chapter for humankind in tackling climate change issues after 2020. In the Paris Agreement, the parties to the Convention, acknowledging that "climate change is a common concern of humankind" (eleventh preambular para.), dealt with, *inter alia*, mitigation, adaptation, loss and damage, finance, technology development and transfer, capacity-building, and transparency of action and support. The Paris Agreement aims to hold "the increase in the global average temperature to well below 2 °Cabove pre-industrial levels and pursues efforts to limit the temperature increase to 1.5°C above preindustrial levels" (art. 2, para. 1 (*a*)). It is significant that the Paris Agreement, pursuant to the Durban Platform for Enhanced Action,[33] obliges "all parties" to undertake the commitments made thereunder (art. 3).

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[14] China, A/C.6/70/SR.18, para. 18.

[15] China, *ibid*., para. 17; Italy, A/C.6/70/SR.17, para. 57; Spain, A/C.6/70/SR.18, para. 65; Republic of Korea, *ibid*., para. 83.

[16] Islamic Republic of Iran, A/C.6/70/SR.18, para. 32.

[17] Hungary, A/C.6/70/SR.21, paras. 81–82.

[18] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[19] El Salvador, A/C.6/70/SR.18, para. 49.

[20] Philippines, A/C.6/70/SR.19, para. 15.

[21] Finland (on behalf of the Nordic countries), A/C.6/70/SR.17, para. 38; Sri Lanka, A/C.6/70/SR.18, para. 41. Singapore stressed also that the principle of "good faith" should be articulated in the commentary (A/C.6/70/SR.17, para. 48).

[22] E.g., Belarus, A/C.6/70/SR.17, para. 72.

[23] E.g., El Salvador, A/C.6/70/SR.18, para. 48.

[24] Singapore, A/C.6/70/SR.17, para. 50. Other States expressed a similar view: Algeria, A/C.6/70/SR.19, para. 34; Islamic Republic of Iran, A/C.6/70/SR.18, para. 35; Malaysia, A/C.6/70/SR.19, para. 11.

[25] Russian Federation, A/C.6/70/SR.19, para. 7.

[26] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 24.

[27] On file with the Secretariat. This legislation is referred to in paragraph 32 and footnote 98 of the present report.

[28] General Assembly resolution 70/1 of 25 September 2015.

[29] See the overview in the informal summary of the United Nations Summit on Sustainable Development 2015, 25–27 September 2015, New York (available from https://sustainabledevelopment.un.org/post2015/summit). See Lode, Schönberger and Toussaint, "Clean air for all by 2030?".

[30] See General Assembly resolution 70/1, para. 59. See also *ibid.*, paras. 12, 31, 49 and 73.

[31] General Assembly resolution 55/2 of 8 September 2000.

[32] *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, Addendum: Part Two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2015/10/Add.1), decision 1/CP.21.

[33] See *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011*, Addendum: Part Two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2011/9/Add.1), decision 1/CP.17.

D. Purpose of the present report

11. Building on the previous two reports, the Special Rapporteur wishes to consider, in the present report, several key issues of the topic, namely, the obligations of States to prevent transboundary atmospheric pollution and mitigate global atmospheric degradation and the requirement of due diligence and environmental impact assessment (see chap. I, below). He also explores the principle of sustainable and equitable utilization of the atmosphere and the legal limits on certain activities aiming at intentional modification of the atmosphere (see chap. II, below).

Chapter I

Obligations of States to protect the atmosphere

A. The duty to prevent transboundary atmospheric pollution

12. In his second report in 2015,[34] the Special Rapporteur proposed draft guideline 4 on the "General obligation of States to protect the atmosphere", stipulating in a straightforward form that "States have the obligation to protect the atmosphere". That was modelled on article 192 of the United Nations Convention on the Law of the Sea, which provides that "States have the obligation to protect and preserve the marine environment".[35] The Special Rapporteur's characterization of this obligation as an "obligation *erga omnes*" was a point of debate in the Commission[36] and in the Sixth Committee,[37] which was not resolved. The proposed guideline was supported by some members of the Commission,[38] while others expressed objections on the grounds that it was "too open-ended and general".[39] To address the criticism of some members, the Special Rapporteur proposes in the present report to differentiate between two dimensions of the protection of the atmosphere, one on transboundary atmospheric pollution and the other on global atmospheric degradation. That division corresponds to the definitions provisionally adopted by the Commission in draft guideline 1, subparagraphs (*b*) and (*c*), respectively.

13. The "maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another) has been accepted in inter-State relations as the principle that the sovereign right of a State to use its territory is circumscribed by an obligation not to cause injury to, or within, the territory of another State".[40] That maxim has become the basis for the so-called "no harm rule", a prohibition of harmful transboundary impacts in the context of air pollution, most notably in the famous 1938–1941 *Trail Smelter* case,[41] in which the tribunal confirmed the existence of the rule in international law, stating as follows:

> under the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[42]

14. The *Trail Smelter* case was a traditional type of transboundary air pollution dispute—one in which the cause of the damage and its effects were sufficiently identifiable. That decision is frequently cited in support of the view that, under international law, States are obligated to ensure that activities within their jurisdiction or control do not cause transboundary damage when the injury is foreseeable, as supported "by clear and convincing evidence".[43] Thus, the *sic utere tuo ut alienum non laedas* principle has been recognized as customary international law as applied to the relationship with an "adjacent State" sharing a common territorial border. That rule was confirmed in principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (hereinafter, "Stockholm Declaration"),[44] and reconfirmed, in a slightly modified form, in principle

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[34] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681.

[35] *Ibid.*, paras. 41–59.

[36] Critical views were expressed by Mr. Murphy (*Yearbook … 2015*, vol. I, 3246th meeting, paras. 10–11), Mr. Hassouna (*ibid.*, 3247th meeting, para. 21), Mr. Kittichaisaree (*ibid.*, para. 24) and Mr. McRae (*ibid.*, 3248th meeting, para. 25), while Mr. Peter stated that he "could live with the Special Rapporteur's proposal, which was likely to garner more general support", noting that "once it had been agreed that the atmosphere was an area of common concern of mankind, there was an obligation on all States to protect it … Furthermore, the very nature of the atmosphere, which was in constant movement around the Earth, militated in favour of such an obligation" (*ibid.*, 3247th meeting, paras. 62–63). Mr. Nolte was not convinced that "theoretical developments regarding the nature of obligations *erga omnes* were really helpful and even feared that they went too far" (*ibid.*, 3246th meeting, para. 20).

[37] The Federated States of Micronesia, supporting "a normative statement that imposed *erga omnes* obligations" (A/C.6/70/SR.18, para. 15). The Islamic Republic of Iran drew attention to "the case law of the International Tribunal for the Law of the Sea … that might be replicated for the purposes of the protection of the atmosphere" (*ibid.*, para. 34), citing the advisory opinion of 1 February 2011, which referred to the *erga omnes* character of the obligations under article 137 of the United Nations Convention on the Law of the Sea (*Responsibilities and obligations of States with respect to Activities in the Area*, Case No. 17, Advisory Opinion, 1 February 2011, Seabed Disputes Chamber, International Tribunal for the Law of the Sea, *ITLOS Reports 2011*, p. 10).

[38] Mr. Nolte (*Yearbook … 2015*, vol. I, 3246th meeting, para. 20); Mr. Hmoud (*ibid.*, 3247th meeting, paras. 46 and 48); Mr. Comissário Afonso (*ibid.*, para. 58), Mr. Peter (*ibid.*, para. 63), Mr. Candioti (*ibid.*, 3248th meeting, para. 27), Mr. Vázquez-Bermúdez (*ibid.*, para. 36).

[39] Mr. Park (*Yearbook … 2015*, vol. I, 3244th meeting, para. 19), Mr. Murphy (*ibid.*, 3246th meeting, paras. 10–11), Sir Michael Wood (*ibid.*, 3247th meeting, para. 14), Mr. Hassouna (*ibid.*, para. 21), Mr. Kittichaisaree (*ibid.*, paras. 31–32), Mr. Šturma (*ibid.*, para. 40), Mr. Petrič (*ibid.*, para. 51), Ms. Jacobsson (*ibid.*, 3248th meeting, para. 7), Ms. Escobar Hernández (*ibid.*, para. 13), Mr. McRae (*ibid.*, para. 25).

[40] Brunnée, "*Sic utere tuo ut alienum non laedas*", p. 188.

[41] *Trail Smelter case (United States/Canada)*, Award of 16 April 1938 and 11 March 1941, UNRIAA, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982.

[42] *Ibid.*, p. 1965. See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, para. 43. See also Kuhn, "The *Trail Smelter* arbitration, United States and Canada"; Read, "The *Trail Smelter* Dispute".

[43] *Trail Smelter case* (see footnote 41 above), p. 1965.

[44] Adopted at Stockholm on 16 June 1972, see *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.II.A.14), part one, chap. I, p. 3. See Sohn, "The Stockholm Declaration on the Human Environment", pp. 485–493.

2 of the Rio Declaration on Environment and Development (hereinafter, "Rio Declaration").[45] In those Declarations, which provided for the duty of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of *other** States or of areas beyond the limits of national jurisdiction", the scope of application of that principle has been broadened to the relationship with long-range transboundary causes and effects between the State of origin and the affected States. The same "no harm rule" has been endorsed in a large number of conventions relating to transboundary air pollution, such as the 1979 Convention on Long-range Transboundary Air Pollution.

1. Prevention

15. As a corollary of the *sic utere tuo* principle, the principle of prevention (obligation of States to take preventive measures) is recognized as a rule of customary international law in the context of transboundary atmospheric pollution.[46] That principle is regarded as consisting of two different obligations, one being the obligation to "prevent" before actual pollution or degradation occurs, and the other the duty to "eliminate", "mitigate" and "compensate" after they have already occurred. For example, article 7 of the 1997 Convention on the Law of Nonnavigational Uses of International Watercourses, under the heading "Obligation not to cause significant harm", provides both for the obligation to prevent (para. 1) and the obligation to compensate if harm nevertheless occurred (para. 2). In that context, more weight is given to the prevention of predictable future damage than to the reparation for damage which has already occurred. The Commission has recognized in its previous work on the prevention of transboundary harm from hazardous activities that

> [t]he emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate, has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. … In any event, prevention as a policy is better than cure.[47]

The International Court of Justice has emphasized prevention as well. In the *Gabčíkovo-Nagymaros* case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage".[48] In the *Iron Rhine Railway* case, the arbitral tribunal also stated that "Today, in international environmental law, a growing emphasis is being put on the duty of prevention".[49]

16. The Commission has dealt with the obligation of prevention in its 2001 articles on responsibility of States for internationally wrongful acts. Article 14, paragraph 3, provides that "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues". According to the commentary, "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur".[50] The commentary illustrated "the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration" as one of the examples of the obligation of prevention.[51]

2. Due diligence

17. The principle of prevention in environmental law is based on the concept of due diligence. Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are not normally attributable to a State. In that respect, due diligence requires States to ensure that such activities within their jurisdiction or control do not cause significant adverse effects. That does not mean, however, that due diligence applies solely to private activities. The activities of a State are also subject to the due diligence rule.[52]

18. Due diligence is an obligation to make best possible efforts in accordance with the capabilities of the State controlling the activities. Therefore, even where actual adverse effects materialize, that does not automatically constitute a failure of due diligence. Such failure is limited to the negligence of the State in meeting its obligation to take all appropriate measures to control, limit, reduce or prevent human activities where those activities have or are likely to have significant adverse effects. The obligation of States "to ensure" does not require the achievement of a certain result (obligation of result) but only requires the best available efforts not to cause adverse effects (obligation of conduct). In that sense, it does not guarantee that the harm would never occur.[53]

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[45] Adopted at Rio de Janeiro on 14 June 1992, see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 and Corr. 1 (vol. I); United Nations publication, Sales No. E.93.I.8), annex I, p. 3. See Duvic-Paoli and Viñuales, "Principle 2: Prevention".

[46] Handl, "Transboundary impacts", pp. 538–540; De Sadeleer, "The principles of prevention and precaution in international law …".

[47] Para. (2) of the general commentary to the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, paras. 97–98, at p. 148. The articles were adopted in General Assembly resolution 62/68 of 6 December 2007, annex.

[48] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at p. 78, para. 140.

[49] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, UNRIAA, vol. XXVII (United Nations publication, Sales No. E/F.06.V.8), pp. 33–125, at p. 116, para. 222.

[50] Para. (14) of the commentary to art. 14 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, paras. 76–77, at p. 62.

[51] *Ibid.*

[52] Para. (7) of the commentary to art. 3 of the articles on prevention of transboundary harm from hazardous activities, *ibid.*, p. 146, paras. 97–98, at p. 154 ("The obligation of the State of origin to take preventive … measures is one of due diligence"); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 55, para. 101 ("the principle of prevention, as a customary rule, has its origins in … due diligence"). See generally on due diligence, International Law Association, "First report on due diligence in international law".

[53] Although the principle to prevent is referred to as "no harm rule", that term is somewhat misleading: Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 137. In relation to obligations of

19. In its previous work analysing the due diligence standard, the Commission considered it to be "a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it"[54] or "to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance".[55] Accordingly, "activities which may be considered ultra-hazardous require a much higher standard of care in designing policies", which is an absolute standard.[56] In the case of activities relating to the atmosphere, the required standard of care is set according to the scale and magnitude of a planned activity in the particular instance on the one hand, and the significance and irreparability of the adverse effects which that activity is expected to cause, or is likely to cause on the other hand.

3. Knowledge or foreseeability

20. A State may be deemed to have failed in its duty of due diligence only if it knew or ought to have known that the particular activities would cause significant harm to other States.[57] As observed by the International Court of Justice in the *Corfu Channel* case, it is "every State's obligation not to allow *knowingly** its territory to be used for acts contrary to the rights of other States".[58] The use of the word "knowingly" in this case clarifies a key subjective condition of due diligence. The Court then associated the condition of knowledge with the concept of control and stated that:

> It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation … But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein.[59]

21. In the area of international environmental law, the knowledge required of a State is intimately connected with the obligation to carry out an environmental impact assessment. An environmental impact assessment is "one of the central mechanisms used by States to acquire knowledge respecting the environmental consequences of their actions",[60] and "address[es] foreseeability by requiring project proponents to comprehensively analyze the likely impacts of proposed activities, including trans-boundary impacts".[61] As the International Court of Justice pointed out in the *Pulp Mills* case, "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party … did not undertake an environmental impact assessment on the potential effects of such works".[62] The Court, in the recent cases of *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*, also stated that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment".[63] The Court continued that "to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm".[64] Since the Court concluded in the *Pulp Mills* case that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource",[65] it can be concluded from the fact of an environmental impact assessment carried out by a State that the State necessarily knew, or ought to have known, of a risk of significant transboundary harm.

4. Degree of care

22. Since due diligence requires States to "act" so as not to cause significant transboundary harm, it is necessary to clarify the degree of care required of a State, that is, the extent to which the behaviour of a State in a set of given circumstances discharges the due diligence obligation.[66] While the condition of knowledge is a subjective element of due diligence, the degree of care constitutes an objective element. Those are cumulative conditions. In the theory and practice of international environmental law, two categories of degree of care exist: "generally accepted international … standards" on the one hand and "best practicable means" on the other hand.[67]

23. The former criteria, generally accepted international standards, are "internationally agreed minimum standards set out in treaties or in the resolutions and decisions of international bodies".[68] For example, articles 207, 208 and 210 to 212 of the United Nations Convention on the Law of the Sea provide for "*generally accepted** rules and

result and obligations of conduct, see generally Dupuy, "Reviewing the difficulties of codification …". See also Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 113–115.

[54] Para. (4) of the commentary to draft art. 7 of the draft articles on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), para. 222, at p. 103.

[55] Para. (11) of the commentary to art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, paras. 97–98, at p. 154.

[56] *Ibid.*

[57] Para. (8) of the commentary to draft art. 7 of the draft articles on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), at p. 104.

[58] *Corfu Channel case*, Judgment of April 9th, 1949, *I.C.J. Reports 1949*, p. 4, at p. 22. Bannelier, "Foundational judgment or constructive myth? …", pp. 246–247.

[59] *Corfu Channel Case* (see previous footnote), p. 18.

[60] Craik, *The International Law of Environmental Impact Assessment …*, p. 64.

[61] *Ibid.*

[62] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 204.

[63] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 665, at pp. 706–707, para. 104; see also *ibid.*, p. 720, para. 153.

[64] *Ibid.*, para. 154.

[65] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 204. See also para. 55 below.

[66] Dupuy, "Due diligence in the international law of liability", pp. 369–379.

[67] Birnie, Boyle and Redgwell, *International Law and the Environment*, pp. 148–150; see also Plakokefalos, "Prevention obligations in international environmental law", pp. 32–36.

[68] Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 149.

*standards** established through the competent international organization or general diplomatic conference" (or similar wording). Those provisions can incorporate recommendations and resolutions of international organizations, such as the International Maritime Organization (IMO), into the obligations of the treaty by reference.[69] Quite apart from their incorporation by treaty, such criteria may require to be recognized as having the force of customary international law by virtue of the obligation of due diligence if international support is sufficiently widespread and representative.[70]

24. The latter criteria require States to employ the best practicable means available to them at their disposal and in accordance with their capabilities, so as to prevent transboundary harm so far as possible.[71] A typical example is article 194, paragraph 1, of the United Nations Convention on the Law of the Sea which provides that "States shall take … all measures … 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**". In the application of that criterion, the regulatory capacity and technology of the State concerned are taken into account, so that a differentiated degree of care for different States is allowed.[72] The Commission confirmed such consideration in its work on the prevention of transboundary harm from hazardous activities, stating that:

> the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.[73]

Therefore, to fulfil the duty of due diligence under general international law, States are required to use the best practicable means at their disposal and in accordance with their capabilities.

25. As regards the temporal scope of application, the Commission has affirmed in its previous work that

> The duty of prevention based on the concept of due diligence is not a one-time effort but requires continuous effort. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues … as long as the activity continues.[74]

In that regard, the content of "due diligence" is not static, and the degree of care may change over time. The Commission stated that:

> What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.[75]

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea also held, as a matter of general international law, that "'due diligence' is a variable concept", and that "[i]t may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".[76]

5. Burden of proof and standard of proof

26. In the *Trail Smelter* case, the Tribunal applied the *sic utere tuo* principle only under the condition when "the injury is established by clear and convincing evidence".[77] In general, there are two main standards of proof: the higher "beyond reasonable doubt" standard in a criminal case and the lower standard of proof of a "balance of probabilities" in a civil case.[78] The tribunal in the *Trail Smelter* case appears to have set a higher standard of proof for transboundary air pollution,[79] and the special context and circumstances of that case should not be overlooked. First, both parties referred the case to the tribunal by special agreement. Therefore, the attitudes of both parties were relatively cooperative for the resolution of the dispute, and consequently they were able to entrust the International Joint Commission established pursuant to the Boundary Waters Treaty of 1909,[80] with the scientific investigation.[81] Secondly, as a result of the scientific examination, it was considered that the direction of the wind that carried pollution across the boundary was unidirectional by reason of the geographical features and resulting meteorological conditions prevailing in the Columbia River valley.[82] Those factors enabled the tribunal to set a higher standard of proof in the case.

27. One can observe somewhat similar developments in the *Lac Lanoux* case.[83] The tribunal was established by

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[69] Boyle and Chinkin, *The Making of International Law*, p. 219.

[70] Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 150.

[71] *Ibid.*, p. 149.

[72] *Ibid.* See also Plakokefalos, "Prevention obligations in international environmental law", pp. 32–36.

[73] Para. (17) of the commentary to art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, paras. 97–98, at p. 155.

[74] Para. (2) of the commentary to art. 12, *ibid.*, p. 165. Although the context is slightly different, the International Court of Justice stated in the *Pulp Mills* case that "the obligation … to prevent pollution … is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators" (*Pulp Mills on the River Uruguay* (see footnote 52 above), para. 197).

[75] Para. (11) of the commentary to art. 3, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, paras. 97–98, at p. 154.

[76] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 37 above), para. 117.

[77] *Trail Smelter* (see footnote 41 above), p. 1965.

[78] Riddell and Plant, *Evidence before the International Court of Justice*, p. 124; Valencia-Ospina, "Evidence before the International Court of Justice", p. 203.

[79] McCaffrey, "Of paradoxes, precedents, and progeny …", p. 39.

[80] Boundary Waters Treaty [between the United States and Canada] (Washington, D.C., 11 January 1909), *in* Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 12 (Department of State publication 8761. Released 1974), p. 319.

[81] *Trail Smelter* (see footnote 41 above), p. 1918.

[82] *Ibid.*, pp. 1943 and 1969–1974. See also Read, "The *Trail Smelter* dispute [abridged]", p. 27.

[83] *Affaire du Lac Lanoux* (Spain, France), 16 November 1957, UNRIAA, vol. XII (United Nations publication, Sales No. E.63.V.3), pp. 281–317.

compromis between the States. As for the fact-finding, the tribunal stated that, "[i]t has not been *clearly affirmed** that the proposed works [i.e. the diversion of the waters of the international river] would entail an abnormal risk in neighbourly relations or in the utilization of the waters".[84] Therefore, the tribunal set a higher standard of proof. However, in that case, the river flow was unidirectional so that the chain of causation was relatively easy to establish as well.

28. By contrast, when one of the parties refers a dispute to an international court or tribunal on the basis of an optional clause, compromissory clause or treaty, or *forum prorogatum*, there tend to be different claims on the facts and allocation of the burden of proof. In that case, in accordance with the well-established principle of *onus probandi incumbit actori*, it is for the party alleging a fact to establish its existence.[85] However, it will be difficult for the (potentially) affected States to establish the alleged facts by clear and convincing evidence, because "the necessary information may largely be in the hands of the party causing or threatening the damage".[86] That is the main reason why a (potentially) affected State may claim a shift or reversal of the burden of proof based on the alleged precautionary principle. However, it may be noted that the International Court of Justice pointed out in the *Pulp Mills* case that the precautionary approach does not necessarily operate "as a reversal of the burden of proof".[87]

29. In that case, the majority opinion preferred to resolve the burden-shifting problem by requiring the other party to cooperate "in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it".[88] In the recent case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, although the applicant claimed that "[t]he respondent is best placed … to provide explanations of acts which are claimed to have taken place in a territory over which [the respondent] exercised exclusive control", the Court primarily allocated the burden of proof to the party alleging a fact, while it relied on the other party's "duty to cooperate" in good faith in matters of evidence.[89] However, the duty to cooperate in matters of evidence is a procedural duty, noncompliance with which does not give rise to State responsibility.[90]

30. In contrast, Judge Greenwood suggested, in his separate opinion in the *Pulp Mills* case, a lessening of the standard of proof in the circumstances of that case. Referring to the statement of the Court in the *Application of the on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that charges of conduct as grave as genocide require "proof at a high level of certainty appropriate to the seriousness of the allegation",[91] he indicated that it was implicit "in that statement that a lower standard of proof is acceptable in the case of other, less grave, allegations".[92] He concluded that "the nature of environmental disputes is such that the application of the higher standard of proof would have the effect of making it all but impossible for a State to discharge the burden of proof", and accordingly the (potentially) affected State is required to establish the facts on the balance of probabilities.[93]

31. Indeed, the International Court of Justice had already implied a "lessening of the standard of proof" in the 1949 *Corfu Channel* case,[94] stating:

> It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. … But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein …
>
> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[95]

6. Jurisdiction and control

32. As stated in Max Huber's dictum in the *Island of Palmas* case, the dominant criterion for identifying the State that owes the obligation of protection is territorial jurisdiction.[96] Territory is a primary basis of jurisdiction. Consequently, when an activity occurs within the territory of

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[84] *Ibid.*, p. 303. For the English text, see *ILR*, vol. 24 (1994), p. 101, at p. 123.

[85] In the civil procedure of municipal courts, the result is the rule of *ei incumbit probatio qui dicit, non qui negat* (the burden of proof lies with who declares, not who denies).

[86] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests *(New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288 ("*Nuclear Tests II*"), Dissenting Opinion of Judge Weeramantry, at p. 342.

[87] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 164.

[88] *Ibid.*, para. 163.

[89] *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. 73, paras. 170 and 173.

[90] Sandifer, *Evidence before International Tribunals*, pp. 112 and 117; Fukasaka, "Burdens of proof before international litigation: burden of proof and producing evidence (1)".

[91] *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. 130, para. 210. The standard of proof, i.e., what a party must do in order to discharge the burden of proof when that burden rests upon it, is essentially a common law tradition. In the civil law tradition, "[i]f the judge considers himself to have been persuaded by the argument on a certain matter, then the standard of proof has been met" (Romano, Alter and Shany, *The Oxford Handbook of International Adjudication*, p. 860). Whereas the International Court of Justice, being composed of the judges of "the principal legal systems of the world" (article 9 of the Statute), had long not referred to the standard of proof, in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 89 above), it addressed that concept for the first time.

[92] *Pulp Mills on the River Uruguay* (see footnote 52 above), Separate Opinion of Judge Greenwood, para. 25.

[93] *Ibid.*, para. 26.

[94] See Del Mar, "The International Court of Justice and standards of proof".

[95] *Corfu Channel case* (see footnote 58 above), p. 18.

[96] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, p. 92.

a State, the duty to protect falls firstly on that State. The territoriality principle is not without exceptions,[97] and there may be a situation where extraterritorial application of a domestic law is envisaged in the context of transboundary atmospheric pollution.[98] On the other hand, in common areas, such as the high seas and the airspace above the high seas, there is no territorial link between a State and the activity because of the location of the activity. In such situations, if the activity leads to significant adverse effects on the atmosphere, the State exercising jurisdiction over the area in question should comply with the duty to prevent. An example is the introduction of substances or energy into the atmosphere by vessels or aircraft flying its flag in the area of other States or in areas beyond national jurisdiction, such as the high seas and the airspace above the high seas.

33. It may be noted that there has been a shift of emphasis from "jurisdiction" to "control" in exercising the State obligation of prevention. As both principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration use the disjunctive conjunction "or", the term "control" is distinct from the term "jurisdiction",[99] The two concepts have acquired a special meaning, to the effect that "activities within their … control" are treated on a separate and independent basis.[100] In its previous work, the Commission considered that

> [t]he function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*.[101]

Therefore, jurisdiction refers to "legal" ties, whereas "control" refers to the factual capacity of effective control over activities outside the jurisdiction of a State. As for the concept of "control", the International Court of Justice stated in the *Namibia* case that

> [t]he fact that South Africa no longer has any title to administer the Territory [of Namibia] 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**.[102]

34. In line with the jurisprudence of international courts and tribunals, the Special Rapporteur concludes that, in the context of transboundary atmospheric pollution, the principle *sic utere tuo ut alienum non laedas* has now been confirmed as a principle of general international law.[103]

B. The duty to mitigate the risk of global atmospheric degradation

1. The *sic utere tuo* principle in the global context

35. As discussed above (para. 12 of the present report), in the draft guidelines, the *sic utere tuo* principle has two distinct dimensions, one in a transboundary context and the other in the global context. That differentiation should be viewed in line with the judgment in the *Pulp Mills* case by the International Court of Justice, which distinguished two different forms of obligations flowing from the principle.[104] One is the *sic utere tuo* principle in the narrow sense, as formulated in the *Trail Smelter* award, the other being the broader interpretation extending beyond the transboundary perspective. In one way, the Court in *Pulp Mills* limited the scope of application of the principle to damage to the environment of another State, stating that "[a] State is … obliged to use all the means at its disposal in order to avoid activities which otake place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of *another State**",[105] a formula which, according to the Court, is derived from the judgment in the *Corfu Channel* case.[106] In another way, the Court interpreted the *sic utere tuo* principle in the broader sense, affirming that

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[97] *Ibid.*, pp. 54–57 and 295–304; American Law Institute, *Restatement of the Law (Third)*, sect. 401 and introductory note, pp. 230–234; Mann, "The doctrine of jurisdiction in international law", pp. 39–41; Mann, "The doctrine of international jurisdiction revisited after twenty years", pp. 5–10; Meng, "Extraterritorial effects of administrative, judicial and legislative acts", p. 340; Kamminga, "Extraterritoriality".

[98] Section 4 of the Singapore Transboundary Haze Pollution Act 2014 (No. 24 of 2014; 5 August 2014, *Government Gazette, Acts Supplement*, No. 28), stipulates for extraterritorial application that "[t]his Act shall extend to and in relation to any conduct or thing outside Singapore which causes or contributes to any haze pollution in Singapore." It was explained by the Minister for the Environment and Water Resources, D. Vivian Balakrishnan, before Parliament that "[b]ecause we are addressing transboundary haze pollution, an extraterritorial approach is necessary for the law to be effective. This exercise of extraterritorial jurisdiction under this Bill is in line with international law, specifically the objective territorial principle" (Parliament of Singapore, *Official Reports*, vol. 92, No. 12, Session 2, 4 August 2014). It may be noted, however, that the ASEAN Agreement on Transboundary Haze Pollution is now effective (having entered into force on 25 November 2003, see http://haze.asean.org/status-of-ratification/; to date, all the ASEAN member States are parties, since Indonesia, the tenth ASEAN member State to do so, ratified the Agreement on 14 October 2014); therefore, it may not be necessary to resort to extraterritorial application of a domestic law, since the same objective can be achieved by application of the Convention, the method which is normally more desirable. However, if the measures contemplated under the Act extend beyond the scope of the Agreement, that part of the measures may be considered either as opposable or non-opposable in view of the legitimacy and effectiveness of the measures in question. See Murase, "Unilateral measures and the concept of opposability in international law", in Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 214–266.

[99] However, there is a difference between the wording of the Stockholm Declaration, principle 21, and the observation of the advisory opinion in the *Nuclear Weapons* case (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226). While principle 21 provides for "activities within their jurisdiction or control", the International Court of Justice used the coordinate conjunction, stating "activities within their jurisdiction and control" (*ibid.*, p. 242, para. 29). One observer considers that "[i]t constrains the application of the principle by limiting extraterritorial application." Brown Weiss, "Opening the door to the environment and to future generations", p. 340.

[100] Sohn, "The Stockholm Declaration on the Human Environment", p. 493; Murase, *International Lawmaking*, pp. 421–422 (in Japanese), Chinese translation, pp. 210–212.

[101] Para. (12) 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, p. 146, paras. 97–98, at p. 151.

[102] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[103] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681, para. 58.

[104] See Bannelier, "Foundational judgment or constructive myth? …", p. 251.

[105] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 101.

[106] *Ibid.*, para. 101. The Court affirmed in the *Corfu Channel* case "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". *Corfu Channel case* (see footnote 58 above), p. 22.

the principle has since been expanded in scope to encompass a broader geographical context, by referring to the *Nuclear Weapons* advisory opinion[107] that "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**".[108]

36. In his second report, the Special Rapporteur stated that the *sic utere tuo ut alienum non laedas* principle, whose application was initially limited to the relationship with an "adjacent State" sharing a common territorial border, has subsequently been widened to include global atmospheric issues.[109] While the traditional principle dealt only with transboundary harm to other States in a narrow sense, it has evolved to extend the territorial scope so as to address the global commons *per se*.[110] In principle 21 of the Stockholm Declaration, the principle was reformulated, providing that "States have … the responsibility [*devoir*] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States *or of areas beyond the limits of national jurisdiction**." That part of the principle was reiterated in principle 2 of the Rio Declaration. The areas beyond the jurisdiction and sovereignty of any State, generally referred to as "global commons", are understood to include the high seas, outer space and the global atmosphere.[111] Although the atmosphere, which is not an area-based notion, does not conform to the notion of "areas beyond the limits of national jurisdiction", it is nonetheless clear that the atmosphere existing above those areas is now covered by principle 21 of the Stockholm Declaration.[112]

37. It is notable that the *sic utere tuo* principle encounters certain evidentiary difficulties when it is applied to global issues, such as long-distance, transcontinental air pollution, ozone depletion and climate change. In such cases, the chain of causation, i.e. the physical link between cause (activity) and effect (harm), is difficult to prove, because of the widespread, long-term and cumulative character of their effects. The adverse effects, because of their complex and synergistic nature, result from multiple sources and any single activity is not sufficiently attributable to such adverse effects. In the global setting, virtually all States are likely to be responsible States as well as injured States. Consequently, even where actual harm has occurred, it is difficult, if not impossible, to identify a single responsible State of origin.[113] The difficulty of establishing the causal link between the wrongful act and the harm suffered has already been acknowledged by the Convention on Long-range Transboundary Air Pollution. Article 1 of that Convention characterizes long-range transboundary air pollution as pollution "at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources". Notwithstanding that definition, the Convention enshrines principle 21 of the Stockholm Declaration in the preambular paragraph as a "common conviction". The Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change recognize the above difficulties as well. However, they also expressly incorporate principle 21 of the Stockholm Declaration into their preambles and therefore can lead it to be considered an integral component of international law.[114]

38. In fact, it was confirmed in the International Court of Justice advisory opinion on *Nuclear Weapons* that the terms of principles 21 of the Stockholm Declaration and principle 2 of the Rio Declaration are "now part of the corpus of international law relating to the environment".[115] In the *Gabčíkovo-Nagymaros* case, the Court reaffirmed this view, recognizing further that "it has recently had occasion to stress … the great significance that it attaches to respect for the environment, not only for States *but also for the whole of mankind**".[116] The Court also cited the same paragraph in the *Pulp Mills* case.[117] In addition, in the *Iron Rhine Railway* case, the tribunal stated that "Environmental law … require[s] that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm … This duty … has now become a principle of general international law."[118] Those cases have confirmed the principle of not causing significant harm to the atmospheric

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[107] See footnote 99 above.

[108] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 193.

[109] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681, paras. 52–57.

[110] Hanqin, *Transboundary Damage in International Law*, p. 191.

[111] *Ibid.*, pp. 191–193; Boyle, "State responsibility for breach of obligations to protect the global environment".

[112] Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 143, citing the preambles of the United Nations Framework Convention on Climate Change and other global conventions.

[113] In contrast, an "injured State" for the purpose of the law of State responsibility may be identified even in that case. According to article 42 (*b*) (i) of the draft articles on responsibility of States for internationally wrongful acts, where the obligation breached is owed to the international community as a whole, a specially affected State is considered to be an injured State. According to the commentary, "[e]ven in cases where the legal effects of an internationally wrongful act extend by implication … to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States". Para. (12) of the commentary to art. 42 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, at p. 119. An example given in the commentary is the pollution of the high seas, which constitutes a breach of the customary rule, where such pollution has a particular impact on the territorial sea of a particular State. In that case, according to one commentator, "the breach exists in respect of all other States, but among these the coastal State which is particularly affected by the pollution is to be considered as 'specially' affected" (Gaja, "The concept of an injured State", p. 947). The same can be applied, for example, to acid rain damage resulting from transboundary air pollution or damage caused by the ozone hole.

[114] Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer*, pp. 62–67; Fitzmaurice, "Responsibility and climate change", pp. 117–118.

[115] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 99 above), pp. 241–242, para. 29.

[116] *Gabčíkovo-Nagymaros* (see footnote 48 above), para. 53.

[117] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 193.

[118] *Iron Rhine ("Ijzeren Rijn") Railway* case (see footnote 49 above), para. 59. It may have been premature to say that Principle 21 was only a starting point and that the principle had not yet entered into customary international law at the time of the adoption of the Stockholm Declaration in 1972. However, subsequent developments of jurisprudence, such as the 1995 *Nuclear Tests II* case (see footnote 86 above), the 1996 *Nuclear Weapons* case (see footnote 99 above), the 1997 *Gabčíkovo-Nagymaros* case (see footnote 48 above) and the 2010 *Pulp Mills on the River Uruguay* (see footnote 52 above) case, confirm the customary status of the principle, consolidated by State practice and *opinio juris* as well: see Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 143; Galizzi, "Air, atmosphere and climate change".

environment of other States, not limited exclusively to adjacent States, as an established principle of customary international law.

2. Precaution

39. In the context of the protection of the atmosphere from global atmospheric degradation, substantive obligations incorporated in the relevant conventions are those of precautionary measures. Unlike the "preventive measures" that are based on scientific knowledge, precaution is addressed where there exists no sufficient scientific certainty. Thus, in dealing with the protection of the atmosphere, consideration of precaution is inevitable. Precaution is distinguished into two types: one is "precautionary measures" (precautionary approach) and the other the "precautionary principle". While the former implies administrative measures implementing the rules of precaution, the latter is a legal principle to be applicable before a court of law, the main function of which is to shift the burden of proof from the party alleging the existence of damage to the defendant party, who is required to prove non-existence of the damage.[119] While there are a few conventions providing for a precautionary principle,[120] international courts and tribunals have thus far never recognized the precautionary principle as customary international law, although it has been invoked several times by claimants.[121] It should thus be considered inappropriate to refer to a precautionary principle in the present guidelines.[122] As mentioned above, the law relating to degradation of the atmosphere is based on the idea of precaution and the relevant conventions incorporate the precautionary approaches/measures, either explicitly or implicitly, as essential elements for the obligation of States to minimize the risk of atmospheric degradation.

40. On the basis of the foregoing, the following draft guideline is proposed:

"*Draft guideline 3. Obligation of States to protect the atmosphere*

"States have the obligation to protect the atmosphere from transboundary atmospheric pollution and global atmospheric degradation.

"(*a*) Appropriate measures of due diligence shall be taken to prevent atmospheric pollution under international law.

"(*b*) Appropriate measures shall be taken to minimize the risk of atmospheric degradation in accordance with relevant conventions."

C. The duty to assess environmental impacts

41. One of the important obligations of States in protecting the atmosphere by preventing atmospheric pollution and minimizing the risk of atmospheric degradation is to conduct an appropriate environmental impact assessment. In the recent case of the International Court of Justice on the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, the Court affirmed that

> a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment[123]

and concluded that the State in question had

> not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.[124]

It may be noted that

> an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law.[125]

1. Evolution of environmental impact assessment in international law

42. Environmental impact assessment, a process which identifies and analyses the environmental impact of a certain project, plan or programme,[126] was first introduced in

[119] In adopting the 2000 Cartagena Protocol on Biosafety, States opted for "precautionary approach" rather than "precautionary principle" as reflected in its preamble (De Sadeleer, "The principles of prevention and precaution in international law …", pp. 191–192). On this continuing discourse, see Wiener, "The rhetoric of precaution".

[120] For example, 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the 2001 Stockholm Convention on Persistent Organic Pollutants. De Sadeleer, "The principles of prevention and precaution in international law …", pp. 186–187. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, p. 15; Wiener, "Precaution", p. 601. See Cançado Trindade, "Principle 15: Precaution", pp. 417–421.

[121] The order of the International Tribunal for the Law of the Sea on the provisional measures of 27 August 1999 in the cases of *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* held that the parties should "act with *prudence and caution** to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna", but the Tribunal avoided referring to the "precautionary principle" that had been invoked by the applicants. (*Southern Blue Fin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, International Tribunal for the Law of the Sea, *ITLOS Reports 1999*, p. 280, at para. 77; this Order was nullified by the subsequent award by the Arbitral Tribunal of 4 August 2000: *Southern Bluefin Tuna (New Zealand–Japan, Australia–Japan)*, 4 August 2000, UNRIAA, vol. XXIII, pp. 1–57). In the *Mox Plant (Ireland v. United Kingdom)* case, the Tribunal again referred to "prudence and caution" rather than the "precautionary principle" (Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, para. 84). The phrase was repeated by the Tribunal in the *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)* (Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at para. 99). See De Sadeleer, "The principles of prevention and precaution in international law …", pp. 189 and 208.

[122] In drawing up the 2013 understanding, this difference was stressed by the Special Rapporteur and it was agreed that "precautionary approach/measures" could be dealt with in the draft guidelines, if not the "precautionary principle" (noting however the phrase "but without prejudice to" in the said understanding). The present guidelines proposed by the Special Rapporteur do not refer to either of the two concepts. The concept of precautionary approach/measures is naturally implicit in draft guideline 3 (*a*) below.

[123] *Construction of a Road in Costa Rica along the San Juan River* (see footnote 63 above), para. 153.

[124] *Ibid.*, para. 168.

[125] *Ibid.*, Separate Opinion of Judge Hisashi Owada, para. 18.

[126] Epiney, "Environmental impact assessment"; Sands and Peel, *Principles of International Environmental Law*, 3rd ed., pp. 601–623; Elias, "Environmental impact assessment"; Glasson, Therivel and

the 1969 National Environmental Policy Act of the United States of America. Today, more than 130 States around the world have followed or adapted the model of environmental impact assessment in their national legislation.[127] At the international level, environmental impact assessment is said to have emerged after the United Nations Conference on the Human Environment, held in Stockholm in 1972. Even though the Stockholm Declaration did not expressly refer to environmental impact assessment, its principles 14 and 15 have been interpreted as implying the rationale underlying environmental impact assessment.[128] Furthermore, principle 17 of the Rio Declaration provides, framed as a mandatory action (although the Declaration itself is a non-binding instrument): "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

43. Today, environmental impact assessment has been widely adopted in international legal systems and included in numerous international conventions.[129] It is defined as "a national procedure for evaluating the likely impact of a proposed activity on the environment" (Convention on Environmental Impact Assessment in a Transboundary Context [hereinafter, "Espoo Convention"], art. 1 (*vi*)). A number of international judicial precedents have confirmed the requirements of environmental impact assessment.[130] Generally, it is used as a legal technique for rendering possible integration of environmental considerations into the decision-making process, proposing possible measures to mitigate adverse environmental effects and describing alternatives that are less harmful to the environment, helping the decision maker to evaluate a project and then make a decision as to whether to implement the project or not, and enabling possible affected persons to participate in the decision-making process, etc.[131] Furthermore, it is regarded as necessary to understand the environmental impacts of a project as early as possible, in order to prevent, reduce or control environmental harm.[132] Moreover, in the context of the principle of sustainable development, it is also a legal technique for reconciling socioeconomic development and environmental protection, with a view to striking a proper balance for sustainable development.[133] Environmental impact assessment itself is a procedure and neither compels by itself "a particular result, nor imposes substantive environmental standards".[134]

2. Treaties

44. There is so far no comprehensive global convention governing transboundary environmental impact assessment; instead, States have addressed the subject mainly through a series of regional or sectoral treaties. As a result, environmental impact assessment regimes vary from region to region and from resource to resource.[135] A large number of conventions include provisions requiring an environmental impact assessment, of which the field of marine environmental protection is of special importance for the development of the process.[136] The following conventions refer in different ways to the obligation to conduct an environmental impact assessment: (*a*) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (hereinafter, "London Convention") (arts. 4 and 5, and the 1996 Protocol thereto, annexes II and III); (*b*) United Nations Convention on the Law of the Sea (art. 206); (*c*) Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (art. XI); (*d*) Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (art. 13); (*e*) Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (art. 8); (*f*) Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (art. XI); (*g*) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (art. 12); (*h*) Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean of 1985 and the Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean of 2010 (art. 14); (*i*) Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (hereinafter, "Noumea Convention") (art. 16); (*j*) Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (art. 4); and the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (art. 5) and

Chadwick, *Introduction to Environmental Impact Assessment*; Hunter, "International environmental law: sources, principles and innovations"; Anton, "Case concerning pulp mills on the River Uruguay (*Argentina v Uruguay*) …"; Hua, "The evolution and implementation of environmental impact assessment in international law". See also Robinson, "International trends in environmental impact assessment"; Gray, "International environmental impact assessment"; Knox, "The myth and reality of transboundary environmental impact assessment"; Knox, "Assessing the candidates for a global treaty on transboundary environmental impact assessment"; Kersten, "Rethinking transboundary environmental impact assessment"; Edwards, "A review of the Court of Justice's case law in relation to waste and environmental impact assessment: 1992–2011"; Peters, "Minimize risk of carbon sequestration through environmental impact assessment and strategic environmental assessment".

[127] Kersten, "Rethinking transboundary environmental impact assessment", p. 176; Rasband, Salzman and Squilace, *Natural Resources Law and Policy*, p. 253.

[128] Principles 14 and 15 of the Stockholm Declaration (see footnote 44 above) provide as follows:

"*Principle 14*

"Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment."

"*Principle 15*

"Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect, projects which are designed for colonialist and racist domination must be abandoned."

[129] See paras. 44–50 below.

[130] See paras. 52–58 below.

[131] Epiney, "Environmental impact assessment", p. 581.

[132] *Ibid.*, p. 580.

[133] Bates, *Environmental Law in Australia*, p. 307.

[134] Elias, "Environmental impact assessment", p. 227.

[135] For a discussion as to why a global treaty on environmental impact assessment remains elusive, see Knox, "Assessing the candidates for a global treaty on transboundary environmental impact assessment"; see also Kersten, "Rethinking transboundary environmental impact assessment", p. 178.

[136] Epiney, "Environmental impact assessment", p. 582.

the Protocol on Integrated Coastal Zone Management in the Mediterranean (art. 19) thereto; (*k*) Framework Convention for the Protection of the Marine Environment of the Caspian Sea (art. 17) and the Protocol for the Protection of the Caspian Sea from Pollution from Land-based Sources and Activities thereto (art. 12; a further protocol on environmental impact assessment in a transboundary context is scheduled to be adopted in 2016[137]).

45. Conventions in other fields of international environmental law also provide for an environmental impact assessment: (*a*) Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden (art. 6); (*b*) ASEAN [Association of Southeast Asian Nations] Agreement on the Conservation of Nature and Natural Resources (art. 14, para. 1); (*c*) Agreement on Air Quality between Canada and the United States of America (art. V);[138] (*d*) United Nations Framework Convention on Climate Change (art. 4, para. 1 (*f*)); (*e*) Convention on Biological Diversity (art. 14, para. 1); (*f*) Protocol on Environmental Protection to the Antarctic Treaty (art. 8); (*g*) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (art. 4, para. 2 (*f*)); (*h*) Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (arts. 3, para. 1 (*h*), and 9, para. 2 (*j*)).

46. It is noteworthy that several multilateral financial institutions insist that the borrower States conduct an environmental impact assessment as a condition of their lending activities. The pertinent instruments of the International Bank for Reconstruction and Development (World Bank) provide for its own assessment procedures, which are laid down in the World Bank environmental assessment operational policy 4.01 (January 1999, revised in April 2013, under further review at the time of writing), according to which the World Bank requires an environmental impact assessment of projects proposed for financing. In the course of the assessment, an array of factors are to be taken into consideration, including the natural environment, human health and safety, social aspects and transboundary and global environmental implications, and public participation has to be guaranteed. The World Bank is free to refuse financing of a project that may have harmful consequences for the environment. The purpose of imposing this obligation is to help ensure that the projects are environmentally sound and sustainable with a view to improving its decision-making.[139] It may be noted that the newly established Asian Infrastructure Investment Bank has also proposed certain environmental assessment provisions.[140]

47. The leading multilateral instrument in the field of environmental impact assessment is the Espoo Convention, which is particularly important in the development of the environmental impact assessment regime in international law. The Convention sets out the obligations of parties to assess the environmental impact of certain activities at an early stage of planning and it also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.[141] Since it was adopted under the auspices of the United Nations Economic Commission for Europe (UNECE), the geographical scope of the Espoo Convention was at first limited to parties in the UNECE region (45, including the European Union). However, following the entry into force of its first amendment on 26 August 2014, the Convention is now open to all States Members of the United Nations, which it is expected will play an important role in international law, further advancing environmental impact assessment as an important tool for sustainable development.[142]

48. According to its article 2, paragraph 1, the general purpose of the Espoo Convention is the commitment of parties to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. Therefore, according to article 2, paragraph 2, the parties are required to establish an environmental impact assessment procedure for certain activities within their jurisdiction that are likely to have a "significant adverse transboundary impact"; moreover, the parties have the obligation to notify and consult with potentially affected States regarding the expected transboundary effects of the activity (art. 2). According to article 1 on definitions, "proposed activities" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure; "environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment; "impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors, and also includes effects on cultural heritage or socioeconomic conditions resulting from alterations to those factors; "transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party. More detailed procedural obligations are laid down in the other provisions of the Convention. The significance of the Convention lies in the fact that it provides for rather detailed and precise standards as regards the manner of carrying out an environmental impact assessment.[143] The Espoo Convention has been applied with notable frequency, which reflects the increase in the number of parties, but also indicates that States consider transboundary

[137] To be the Protocol on Environmental Impact Assessment in a Transboundary Context to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea.

[138] United Nations, *Treaty Series*, vol. 1852, No. 31532, p. 79.

[139] Epiney, "Environmental impact assessment", pp. 582–583; see also Sands, *Principles of International Environmental Law*, 2nd ed., pp. 821–822. For similar environmental assessment guidelines adopted by the African Development Bank, the Asian Development Bank and the Inter-American Development Bank, see Handl, *Multilateral Development Banking* …. See also International Seabed Authority, Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, document ISBA/19/LTC/8.

[140] See Asian Infrastructure Investment Bank, Environmental and Social Framework, February 2016, available from www.aiib.org.

[141] See www.unece.org/env/eia/eia.html.

[142] UNECE, "UNECE Espoo Convention on environmental impact assessment becomes a global instrument" (27 August 2014), press release, 27 August 2014, available from www.unece.org *Media*.

[143] Epiney, "Environmental impact assessment", p. 584.

environmental impact assessment as a valuable procedure for informing and consulting the authorities and the public of neighbouring countries. In 2003, the Convention was supplemented by the Protocol on Strategic Environmental Assessment (entered into force in 2011). The Protocol lays the groundwork for sustainable development: it ensures that parties integrate environmental, including health, considerations and public concerns into their plans and programmes and, to the extent possible, also into policies and legislation, at the earliest stages. As of January 2016, there were 26 parties to the Protocol, including the European Union.[144]

49. Transboundary environmental impact assessment has also been adopted by the European Union, which has issued directives that require a member State to assess the impact of a project on the environment of other member States. The original environmental impact assessment directive (85/337/EEC) has been in force since 1985 and applies to a wide range of public and private projects, as defined in annexes I and II.[145] The directive has been amended three times, in 1997, 2003 and 2009, respectively. Directive 97/11/EC brought its content into line with the Espoo Convention, widening its scope of regulation by increasing the types of projects covered and the number of projects requiring mandatory environmental impact assessment (annex I to the Directive). It also provided for new screening arrangements, including new screening criteria (annex III to the Directive) for annex II projects and established minimum information requirements. Directive 2003/35/EC was aimed at aligning the provisions on public participation with the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Directive 2009/31/EC amended annexes I and II of directive 85/337/EEC by adding projects related to the transport, capture and storage of carbon dioxide. Directive 85/337/EEC and its three amendments were codified by directive 2011/92/EU of 13 December 2011. Directive 2011/92/EU was amended in 2014 by directive 2014/52/EU, which entered into force on 15 May 2014 to simplify the rules for assessing the potential effects of projects on the environment.[146] It is in line with the drive for smarter regulation in order to reduce administrative burdens. It also improves the level of environmental protection, with a view to making business decisions on public and private investments more sound, predictable and sustainable in the longer term. The new approach pays greater attention to threats and challenges that have emerged since the original rules came into force over 30 years ago. That means that more attention is paid to areas such as resource efficiency, climate change and disaster prevention, which are now better reflected in the assessment process.[147] In comparison with a large number of international instruments, the environmental impact assessment directive contains rather detailed provisions that have also been specified by many rulings of the European Court of Justice.[148] The Court has thus contributed in a decisive way to the effectiveness of the directive, while its formulations still leave notable discretion to member States.[149]

50. The Protocol on Environmental Protection to the Antarctic Treaty incorporates a more progressive form of environmental impact assessment. Article 8, paragraph 1, provides that proposed activities shall be subject to the procedures set out in annex I to the Protocol for prior assessment of the impacts of those activities on the Antarctic environment. If a proposed activity is found to cause "less than a minor or transitory impact", that activity may proceed. If it is not so found, an initial environmental evaluation will be prepared, and if it is found that there is "minor or transitory impact", the activity may proceed under appropriate procedures of monitoring, assessment and verification of the impact of the activity. If it is found that there is "more than a minor or transitory impact", a comprehensive evaluation will be circulated to all parties and made publicly available, and considered by the Consultative Meeting. That represents an advanced version of how the requirement for an environmental impact assessment operates and is more likely to be acceptable within defined contexts such as Antarctica.[150]

3. Non-binding instruments

51. With regard to non-binding instruments on the subject of environmental impact assessment, the following instruments are noteworthy: (*a*) draft principles of conduct in the field of the environment for the guidance of States

[144] See *Multilateral Treaties Deposited with the Secretary-General*, C.N.244.2017.TREATIES-XXVII.4.b, available from https://treaties.un.org, *Depositary*, *Status of Treaties*, chapter XXVII, Environment.

[145] Kersten, "Rethinking transboundary environmental impact assessment", pp. 179–180.

[146] See European Commission, "Environmental impact assessment—EIA", available from http://ec.europa.eu/environment/eia/eia-legalcontext.htm.

[147] The main amendments of EIA Directive 2014/52/EU are as follows: (*a*) member States now have a mandate to simplify their different environmental assessment procedures; (*b*) time frames are introduced for the different stages of environmental assessments: screening decisions should be taken within 90 days (although extensions are possible) and public consultations should last at least 30 days — member States also need to ensure that final decisions are taken within a "reasonable period of time"; (*c*) the screening procedure, determining whether an EIA is required, is simplified. Decisions must be duly motivated in the light of the updated screening criteria; (*d*) EIA reports are to be made more understandable for the public, especially as regards assessments of the current state of the environment and alternatives to the proposal in question; (*e*) the quality and the content of the reports will be improved. Competent authorities will also need to prove their objectivity to avoid conflicts of interest; (*f*) The grounds for development consent decisions must be clear and more transparent for the public; member States may also set time frames for the validity of any reasoned conclusions or opinions issued as part of the EIA procedure; (*g*) if projects do entail significant adverse effects on the environment, developers will be obliged to do the necessary to avoid, prevent or reduce such effects; these projects will need to be monitored using procedures determined by the member States and existing monitoring arrangements may be used to avoid duplication of monitoring and unnecessary costs. See, for details, European Commission, "Review of the Environmental Impact Assessement (EIA) Directive", available from http://ec.europa.eu/environment/eia/review.htm.

[148] For example: *Commission of the European Communities v. Federal Republic of Germany*, Case C-301/95, Judgment of 22 October 1998, ECR 1998, p. I-6135; *Commission of the European Communities v. Ireland*, Case C-392/96, Judgment of 21 September 1999, ECR 1999, p. I-5901; *Commission v. Italy*, Case C-87/02, Judgment of 10 June 2004, ECR 2004, p. I-5975; *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case C508/03, Judgment of 4 May 2006, ECR 2006, p. I-3969; *Barker v. London Borough of Bromley*, Case C-290/03, Judgment of 4 May 2006, ECR 2006, p. I-3949; *World Wildlife Fund v. Autonome Provinz Bozen and Others*, Case C-435/97, Judgment of 16 September 1999, ECR 1999, p. I-5613; *State of the Grand Duchy of Luxembourg v. Linster*, Case C-287/98, ECR 2000, p. I-6917.

[149] Epiney, "Environmental impact assessment", p. 586.

[150] Elias, "Environmental impact assessment", p. 234.

in the conservation and harmonious utilization of natural resources shared by two or more States (principle 5) of the United Nations Environment Programme,[151] endorsed by the General Assembly in resolution 34/186 of the 18 December 1979; (*b*) conclusions of the study on the legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction undertaken by the Working Group of Experts on Environmental Law,[152] endorsed by the General Assembly in resolution 37/217 of 20 December 1982 (para. 6 (*b*)); (*c*) World Charter for Nature (para. 11 (*b*) and (*c*)), endorsed by the General Assembly in resolution 37/7;[153] (*d*) Goals and Principles of Environmental Impact Assessment,endorsed by the General Assembly in resolution 42/184 of 11 December 1988 (para. 10);[154] (*e*) Rio Declaration (principle 17);[155] and, finally, (*f*) the articles on prevention of transboundary harm from hazardous activities of 2001.[156] It should be noted that article 7 provides as follows: "Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment." According to its commentary, article 7 does not oblige the State of origin to require risk assessment for any activity being undertaken within its territory or otherwise under its jurisdiction or control. However, article 7 is fully consonant with principle 17 of the Rio Declaration, which provides also for assessment of the risk of activities that are likely to have a significant adverse impact on the environment. A State of origin should thus ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm and that the assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. Although draft article 7 does not specify what the content of the risk assessment should be, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity and include the effects of the activity not only on persons and property, but also on the environment of other States.[157]

4. Judicial decisions

52. It may be appropriate here to review briefly how international courts and tribunals have regarded the obligation of carrying out an environmental impact assessment in their jurisprudence. In the *Nuclear Tests II* case before the International Court of Justice in 1995,[158] New Zealand sought to prevent France resuming underground nuclear testing in the Pacific, citing among other reasons that France had not conducted an environmental impact assessment, as required under the Noumea Convention and also under customary international law.[159] It may be noted that France does not seem to have denied the existence of those obligations under the Noumea Convention and under customary international law. Instead, its argument was that an environmental impact assessment should be understood as leaving some latitude to States in conducting the assessment. While the majority of the members of the Court did not consider those points for lack of jurisdiction, Judge Weeramantry stated that in his opinion the obligation to carry out the transboundary environmental impact assessment had become sufficiently developed for the Court to "take notice" of it,[160] and Judge *ad hoc* Sir Geoffrey Palmer also considered that customary international law might require such an assessment in respect of activities that could have significant environmental effects.[161]

53. In the 1997 *Gabčíkovo-Nagymaros* case, the concept of environmental impact assessment was first referred to by Hungary, claiming that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.[162] In its judgment, the International Court of Justice seems to admit that there is an obligation to proceed to an environmental impact assessment before realizing a project with potentially harmful effects on the environment of another State, the Court doing so by interpreting the relevant treaty in an evolving way[163] and holding that:

> It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties … provide abundant evidence that this impact and these implications are considerable.
>
> In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of articles 15 and 19 [of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977], but even prescribed, to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature.
>
> The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[164]

The Court stressed that newly developed environmental standards had to be taken into account "not only when States contemplate new activities but also when continuing

[151] UNEP, Governing Council, Environmental Law: Guidelines and Principles, Sixth Session, 1978. See also Decision 6/14 of the Governing Council of the United Nations Environment Programme of 19 May 1978, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25* (A/33/25), annex I. The text of the draft principles is contained in "Governing Council: Approval of the report of the Intergovernmental Working Group of Experts on natural resources shared by two or more States", ILM, vol. 17 (1978), p. 1091, at p. 1097.

[152] UNEP, "The Environment Programme: Programme Performance Report, January-April 1981", document UNEP/GC.9/5/Add.5, annex III.

[153] General Assembly resolution 37/7 of 28 October 1982, annex.

[154] UNEP, Governing Council, Programme matters requiring guidance from the Governing Council, Report of the Exective Director, documentUNEP/GC.14/17, annex III.

[155] See footnote 45 above.

[156] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.

[157] *Ibid.*, at pp. 157–159.

[158] *Nuclear Tests II* (see footnote 86 above).

[159] Pleadings of New Zealand, verbatim record CR/95/20, *Pleadings, I.C.J. Reports 1995*, pp. 10–25.

[160] *Nuclear Tests II* (see footnote 86 above), Dissenting Opinion of Judge Weeramantry, at p. 344.

[161] *Ibid.*, Dissenting Opinion of Judge Sir Geoffrey Palmer, at p. 412, para. 91 (*c*). See Elias, "Environmental impact assessment", pp. 234–235.

[162] *Gabčíkovo-Nagymaros* (see footnote 48 above), p. 73, para. 125.

[163] Epiney, "Environmental impact assessment", p. 588.

[164] *Gabčíkovo-Nagymaros* (see footnote 48 above), pp. 77–78, para. 140.

with activities begun in the past",[165] thus noting the close relationship between prior impact assessment and subsequent monitoring of the implementation of treaties to take account of environmental effects.[166]

54. The 2005 award of the *Iron Rhine Railway* arbitration provided support as to the general requirement of an environmental impact assessment under international law. The tribunal stated that both international law and European Community law require "the integration of appropriate environmental measures in the design and implementation of economic development activities" and that "emerging principles now integrate environmental protection into the development process", thus endorsing the views expressed by the International Court of Justice in the *Gabčíkovo-Nagymaros* judgment.[167]

55. In the 2010 *Pulp Mills* case judgment, the International Court of Justice noted the practice of environmental impact assessment, "which in recent years has gained so much acceptance among States that *it may now be considered a requirement under general international law to undertake an environmental impact assessment** where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[168] Although the 1975 Statute of the River Uruguay between Argentina and Uruguay did not require an environmental impact assessment, Uruguay had prepared one. While both parties agreed that international law required such an assessment, Argentina argued that the scope of the Uruguayan assessment did not satisfy international standards, particularly with regard to the evaluation of siting alternatives and public consultation. The Court found that the assessment was adequate in both respects.[169] One of the most significant outcomes of the *Pulp Mills* case is the recognition by the Court that environmental impact assessment is a practice that has become an obligation of general international law in situations where a proposed industrial activity may have a significant adverse impact on another State or a shared natural resource. The comments of the Court should be seen as reflecting standard practice in defining some of the issues that States should consider when implementing the obligation to carry out an assessment through their own domestic legislation or project authorization procedures. For example, the indication by the Court that an environmental impact assessment must be conducted "prior to the implementation of a project"[170] would seem to imply that such an assessment can influence the decision and the overall design of a project.[171] The statement by the Court that an environmental impact assessment must be followed, when necessary, by continuous monitoring of the effects of the project on the environment throughout the life of the project is reflective of best practice and logically flows from the acknowledgement by the Court of "due diligence, and the duty of vigilance and prevention which it implies".[172] Thus, while in the *Gabčíkovo-Nagymaros* case the Court stopped short of recognizing the non-conventional status of the requirement of an environmental impact assessment, it seems that the Court positively endorsed such a status in the *Pulp Mills* case. It may be concluded that environmental impact assessment is now recognized as an essential tool for integrating environmental concerns into the development process and therefore that a general requirement of environmental impact assessment is now part of positive international law.[173]

56. In 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea rendered its Advisory Opinion on the *Responsibilities and Obligations of States with respect to Activities in the Area*.[174] In its opinion, the Chamber dealt with environmental impact assessment by referring to the *Pulp Mills* judgment. In answering the question submitted by the Council of the International Seabed Authority as to "what are the legal … obligations of States Parties to the [United Nations] Convention [on the Law of the Sea] with respect to the sponsorship of activities in the Area",[175] the Chamber highlighted the obligation to conduct environmental impact assessments as one of the direct obligations incumbent on sponsoring States.[176] As the Chamber noted, under article 206 of the Convention and related instruments, such as regulation 31, paragraph 6, of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area[177] and regulation 33, paragraph 6, of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area[178] adopted by the International Seabed Authority, sponsoring States have the obligation to conduct an environmental impact assessment.[179] However, the Chamber did not stop there and it stated that: "It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention *and a general obligation under customary international law**".[180] The Chamber deduced this statement from the *Pulp Mills* judgment,[181] and broadened the scope of the obligation to cover activities in the Area. According to the Chamber:

> Although aimed at the specific situation under discussion by the Court [in the *Pulp Mills* case], the language used [by the International Court of Justice] seems broad enough to cover activities in the Area even beyond the scope of the Regulations. *The Court's reasoning* [in the *Pulp Mills* case] *in a transboundary context may also apply to activities with an impact on the environment in an area beyond the*

[165] *Ibid.* Judge Weeramantry referred in his opinion to the "principle of continuing environmental impact assessment", stating that the incorporation of environmental considerations into the treaty meant that EIA with a duty of monitoring was also built into the treaty. *Ibid.*, Separate Opinion of Judge Weeramantry, pp. 111–112.

[166] Elias, "Environmental impact assessment", p. 235.

[167] *Iron Rhine Railway* case (see footnote 49 above), pp. 66–67, para. 59.

[168] *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 204. In the judgment, the Court held that "an environmental impact assessment must be conducted prior to the implementation of a project". *Ibid.*, para. 205.

[169] *Ibid.*, paras. 210, 211 and 219.

[170] *Ibid.*, para. 205.

[171] See *ibid.*, Dissenting Opinion of Judge *ad hoc* Vinuesa, para. 65: "all of the consultations … took place after environmental authorizations had been granted, and therefore all are meaningless".

[172] *Ibid.*, para. 204. See also Payne, "Pulp Mills on the River Uruguay (Argentina v. Uruguay)", pp. 99–100.

[173] Elias, "Environmental impact assessment", p. 235.

[174] *Responsibilities and Obligations with respect to Activities in the Area* (see footnote 37 above).

[175] *Ibid.*, para. 1.

[176] *Ibid.*, para. 122.

[177] Adopted in 2000 (ISBA/6/A/18, annex).

[178] Adopted in 2010 (ISBA/16/A/12/Rev.1, annex).

[179] *Responsibilities and Obligations with respect to Activities in the Area* (see footnote 37 above), paras. 142 and 146.

[180] *Ibid.*, para. 145.

[181] *Ibid.*, para. 147.

*limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind**.[182]

Bearing the opinion in mind, it may be concluded that the obligation to conduct an environmental impact assessment under general international law also applies in the context of activities in an area beyond the limits of national jurisdiction.

57. The 2013 partial award of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* confirmed the obligation of the State under customary international law to undertake an environmental impact assessment in light of the judgments of the International Court of Justice in the *Gabčíkovo-Nagymaros*, *Pulp Mills* and *Iron Rhine* cases.[183]

58. In the recent case of *Certain Activities*, the International Court of Justice reiterated its statement in the *Pulp Mills* case that "it may now be considered a requirement under general international law to undertake an environmental impact assessment".[184] The Court in the present case developed the content of the obligation held in the *Pulp Mills* case in three ways. First, although the statement by the Court in the *Pulp Mills* case refers to industrial activities undertaken by private companies, it concluded in the present case that the obligation of environmental impact assessment "applies generally to proposed activities which may have a significant adverse impact in a transboundary context",[185] and therefore applies to projects conducted by a State itself as well. Secondly, although the Court held in the *Pulp Mills* case that the obligation to carry out environmental impact assessments is a continuous one, the Court in that case put an emphasis on the obligation to conduct the assessment prior to undertaking an activity, stating that "the obligation to conduct an environmental impact assessment requires an ex ante evaluation of the risk of significant transboundary harm".[186] Thirdly, the Court observed that the "reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken".[187]

5. Customary international law

59. Based on the aforementioned international practice, there has been considerable support for the view that an environmental impact assessment is required as customary international law with regard to the activities or projects that may cause considerable transboundary environmental effects. Since the early 1980s, an environmental impact assessment has regularly been required in a broad range of international instruments in case of potentially harmful activities: in addition, more than 130 countries have incorporated requirements for environmental impact assessments in their national legislation, so a rather uniform and continuous State practice exists. States also recognize that obligation as legally binding, at least as far as projects with potential transboundary effects are concerned. Therefore, at least the principle of requiring prior environmental assessment of projects, which may cause significant transboundary environmental harm, can be considered as international customary law. In other words, States have the obligation to conduct an environmental impact assessment if the following conditions are fulfilled: first, the project must be likely to have an impact on the environment; second, transboundary effects must be likely; third, the impact must be significant. Meanwhile, according to international practice, some indications with regard to the procedure of an environmental impact assessment have to be observed: first, the assessment should be carried out prior to the decision on the project; second, it must be carried out in such a manner that all relevant environmental impacts can be analysed and evaluated; third, public participation should be guaranteed in some way; fourth, in practice, the assessment is generally conducted by State authorities; and fifth, the result of an assessment must be taken into consideration when the competent authority decides on the realization of the project.[188] Concerning the conditions or indications mentioned above, some are still vague and lack details in many international instruments, even though some supranational instruments, such as directive 85/337/EEC,[189] contain more precise elements as to the procedure. However, those elements can hardly be said to reflect a real continuous practice, so that it is not possible at the present stage to formulate more precise conclusions as to the manner how to conduct an environmental impact assessment under customary international law.

60. While those observations primarily address the requirement of environmental impact assessment in transboundary contexts, it is uncertain, mainly for the lack of relevant precedents, whether the same applies to environmental impact assessment for projects intended to have significant effects on the global atmosphere, such as geoengineering activities. It is submitted, however, that those activities are likely to carry a more extensive risk of "widespread, long-term and severe" damage than even those of transboundary harm and therefore that the same rules should a fortiori be applied to those activities potentially causing global atmospheric degradation.

61. In view of the above, the following draft guideline is proposed:

"*Draft guideline 4. Environmental impact assessment*

"States have the obligation to take all necessary measures to ensure an appropriate environmental impact assessment, in order to prevent, mitigate and control the causes and impacts of atmospheric pollution and atmospheric degradation from proposed activities. The environmental impact assessment should be conducted in a transparent manner, with broad public participation."

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[182] *Ibid.*, para. 148.

[183] Permanent Court of Arbitration, *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 between the Islamic Republic of Pakistan and the Republic of India*, Partial Award of 18 February 2013, ILR, vol. 154, p. 1, at pp. 172–173, paras. 450–452. This was confirmed by the Final Award of 20 December 2013, para. 112.

[184] *Certain Activities* (see footnote 63 above), para. 104.

[185] *Ibid.*

[186] *Ibid.*, para. 161. It must be borne in mind, however, that even in the *Pulp Mills* case the Court held that "an environmental impact assessment must be conducted prior to the implementation of a project". *Pulp Mills on the River Uruguay* (see footnote 52 above), para. 205.

[187] *Certain Activities* (see footnote 63 above), para. 157.

[188] Epiney, "Environmental impact assessment", pp. 588–590, paras. 49 *et seq.*

[189] See para. 49 above.

Chapter II

Obligations of sustainable and equitable utilization of the atmosphere

A. Sustainable utilization of the atmosphere

1. The notion of sustainability in international law

62. The atmosphere was long considered to be non-exhaustible and non-exclusive, since it was assumed that everyone could benefit from it without depriving others.[190] That view is no longer held.[191] It must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity. Even though the atmosphere is not exploitable in the traditional sense of the word (such as in the context of mineral or oil and gas resources), any polluter in fact exploits the atmosphere by reducing its quality and its capacity to assimilate pollutants, thus necessitating its proper maintenance for organisms to breathe and enjoy stable climatic conditions. If the atmosphere is a limited natural resource, it must be used in a sustainable manner. That is easy to say, but difficult to implement, since the normative character of sustainable development has not always been clear in international law. Sustainable development is a concept that seems to be widely supported in theory, but at the same time, there have been certain disagreements with regard to its actual application.[192]

63. The evolution of the notion of sustainable development is well summarized, for example, by the work of Nico Schrijver on the subject[193] and it will not be repeated in the present report. It may, however, be noted that the 1893 Bering Sea *Fur Seal* arbitration was a precursor of the present-day notion of sustainable development.[194] The notion of sustainability in international law first appeared in the high sea fisheries agreements in the form of "maximum sustainable yield" in the 1950s.[195] The maximum sustainable yield was determined in principle by scientific evidence regarding the level of sustainable existence of a species, so that the total allowable catch of the species should not exceed that level. It is important to note that the notion of sustainability was based, in principle, on scientific data. In article 2 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, "conservation of the living resources of the high seas" is defined as "the aggregate of the measures rendering possible the *optimum sustainable yield** from those resources so as to secure a maximum supply to food and other marine products". In the context of fisheries law, the standard of maximum sustainable yield has subsequently been qualified with a view to limiting the total allowable catch. For example, the United Nations Convention on the Law of the Sea provides in article 61, paragraph 3, that the measures for conservation "shall also be designed to maintain or restore populations of harvested species at levels which can produce the *maximum sustainable yield, as qualified by relevant environmental and economic factors**, including the economic needs of coastal fishing communities and the special requirements of developing States".[196] The qualifier is said to reflect the concern of the international community that the standard of maximum sustainable yield itself would not effectively ensure appropriate limits to prevent over-catching.[197] Thus, it can be said that the notion of sustainability, at least in high sea fisheries, is based on scientific knowledge but also on certain (non-scientific) policy considerations.

2. Treaties and other instruments

64. The first visible use of the term "sustainable development" in an international document appears to be the 1980 World Conservation Strategy prepared by the International Union for Conservation of Nature and Natural Resources, which defined sustainable development as "the integration of conservation and development to ensure that modifications to the planet do indeed secure the survival and wellbeing of all people".[198] The report by the World Commission on Environment and

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[190] As mentioned in *Yearbook … 2014*, vol. II (Part One), document A.CN.4/667, para. 84, footnote 222, this appears quite similar to the classic sixteenthth/seventeenth century controversy between Hugo Grotius' *Mare Liberum* and John Selden's *Mare Clausum* over whether ocean resources were to be regarded as unlimited or limited.

[191] See para. (2), footnote 27, of the commentary to the preamble to the draft guidelines on the protection of atmosphere, provisionally adopted by the Commission, *Yearbook … 2015*, vol. II (Part Two), para. 54, at pp. 19–20. In the 1996 *Gasoline* case, the World Trade Organization (WTO) Panel and Appellate Body recognized that clean air was an "exhaustible natural resource" that could be "depleted" (WTO Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996).

[192] French, "Sustainable development"; Barstow Magraw and Hawke, "Sustainable development". See also Lang, *Sustainable Development and International Law*; Ginther and de Waart, "Sustainable development as a matter of good governance: an introductory view"; Hossain, "Evolving principles of sustainable development and good governance"; Boyle and Freestone, *International Law and Sustainable Development*.

[193] See Schrijver, "The evolution of sustainable development in international law: inception, meaning and status". See also Tladi, *Sustainable Development in International Law* …, pp. 11–38.

[194] The arbitral tribunal adopted the "Regulations" for the sustainable conservation of the fur seal resources. *Fur Seal Arbitration*, Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, p. 755. See Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 227–228.

[195] Para. 10 (*a*) of the Schedule to the International Convention on the Regulation of Whaling, as amended by the International Whaling Commission at its 65th Meeting in Portorož, Slovenia, in September 2014; art. IV, para. 1 (*b*) (i), of the International Convention for the High Seas Fisheries of the North Pacific Ocean; art. II, para. 1 (*a*), of the Interim Convention [between the United States of America, Canada, Japan and the Union of Soviet Socialist Republics] on Conservation of North Pacific Fur Seals.

[196] Similar provisions can be found in article 119, paragraph 1 (*a*), of the United Nations Convention on the Law of the Sea; article 5 (*b*) of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; section 7.2.1 of the 1995 Food and Agriculture Organization of the United Nations Code of Conduct for Responsible Fisheries; and in Agenda 21: Programme of Action for Sustainable Development, chapter 17, paragraph 17.46 (*b*), concerning sustainable use and conservation of marine living resources of the high seas (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions Adopted by the Conference* (see footnote 45 above), annex II, p. 9, at p. 252).

[197] Caddy and Cochrane, "A review of fisheries management past and present and some future perspectives for the third millennium"; Yamada *et al*., "Regarding the *Southern Bluefin Tuna* case".

[198] International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, chap. 1, para. 12.

Development (Brundtland Commission), entitled *Our Common Future*, gave international prominence to the term "sustainable development".[199] Those two publications led to a significant "paradigm shift" in international environmental law.[200] The United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, in 1992, was the first occasion on which Governments officially adopted sustainable development as a global policy, which was confirmed in the Rio Declaration[201] and in Agenda 21.[202] The two important conventions adopted in Rio, namely, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, provide for sustainable development. Article 3, paragraph 4, of the United Nations Framework Convention on Climate Change provides as a "principle" that: "The Parties have a right to, and should, promote sustainable development". Article 1 of the Convention on Biological Diversity states that: "The objectives of this Convention … are the conservation of biological diversity [and] the sustainable use of its components". In the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests,[203] also adopted in Rio, the global consensus on the management, conservation, and "sustainable development" of the world's forests is expressed. In 1994, sustainable development was recognized as an objective of the World Trade Organization (WTO) in the first preambular paragraph to the Marrakesh Agreement Establishing the World Trade Organization. The fact that sustainable development is provided only as an "objective" or a "principle" in those instruments may imply that the term offers no more than a policy statement or guidance, rather than an operational code to determine rights and obligations among States.

3. Judicial decisions

65. In its decision on the case concerning the *Gabčíkovo-Nagymaros* in 1997, the International Court of Justice referred to the "need to reconcile economic development with protection of the environment", which is, in its opinion, "aptly expressed in the concept of sustainable development", although the Court never went further to analyse the normative character and status of the concept.[204] On that point, Judge Weeramantry in his separate opinion considered sustainable development "to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case",[205] a view shared by some with certain qualifications.[206] In the 2006 order of the *Pulp Mills*, the International Court of Justice highlighted "the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development", noting that "account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States".[207] The judgment of 2010 on the same case reiterated the reference to sustainable development in the 2006 order[208] and also that of the *Gabčíkovo-Nagymaros* judgment.[209]

66. The WTO Appellate Body decision of 1998 on *United States—Import Prohibition of Certain Shrimp and Shrimp Products* stated that, "recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that article XX (*g*) of the [General Agreement on Tariffs and Trade] 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living resources", and that: "As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe that it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the [General Agreement on Tariffs and Trade] 1994".[210]

67. In the arbitral case of 2005 on the *Iron Rhine Railway* case, the tribunal held as follows:

> There is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law … The emerging principles, whatever their current status, make reference to … sustainable development … Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate such harm … This duty, in the opinion of the Tribunal, has now become a principle of general international law.[211]

In the 2013 partial award of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* the Court of Arbitration stated as follows:

> There is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international … arbitral decisions have addressed the need to manage natural resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of "sustainable development"

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[199] World Commission on Environment and Development, *Our Common Future*, pp. 43–46.

[200] Tladi, *Sustainable Development in International Law* …, pp. 34–38.

[201] Rio Declaration, principle 14.

[202] See footnote 196 above).

[203] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions Adopted by the Conference* (see footnote 45 above), annex III, p. 480.

[204] *Gabčíkovo-Nagymaros* (see footnote 48 above), para. 140.

[205] Separate Opinion of Judge Weeramantry, p. 88. He also stated that "[t]he law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development" (*ibid.*, p. 90), further noting that it is "a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community" (*ibid.*, p. 95).

[206] See Lowe, "Sustainable development and unsustainable arguments", in which sustainable development is characterized as a "meta-principle". See also Tladi, *Sustainable Development in International Law* …, pp. 94–109.

[207] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order, *I.C.J. Reports 2006*, p. 113, at p. 133, para. 80.

[208] *Pulp Mills on the River Uruguay*, Judgment (see footnote 52 above), para. 75.

[209] *Ibid.*, para. 76.

[210] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998 VII, p. 2755, at paras. 129, 131 and 153.

[211] *Iron Rhine ("Ijzeren Rijn") Arbitration* (see footnote 49 above), pp. 66–67, paras. 58–59.

in *Gabčíkovo-Nagymaros*, referring to the "need to reconcile economic development with protection of the environment."[212]

68. Thus, with regard to the question of whether the "concept" of sustainable development has evolved as a "principle", the trend seems definitely to be leading to its recognition of its legal character as an "emerging principle" under customary international law. However, in view of a certain ambiguity remaining as to its legal status, the Commission may wish to opt for the term "should" in referring to sustainable utilization of the atmosphere, as follows:

"Draft guideline 5. Sustainable utilization of the atmosphere

"1. Given the finite nature of the atmosphere, its utilization should be undertaken in a sustainable manner.

"2. For sustainable utilization of the atmosphere, it is required under international law to ensure a proper balance between economic development and environmental protection."

B. Equitable utilization of the atmosphere

1. The notion of equity in international law

69. Equity and sustainable development are two notions frequently employed as inherently interrelated concepts in international environmental law, and in the law of the atmosphere in particular, since equitable use of the atmosphere is a corollary of its sustainable use.[213] While equity addresses distributive justice in allocating resources on the one hand, it also refers to distributive justice in allocating burdens on the other hand,[214] and therefore, the relationship between the two within the concept of equity should also be taken into account.

70. Equity has been a long-standing concern in general international law, within which diverse meanings of the concept have been discussed.[215] While it is difficult to define, equity in international law has been equated by the International Court of Justice to "a direct emanation of the idea of justice".[216] The notion conveys "considerations of fairness and reasonableness often necessary for the application of settled rules of law".[217] The International Court of Justice referred to the concept in its Chamber judgment of 1986 in the *Frontier Dispute* case,[218] in which the Court recalled that there were three categories of equity in international law: (*a*) equity *infra legem* (within the law), (*b*) equity *praeter legem* (outside, but close to, the law) and (*c*) equity *contra legem* (contrary to law). Equity *infra legem*, according to the judgment, is "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes".[219] The notion of equity *praeter legem* is particularly important for its function of filling gaps in existing law.[220] Equity *contra legem* (contrary to the law) is similar to settlement *ex aequo et bono* (see Article 38, paragraph 2, of the Statute of the International Court of Justice), which may, upon agreement of the parties concerned, serve as a mechanism to correct existing legal rules that might otherwise lead to an unreasonable or unjust consequence, but it should be distinguished from the interpretation and application of existing law.

71. In the context of international environmental law, equity has a dual dimension.[221] On the one hand, it postulates an equitable global "North-South" balance, reflected in the concept of "common but differentiated responsibilities" (formulated in principle 7 of the Rio Declaration and in several multilateral environmental agreements). On the other hand, it calls for an intergenerational equitable balance between the present generation and future generations of humankind, highlighted by the seminal definition in the report of the World Commission on Environment and Development: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[222]

2. Treaties and other instruments

72. Provisions concerning equity and equitable principles are crucial in many global multilateral treaties. According to its preamble, the Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention on the Protection of the Ozone Layer, purports to "control equitably total global emissions" (sixth preambular para.). The United Nations Framework Convention on Climate Change recognizes in article 3, paragraph 1, that: "The Parties should protect the climate system for the benefit of present and future generations of humankind", and "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". Article 4, paragraph 2 (*a*), of that Convention provides that: "Each of these Parties [included in annex I to the Convention] shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic

[212] *Indus Waters Kishenganga Arbitration*, Partial Award of 18 February 2013 (see footnote 183 above), p. 172, para. 449. This was confirmed by the Final Award of 20 December 2013, para. 111.

[213] For example, the Copenhagen Accord of the fifteenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in 2009 stated that those who associate with the Accord agree "on the basis of equity and in the context of sustainable development" to enhance long-term cooperative action to combat climate change (para. 1). The Paris Agreement adopted by the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change and the eleventh session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on 12 December 2015 emphasized the "intrinsic relationship" of "equitable access to sustainable development" in its eighth preambular paragraph.

[214] Shelton, "Equity".

[215] Akehurst, "Equity and general principles of law"; Francioni, "Equity in international law"; Janis, "Equity in international law".

[216] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 18, at p. 60, para. 71.

[217] Crawford, *Brownlie's Principles of Public International Law*, p. 44. See also Franck, *Fairness in International Law and Institutions*.

[218] *Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554.

[219] *Ibid.*, at p. 567, para. 28.

[220] See, in general, Weil, "L'équité dans la jurisprudence de la Cour Internationale de Justice: Un mystère en voie de dissipation?"; Kokott, "Equity in international law", pp. 186–188; Shelton, "Equity", p. 642.

[221] Shelton, "Equity", pp. 640–645.

[222] *Our Common Future*, p. 43. See also Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*; and Molinari, "Principle 3: From a right to development to intergenerational equity".

emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs … taking into account … the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective", and most recently, the Paris Agreement, adopted by the parties to the Convention on 12 December 2015, stipulates in article 2, paragraph 2, that it "will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances". The Convention on Biological Diversity sets forth, among its objectives in article 1, "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources". Similarly, the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa repeatedly emphasizes benefit sharing "on an equitable basis and on mutually agreed terms" (see arts. 16 (*g*); 17, para. 1 (*c*); and 18, para. 2 (*b*)).

73. Explicit reference to equity is contained in the United Nations Convention on the Law of the Sea: (*a*) the preamble affirms among the goals of the Convention "the equitable and efficient utilization" of the ocean's resources, "[b]earing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked"; (*b*) articles 74, paragraph 1, and 83, paragraph 1, provide for an "equitable solution" of disputes; (*c*) articles 69, paragraph 1, and 70, paragraph 1, provide for participation "on an equitable basis"; (*d*) articles 82, paragraph 4, and 140, pargraph 2, provide for "equitable sharing" in the exploitation of resources; and (*e*) article 155, paragraph 2, provides for "equitable exploitation of the resources of the Area for the benefit of all countries".

74. Similar provisions also exist in regional treaties and instruments. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides that the parties "shall … take all appropriate measures … [t]o ensure that transboundary waters are used in a reasonable and equitable way" (art. 2, para. 2 (*c*)). The Convention on Cooperation for the Protection and Sustainable Use of the Danube River sets forth the goals of "sustainable and equitable water management" (art. 2, para. 1), and provides that the contracting parties "shall take appropriate measures aiming at the prevention or reduction of transboundary impacts and at a sustainable and equitable use of water resources as well as at the conservation of ecological resources" (art. 6). The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin provides for "reasonable and equitable utilization" of the waters of the Mekong River system (art. 5). The Revised Protocol on Shared Watercourses in the Southern African Development Community highlights the equitable utilization of shared watercourse systems in the region (preamble and arts. 2 (*a*); 3, para. 7; and 3, para. 8). Similar provisions can also be found in the Framework Convention on the Protection and Sustainable Development of the Carpathians, which aims to take measures for "sustainable, balanced and equitable water use" (art. 6 (*b*)).

3. Previous work of the Commission

75. The previous work of the Commission in relation to equity should be noted. Article 5 ("Equitable and reasonable utilization and participation") of the draft articles on the law of the non-navigational uses of international watercourses of 1994[223] (adopted as the Convention on the Law of Nonnavigational Uses of International Watercourses in 1997), provides that watercourse States "shall in their respective territories utilize an international watercourse in an *equitable and reasonable manner**" and "shall participate in the use, development and protection of an international watercourse in an *equitable and reasonable manner**".[224] The Commission's articles on the law of transboundary aquifers have similar provisions in article 4 ("Equitable and reasonable utilization") to the effect that: "Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization".[225]

76. The articles on prevention of transboundary harm from hazardous activities of 2001 provide that: "The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10" (art. 9, para. 2).[226] Article 10 ("Factors involved in an equitable balance of interests") provides as follows:

> In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:
>
> (*a*) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;
>
> (*b*) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;
>
> (*c*) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;
>
> (*d*) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;
>
> (*e*) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity; (*f*) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.[227]

4. Judicial decisions

77. The International Court of Justice has also invoked the rules of equity, particularly in the context of maritime disputes. In considering the concave coastline of Germany, the Court, in the 1969 judgment in the *North Sea Continental Shelf* cases, resorted to equity as a principle for the delimitation of continental shelves, rather than supporting

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[223] *Yearbook … 1994*, vol. II (Part Two), para. 222, p. 96.

[224] See also draft article 6 for "Factors relevant to equitable and reasonable utilization" and the commentary thereto. *Ibid.*, para. 222, at pp. 101 *et seq.*

[225] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54.

[226] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 97, at p. 147.

[227] *Ibid.*

the application of the equidistance rule which would, in its opinion, lead to a substantively unjust result. The Court stated that "[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable" and that it was "not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".[228] That judgment of the *North Sea Continental Shelf* cases was followed by subsequent maritime delimitation or resource allocation cases. They include: the *Fisheries Jurisdiction* cases *(United Kingdom of Great Britain and Northern Ireland v. Iceland* and *Federal Republic of Germany v. Iceland)* of 1974,[229] the arbitration on the delimitation of the continental shelf between the United Kingdom and France of 1977 and 1978,[230] the Tunisia-Libyan Arab Jamahiriya continental shelf case of 1982;[231] the *Gulf of Maine Area* case of 1984;[232] the Libyan Arab Jamahiriya-Malta continental shelf case of 1985;[233] the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case of 2001.[234] In an environmental context, the concept of intergenerational equity has been elaborated, in particular, in the opinions of Judge Cançado Trindade.[235]

78. On the basis of the foregoing, the following draft guideline is proposed:

"Draft guideline 6. Equitable utilization of the atmosphere

"States should utilize the atmosphere on the basis of the principle of equity and for the benefit of present and future generations of humankind."

5. Relation of equity with the need for special consideration for developing countries

79. Equity does not mean equality and usually the truth is that "relevant dissimilarities warrant adjustment or special treatment"[236] for the sake of a result-oriented equity. The concept of common but differentiated responsibilities might have been such an attempt, by adopting an equitable approach, to foster substantive equality in international environmental law. It entails that "while pursuing a *common goal**, States take on *different obligations**, depending on their socio-economic situation and their historical contribution to the environmental problem at stake".[237] That phenomenon is not new in international law. The first such attempt was probably the Washington Conference of the International Labour Organization in 1919, at which delegations from Asia and Africa succeeded in ensuring the adoption of differential labour standards.[238] Another

[228] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at pp. 47 and 48, paras. 85 and 88.

[229] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 3, and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *ibid.*, p. 175. The Court stressed that "[n]either right is an absolute one" and that both parties should take into account the rights of other states and the needs of conserving the fish stocks (paras. 71 and 63, respectively). "[B]oth Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources" (paras. 72 and 64, respectively), the Court emphasized, restating its similar standpoint expressed in the *North Sea Continental Shelf* cases, that "[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law" (paras. 78 and 69, respectively).

[230] *English Channel (Case concerning delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic)*, Decision of 30 June 1977, UNRIAA, vol. XVIII (United Nations publication, sales No. E/F.80.V.7), p. 3, at p. 57, para. 99.

[231] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 216 above). The Court called for not only the application of equitable principles, but an equitable result derived from the application of equitable principles. "The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result" (para. 70). Furthermore, the Court took into account relevant circumstances to "meet the requirements of the test of proportionality as an aspect of equity" (para. 131).

[232] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246. After a detailed discussion, the Chamber drew the conclusion that "the delimitation effected in compliance with the governing principles and rules of law, applying equitable criteria and appropriate methods accordingly, has produced an equitable overall result" (para. 241).

[233] In the 1985 *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, the Court affirmed the importance of "[t]he normative character of equitable principles applied as a part of general international law", the reason being that "these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result" (Judgment, *I.C.J. Reports 1985*, p. 13, at p. 39, para. 46).

[234] In the 2001 case between Qatar and Bahrain, the Court, after weighing "whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result", applied the equidistance rule in view of the special geographical circumstances as the equitable solution. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at p. 104, para. 217.

[235] See his separate opinions in the cases of *Pulp Mills on the River Uruguay* (Judgment; footnote 52 above), pp. 177–184, paras. 114–131, and *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, *I.C.J. Reports 2014*, p. 226, at pp. 362–367, paras. 41–47.

[236] Shelton, "Equity", p. 647.

[237] Hey, "Common but differentiated responsibilities".

[238] See Ayusawa, *International Labor Legislation*, pp. 149 *et seq.* He wrote that the third point of the President Wilson's Fourteen Points, "[t]he removal … of all economic barriers and the establishment of an equality of trade conditions among all nations" was "an empty phrase", and stressed that varied economic conditions require differential treatment in labour legislation (pp. 149 *et seq.*), which was recognized in the Washington Conference of 1919 concerning the working conditions of workers in Asian and African countries including his own country Japan (pp. 173 *et seq.*). Long before the advent of the "common but differentiated responsibilities" concept, this was in fact the first attempt in international law-making for asserting differentiated treatment, on the basis of article 405 of the 1919 Versailles Peace Treaty, which became article 19, paragraph 3, of the Constitution of the International Labour Organization (labour conventions "shall have due regard" to the special circumstances of countries where local industrial conditions are "substantially different"). The same principle also appeared in some of the conventions approved by the International Labour Organization in 1919 and in several conventions adopted after Dr. Ayusawa's article. While the idea of differential treatment did not originate with Ayusawa, he was one of the first scholars to take note of the principle as a normative dictate and to link it more generally to substantive equality of treatment in international economic law. In his later years in the 1960s, Dr. Ayusawa served as professor at International Christian University in Tokyo where he gave courses on international labour law as well as international relations. The present writer, then a freshman student, had the privilege to attend one of his courses in which he lectured with passion and enthusiasm North–South problems, which he considered a top-priority agenda for the post-war world. (The Special Rapporteur is deeply grateful to Professor Steve Charnovitz of George Washington University School of Law for drawing his attention to the contribution made by Dr. Ayusawa.)

example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s.[239]

80. The need for special consideration for developing countries in the context of environmental protection has been endorsed by a number of international instruments, such as the Stockholm and Rio Declarations. Principle 12 of the Stockholm Declaration attaches importance to "taking into account the circumstances and particular requirements of developing countries". Principle 6 of the Rio Declaration highlights the special needs of developing countries and particularly the least developed and those most environmentally vulnerable, while principle 7 provides that: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities".

81. The concept of common but differentiated responsibilities is reflected in the provisions of several multilateral environmental agreements, starting with the United Nations Framework Convention on Climate Change.[240] Article 3, paragraph 1, provides that: "The Parties should protect the climate system … on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities." In the Kyoto Protocol of 1997, the parties adopted a strict dictate of the concept of common but differentiated responsibilities, imposing obligations to mitigate or stabilize greenhouse gas emissions only on the developed, industrialized States (Annex 1 parties), leaving the developing countries without new legally binding obligations. However, at the seventeenth session of the Conference of the Parties in 2011, it was decided to launch a process to develop a legal instrument which would be applicable to all parties. It is noteworthy that there is no longer any reference here to the concept of common but differentiated responsibilities. Indeed, the Paris Agreement obliges all parties to undertake the commitments made thereunder (art. 3). It should be noted, however, that, the parties are still to be guided by "equity" and "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (third preambular para., art. 2, para. 2, and art. 4, para. 3).

82. Since there are various situations affecting the allocation of shared or common resources and the burden of environmental protection, as mentioned before, equal treatment "may yield extreme outcomes when pre-existing economic or other inequalities exist in society".[241] Equality of rights "does not necessarily bring about equality of outcomes",[242] and therefore, international environmental law has moved considerably away from "formal equality towards grouping states" to "allocate burdens and benefits based on responsibility for harm and financial or technological capacity to respond".[243] That is the background against which the concept of common but differentiated responsibilities was considered necessary. It may be noted however that the concept leaves an inherent ambiguity as to the basis of the proposed differentiation.[244] Furthermore, in the context of climate change, there has been a certain regression in the application of the concept, as exemplified by the Durban Platform for Enhanced Action of 2011 that ultimately led to the adoption of the Paris Agreement in 2015, recognizing the obligations thereunder as being applicable to all States (art. 3).

83. It may be recalled that, in adopting the present topic in 2013, the Commission stated its understanding that "the topic will not deal with, *but is also without prejudice to**, questions such as … common but differentiated responsibilities".[245] While the exact meaning of this "double negative" expression remains uncertain,[246] it may be noted that the words "but is also without prejudice to" were inserted with the agreed intention that the concept of common but differentiated responsibilities should be included in the draft guidelines. However, given that respect for the needs of developing countries remains significant in international law but not necessarily in the form of common but differentiated responsibilities, the Special Rapporteur proposes a guiding principle in the preamble, modelled on the ninth paragraph of the preamble of the articles on the law of transboundary aquifers, as follows:

"*Draft preambular paragraph 4*

"*Emphasizing* the need to take into account the special situation of developing countries"

C. Legal limits on intentional modification of the atmosphere

84. The atmosphere has been used in several ways, most notably in the form of aerial navigation. Obviously, most of the activities so far are those conducted without a clear or concrete intention to affect atmospheric conditions. There are, however, certain activities whose very purpose is to alter atmospheric conditions, for example, weather modification (weather control). Weather modification is an example of utilization of the atmosphere that has already been practised domestically. Additionally,

[239] See article 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) and article 30 (New rules of international law in favour of developing countries) of the Commission's 1978 draft articles on the most-favoured-nation clauses, *Yearbook … 1978*, vol. II (Part Two), p. 16, para. 72, at pp. 59 and 72, respectively. Murase, *Economic Basis of International Law*, pp. 109–179. Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements*, pp. 49–66. And see the earlier exceptions for developing countries specified in article XVIII of the 1947 General Agreement on Tariffs and Trade.

[240] See Stone, "Common but differentiated responsibilities in international law", p. 279.

[241] Shelton, "Equity", p. 654.

[242] *Ibid.*, p. 655.

[243] *Ibid.*, p. 653.

[244] There are a variety of views as to the grounds and criteria for differentiated treatment such as the "contribution theory" (industrialized countries generating the largest share of historical and current global emissions of greenhouse gases are responsible for the global environmental degradation and hence should bear the costs of clean up), "entitlement theory" (developing countries are entitled to fewer and less stringent commitments and financial/technical assistances, in the light of the history of colonialism and exploitation as well as necessity of development), "capacities theory" (developed countries having resources and capacities to take responsive measures should lead to the environmental protection) and "promotion theory" (differentiation tailoring commitments for different situations of each country is necessary to promote a large participation in international treaties). See Rajamani, *Differential Treatment in International Environmental Law*, pp. 2 and 118–125. See also Cullet, "Common but differentiated responsibilities".

[245] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[246] See para. 6 and footnote 20 above.

ocean fertilization for carbon dioxide absorption has been conducted on a limited experimental basis. Scientists have suggested various possible methods for active utilization of the atmosphere. Some of the proposed geoengineering technologies (such as carbon dioxide removal and solar radiation management) are relevant if they become realizable. Thus, it is considered that the modalities of the use (or utilization) of the atmosphere and their legal implications should be carefully studied in the present report.

85. Weather modification "in warfare" has been prohibited under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The Convention does not deal with the question of whether or not a given use of environmental modification techniques for peaceful purposes is in accordance with generally recognized principles and applicable rules of international law. Nonetheless, as the only international instrument to directly regulate deliberate manipulation of natural processes, which have "widespread, long-lasting or severe effects" (art. 1) of a transboundary nature, the Convention is considered to offer one possible route to the prohibition of large-scale geoengineering practices. Weather control has been experimented with and practised widely in domestic settings since the 1940s to produce desirable changes in weather. The General Assembly first addressed the issue in 1961.[247] The goals of weather control range from preventing the occurrence of harmful meteorological events, such as hurricanes or tornadoes, to causing beneficial weather, such as artificial rainfall in an area experiencing drought or, conversely, for temporary avoidance of rainfall in a designated area where an important event is scheduled to take place. Cloud seeding is a common technique to enhance precipitation; it entails spraying small particles such as dry ice and silver iodide into the sky in order to trigger cloud formation for eventual rainfall. Evidence of safety is widely believed to be strong, but doubts remain as to its efficacy. The Governing Council of the United Nations Environment Programme approved a set of recommendations for consideration by States and other weather modification operators in 1980.[248] If large-scale weather control were to become feasible in the future, there could be some harmful consequences. Potential negative implications may include unintended side effects, damage to existing ecosystems and health risks to humans. Those effects, if transboundary in nature, could generate international concern for their injurious consequences.[249] It is suggested that progressive development of international law in that particular area should be pursued.[250]

86. Geoengineering is commonly understood as the "intentional large-scale manipulation of the global environment".[251] In the context of climate change, geoengineering refers to "a broad set of methods and technologies that aim to deliberately alter the climate system in order to alleviate the impacts of climate change".[252] To combat global warming, reducing the emission of greenhouse gases is the primary solution.[253] However, in view of the fact that reducing greenhouse gas emission has not been fully achieved,[254] extracting existing greenhouse gases, especially carbon dioxide, is considered to be an alternative solution.[255] Afforestation is a traditional measure to reduce carbon dioxide and has been incorporated in the Kyoto Protocol regime as a valuable climate change mitigation measure.[256] That measure has been recognized in the decisions adopted at various sessions of the Conference of the Parties to the United Nations Framework Convention on Climate Change: in Copenhagen in 2009[257] and

[247] The General Assembly, in resolution 1721 (XVI) C of 20 December 1961 on international co-operation in the peaceful uses of outer space (1961), paragraph 1 (*a*), advised Member States and other relevant organizations: "To advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate and the possibility of large-scale weather modification".

[248] Decision 8/7/A of the Governing Council on provisions for co-operation between States in weather modification, eighth session, 29 April 1980, UNEP, *Report of the Governing Council on the work of its eighth session, 16–29 April 1980, Official Records of the General Assembly, Thirty-fifth Session*, Supplement No. 25 (A/35/25), annex I, p. 117. It may be noted that, as early as 1963, WMO had called for a prudent approach to weather modification technologies, stating as follows: "[T]he complexity of the atmospheric processes is such that a change in the weather induced artificially in one part of the world will necessarily have repercussions elsewhere. This principle can be affirmed on the basis of present knowledge of the mechanism of the general circulation of the atmosphere. However, that knowledge is still far from sufficient to enable us to forecast with confidence the degree, nature or duration of the secondary effects to which change in weather or climate in one part of the earth may give rise elsewhere, nor even in fact to predict whether these effects will be beneficial or detrimental. Before undertaking an experiment on large-scale weather modification, the possible and desirable consequences must be carefully evaluated, and satisfactory international agreement must be reached." WMO, *Second Report on the Advancement of Atmospheric Sciences and Their Application in the Light of Developments in Outer Space*, para. 31. See Taubenfeld and Taubenfeld, "Some international implications of weather modification activities", p. 811.

[249] Roslycky, "Weather modification operations with transboundary effects"; Sand, "Internationaler Umweltschutz und neue Rechtsfragen der Atmosphärennutzung". See also Taubenfeld, "International environmental law", p. 195; Brown Weiss, "International responses to weather modification", p. 813.

[250] It has been suggested that the following points should be considered in the regulation of weather modification: the duty to benefit the common good of mankind; the duty not to cause significant transboundary harm; the duty to perform environmental impact assessments; public participation; the duty to co-operate; exchange of information and notification; consultation; the duty to utilize international organizations; and State responsibility; Roslycky, "Weather modification operations with transboundary effects", pp. 27–40. See also Davis, "Atmospheric water resources development and international law", p. 17.

[251] Keith, "Geoengineering", p. 495.

[252] Intergovernmental Panel on Climate Change, IPCC Expert Meeting on Geoengineering, Lima, Peru, 20–22 June 2011, Meeting report, p. 2. See also generally the Oxford Geoengineering Programme, "What is geoengineering?", available from www.geoengineering.ox.ac.uk; Parson, "Climate engineering"; Reynolds, "The international legal framework for climate engineering"; Hamilton, *Earthmasters: The Dawn of the Age of Climate Engineering*.

[253] United States, Environmental Protection Agency, "Greenhouse gas (GHG) emissions and removals", available from www.epa.gov/ghgemissions; Shepherd *et al*., *Geoengineering the Climate*.

[254] Shepherd, *et al*., *Geoengineering the Climate*, p. 1.

[255] Urpelainen, "Geoengineering and global warming".

[256] Canadell and Raupach, "Managing forests for climate change mitigation"; Ornstein, Aleinov and Rind, "Irrigated afforestation of the Sahara and Australian outback to end global warming", pp. 409–410; Richards and Stokes, "A review of forest carbon sequestration cost studies", pp. 24–25.

[257] Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009*, Addendum, *Part Two: Action taken by the Conference of the Parties at its fifteenth session* (FCCC/CP/2009/11/Add.1), p. 11, decision 4/CP.15.

Cancun, Mexico, in 2010[258] and in article 5, paragraph 2, of the Paris Agreement. New incentives were created to reduce emissions from deforestation and forest degradation in developing countries.[259]

87. Generally, global warming reduction-oriented geoengineering can be divided into two categories: carbon dioxide removal and solar radiation management.[260] The carbon dioxide removal techniques are designed to remove carbon dioxide from the atmosphere, directly countering the increased greenhouse effect and ocean acidification.[261] Those techniques would probably need to be implemented on a global scale to have a significant impact on carbon dioxide levels in the atmosphere. The proposed techniques include: (*a*) "soil-carbon sequestration", also known as "biochar", which is to char biomass and bury it so that its carbon is locked up in the soil,[262] which, however, was not endorsed in the Kyoto Protocol;[263] and (*b*) "carbon capture and storage", referring to a set of technologies to capture carbon dioxide emissions from large-point sources, such as coal-fired power plants,[264] with the captured carbon dioxide to be stored in geological reservoirs or in the oceans.[265] (The long-term advantage of carbon capture and storage is that the sequestration costs can be partially offset by revenues from oil and gas production,[266] while its disadvantage is also recognized—since the carbon dioxide stored underground may escape, it could cause explosions.)[267] Under some international legal instruments, measures have recently been adopted for regulating carbon capture and storage. For example, the 1996 Protocol to the London Convention now includes an amended provision and annex, as well as new guidelines for controlling the dumping of wastes and other matter. Those amendments created a legal basis in international environmental law for regulating carbon capture and storage in sub-seabed geological formations for permanent isolation.[268] In accordance with those regulations, carbon dioxide sequestration and export to other States is conditionally allowed for the purposes of sub-seabed storage.[269]

88. Marine geoengineering, as "a deliberate intervention in the marine environment to manipulate natural processes", may be a useful technology for absorption of carbon dioxide, but may also result in deleterious effects.[270] There are several types of marine geoengineering.[271] The following two types of activities, namely "ocean iron fertilization" and "ocean alkalinity enhancement" are related to ocean dumping, and therefore to the London Convention and the 1996 Protocol thereto. In 2008, the parties adopted a resolution stating that ocean fertilization activities, apart from legitimate scientific research, should not be allowed and urging States to use the "utmost caution and the best available guidance" even for scientific research.[272] Furthermore, in 2008, the Conference of the Parties to the Convention on Biological Diversity urged States to ensure that ocean fertilization activities would not take place until there was an adequate scientific basis on which to justify such activities and a "global, transparent and effective control and regulatory mechanism is in place for these activities".[273] Another form of marine geoengineering is "ocean alkalinity enhancement", which involves grinding up, dispersing, and dissolving rocks such as limestone, silicates, or calcium hydroxide in the ocean to increase its ability to store carbon and directly ameliorate ocean acidification.[274] The objective is to sequester carbon dioxide from the atmosphere by increasing the alkalinity (and the pH) of the oceans.[275] It is geochemically equivalent to the natural weathering of rocks, which helps to buffer the ocean against decreasing pH and is thereby considered to help to counter ocean acidification.[276] That may pose legal problems similar to those of ocean fertilization, but has not yet been addressed by competent international bodies.

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[258] Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010*, Addendum, *Part Two: Action taken by the Conference of the Parties at its sixteenth session*, (FCCC/CP/2010/7/Add.1), p. 2, decision 1/CP.16.

[259] *Ibid.*

[260] Flannery *et al*., "Geoengineering climate", p. 381; Blackstock and Long, "The politics of geoengineering".

[261] Oxford Geoengineering Programme, "What is geoengineering?" (see footnote 252 above).

[262] *Ibid.*

[263] Scott, "International law in the anthropocene", p. 322.

[264] Stephens, "Carbon capture and storage".

[265] *Ibid.*

[266] *Ibid.*

[267] Metz *et al*., *Carbon Dioxide Capture and Storage*, p. 259. (For example, the explosions in 2001 in Hutchinson, Kansas, United States, when compressed natural gas escaped from salt cavern storage facilities: *ibid.*).

[268] These regulations include: 2012 Specific Guidelines for the Assessment of Carbon Dioxide for Disposal into Sub-seabed Geological Formations, adopted 2 November 2012 (LC 34/15, annex 8); Risk Assessment and Management Framework for CO_2 Sequestration in Sub-Seabed Geological Structures (CS-SSGS) (LC/SG-CO2 1/7, annex 3); Resolution LP 3(4) on the Amendment to article 6 of the London Protocol (adopted on 30 October 2009); Resolution LP 1(1) on the amendment to include CO_2 sequestration in sub-seabed geological formations in Annex 1 to the London Protocol. See www.imo.org for more information.

[269] Specific guidelines for the assessment of carbon dioxide streams for disposal into sub-seabed geological formations", art. 6 (IMO, Report of the twenty-ninth consultative meeting and the second meeting of Contracting Parties, 14 December 2007, LC 29/17, annex 4).

[270] Amendment to article 1 of the London Protocol, new para. 5 *bis*, resolution LP.4(8) on the amendment to the London Protocol to regulate the placement of matter for ocean fertilization and other marine geoengineering activities, adopted on 18 October 2013 (IMO, Report of the thirty-fifth consultative meeting and the eighth meeting of contracting parties, 14–18 October 2013, LC 35/15, annex 4).

[271] C. M. G. Vivian, "Brief summary of marine geoengineering techniques", leaflet issued by Centre for Environment, Fisheries and Aquaculture Science [Cefas], January 2013.

[272] IMO, Report of the thirtieth consultative meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and the third meeting of Contracting Parties to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, 27–31 October 2008 (LC 30/16), annex 6, resolution LC-LP.1 (2008) on the regulation of ocean fertilization.

[273] UNEP, Report of the Conference of the Parties to the Convention on Biological Diversity on the work of its ninth meeting, Bonn, 19–30 May 2008 (UNEP/CBD/COP/9/29), annex I, p. 149, decision IX/16 on biodiversity and climate change, part C, para. 4. An exception was made for small-scale research activities within "coastal waters" for scientific purposes, without generation or selling carbon offsets or for any other commercial purposes. Okuwaki, "The London Dumping Convention and ocean fertilization experiments".

[274] Oxford Geoengineering Programme, "What is geoengineering?" (see footnote 252 above).

[275] Kheshgi, "Sequestering atmospheric carbon dioxide by increasing ocean alkalinity".

[276] *Ibid.*

89. Solar radiation management is another form of geoengineering. The techniques are designed to mitigate the negative impacts of climate change by lowering earth surface temperatures through increasing the albedo of the planet or by deflecting solar radiation.[277] It has been estimated that a deflection of approximately 1.8 per cent of solar radiation would offset the global mean temperature effects of a doubling of atmospheric concentrations of carbon dioxide.[278] There are several proposals in this area, such as "albedo enhancement" and "stratospheric aerosols". The former is a method for increasing the reflectiveness of clouds or the land surface, so that more of the heat of the sun is reflected back into space. That measure is thought by many to be risk-free, because it does not change the composition of the atmosphere. It only involves the utilization of white or reflective materials in urban environments to reflect greater amounts of solar radiation and therefore to cool global temperatures.[279] However, its effectiveness as a mitigation measure is not thought to be entirely satisfactory.[280] The stratospheric aerosols method is to introduce small, reflective particles into the upper atmosphere to reflect some sunlight before it reaches the surface of the Earth. However, there are some concerns over the injection of sulphate aerosols into the stratosphere. First, it is likely to increase the depletion of the ozone layer.[281] Second, it also has the potential to affect rainfall and monsoon patterns, with consequences for food and water supplies, especially in Africa and Asia.[282] Third, the option is not considered to be cost effective as a climate change mitigation measure.[283]

90. Thus, while geoengineering is a potential response to climate change, it has also been criticized as a rather deceptively alluring reaction to global warming issues, because it will reduce the incentive to cut greenhouse gas emissions.[284] It is in part a consequence of the perceived challenges of the climate change regime and the current policies of focusing on emissions reductions that has led to geoengineering becoming more attractive.[285] Given the imperfect knowledge of both the technologies and the climatic system, there are concerns about unintended environmental and ecosystem side effects. Some experts argue that, while geoengineering should remain on the table, it is important to begin developing international norms and legal rules to govern its usage in the future.[286] It has also been argued that there should be a thorough scientific review of geoengineering by a competent organ, such as the Intergovernmental Panel on Climate Change, which may lead to the formation of a new international agreement to govern geoengineering.[287] As a new law-making exercise, that is certainly beyond the task of the Commission. However, among the examples of geoengineering cited above, afforestation is well established within the Kyoto Protocol and weather modification is partially regulated by international law (the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques), and supplemented by the relevant General Assembly resolutions and United Nations Environment Programme guidelines. Ocean fertilization, as a form of marine geoengineering, is in part under the control of the London Convention and the 1996 Protocol thereto, and is permitted only for scientific research. In 2010, the parties to the Convention on Biological Diversity also addressed all geoengineering activities. It was decided, in line with the above-mentioned decision on ocean fertilization, that

> no climate-related geo-engineering activities that may affect biodiversity take place, until there is an adequate scientific basis on which to justify such activities and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impacts, with the exception of small scale scientific research studies that would be conducted in a controlled setting … and only if they are justified by the need to gather specific scientific data and are subject to a thorough prior assessment of the potential impacts on the environment.[288]

In addition, there are several notable non-binding guidelines proposed in the field: the recommendations of the Asilomar Conference on Climate Intervention convened by the United States Climate Institute in 2010;[289] the voluntary standards formulated in 2011 by the United States Bipartisan Policy Center's Task Force on Climate Remediation Research[290] and the Oxford Principles on Climate Geoengineering Governance, elaborated by British academics in 2013.[291] Thus, it is clear that conducting geoengineering

[277] Scott, "International law in the anthropocene", p. 326.

[278] Caldeira and Wood, "Global and Arctic climate engineering: numerical model studies", p. 4040.

[279] Akbari, Menon and Rosenfeld, "Global cooling: increasing world-wide urban albedos to offset CO_2", p. 277; Hamwey, "Active amplification of the terrestrial albedo to mitigate climate change", pp. 419–421.

[280] Shepherd *et al*., *Geoengineering the Climate*, p. 34.

[281] Tilmes, Müller and Salawitch, "The sensitivity of polar ozone depletion to proposed geoengineering schemes"; Crutzen, "Albedo enhancement by stratospheric sulfur injections".

[282] Robock, Oman and Stenchikov, "Regional climate responses to geoengineering with tropical and Arctic SO_2 injections", p. 1.

[283] Goes, Tuana and Keller, "The economics (or lack thereof) of aerosol geoengineering", p. 720.

[284] Richard Black, "UK climate fix balloon grounded", BBC News, 16 May 2012; Urpelainen, "Geoengineering and global warming".

[285] Scott, "International law in the anthropocene", p. 320.

[286] Urpelainen, "Geoengineering and global warming", p. 378.

[287] *Ibid.* See also Barrett, "The incredible economics of geoengineering", p. 53.

[288] UNEP, Report of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity, Tenth meeting, Nagoya, Japan, 18–29 October 2010 (UNEP/CBD/COP/10/27), annex, p. 259, decision X/33, para. 8 (*w*).

[289] The recommendations on principles for research into climate engineering techniques of the Asilomar International Conference on Climate Intervention, held in Pacific Grove, California, from 22 to 26 March 2010, are: (*a*) promoting collective benefit; (*b*) establishing responsibility and liability; (*c*) open and cooperative research; (*d*) iterative evaluation and assessment; (*e*) public investment and consent. See http://climate.org/archive/resources/climate-archives/conferences/asilomar/report.html.

[290] The Bipartisan Policy Center's Task Force on Climate Remediation Research elaborated the following principles: Principle 1: Purpose of climate remediation research; Principle 2: Testing and deploying climate remediation technologies; Principle 3: Oversight issues for research programmes; Principle 4: Importance of transparency; Principle 5: International coordination; Principle 6: Adaptive management. Bipartisan Policy Center's Task Force on Climate Remediation Research, "Geoengineering: A national strategic plan for research on the potential effectiveness, feasibility, and consequences of climate remediation technologies", pp. 13–14.

[291] The principles are as follows: 1. Geo-engineering to be regulated as a public good; 2. Public participation in geo-engineering decision-making; 3. Disclosure of geo-engineering research and open publication of results; 4. Independent assessment of impacts; 5. Governance before deployment (the five principles have equal status; numbering does not imply priority). See Rayner *et al*., "The Oxford principles". See also Armani, "Global experimentalist governance, international law and climate change technologies".

will require "prudence and caution" (to use the words of the orders of the International Tribunal for the Law of the Sea[292]), even where such an activity is permitted, and that, in any event, prior assessment of geoengineering activities should be made on a case-bycase basis in respect of each individual project. It is clearly a requirement of international law that environmental impact assessments are required for such activities as discussed at length earlier in the present report (paras. 41–60 above).

91. In view of the above, the following draft guideline is proposed:

"*Draft guideline 7. Geoengineering*

"Geoengineering activities intended to modify atmospheric conditions should be conducted with prudence and caution in a fully disclosed, transparent manner and in accordance with existing international law. Environmental impact assessments are required for such activities."

[292] See the orders of the International Tribunal for the Law of the Sea on the provisional measures in the 1999 case of *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (para. 77), in the 2001 case of the *Mox Plant (Ireland v. United Kingdom)* ((para. 84) and in the 2003 *Case concerning Land Reclamation by Singapore in and around the Strait of Johor (Malaysia v. Singapore)* (para. 99) (see footnote 121 above).

Chapter III

Conclusion

92. Having covered core substantive guidelines on the subject (namely, the obligations of States to protect the atmosphere and sustainable and equitable utilization of the atmosphere) in the present third report, the Special Rapporteur wishes to suggest that the Commission deal in 2017 with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law), and in 2018 with the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere, by which time hopefully the first reading of the topic could be concluded that year, and the second reading in 2019.

Annex

Draft guidelines proposed by the Special Rapporteur

Preamble

…

Emphasizing the need to take into account the special situations of developing countries,

[Some other paragraphs may be added, and the order of paragraphs may be coordinated, at a later stage.]

Guideline 3. Obligation of States to protect the atmosphere

States have the obligation to protect the atmosphere from atmospheric pollution and atmospheric degradation.

(*a*) Appropriate measures of due diligence shall be taken to prevent atmospheric pollution in accordance with the relevant rules of international law.

(*b*) Appropriate measures shall be taken to minimize the risk of atmospheric degradation in accordance with relevant conventions.

Guideline 4. Environmental impact assessment

States have the obligation to take all such measures that are necessary to ensure an appropriate environmental impact assessment, in order to prevent, reduce and control the causes and impacts of atmospheric pollution and atmospheric degradation from proposed activities. Environmental impact assessment should be conducted in a transparent manner, with broad public participation.

Guideline 5. Sustainable utilization of the atmosphere

1. Given the finite nature of the atmosphere, its utilization should be undertaken in a sustainable manner.

2. For sustainable utilization of the atmosphere, it is required under international law to ensure a proper balance between economic development and environmental protection.

Guideline 6. Equitable utilization of the atmosphere

States should utilize the atmosphere on the basis of the principle of equity and for the benefit of present and future generations of humankind.

Guideline 7. Geoengineering

Geoengineering activities should be conducted with caution and prudence in a fully disclosed, transparent manner and in accordance with existing international law. Environmental impact assessments are required for such activities.

Guideline 8 [5]. International cooperation

Draft guideline 8 would be draft guideline 5, as provisionally adopted by the Commission in 2015.Ulluptate

CRIMES AGAINST HUMANITY

[Agenda item 9]

DOCUMENT A/CN.4/690

Second report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur*

[*Original: English*]
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Multilateral instruments cited in the present report

	Source
International Convention for the Suppression of Counterfeiting Currency (Geneva, 20 April 1929)	League of Nations, *Treaty Series*, vol. CXII, No. 623, p. 112.
Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (Geneva, 26 June 1936)	*Ibid.*, vol. CXCVIII, No. 4648, p. 299.
Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)	League of Nations, *Official Journal*, vol. 19, No. 1 (January 1938), p. 23, document C.546.M.383.1937.V.
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal ("Nürnberg Charter") (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, p. 31.
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)	*Ibid.*, No. 970, pp. 31 *et seq.*
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, pp. 85 *et seq.*
Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949)	*Ibid.*, No. 972, pp. 135 *et seq.*
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid.*, No. 973, pp. 287 *et seq.*
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.
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (opened for signature, Lake Success, New York, 21 March 1950)	*Ibid.*, vol. 96, No. 1342, p. 271.
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.
European Convention on Extradition (Paris, 13 December 1957)	*Ibid.*, vol. 359, No. 5146, p. 273.
Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961)	*Ibid.*, vol. 520, No. 7515, p. 151.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.

	Source
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (New York, 26 November 1968)	*Ibid.*, vol. 754, No. 10823, p. 73.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	*Ibid.*, vol. 860, No. 12325, p. 105.
Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing, 10 September 2010)	International Civil Aviation Organization, *Final Act of the International Conference on Air Law (Diplomatic Conference on Aviation Security) held under the auspices of the International Civil Aviation Organization at Beijing from 30 August to 10 September 2010*, Beijing, 2010.
Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971)	United Nations, *Treaty Series*, vol. 1438, No. 24381, p. 194.
Convention on Psychotropic Substances (Vienna, 21 February 1971)	*Ibid.*, vol. 1019, No. 14956, p. 175.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	*Ibid.*, vol. 974, No. 14118, p. 177.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February 1988)	*Ibid.*, vol. 1589, No. 14118, p. 474.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	*Ibid.*, vol. 1015, No. 14861, p. 243.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	*Ibid.*, vol. 1035, No. 15410, p. 167.
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974)	*Ibid.*, vol. 2245, No. 39987, p. 307.
European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977)	*Ibid.*, vol. 1137, No. 17828, p. 93.
Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977)	*Ibid.*, vol. 1490, No. 25573, p. 89.
Convention on the Physical Protection of Nuclear Material (Vienna, 26 October 1979)	*Ibid.*, vol. 1456, No. 24631, p. 101.
International Convention against the Taking of Hostages (New York, 17 December 1979)	*Ibid.*, vol. 1316, No. 21931, p. 205.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid.*, vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 9 December 1985)	OAS, *Treaty Series*, No. 67.
SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987)	Available from https://saarc-sec.org, *Resources, Agreements & Conventions.*
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)	United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 221.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	*Ibid.*, vol. 1582, No. 27627, p. 95.
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.
Convention on the Rights of the Child (New York, 20 November 1989)	*Ibid.*, vol. 1577, No. 27531, p. 3.
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000)	*Ibid.*, vol. 2171, No. 27531, p. 227.
International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	*Ibid.*, vol. 2163, No. 37789, p. 75.
Inter-American Convention on International Traffic in Minors (Mexico City, 18 March 1994)	OAS, *Treaty Series*, No. 57.

	Source
Inter-American Convention on the Forced Disappearance of Persons (Belém, 9 June 1994)	*Ibid.*, No. 60.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	Document E/1996/99.
Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests (Luxembourg, 19 July 1997)	*Official Journal of the European Communities*, No. C 221 of 19 July 1997, annex, p. 12.
Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other related materials (Washington, D.C., 14 November 1997)	United Nations, *Treaty Series*, vol. 2029, No. 35005, p. 55.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	*Ibid.*, vol. 2149, No. 37517, p. 256.
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (with annex) (Paris, 17 December 1997)	*Ibid.*, vol. 2802, No. 49274, p. 225.
Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998)	Available from www.unodc.org/images /tldb-f/conv_arab_terrorism.en.pdf.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	*Ibid.*, vol. 2216, No. 39391, p. 225.
Convention of the Organization of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999)	*International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication (Sales No. E.08.V.2), p. 204.
OAU Convention on the Prevention and Combating of Terrorism, 1999 (Algiers, 14 July 1999)	United Nations, *Treaty Series*, vol. 2219, No. 39464, p. 179.
Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999)	*Ibid.*, vol. 2253, No. 3511, p. 172.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	*Ibid.*, vol. 2178, No. 38349, p. 197
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2225, No. 39574, p. 209.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing The United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2488, No. 44655, p. 129.
Charter of Fundamental Rights of the European Union (Nice, 7 December 2000)	*Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1.
Convention on Cybercrime (Budapest, 23 November 2001)	United Nations, *Treaty Series*, vol. 2296, No. 40916, p. 167.
African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003)	ILM, vol. 43, No. 1 (January 2004), p. 5.
United Nations Convention against Corruption (New York, 31 October 2003)	United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.
International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005)	*Ibid.*, vol. 2445, No. 44004, p. 89.
Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)	*Ibid.*, vol. 2488, No. 44655, p. 129.
Council of Europe Convention on Action Against Trafficking in Human Beings (Warsaw, 16 May 2005)	*Ibid.*, vol. 2569, No. 45795, p. 33.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	*Ibid.*, vol. 2716, No. 48088, p. 3.
ASEAN Convention on Counter Terrorism (Cebu, 13 January 2007)	Available from https://asean.org.
Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011)	Council of Europe, *European Treaty Series*, No. 210.
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014)	Available from the website of the African Union: www.au.int/en/treaties.

Works cited in the present report

Akhavan, Payam

"The universal repression of crimes against humanity before national jurisdictions: the need for a treaty-based obligation to prosecute", *in* Leila Nadya Sadat, ed., *Forging a Convention for Crimes Against Humanity*, Cambridge, Cambridge University Press, 2011, pp. 28–42.

Amann, Diane Marie

"Capital punishment: corporate criminal liability for gross violations human rights", *Hastings International and Comparative Law Review*, vol. 24, No. 3 (Spring 2001), pp. 327–337.

Ambos, Kai

Treatise on International Criminal Law, vol. I: *Foundations and General Part*, Oxford, Oxford University Press, 2013.

"Article 25: individual criminal responsibility", *in* Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2d ed., Munich, C. H. Beck, 2008, pp. 743–770.

Amnesty International

Fair Trial Manual, 2nd ed., 2014, London, Amnesty International Publications, available from www.amnesty.org/en/documents/POL30/002/2014/en/.

Bair, Johann

The International Covenant on Civil and Political Rights and its (First) Optional Protocol: A Short Commentary Based on Views, General Comments, and Concluding Observations by the Human Rights Committee, Frankfurt, Peter Lang, 2005.

Bantekas, Ilias

International Criminal Law. Oxford, Hart Publishing, 2010.

"The contemporary law of superior responsibility," AJIL, vol. 93, No. 3 (1999), pp. 573–595.

Bassiouni, M. Cherif, ed.

International Criminal Law: International Enforcement, vol. III, 3rd ed. Leiden, Martinus Nijhoff, 2008.

Bassiouni, M. Cherif, and Edward M. Wise

Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law. Dordrecht, Martinus Nijhoff, 1995.

Bergsmo, Morten, Mads Harlem, and Nobuo Hayashi, eds.

Importing Core International Crimes into National Law, 2nd ed. Oslo, Torkel Opsahl Academic EPublisher, 2010.

Bossuyt, Marc J.

Guide to the "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*. Dordrecht, Martinus Nijhoff, 1987, 851 p.

Brickey, Kathleen F.

"Corporate criminal accountability: a brief history and an observation," *Washington University Law Review*, vol. 60, No. 2 (1982), pp. 393–423.

Brown, Bartram S.

"International criminal law: nature, origins and a few key issues," *in* Bartram S. Brown, ed., *Research Handbook on International Criminal Law*, Cheltenham, Edward Elgar Publishing, 2011, pp. 3–16.

Brownlie, Ian

Principles of Public International Law, 7th ed. Oxford, Oxford University Press, 2008.

Burgers, J. Herman, and Hans Danelius

The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Dordrecht, Martinus Nijhoff, 1988.

Bush, Jonathan A.

"The prehistory of corporations and conspiracy in international criminal law: what Nuremberg really said", *Columbia Law Review*, vol. 1095 (2009), pp. 1094–1262.

Cassese, Antonio

International Law, 2nd ed. Oxford, Oxford University Press, 2005.

Cassese, Antonio *et al.*

International Criminal Law: Cases and Commentary. Oxford, Oxford University Press, 2011.

Clapham, Andrew

Brierly's Law of Nations: an Introduction to the Role of International Law in International Relations, 7th ed. Oxford, Oxford University Press, 2012.

"Extending international criminal law beyond the individual to corporations and armed opposition groups", *Journal of International Criminal Justice*, vol. 6 (2008), pp. 899–926.

Costello, Declan

"International terrorism and the development of the principle *aut dedere aut judicare*", *The Journal of International Law and Economics*, vol. 10, Nos. 2–3 (August–December 1975), pp. 483–501.

Couturier, Gérard

"Répartition des responsabilités entre personnes morales et personnes physiques", *Revue des sociétés*, vol. 111 (April 1993), pp. 307–314.

Crawford, James

Brownlie's Principles of Public International Law, 8th ed. Oxford, Oxford University Press, 2012.

Cryer, Robert

"International criminal law", *in* Malcolm David Evans, ed., *International Law*, 4th ed. Oxford, Oxford University Press, 2014, pp. 752–782.

Cryer, Robert *et al.*

An Introduction to International Criminal Law and Procedure, 3rd ed. Cambridge, Cambridge University Press, 2014.

Damaška, Mirjan

"The shadow side of command responsibility," *The American Journal of Comparative Law*, vol. 49, No. 3 (Summer 2001), pp. 455–496.

D'Amato, Anthony

"National prosecution for international crimes" *in* M. Cherif Bassiouni, ed., *International Criminal Law: International Enforcement*, vol. III, 3rd ed., Leiden, Martinus Nijhoff, 2008, pp. 285–295.

de Doelder, Hans, and Klaus Tiedemann, eds.

Criminal Liability of Corporations/La criminalisation du comportement collectif. The Hague, Kluwer Law International, 1996.

Doswald-Beck, Louise

"Fair trial, right to, international protection", *Max Planck Encyclopedia of Public International Law*, vol. III, Oxford, Oxford University Press, 2013, pp. 1104–1112.

Dupuy, Pierre-Marie, and Yann Kerbrat

Droit International Public, 12th ed., Dalloz, 2012.

Eser, Albin *et al.*, eds.

National Prosecution of International Crimes, 6 vols. Freiburg, Max Planck Institute, 2003–2006.

Ferstman, Carla J.

"Domestic trials for genocide and crimes against humanity: the example of Rwanda", *African Journal of International and Comparative Law*, vol. 9 (1997), pp. 857–877.

Finnin, Sarah

Elements of Accessorial Modes of Liability: Article 25 (3) (b) and (c) of the Rome Statute of the International Criminal Court. Leiden, Martinus Nijhoff, 2012.

Fisse, Brent, and John Braithwaite

Corporations, Crime and Accountability. Cambridge, Cambridge University Press, 1993.

Gaeta, Paola

"The defence of superior orders: the Statute of the International Criminal Court versus customary international law", EJIL, vol. 10 (1999), pp. 172–191.

García Falconí, Ramiro

"The codification of crimes against humanity in the domestic legislation of Latin American States", *International Criminal Law Review*, vol. 10 (2010), pp. 453–459.

Gobert, James, and Ana-Maria Pascal, eds.

European Developments in Corporate Criminal Liability. London, Routledge, 2011.

Guillaume, Gilbert

"Terrorisme et droit international", *Collected Courses of the Hague Academy of International Law* (1989-III), vol. 215, Dordrecht, Martinus Nijhoff, 1990, pp. 290–371.

Harvard Law Review Association

"Developments in the law-international criminal law: V. Corporate liability for violations of international human rights law," *Harvard Law Review*, vol. 114, No. 7 (May 2001), pp. 2025–2048.

Hasnas, John

"The centenary of a mistake: one hundred years of corporate criminal liability", *American Criminal Law Review*, vol. 46 (2009), pp. 1329–1358.

Heller, Kevin Jon

The Nuremberg Military Tribunals and the Origins of International Criminal Law. Oxford, Oxford University Press, 2011.

Hood, Roger, and Carolyn Hoyle

The Death Penalty: A Worldwide Perspective, 5th ed. Oxford, Oxford University Press, 2015.

Ingelse, Chris

The UN Committee against Torture: An Assessment. The Hague, Kluwer Law International, 2001.

International Commission of Jurists

Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations, vol. 1 (2004), available from www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf.

International Human Rights Clinic, the George Washington University Law School

Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction, 2013, 128 p., updated and reprinted in part *in* A. J. Carrillo and A. K. Nelson, "Comparative law study and analysis of national legislation relating to crimes against humanity and extraterritorial jurisdiction", *The George Washington International Law Review*, vol. 46 (2014), pp. 481–530.

International Military Tribunal

"Judicial decisions: International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, Judgment", AJIL, vol. 41 (1947), pp. 172–333.

Ireland-Piper, Danielle

"Prosecutions of extraterritorial criminal conduct and the abuse of rights doctrine", *Utrecht Law Review*, vol. 9, No. 4 (September 2013), pp. 68–89.

Jain, Neha

Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes. Oxford, Hart Publishing, 2014.

Jennings Robert, and Arthur Watts, eds.

Oppenheim's International Law, vol. I: Peace, 9th ed. Oxford, Oxford University Press, 1992.

Kelly, Michael J.

"Grafting the command responsibility doctrine onto corporate criminal liability for atrocities", *Emory International Law Review*, vol. 24, No. 2 (2010), pp. 671–696.

Kok, Ruth A.

Statutory Limitations in International Criminal Law. The Hague, T.M.C. Asser Press, 2007.

Kyriakakis, Joanna

"Prosecuting corporations for international crimes: the role for domestic criminal law," *in* Larry May and Zachary Hoskins, eds., *International Criminal Law and Philosophy*, Cambridge, Cambridge University Press, 2010, pp. 108–137.

"Corporate criminal liability and the ICC Statute: the comparative law challenge", *Netherlands International Law Review*, vol. 56, No. 3 (2009), pp. 333–366.

Lael, Richard L.

The Yamashita Precedent: War Crimes and Command Responsibility. Lanham, Maryland, Rowman and Littlefield, 1982.

Lambert, Joseph J.

Terrorism and Hostages in International Law: a Commentary on the Hostages Convention 1979. Cambridge, Grotius, 1990.

Law Library of Congress

Crimes against Humanity Statutes and Criminal Code Provisions in Selected Countries, 2010, available from www.loc.gov/law/help/crimes-against-humanity/index.php.

Lehtimaja, Lauri, and Matti Pellonpää

"Article 10", *in* Asbjorn Eide, *et al.*, eds., *The Universal Declaration of Human Rights: A Commentary*. Oslo, Scandinavian University Press, 1992, pp. 159–174.

Macedo, Stephen, ed.

Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law. Philadelphia, University of Pennsylvania Press, 2004.

McClean, David

Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols. Oxford, Oxford University Press, 2007.

Mitchell, Claire

Aut Dedere, aut Judicare: *The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, 2009, available from https://books.openedition.org/iheid/301#tocto2n4.

Naqvi, Yasmin Q.

Impediments to Exercising Jurisdiction over International Crimes. The Hague, T.M.C. Asser Press, 2010.

Nowak, Manfred

"Dignity and physical integrity: legal controversies relating to torture", *in* Rikke Franck Jørgensen and Klaus Slavensky, eds., *Implementing Human Rights: Essays in Honour of Morten Kjaerum*, Danish Institute for Human Rights, 2007, pp. 233–256.

Nowak, Manfred, and Elizabeth McArthur

The United Nations Convention against Torture: A Commentary. Oxford, Oxford University Press, 2008.

ODENDAHL, Kerstin

"Article 28. Non-retroactivity of treaties", *in* Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: a Commentary*, Berlin, Springer, 2012, pp. 477–487.

OHLIN, Jens David

"Three conceptual problems with the doctrine of joint criminal enterprise", *Journal of International Criminal Justice*, vol. 5, No. 1 (March 2007), pp. 69–90.

O'KEEFE, Roger

International Criminal Law. Oxford, Oxford University Press, 2015.

PICTET, Jean, ed.

Commentary on the Geneva Conventions of 12 August 1949, vol. I: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, ICRC, 1952.

PIETH, Mark, and Radha IVORY, eds.

Corporate Criminal Liability: Emergence, Convergence, and Risk. Dordrecht, Springer, 2011.

RAMASASTRY, Anita, and Robert C. THOMPSON

Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries. Oslo, Fafo, 2006, executive summary available from www.fafoarkiv.no/pub/rapp/536/536.pdf.

REYDAMS, Luc

Universal Jurisdiction: International and Municipal Legal Perspectives. Oxford, Oxford University Press, 2003.

RONEN, Yaël

"Superior responsibility of civilians for international crimes committed in civilian settings", *Vanderbilt Journal of Transnational Law*, vol. 43 (2010), pp. 313–356.

SAUL, Ben

"The implementation of the Genocide Convention at the national level", *in* Paola Gaeta, ed., *The UN Genocide Convention: a Commentary*, Oxford, Oxford University Press, 2009, pp. 58–83.

SCHABAS, William A.

The International Criminal Court: A Commentary on the Rome Statute. Oxford, Oxford University Press, 2010.

Genocide in International Law: The Crime of Crimes, 2nd ed. Cambridge, Cambridge University Press, 2009.

"Article 29", *in* Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, pp. 523–526.

"Article 67", in *ibid*., pp. 845–868.

SCHWARZENBERGER, Georg

International Law, vol. I: *International Law as Applied by International Courts and Tribunals*, 3rd ed. London, Stevens and Sons Ltd., 1957.

SCOVAZZI, Tullio, and Gabriella CITRONI

The Struggle Against Enforced Disappearance and the 2007 United Nations Convention. Leiden, Martinus Nijhoff, 2007.

SEN, B.

A Diplomat's Handbook of International Law and Practice, 3rd rev. ed. Dordrecht, Martinus Nijhoff, 1988.

SEPINWALL, Amy J.

"Failures to punish: command responsibility in domestic and international law", *Michigan Journal of International Law*, vol. 30 (2009), pp. 251–303.

SHAW, Malcolm N.

International Law, 7th ed. Cambridge, Cambridge University Press, 2014.

STAKER, Christopher

"Jurisdiction", *in* Malcolm D. Evans, ed., *International Law*, 4th ed., Oxford, Oxford University Press, 2014, pp. 309–335.

STEWART, James G.

"The turn to corporate criminal liability for international crimes: transcending the Alien Tort Statute", *New York University Journal of International Law and Politics*, vol. 47, No. 1 (2014), pp. 121–206.

"A pragmatic critique of corporate criminal theory: lessons from the extremity", *New Criminal Law Review*, vol. 16, No. 2 (2013), pp. 261–299.

"The end of 'modes of liability' for international crimes", *Leiden Journal of International Law*, vol. 25 (2012), pp. 165–219.

STOITCHKOVA, Desislava

Towards Corporate Liability in International Criminal Law. Antwerp, Intersentia, 2010.

THALMANN, Vanessa

"National criminal jurisdiction over genocide", *in* Paola Gaeta, ed., *The UN Genocide Convention: a Commentary*, Oxford, Oxford University Press, 2009, pp. 231–258.

VAN DEN HERIK, Larissa

"The Dutch engagement with the project of international criminal justice", *Netherlands International Law Review*, vol. 57, No. 2 (2010), pp. 303–322.

VAN DER WILT, Harmen

"Corporate criminal responsibility for international crimes: exploring the possibilities", *Chinese Journal of International Law*, vol. 12, No. 1 (2013), pp. 43–77.

"Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the *van Anraat* case", *Journal of International Criminal Justice*, vol. 4, No. 2 (2006), pp. 239–257.

VAN DER WOLF, Willem-Jan

Prosecution and Punishment of International Crimes by National Courts. The Hague, International Courts Association, 2011.

VAN SCHAACK, Beth

"Command responsibility: the anatomy of proof in *Romagoza v. Garcia*", *University of California Davis Law Review*, vol. 36, No. 5 (2003), pp. 1213–1259.

VAN SLIEDREGT, Elies

Individual Criminal Responsibility in International Law. Oxford, Oxford University Press, 2012, 376 p.

VERMEULEN, Gert, Wendy DE BONDT, and Charlotte RYCKMAN

Liability of Legal Persons for Offences in the EU. Antwerp, Maklu, 2012.

WEISSBRODT, David, and Rüdiger WOLFRUM, eds.

The Right to a Fair Trial. Berlin, Springer, 1998.

WELLS, Celia

Corporations and Criminal Responsibility, 2nd ed. Oxford, Oxford University Press, 2001.

WOOD, Michael C.

"The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents", *International and Comparative Law Quarterly*, vol. 23, No. 4 (1974), pp. 791–817.

ZAPPALÀ, Salvatore

"The rights of the accused", *in* Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford, Oxford University Press, 2002, pp. 1319–1354.

Introduction

A. Work to date on this topic

1. At its sixty-sixth session in July 2014, the International Law Commission placed the topic "Crimes against humanity" on its current programme of work and appointed a Special Rapporteur.[1] At its sixty-seventh session in May 2015, the Commission held a general debate concerning the Special Rapporteur's first report and in July 2015 provisionally adopted four draft articles with commentary.[2]

B. Debate in 2015 in the Sixth Committee

2. During the debate in the Sixth Committee in 2015, 38 States[3] addressed this topic with reactions that generally favoured the Commission's work, stressing the importance of the topic,[4] welcoming the four draft articles[5] and viewing them as largely reflecting existing State practice and jurisprudence.[6] Among other things, States expressed appreciation that the topic was proceeding in a manner that was complementary to the system of the Rome Statute of the International Criminal Court[7] and underscored the need to avoid establishing new obligations that would conflict with obligations existing under the Statute or other treaties.[8] A large number of States agreed with the Commission's approach of using, in draft article 3, the definition of crimes against humanity that appears in article 7 of the Rome Statute of the International Criminal Court,[9] while two States indicated a desire to improve upon that definition.[10]

3. Several States noted the value in focusing this project on issues such as the prevention of crimes against humanity,[11] the adoption and harmonization of national laws,[12] *aut dedere aut judicare*,[13] offences by not just States but also non-State actors[14] and the promotion of inter-State cooperation, including through extradition and mutual legal assistance.[15] At the same time, some States called for greater clarity in what is meant by an obligation to prevent,[16] called for different terminology (such as referring to crimes against humanity as "the most serious crimes of international concern" or as "international crimes" rather than as "crimes under international law"[17]), pressed for addressing certain issues (for example, the inapplicability of statutes of limitations,[18] immunity,[19] reparations for victims[20] or the need for national courts to take into account international jurisprudence[21]) or urged avoiding certain issues (such as civil jurisdiction,[22] immunity[23] or the creation of an institutional structure to monitor a new convention[24]).

4. Many States indicated that they supported the drafting of these articles for the purpose of a new convention.[25]

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[1] *Yearbook … 2014*, vol. II (Part Two), para. 266.

[2] *Yearbook … 2015*, vol. II (Part Two), para. 113.

[3] Presentations to the Sixth Committee were made by Argentina, Austria, Belarus, Chile, China, Croatia, the Czech Republic, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, the Islamic Republic of Iran, Israel, Italy, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, the Netherlands, Peru, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden (on behalf of the Nordic countries), Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

[4] See, for example, China, A/C.6/70/SR.22, para. 63; Israel, A/C.6/70/SR.21, para. 73; Japan, A/C.6/70/SR.22, para. 129; and Malaysia, A/C.6/70/SR.23, para. 46.

[5] See, for example, Slovakia, A/C.6/70/SR.23, para. 12; and South Africa, *ibid.*, para. 13.

[6] See, for example, Czech Republic, A/C.6/70/SR.20, para. 59; Spain, A/C.6/70/SR.22, para. 94; Slovenia, A/C.6/70/SR.23, para. 4; and Switzerland, A/C.6/70/SR.22, paras. 18–19.

[7] See, for example, Italy, A/C.6/70/SR.17, para. 59; Mexico, A/C.6/70/SR.21, para. 51; and Sweden, on behalf of the Nordic countries, A/C.6/70/SR.20, para. 6.

[8] See, for example, Hungary, A/C.6/70/SR.21, para. 83; India, *ibid.*, para. 65; Italy, A/C.6/70/SR.17, para. 58; Japan, A/C.6/70/SR.22, para. 130; Malaysia, A/C.6/70/SR.23, para. 47; Portugal, A/C.6/70/SR.22, para. 61; and the United Kingdom, A/C.6/70/SR.23, para. 36.

[9] Argentina, A/C.6/70/SR.23, para. 72; Austria, A/C.6/70/SR.20, para. 32; the Czech Republic, *ibid.*, para. 59; France, *ibid.*, para. 20; Germany, A/C.6/70/SR.22, para. 15; Japan, *ibid.*, para. 130; the Republic of Korea, A/C.6/70/SR.23, para. 56; New Zealand, A/C.6/70/SR.22, para. 31; Poland, A/C.6/70/SR.21, para. 68; Portugal, A/C.6/70/SR.22, para. 61; Romania, A/C.6/70/SR.21, para. 79; the Russian Federation, A/C.6/70/SR.23, para. 18; Slovakia, *ibid.*, para. 12; Slovenia, *ibid.*, para. 4; South Africa, *ibid.*, para. 14; Sweden, on behalf of the Nordic countries, A/C.6/70/SR.20, para. 6; Switzerland, A/C.6/70/SR.22, para. 18; and the United Kingdom, A/C.6/70/SR.23, para. 36.

[10] Croatia, A/C.6/70/SR.22, para. 78; and Mexico, A/C.6/70/SR.21, paras. 52–54.

[11] New Zealand, A/C.6/70/SR.22, para. 31; Slovenia, A/C.6/70/SR.23, para. 5; and South Africa, *ibid.*, para. 13.

[12] Peru, A/C.6/70/SR.21, para. 93; and the Russian Federation, A/C.6/70/SR.23, para. 18.

[13] Sweden, on behalf of the Nordic countries, A/C.6/70/SR.20, para. 6; and the United Kingdom, A/C.6/70/SR.23, para. 36.

[14] Israel, A/C.6/70/SR.21, para. 74.

[15] See, for example, Germany, A/C.6/70/SR.22, para. 14; Portugal, *ibid.*, para. 61; and Switzerland, *ibid.*, para. 20.

[16] Indonesia, A/C.6/70/SR.23, para. 29.

[17] Austria, A/C.6/70/SR.20, para. 31; and France, *ibid.*, para. 20.

[18] Switzerland, A/C.6/70/SR.22, para. 20.

[19] Malaysia, A/C.6/70/SR.23, para. 48; and Switzerland, A/C.6/70/SR.22, para. 20.

[20] El Salvador, A/C.6/70/SR.22, para. 105; and Poland, A/C.6/70/SR.21, para. 68.

[21] Germany, A/C.6/70/SR.22, para. 15.

[22] United Kingdom, A/C.6/70/SR.23, para. 37.

[23] *Ibid.*

[24] France, A/C.6/70/SR.20, para. 21.

[25] See Austria, A/C.6/70/SR.20, para. 30 (welcoming the Special Rapporteur's conclusions regarding a future convention on the topic); Chile, A/C.6/70/SR.22, para. 86 (stating that the Commission's contribution to developing a new treaty in this area was vital); Croatia, *ibid.*, para. 75 (strongly supporting all efforts aimed at developing a global international instrument); El Salvador, *ibid.*, para. 103 (agreeing on the importance of elaborating a new draft convention devoted to such crimes, so as to fill existing gaps); Germany, *ibid.*, para. 14 (finding that a new convention would not only complement treaty law on the core crimes, but also foster inter-State cooperation); Hungary, A/C.6/70/SR.21, para. 83 (indicating that there was no unified treaty basis for prosecuting crimes against humanity, such as exists for war crimes and genocide, and therefore a legal gap needs to be addressed); Indonesia, A/C.6/70/SR.23, para. 29 (asserting that a new convention was an essential part of the international community's effort to combat impunity and a key missing piece in the current framework); Israel, A/C.6/70/SR.21, para. 74 (indicating that it would be honoured to contribute to the drafting of a new treaty); Italy, A/C.6/70/SR.17, para. 58 (convinced of the potential benefits of developing a convention on the subject); Peru, A/C.6/70/SR.21, para. 93 (welcoming work towards development of a possible future convention); Portugal, A/C.6/70/SR.22, para. 61 (finding that a new convention could help fight impunity and ensure accountability); Slovakia, A/C.6/70/SR.23, para. 12 (finding wise the decision to approach the topic by drafting a new convention, since that was the only viable option); Switzerland, A/C.6/70/SR.22, paras. 18 and 20 (favouring a concise convention); and the United States, *ibid.*, para. 41 (finding that developing draft articles for a convention could prove valuable).

Some States noted the existence of a different initiative to develop a new convention focused just on mutual legal assistance and extradition, and relating not just to crimes against humanity but to the most serious international crimes.[26] Three States expressed doubts as to the desirability and necessity of a new convention on crimes against humanity, viewing the Rome Statute of the International Criminal Court and other existing instruments as sufficient,[27] while two States suggested that outcomes other than a new treaty might be more appropriate.[28]

5. In addition to the debate in the Sixth Committee, this report has benefited from written comments received from States in response to the request made by the Commission in 2014[29] (reiterated in 2015[30]) for information on existing national laws and jurisprudence with respect to crimes against humanity.

C. Purpose and structure of the present report

6. The purpose of the present report is to address various actions to be taken by States under their national laws with respect to crimes against humanity, which are among the most serious crimes of concern to the international community as a whole. The issues addressed herein are: establishment of national laws that identify offences relating to crimes against humanity; establishment of national jurisdiction so as to address such offences when they occur; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present in a State's territory; submission of the alleged offender to prosecution or extradition or surrender (*aut dedere aut judicare*); and fair treatment of the alleged offender at all stages of the process.

7. Chapter I of the present report addresses the obligation of a State to establish national laws that identify offences relating to crimes against humanity. An obligation of this kind typically exists in treaties addressing crimes and, in doing so, provides that the State's national criminal law shall establish criminal responsibility when the offender "commits" the act (sometimes referred to in national law as "direct" commission, "perpetration" of the act or being a "principal" in the commission of the act), attempts to commit the act, or participates in the act or attempt in some other way (sometimes referred to in national law by terms such "soliciting", "aiding" or "inciting" the act, or as the person being an "accessory" or "accomplice" to the act). Further, relevant international instruments, as well as many national laws, provide that commanders and other superiors are criminally responsible for the acts of subordinates in certain circumstances. Such instruments and laws also provide that the fact that an offence was committed by a subordinate pursuant to an order of a superior is not, by itself, a ground for excluding criminal responsibility of the subordinate, and sometimes provide that no statute of limitations shall be applied for such offences. Finally, such instruments and laws typically provide that penalties shall sufficiently take into account the grave nature of the offence. Chapter I concludes by proposing a draft article addressing these points for crimes against humanity.

8. Chapter II of the present report addresses issues relating to the establishment of national jurisdiction so as to address such offences when they occur. To ensure that there is no safe haven for those who commit such crimes against humanity, this chapter identifies the various types of State jurisdiction that treaties addressing crimes typically require States parties to establish. Such jurisdiction normally must be established not just by the State where the offence is committed, but by other States as well, based on connections such as the nationality or presence of the alleged offender. These treaties also typically provide that, while they obligate a State to establish specific forms of jurisdiction, they do not exclude the establishment of other criminal jurisdiction by the State. Chapter II concludes by proposing a draft article addressing these points for crimes against humanity.

9. Chapter III of the present report addresses the obligation of a State to investigate promptly and impartially whenever there is a reason to believe that a crime against humanity has occurred or is occurring in any territory under its jurisdiction or control. Some treaties addressing crimes have included an obligation to investigate whenever there are reasons to believe that the relevant crime has been committed in the State's territory, though many treaties have not done so. Ideally, a State that determines that such a crime has occurred or is occurring would notify other States if it is believed that their nationals are involved in the crime, thereby allowing those other States to investigate the matter also. In any event, if it is determined that a crime against humanity has occurred or is occurring, all States should cooperate, as appropriate, in an effort to identify and locate persons who have committed the offences relating to that crime. Given the importance of investigating and cooperating so as to identify alleged offenders, chapter III concludes by proposing a draft article addressing such an obligation.

10. Chapter IV of the present report discusses the exercise of national jurisdiction over an alleged offender whenever he or she is present in a State's territory. Such an obligation typically exists in treaties addressing crimes and, in doing so, often addresses three requirements: that the State conduct a preliminary investigation; that the State, if necessary, take steps to ensure the availability of the alleged offender for criminal proceedings, extradition or surrender, which may require taking the individual into custody; and that the State notify other States having jurisdiction over the matter of the actions that the State has taken and whether it intends to submit the matter to its competent authorities for prosecution. Chapter IV concludes by proposing a draft article addressing these points for crimes against humanity.

11. Chapter V of the present report addresses the obligation to submit the alleged offender to prosecution or to

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[26] Argentina, A/C.6/70/SR.23, para. 71; Greece, A/C.6/70/SR.20, para. 48; the Netherlands, A/C.6/70/SR.21, paras. 41–43; and Slovenia, A/C.6/70/SR.23, para. 6.

[27] Belarus, A/C.6/70/SR.21, para. 30; Greece, A/C.6/70/SR.20, paras. 47–48; and the Islamic Republic of Iran, A/C.6/70/SR.23, para. 67.

[28] Malaysia, A/C.6/70/SR.23, para. 48 (suggesting draft guidelines); and Singapore, A/C.6/70/SR.21, para. 59 (suggesting unspecified other outcomes).

[29] *Yearbook … 2014*, vol. II (Part Two), para. 34.

[30] *Yearbook … 2015*, vol. II (Part Two), para. 24.

extradite or surrender him or her to another State or competent international tribunal. Treaties addressing crimes typically contain such an *aut dedere aut judicare* obligation. Moreover, recent treaties have also acknowledged the possibility for the State to satisfy such an obligation by surrendering the alleged offender to an international criminal court or tribunal for the purpose of prosecution. Chapter V concludes by proposing a draft article addressing these points for crimes against humanity.

12. Chapter VI of the present report discusses the obligation to accord "fair treatment" to an alleged offender at all stages of the proceedings against him or her, an obligation typically recognized in treaties addressing crimes. Such an obligation includes according a fair trial to the alleged offender. Furthermore, States, as always, are obligated more generally to protect the person's human rights, including during any period of detention. In the event that the alleged offender's nationality is not that of the State, the State is also obligated to permit the person to communicate and receive visits from a representative of his or her State. Chapter VI concludes by proposing a draft article addressing these points for crimes against humanity.

13. Chapter VII addresses a possible future programme of work. Annex I to the present report contains the four draft articles provisionally adopted by the Commission at its sixty-seventh session, in 2015. Annex II contains the draft articles proposed in the present report.

Chapter I

Criminalization under national law

14. The International Military Tribunal at Nürnberg recognized the importance of punishing individuals for, *inter alia*, crimes against humanity when it stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[31] Pursuant to this judgment, the Commission's Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[32] Similarly, the 1968 Convention on the nonapplicability of statutory limitations to war crimes and crimes against humanity asserted in its preamble that "the effective punishment of … crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security".[33]

15. Prosecution and punishment of persons for crimes against humanity may be possible before international criminal courts and tribunals, but must also operate at the national level to be fully effective. The preamble of the Rome Statute of the International Criminal Court affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". Indeed, given the limited capacity and, in some instances, limited jurisdiction of international courts and tribunals, some writers argue that, "[i]n most cases, the only way to enforce international criminal law is through the use of national courts".[34] Furthermore, some writers assert that "[n]ational prosecutions are not only the primary vehicle for the enforcement of international crimes, they are also often considered a preferable option—in political, sociological, practical and legitimacy terms—to international prosecutions".[35]

16. This chapter discusses the establishment of criminal responsibility under national law for persons who have committed crimes against humanity. It first discusses the current situation with respect to the adoption of national laws on crimes against humanity, demonstrating that many States have not done so. Next, it discusses various treaties that have obligated States to adopt national laws with respect to other crimes, which can help provide guidance for a draft article relating to crimes against humanity. This chapter then analyses different types (or modes) of liability that typically exist in national laws addressing crimes against humanity and in treaties addressing crimes, notably offences for committing the crime, attempting to commit the crime, and participating in committing or attempting to commit the crime. This chapter then considers offences that can arise due to command or other superior responsibility. An inability to avoid the offence on grounds of superior orders is considered, as well as the application of a statute of limitations to the crime. Consideration is then given to a requirement that appropriate penalties be issued. This chapter concludes with a proposed draft article consisting of three paragraphs, entitled "Criminalization under national law".

A. Crimes against humanity in national law

17. In their national laws, many States address, in some fashion, crimes against humanity and provide for national prosecution to address those crimes.[36] The Rome Statute of

[31] "Judicial decisions: International Military Tribunal (Nuremberg) …", p. 221.

[32] *Yearbook … 1950*, vol. II, document A/1316, paras. 95–127, at p. 374, Principle I.

[33] As of 2015, this Convention has 55 parties.

[34] Brown, "International criminal law …", p. 16.

[35] Cryer, *An Introduction to International Criminal Law and Procedure*, p. 70. See also *ibid.*, p. 587 ("The site of most international criminal law enforcement is intended to be national systems, not international courts"); and Saul, "The implementation of the Genocide Convention at the national level", p. 59.

[36] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680, paras. 53–56. See also Eser *et al.*, *National Prosecution of International Crimes*; Bergsmo, Harlem and Hayashi, *Importing Core International Crimes into National Law*; García Falconí, "The codification of crimes against humanity …", p. 453; and van der Wolf, *Prosecution and Punishment of International Crimes by National Courts*. For country-specific

the International Criminal Court, in particular, has led to a number of national laws providing for crimes against humanity in terms identical to or very similar to the offence as defined in article 7 of that Statute. Indeed, of those States who responded as of 2015 to the Commission's request for information about their national laws, Austria,[37] Belgium,[38] the Czech Republic,[39] Finland,[40] France,[41] Germany,[42] the Republic of Korea,[43] the Netherlands,[44] Switzerland[45] and the United Kingdom[46] all indicated that their national laws on crimes against humanity essentially align with the definition in the Statute. Cuba[47] and Spain[48] also criminalize crimes against humanity, although not in a manner identical to that of the Statute.

18. At the same time, many States have not adopted national laws on crimes against humanity. As indicated in the first report on this topic,[49] a study conducted in 2013 concluded that, based on a review of earlier studies, at best 54 per cent of the Member States of the United Nations (104 of 193) had some form of national law expressly on crimes against humanity.[50] The remaining Member States (89 of 193) apparently had no national law relating to crimes against humanity. Furthermore, the 2013 study found that earlier studies indicated that, at best, 66 per cent of parties to the Rome Statute of the International Criminal Court (80 of 121) had some form of national law relating to crimes against humanity, leaving 34 per cent of parties to the Statute (41 of 121) without any such law.[51] Consequently, it does not appear that States regard themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity.

19. States that have not adopted a national law on crimes against humanity typically do have national criminal laws that allow for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.[52] These States, however, have not criminalized crimes against humanity *as such* and this failure may preclude prosecution and punishment of the conduct in terms commensurate with the gravity of the offence. In the context of the crime of torture under international law, the Committee against Torture[53] has expressed concern at the failure to adopt a national law that criminalizes torture in accordance with the definition of torture contained in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In its general comment No. 2, the Committee asserted:

> Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum.[54]

Even though a verbatim national adoption of the definition contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

studies, see, for example, Ferstman, "Domestic trials for genocide and crimes against humanity …", p. 857; and van den Herik, "The Dutch engagement with the project of international criminal justice", p. 303.

[37] Written comments to the International Law Commission (2015), Austria ("a draft bill for the incorporation of specific international crimes under the Rome Statute of the International Criminal Court into the Austrian Criminal Code").

[38] *Ibid.*, Belgium, citing article 136 *ter* of its Criminal Code ("Conformément au Statut de la Cour pénale internationale, le crime contre l'humanité" ["In accordance with the Statute of the International Criminal Court, crime against humanity"]).

[39] *Ibid.*, Czech Republic.

[40] *Ibid.*, Finland.

[41] *Ibid.*, France.

[42] *Ibid.*, Germany.

[43] *Ibid.*, the Republic of Korea.

[44] *Ibid.*, Netherlands.

[45] *Ibid.*, Switzerland.

[46] *Ibid.*, United Kingdom ("The definition [of crimes against humanity] is based on the definition in the ICC Statute").

[47] *Ibid.*, Cuba.

[48] *Ibid.*, Spain.

[49] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680, paras. 58–61.

[50] International Human Rights Clinic, *Comparative Law Study and Analysis …*, p. 8; see also Law Library of Congress, *Crimes against Humanity Statutes and Criminal Code Provisions in Selected Countries*.

[51] International Human Rights Clinic, *Comparative Law Study and Analysis …*, p. 8.

[52] Written comments to the International Law Commission (2015), the United States of America. See also *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12 OA, Judgment, 27 May 2015 on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo", International Criminal Court, Appeals Chamber, para. 99 (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining State security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

[53] See, for example, conclusions and recommendations of the Committee against Torture, Slovenia, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44), chap. III, paras. 115 (*a*) and 116 (*a*) (expressing concern that the "[s]ubstantive criminal law does not contain a specific crime of torture, which, although referred to in the Criminal Code, remains undefined" and recommending that the State party "[p]roceed promptly with plans to adopt a definition of torture which covers all the elements of that contained in article 1 of the Convention and amend its domestic penal law accordingly"); and conclusions and recommendations of the Committee against Torture, Belgium, *ibid.*, para. 130 (recommending "that the Belgian authorities ensure that all elements of the definition contained in article 1 of the Convention are included in the general definition provided by Belgian criminal law"). See also *ibid.*, *Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, conclusions and recommendations of the Committee against Torture: Guatemala, para. 10; *ibid.*, *Fifty-seventh Session, Supplement No. 44* (A/57/44), conclusions and recommendations of the Committee against Torture: Saudi Arabia, paras. 100 (*a*) and 101 (*a*); ibid., *Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, concluding observations, France, para. 5; and *ibid.*, Bosnia and Herzegovina, para. 9. For comments by Governments on this issue, see, for example, the report of the Committee against Torture, *ibid.*, *Fifty-Seventh Session, Supplement No. 44* (A/57/44), paras. 30–35 (Benin), and *ibid.*, *Fifty-Fifth Session, Supplement No. 44* (A/55/44), para. 49 (*a*) (Austria), para. 54 (*a*) (Finland), para. 68 (*a*) (Azerbaijan), para. 74 (*a*) (Kyrgyzstan), para. 80 (*a*) (Uzbekistan), para. 87 (Poland), para. 150 (*b*) (Paraguay), para. 160 (El Salvador) and para. 179 (*a*) (United States of America).

[54] Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, *International Human Rights Instruments*, vol. II (HRI/GEN/1/Rev.9(Vol. II)), p. 376, at para. 9. For an assessment of the Committee's practice with respect to article 2, see Nowak and McArthur, *The United Nations Convention against Torture …*, pp. 94–107.

is not required, some writers maintain that it must at least adequately cover the Convention definition and must be adopted into national legislation and in particular in the penal code.[55]

B. Existing treaties obligating States to criminalize conduct in national law

20. Many States have ratified or acceded to treaties in the areas of international humanitarian law, human rights or international criminal law, which require criminalization of specific types of conduct.[56] For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III" of the Convention (art. V). States parties to the Convention have implemented this obligation through the adoption of national laws, such as the Netherlands Act of 2 July 1964 Implementing the Convention on Genocide[57] or the Act to Give Effect to the Convention on the Prevention and Punishment of the Crime of Genocide by Tonga.[58] Other States with laws implementing the Convention include Albania,[59] Armenia,[60] Austria,[61] Brazil,[62] Bulgaria,[63] Croatia,[64] Cuba,[65] the Czech Republic,[66] Fiji,[67] Germany,[68] Ghana,[69] Hungary,[70] Israel,[71] Italy,[72] Liechtenstein,[73] Mexico,[74] Portugal,[75] Romania,[76] the Russian Federation,[77] Slovenia,[78] Spain,[79] Sweden[80] and the United States.[81] Instead of adopting a detailed national law on the crime of genocide, some States simply incorporate the Convention on the Prevention and Punishment of the Crime of Genocide in their national law by cross-reference.[82]

21. Similarly, each of the 1949 Geneva Conventions for the protection of war victims provides that "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for the persons committing … any of the grave breaches of the present Convention" as defined in those Conventions.[83] According to a comprehensive analysis of national laws conducted by the International Committee of the Red Cross, 98 States have adopted national laws to implement this provision of the Geneva Conventions for the

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[55] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 239 (citing conclusions and recommendations of the Committee against Torture, Belgium (see footnote 53 above), para. 6; and conclusions and recommendations of the Committee against Torture, Estonia, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44), para. 50 *a*)). See also Ingelse, *The UN Committee against Torture* …, p. 222.

[56] See, generally, Ambos, *Treatise on International Criminal Law*, pp. 93–95; and Dupuy and Kerbrat, *Droit International Public*, pp. 587–588.

[57] Netherlands, Genocide Convention Implementation Act of 2 July 1964, available from https://wetten.overheid.nl/BWBR0002453/geldigheidsdatum_wijkt_af_van_zoekvraaggeldigheidsdatum_01-05-2002.

[58] Tonga, Laws of Tonga, chapter 19, Act 8 of 1969, an Act to Give Effect to the Convention on the Prevention and Punishment of the Crime of Genocide, available from www.paclii.org/to/legis/consol_act/ga75.rtf.

[59] Albania, Criminal Code of the Republic of Albania, Law No. 7895 of 27 January 1995 (revised 2013), art. 73, available from www.legislationline.org/albania.

[60] Armenia, Criminal Code of the Republic of Armenia of 18 April 2003 (revised 2013), art. 393, www.legislationline.org/armenia.

[61] Written comments to the International Law Commission (2015), Austria.

[62] Brazil, Act No. 2889 of 1 October 1956, available from www.preventgenocide.org/pt/direito/codigos/brasil.htm.

[63] Bulgaria, Criminal Code, No. 26/02.04.1968 (amended 2010), art. 416, available from www.legislationline.org/bulgaria.

[64] Croatia, Criminal Code, *Official Gazette* No. 110 of 21 October 1997 (revised 2003), art. 156, *ibid*.

[65] Cuba, Criminal Code, Law No. 62/87 of 29 December 1987, art. 116, para. 1, available from www.wipo.int/wipolex/en/text.jsp?file_id=242550.

[66] Czech Republic, Criminal Code, Act No. 140/1961, provision 259, available from www.legislationline.org/documents/section/criminal-codes.

[67] Fiji, Criminal Code, art. 69 (inserted by ordinance No. 25 of 1969, amended by Order 13 November 1970 and Ordinance No. 15 of 1973), available from www.preventgenocide.org/law/domestic/fiji.htm.

[68] Germany, Act to Introduce the Code of Crimes Against International Law of 26 June 2002, part 2, ch. 1, sect. 6, available from www.iuscomp.org/gla/statutes/VoeStGB.pdf.

[69] Ghana, Criminal Code of 1960, Act 29 (as amended up to 2003), sect. 49A, available from www.wipo.int/wipolex/en/details.jsp?id=1787.

[70] Hungary, Criminal Code, Act C of 2012 (promulgated on 13 July 2012), sect. 142, available from https://legislationline.org/hungary.

[71] Israel, Crime of Genocide (Prevention and Punishment) Law No. 5710-1950 of 29 March 1950, available from www.preventgenocide.org/il/law1950.htm.

[72] Italy, Law No. 962 of 9 October 1967, available from www.preventgenocide.org/it/legge.htm.

[73] Liechtenstein, Criminal Code of 24 June 1987, sect. 321, available from www.wipo.int/wipolex/en/details.jsp?id=10181.

[74] Mexico, Federal Criminal Code of 14 August 1931, art. 149 *bis* (updated 14 March 2014), available from www.wipo.int/wipolex/en/details.jsp?id=14542.

[75] Portugal, Criminal Code, Decree-Law No. 48/95 of 15 March 1995, art. 239, available from www.preventgenocide.org/pt/direito/codigos/portugal.htm.

[76] Romania, Criminal Code, Law No. 286 of 17 July 2009 (amended 2012), art. 438, available from www.legislationline.org/romania.

[77] Russian Federation, Criminal Code, No. 63Fz of 13 June 1996 (amended 2012), art. 357, www.legislationline.org/Russian-Federation.

[78] Slovenia, Criminal Code (KZ-1), art. 100 (2008), www.legislationline.org/Slovenia.

[79] Spain, Criminal Code, Organic Act No. 10/1995, art. 607 (23 November 1995), www.legislationline.org/Spain.

[80] Sweden, Criminal Code, Act No. 1964:169, available from www.preventgenocide.org/se/lag169.htm.

[81] United States, United States Code, Title 18, sect. 1091 (2012), available from www.gpo.gov/fdsys/granule/USCODE-2011-title18/USCODE-2011-title18-partI-chap50A-sec1091.

[82] See, for example, Antigua and Barbuda, Laws of Antigua and Barbuda, chap. 191, Genocide Act, sect. 3, available from https://laws.gov.ag/wp-content/uploads/2018/08/cap-191.pdf; Barbados, Laws of Barbados, Genocide Act, chap. 133A (1980-18), sect. 4, available from http://104.238.85.55/en/ShowPdf/133A.pdf; Ireland, Genocide Act No. 28/1973, sect. 2 (1), available from www.preventgenocide.org/law/domestic/ireland.htm; and Seychelles, Genocide Act 1969 (Overseas Territories), 1970, sect. 1 (1), available from https://old.seylii.org/sc/legislation/consolidated-act/88.

[83] Geneva Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), art. 129; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), art. 146.

protection of war victims, while at least 30 States address the matter in their military manuals.[84]

22. Indeed, obligations to "criminalize" certain acts in national law exist in a range of international conventions, including the 1970 Convention on the Suppression of Unlawful Seizure of Aircraft;[85] the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[86] the 1979 International Convention against the taking of hostages;[87] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[88] the 1985 Inter-American Convention to Prevent and Punish Torture;[89] the 1994 Convention on the Safety of United Nations and Associated Personnel;[90] the 1994 Inter-American Convention on Forced Disappearance of Persons;[91] the 1997 International Convention for the Suppression of Terrorist Bombings;[92] the 1999 International Convention for the Suppression of the Financing of Terrorism;[93] the OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism, 1999;[94] the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[95] the 2006 International Convention for the Protection of All Persons from Enforced Disappearance;[96] and the 2007 ASEAN [Association of Southeast Asian Nations] Convention on Counter Terrorism.[97]

23. Reflecting on the acceptance of such obligations in treaties, and in particular within the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.[98]

C. Commission of, attempt to commit, or participation in the crime

24. In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized crimes against humanity impose criminal responsibility upon a person who "commits" the offence (sometimes referred to in national law as "direct" commission, as "perpetration" of the act or as being a "principal" in the commission of the act). For example, the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Charter of the International Military Tribunal ("Nürnberg Charter") provided jurisdiction for the International Military Tribunal over "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes" (art. 6). Likewise, the Statutes of both the International Tribunal for the Former Yugoslavia[99] and the International Tribunal for Rwanda[100] provide that a person who "committed" crimes against humanity "shall be individually responsible for the crime". The Rome Statute of the International Criminal Court provides that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" and that "a person shall be criminally

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[84] See the International Committee of the Red Cross (ICRC), Customary IHL Database, "Chapter 43: Practice relating to Rule 151. Individual responsibility" (see sections on national laws and on military manuals), available from www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter43_rule151.

[85] Art. 2 ("Each Contracting State undertakes to make the offence punishable by severe penalties").

[86] Art. 2, para. 2 ("Each State party shall make these crimes punishable by appropriate penalties which take into account their grave nature").

[87] Art. 2 ("Each State party shall make the offences set forth in [this Convention] punishable by appropriate penalties which take into account the grave nature of those offences").

[88] Art. 4 ("Each State party shall ensure that all acts of torture are offences under its criminal law. … Each State party shall make these offences punishable by appropriate penalties which take into account their grave nature").

[89] Art. 6 ("The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature").

[90] Art. 9, para. 2 ("Each State party shall make the crimes set out in [this Convention] punishable by appropriate penalties which shall take into account their grave nature").

[91] Art. III ("The States Parties undertake to adopt … the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity").

[92] Art. 4 ("Each State party shall adopt such measures as may be necessary: (*a*) To establish as criminal offences under its domestic law the offences set forth in … this Convention; (*b*) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences").

[93] Art. 4 ("Each State party shall adopt such measures as may be necessary: (*a*) To establish as criminal offences under its domestic law the offences set forth in [this Convention]; (*b*) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences").

[94] Art. 2 (*a*) ("States Parties undertake to … review their national laws and establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences").

[95] Art. 5 para. 1 ("Each State party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in … this Protocol").

[96] Art. 7, para. 1 ("Each State party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness").

[97] Art. IX, para. 1 ("The Parties shall adopt such measures as may be necessary, including, where appropriate, national legislation, to ensure that offences covered in Article II of this Convention, especially when it is intended to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature").

[98] *Judgment, I.C.J. Reports 2012*, p. 442, at p. 451, para. 75.

[99] Updated Statute of the International Tribunal for the Former Yugoslavia, adopted by Security Council resolution 827 (1993) of 25 May 1993, art. 7, para. 1.

[100] Statute of the International Tribunal for Rwanda, adopted by the Security Council in its resolution 955 (1994) of 8 November 1994, annex, art. 6, para. 1.

responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … [c]ommits such a crime, whether as an individual [or] jointly with another" (art. 25, paras. 2 and 3 (*a*)). Similarly, the instruments regulating the Special Court for Sierra Leone,[101] the Special Panels for Serious Crimes in East Timor,[102] the Extraordinary Chambers in the Courts of Cambodia,[103] the Supreme Iraqi Criminal Tribunal[104] and the Extraordinary African Chambers within the Senegalese Judicial System[105] all provide for the criminal responsibility of a person who "commits" crimes against humanity.

25. National laws that address crimes against humanity invariably criminalize the "commission" of such crimes. Virtually all of the States that responded to the Commission's request for information about their national legislation (Australia,[106] Austria,[107] Belgium,[108] Cuba,[109] the Czech Republic,[110] Finland,[111] France,[112] Germany,[113] the Netherlands,[114] Spain,[115] Switzerland,[116] the Republic of Korea[117] and the United Kingdom[118]) indicated that they criminalize "commission" of crimes against humanity.[119]

26. Although crimes against humanity are undertaken pursuant to a State or organizational policy, suggesting complicity at potentially the highest levels, persons at lower levels committing the offence are nevertheless criminally responsible. According to some writers, criminal responsibility for participation in the offence by such persons is necessary because large-scale international crimes "require not just planners and perpetrators, but numerous actors who participate—sometimes simply by doing their 'job' or because they want to get along or are unwilling to object to those more powerful—and who together make it possible for the crime to occur on a massive level".[120] Further, "commission" of the offence also "may involve an omission to perform prescribed conduct (that is, the failure to do obligatory acts)".[121]

27. Second, all such jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than "commission" of the offence. Such conduct may take the form of an "attempt" to commit the offence, or acting as an "accessory" or "accomplice" to the offence or an attempted offence. With respect to an "attempt" to commit the crime, the Statutes of the International Tribunal for the Former Yugoslavia,[122] the International Tribunal for Rwanda and the Special Court for Sierra Leone contain no provision for this type of responsibility. In contrast, the Rome Statute of the International Criminal Court provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime (art. 25, para. 3 (*f*)). In the *Banda and Jerbo* case, the Pre-Trial Chamber asserted that criminal responsibility for attempt "requires that, in the ordinary course of events, the perpetrator's conduct [would] have resulted in the crime being completed, had the circumstances outside the perpetrator's control not intervened".[123] With respect to "accessorial" responsibility, such a concept is addressed in international instruments through various terms, such as "ordering", "soliciting", "inducing", "instigating", "inciting", "aiding and abetting", "conspiracy to commit", "being an accomplice to", "participating in" or "joint criminal enterprise".[124]

28. Thus, the Nürnberg Charter provides that "[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan" (art. 6). In its Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the Commission noted in principle VII that "complicity" in the commission of a crime against humanity "is a crime under international law".[125]

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[101] Statute of the Special Court for Sierra Leone, United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, art. 6, para. 1.

[102] United Nations Transitional Administration in East Timor, Regulation 2000/15 on the establishment of Panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5.

[103] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 5. See also the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003, United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117).

[104] Statute of the Iraqi Special Tribunal, ILM, vol. 43 (2004), p. 236, art. 10 (*b*). The Iraqi interim administration enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Supreme Iraqi Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Resolution No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

[105] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, ILM, vol. 52 (2013), pp. 1028–1029, arts. 4 (*b*) and 6.

[106] Written comments to the International Law Commission (2016), Australia, citing division 268 of its Criminal Code.

[107] Written comments to the International Law Commission (2015), Austria, citing section 321 of its Criminal Code.

[108] *Ibid.*, Belgium, citing article 136 *sexies* of its Criminal Code.

[109] *Ibid*., Cuba, citing article 18 of its Criminal Code.

[110] *Ibid*., Czech Republic, citing section 401 of its Criminal Code.

[111] *Ibid*., Finland, citing chapter 11, section 3 of its Criminal Code.

[112] *Ibid*., France, citing article 212-1 of its Criminal Code.

[113] *Ibid*., Germany, citing section 7 of its Criminal Code.

[114] *Ibid*., the Netherlands, citing article 4 of its Criminal Code.

[115] *Ibid*., Spain, citing article 451 of its Criminal Code.

[116] *Ibid*., Switzerland, citing article 264*a* of its Criminal Code.

[117] *Ibid*., Republic of Korea, citing article 9 of its Criminal Code.

[118] *Ibid*., United Kingdom, referencing the International Criminal Court Act 2001.

[119] Treaties addressing other types of crimes also invariably call upon States parties to adopt national laws proscribing direct commission of the offence. Thus, the Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the commission of genocide (art. III (*a*)).

[120] Cassese *et al.*, *International Criminal Law* …, p. 381. See also Bantekas, *International Criminal Law*, pp. 51–75.

[121] O'Keefe, *International Criminal Law*, p. 169.

[122] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above).

[123] *Prosecutor v. Banda and Jerbo*, *Case No. ICC-02/05-03/09, corrigendum of the Decision on the Confirmation of Charges of 7 March 2011*, International Criminal Court, Pre-Trial Chamber I, para. 96.

[124] See, generally, van Sliedregt, *Individual Criminal Responsibility in International Law* and Jain, *Perpetrators and Accessories in International Criminal Law*. Some aspects of criminalizing such participation in the offence have elicited criticism. See, for example, Ohlin, "Three conceptual problems with the doctrine of joint criminal enterprise". For an argument that all of these types of liability may be viewed as falling within a unitary theory of perpetration, see Stewart, "The end of 'modes of liability' for international crimes".

[125] *Yearbook … 1950*, vol. II, document A/1316, paras. 95–127, at p. 377.

29. Similarly, the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity provided in its article II that:

> If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

30. The Statute of the International Tribunal for the Former Yugoslavia provides that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime",[126] and the Statute of the International Tribunal for Rwanda uses virtually identical language.[127] Both tribunals have convicted defendants for participation in the offences within their respective jurisdiction.[128] Similarly, the instruments regulating the Special Court for Sierra Leone,[129] the Special Panels for Serious Crimes in East Timor,[130] the Extraordinary Chambers in the Courts of Cambodia,[131] the Supreme Iraqi Criminal Tribunal[132] and the Extraordinary African Chambers within the Senegalese Judicial System[133] all provide for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

31. In article 2 of its 1996 draft code of crimes against the peace and security of mankind, the Commission provided for several types of individual criminal responsibility relating *inter alia* to crimes against humanity, specifically when a perpetrator:

(*a*) Intentionally commits such a crime;

(*b*) Orders the commission of such a crime which in fact occurs or is attempted;

(*c*) Fails to prevent or repress the commission of such a crime [when in a superior or command relationship to the offender];

(*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(*e*) Directly participates in planning or conspiring to commit such a crime which in fact occurs;

(*f*) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(*g*) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.[134]

32. The Rome Statute of the International Criminal Court provides for criminal responsibility if the person commits "such a crime … through another person", if the person "[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted", if the person "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" or if the person "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose" subject to certain conditions.[135]

33. The concept in these various instruments of "ordering" the crime differs from (and complements) the concept of "command" or other superior responsibility, which the next subsection addresses. Here, "ordering" concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. By contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a *failure* to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. Further, in these various instruments the allied concepts of "soliciting", "inducing", aiding" and "abetting" the crime include encouraging, requesting or inciting another person to engage in the action that constitutes the offence; these concepts do not require any superior/subordinate relationship.[136]

34. In addressing the breadth of criminal responsibility for "accessorial" participation in the offence, the International Tribunal for the Former Yugoslavia explained in the *Tadić* case that:

> all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. … It does not exclude those modes of participating in the commission of crimes which occur

[126] Art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Prosecutor v. Dušk o Tadić*, Case No. IT-94-1A, Judgment of 15 July 1999, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 220 (finding "that the notion of common design as a form of accomplice liability is firmly established in customary international law").

[127] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 1.

[128] See, for example, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber II, and ILM, vol. 38 (1999), para. 246 (finding that "[i]f he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and an abettor").

[129] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 1.

[130] UNTAET/REG/2000/15 (see footnote 102 above), sect. 14.

[131] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 29.

[132] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[133] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10.

[134] *Yearbook … 1996*, vol. II (Part Two), pp. 18–19.

[135] Art. 25, para. 3 (*a*)–(*d*). For commentary, see Finnin, *Elements of Accessorial Modes of Liability …*.

[136] See, generally, Ambos, "Article 25 …"; and O'Keefe, *International Criminal Law*, pp. 188–192.

where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.[137]

35. Many national laws also provide criminal responsibility for such involvement in the commission of crimes against humanity, using somewhat different terminology and formulations. For example, the Criminal Code of Cuba sets forth various modes of liability for crimes against humanity that extend beyond "commission" of the act, by addressing:

(*a*) persons who commit the offence;

(*b*) persons who plan an offence and its execution;

(*c*) persons who cause another criminally responsible person to commit an offence;

(*d*) persons who participate in the execution of a criminal act by carrying out actions without which the act could not have been committed;

(*e*) persons who commit an offence through the agency of another person who is not a perpetrator or who is not subject to penalty, or who is not criminally responsible for the offence because they acted as a result of violence, coercion or deception.[138]

36. Indeed, Cuba asserts that "[i]n the case of offences against humanity, human dignity … and offences specified in international treaties, all criminally responsible persons shall be considered perpetrators, whatever the nature of their involvement".[139] Other States also address attempt or participation in the commission of crimes against humanity. For example, Finland, allows that "[a]n attempt is punishable" within the section of its legal code applicable to crimes against humanity.[140] The Republic of Korea punishes "[a]ny attempt to commit a crime" constituting a crime against humanity.[141] The United Kingdom "imposes both principal and accessory liability for crimes against humanity. In particular … the [International Criminal Court (ICC)] Act 2001 makes clear that the following constitute 'ancillary' offences in respect of crimes against humanity: (*a*) aiding, abetting, counselling or procuring the commission of an offence, (*b*) inciting a person to commit an offence, (*c*) attempting or conspiring to commit an offence, or (*d*) assisting an offender or concealing the commission of an offence".[142]

37. In the case of *Zazai v. Canada*, a Canadian appellate court explained the nature of complicity in the context of a prosecution for crimes against humanity:

> At common law and under Canadian criminal law, [complicity] was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime.[143]

38. Thus, the defendant in that case was found guilty because he

> was willingly and to his benefit a member of an organization that only existed for a limited brutal purpose, i.e. the elimination of anti-government activity and the commission of crimes which amount to or can be characterized as crimes against humanity. He knew that the organization in which he was participating and that he assisted was committing crimes of torture and murder.[144]

39. Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other words, such treaties use general terms rather than detailed language, allowing States to shape the contours of the criminal responsibility within national statutes or jurisprudence. For example, article 15, paragraph 2, of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, provides:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, *including the rules extending individual criminal responsibility to persons other than those who directly commit the act**.

40. Although the general formulation used in contemporary treaties addressing commission of, attempt to commit and participation in a crime can vary, a succinct recent formulation appears in article 6, paragraph 1 (*a*) of the International Convention for the Protection of All Persons from Enforced Disappearance: "Each State party shall take the necessary measures to hold criminally responsible at least … [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."

41. Most criminal responsibility under international and national jurisdictions concerns the liability of natural persons, not legal persons (for example, corporations). However, in recent years, corporate criminal liability has become

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[137] *Prosecutor v. Duško Tadić* (see footnote 126 above), para. 190. See also *Prosecutor v. Radoslav Brđanin, Case No. IT-99-36A, Judgment of 3 April 2007*, Appeals Chamber, International Tribunal for the Former Yugoslavia; and *Prosecutor v. Milan Martić, Case No. IT-95-11A, Judgment of 8 October 2008*, Appeals Chamber, International Tribunal for the Former Yugoslavia.

[138] Written comments to the International Law Commission (2015), Cuba, citing article 18, paragraph 2, of its Criminal Code. See also *ibid.*, Germany, citing section 2, paragraph (5), of its Criminal Code.

[139] *Ibid.*, Cuba, citing article 18, paragraph 4, of its Criminal Code.

[140] *Ibid.*, Finland, citing chapter 11, section 3 of its Criminal Code. See also *ibid.*, Austria, citing section 321b, paragraphs 4–5, of its Criminal Code; Canada, citing the Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24) of 29 June 2000, section 4, paragraph (1.1), available from https://laws-lois.justice.gc.ca/eng/acts/C-45.9/FullText.html; and United States Code, Title 18, section 1091.

[141] Written comments to the International Law Commission (2015), the Republic of Korea, citing article 9, paragraph (5), of its Criminal Code. See also *ibid.*, Belgium, citing article 136 *sexies–septies* of its Criminal Code.

[142] *Ibid.*, United Kingdom.

[143] *Zazai v. Canada (Minister of Citizenship and Immigration)*, No. 2005 FCA 303, Judgment of 20 September 2005, Federal Court of Appeal Decisions, paras. 13–14.

[144] *Ibid.*, para. 26.

a feature of many national jurisdictions.[145] Moreover, in some of these national jurisdictions, such responsibility exists with respect to international crimes,[146] which has prompted calls for developing the law in this area.[147] Even so, criminal responsibility for corporations is not uniformly recognized worldwide[148] and the approach adopted in jurisdictions where it is recognized can diverge significantly.[149]

42. To date, corporate criminal responsibility has not featured significantly in any of the international criminal courts or tribunals. The Nürnberg Charter authorized the International Military Tribunal to designate any group or organization as criminal[150] and in the course of the proceedings of the International Military Tribunal, as well as subsequent proceedings under Control Council Law No. 10,[151] a number of Nazi organizations were so designated. Ultimately, however, only natural persons were tried and punished by these post-war tribunals.[152] Likewise, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda did not have any criminal jurisdiction over corporations or other legal persons, nor do the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the Rome Statute of the International Criminal Court noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"[153] and, although proposals for inclusion of a provision on corporate criminal responsibility were made, the Statute ultimately did not contain such a provision.[154]

43. One recent exception, however, appears to be the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of the African Union; once that Protocol enters into force, it will provide jurisdiction to the reconstituted African Court to try corporations for international crimes, including crimes against humanity.[155] Further, although jurisdiction over corporations (or over crimes against humanity) is not expressly provided to the Special Tribunal for Lebanon, an appeals panel of that Tribunal concluded in 2014 that a corporation could be prosecuted for contempt of court (due to an alleged disclosure of the identities of protected witnesses).[156] Among other things, the panel concluded "that the current international standards on human rights allow for interpreting the term 'person' to include legal entities for the purposes of" contempt jurisdiction.[157]

44. Such criminal responsibility has not been expressly incorporated into many treaties addressing crimes, including the Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions for the protection of war victims; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the Convention against Torture and Other Cruel, Inhuman

[145] See de Doelder and Tiedemann, *Criminal Liability of Corporations* (surveying States generally); Brickey, "Corporate criminal accountability …" (discussing the history of corporate criminal responsibility in the United States); Hasnas (same); Gobert and Pascal, *European Developments in Corporate Criminal Liability* (assessing corporate criminal liability in 16 European jurisdictions); and Vermeulen, De Bondt and Ryckman, *Liability of Legal Persons for Offences in the EU* (noting that corporate criminal liability did not come to European countries until 1976 in the Netherlands). See also Couturier, "Répartition des responsabilités entre personnes morales et personnes physiques"; Fisse and Braithwaite, *Corporations, Crime and Accountability*; Wells, *Corporations and Criminal Responsibility*; Kyriakakis, "Prosecuting corporations for international crimes …"; Pieth and Ivory, *Corporate Criminal Liability*; and Stewart, "The turn to corporate criminal liability …".

[146] See Ramasastry and Thompson, *Commerce, Crime and Conflict* ... (surveying 16 legal systems and finding that corporate criminal responsibility for international crimes is available in many of them). See also Amann, "Capital punishment …"; and Stewart, "A pragmatic critique of corporate criminal theory".

[147] See, for example, Clapham, "Extending international criminal law …"; Kelly, "Grafting the command responsibility doctrine …"; Stoitchkova; and van der Wilt, "Corporate criminal responsibility for international crimes".

[148] See, for example, the Harvard Law Review Association, "Developments in the law-international criminal law …", p. 2031 (finding that many States do not recognize corporate liability in their national law).

[149] For example, in Switzerland corporate criminal liability only arises where a crime or misdemeanor committed as part of a business activity cannot be imputed to a particular person associated with the business. See Criminal Code of Switzerland, art. 102 (1), SR 311.0.

[150] Art. 9 ("At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization").

[151] Control Council Law No. 10, in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. VIII, Washington, D.C., United States Government Printing Office, 1952, pp. xvi–xix.

[152] See, for example, *United States v. Krauch* et al., ("The I.G. Farben Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals*, vols. VII–VIII, Washington, D.C., United States Government Printing Office, 1952. The Tribunal in this case found that "where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations". *Ibid.*, vol. VIII, pp. 1132–1133. Further, the tribunal found "that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by [I.G.] Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described. … The action of [I.G.] Farben and its representatives, under these circumstances, cannot be differentiated from the acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich." *Ibid.*, p. 1140. Ultimately, however, "the corporate defendant, [I.G.] Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings". *Ibid.*, p. 1153. For analysis of the Nuremberg legacy in this regard, see Bush, "The prehistory of corporations and conspiracy …".

[153] Draft statute for the International Criminal Court, in the Report of the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1), art. 23, para. 6, footnote 3.

[154] See Kyriakakis, "Corporate criminal liability and the ICC Statute".

[155] See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 46C, paragraph 1 (providing that "[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States").

[156] *New TV S.A.L. Karma Mohamed Tashin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Appeals Panel, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings*, Special Tribunal for Lebanon.

[157] *Ibid.*, para. 60. After briefly surveying treaties that refer to corporate criminal responsibility, the Appeals Panel found that "corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law. Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that, given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law". *Ibid.*, para. 67.

or Degrading Treatment or Punishment; and the International Convention for the Protection of All Persons from Enforced Disappearance. Some recent treaties, usually those targeting financial transactions,[158] do call for enactment of national laws addressing corporate responsibility.[159] Even then, however, the relevant provision typically does not require *criminal* sanctions, and instead provides that subject "to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative".[160]

D. Command or other superior responsibility

45. Separate from the ordering of an individual to commit an offence (addressed in the prior subsection), most jurisdictions impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances, a type of criminal responsibility referred to as "command responsibility" or "superior responsibility".[161] Not all acts committed by subordinates, however, are imputable to those who command them; instead, some form of dereliction of duty by the commander is required. Thus, in the "High Command" case (one of the 12 Nuremberg trials conducted by the United States authorities), the Tribunal noted that:

> A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[162]

46. Notably, the Nürnberg Tribunal and the International Military Tribunal for the Far East used command responsibility with respect to both military and civilian commanders,[163] an approach that influenced later tribunals. As indicated by a Trial Chamber of the International Tribunal for Rwanda in *Prosecutor v. Musema*, "[a]s to whether the form of individual criminal responsibility referred to under Article 6 (3) of the Statute [of the International Tribunal for Rwanda] also applies to persons in both military and civilian authority, it is important to note that during the trials under the International Military Tribunal for the Far East, civilian authorities were convicted of war crimes under this principle".[164]

47. Indeed, contemporary international criminal courts and tribunals provide for the criminal responsibility of commanders. The Statute of the International Tribunal for the Former Yugoslavia provides that "[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof",[165] and several defendants have been convicted by the International Tribunal for the Former Yugoslavia on the basis of such command responsibility.[166] The same language appears in the Statute of the International Tribunal for Rwanda[167] and that Tribunal has also convicted defendants on the basis of command responsibility.[168] Similar wording appears

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[158] But see the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I, para. (2) ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*").

[159] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 2, para. 14 ("For the purposes of this Convention: … 'Person' means any natural or legal person") and art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

[160] The International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 ("Each State party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence …. Such liability may be criminal, civil or administrative"); the United Nations Convention against Transnational Organized Crime, art. 10, para. 2 ("Subject to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative."); and the United Nations Convention against Corruption, art. 26, para. 2 (same). See also the Council of Europe Convention on the Prevention of Terrorism, art. 10, para. 2 ("Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative"); the Convention on combating bribery of foreign public officials in international business transactions, art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official") and art. 3, para. 3 ("Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable"); and the Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, art. 3, para. 1 (on liability of legal persons: "Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person"); and art. 4 (on sanctions for legal persons: "Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (I) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines").

[161] For commentary, see Lael, *The Yamashita Precedent*; Bantekas, "The contemporary law of superior responsibility"; Damaška, "The shadow side of command responsibility"; and Sepinwall, "Failures to punish".

[162] *United States v. von Leeb, et al.* ("The High Command Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. XI, Washington, D.C., United States Government Printing Office, 1950, pp. 543–544.

[163] See, for example, Bassiouni, *International Criminal Law*, p. 461; and Heller, *The Nuremberg Military Tribunals* …, pp. 262–263.

[164] *Prosecutor v. Musema, Case No. ICTR-96-13A*, Judgment and Sentence of 27 January 2000, Trial Chamber I, International Tribunal for Rwanda, para. 132.

[165] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 3.

[166] See, for example, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1T, Judgment of 25 June 1999, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, pp. 535–761, at pp. 565–573, paras. 66–77; and *Prosecutor v. Delalić* et al., Case No. IT-96-21T, Judgment of 16 November 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, paras. 330–400 and 605–810.

[167] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 3.

[168] See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, Trial Chamber, International Tribunal for Rwanda;

in the instruments regulating the Special Court for Sierra Leone,[169] the Special Tribunal for Lebanon,[170] the Special Panels for Serious Crimes in East Timor,[171] the Extraordinary Chambers in the Courts of Cambodia,[172] the Supreme Iraqi Criminal Tribunal[173] and the Extraordinary African Chambers within the Senegalese Judicial System.[174]

48. The Commission's 1996 draft code of crimes against the peace and security of mankind stated in its article 6:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.[175]

49. Article 28 of the Rome Statute of the International Criminal Court[176] contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander in regard to the acts of others.[177] As a general matter, criminal responsibility arises when: (*a*) there is a relationship of subordination; (*b*) the commander knew or should have known that his subordinates were committing or about to commit the offence; and (*c*) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of "command responsibility" theory in national legal systems, in both the criminal and civil contexts.[178]

50. Article 28 also addresses the issue of "superior and subordinate relationships" arising in a non-military or civilian context. Such superiors include civilians that "lead" but are not "embedded" in military activities.[179] Here, criminal responsibility arises when: (*a*) there is a relationship of subordination; (*b*) the civilian superior knew or consciously disregarded information about the offences; (*c*) the offences concerned activities that were within the effective responsibility and control of the superior; and (*d*) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.[180]

51. National laws also contain this type of criminal responsibility for war crimes, genocide, and crimes against humanity, but slightly differing standards are used among States that sometimes do not replicate the standard of the Rome Statute of the International Criminal Court. For example, the national law of Canada provides:

> A superior commits an indictable offence if the superior fails to exercise control properly over a person under their effective authority and control …; the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person; the offence relates to activities for which the superior has effective authority and control; and the superior subsequently fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences.[181]

A number of other States make similar provisions, including Australia,[182] France,[183] Germany,[184] Malta,[185]

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and *Prosecutor v. Kambanda*, Case No. ICTR-97-23S, Judgment and Sentence of 4 September 1998, Trial Chamber, International Tribunal for Rwanda.

[169] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 3.

[170] Statute of the Special Tribunal for Lebanon (Security Council resolution 1757 (2007) of 30 May 2007, attachment), art. 3, para. 2.

[171] UNTAET/REG/2000/15 (see footnote 102 above), sect. 16.

[172] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 29.

[173] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[174] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10, para. 4.

[175] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 25.

[176] Article 28, entitled "Responsibility of commanders and other superiors", provides in paragraph (*a*), that:

"A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

"(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

"(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[177] See, for example, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2T, Judgment of 26 February 2001, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 369 ("It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he 'knew or had reason to know' of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability").

[178] See, for example, *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002); see also Van Schaack, "Command responsibility", p. 1217.

[179] Ronen, "Superior responsibility of civilians …", p. 347.

[180] Article 28, paragraph (*b*), provides that:

"With respect to superior and subordinate relationships not described in paragraph (*a*), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

"(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

"(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

"(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[181] Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24) of 29 June 2000, sect. 5 (2) (*a*)–(*d*), available from https://laws-lois.justice.gc.ca/eng/acts/C-45.9/FullText.html.

[182] International Criminal Court (Consequential Amendments) Act 2002, No. 42, 2002, article 268.115, available from www.comlaw.gov.au/Details/C2004A00993.

[183] Written comments to the International Law Commission (2015), France, citing article 213-41 of its Criminal Code.

[184] Act to Introduce the Code of Crimes Against International Law of 26 June 2002, sects. 4, 13 and 14, available from www.iuscomp.org/gla/statutes/VoeStGB.pdf.

[185] International Criminal Court Act, Act XXIV of 2002, part 54E, available from https://parlament.mt/9th-leg/acts-9th/act-no-xxiv-of-2002/.

the Netherlands,[186] New Zealand,[187] Spain,[188] the United Kingdom,[189] the United States of America[190] and Uruguay.[191] Some States, such as Argentina[192] and Ecuador,[193] that recently adopted laws to implement the Rome Statute of the International Criminal Court, do not address in those laws the issue of command responsibility.

52. Military manuals adopted by States also identify this form of criminal responsibility. For example, the Military Manual of Argentina provides: "Breaches committed by a subordinate do not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew that the subordinate was committing or was going to commit the breach and if they did not take the measures within their power to prevent or repress the breach."[194] Other examples may be found in the military manuals of Cameroon,[195] France,[196] the Russian Federation,[197] Ukraine,[198] the United Kingdom[199] and the United States of America.[200]

53. Treaties addressing offences other than crimes against humanity also often acknowledge command responsibility. While the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims do not do so, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), provides a general formula in article 86, paragraph 2, which has been accepted by its 174 States parties. That provision reads:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[201]

54. As such, national laws and international instruments relating to crimes against humanity, as well as relevant treaties addressing other crimes, typically include—as one facet of participation in the commission of the offence—the possibility of imputation of criminal responsibility to a military commander or other superior for acts committed by subordinates, in circumstances where the superior has been derelict in his or her duties.

E. Superior orders

55. All jurisdictions that address crimes against humanity permit grounds for excluding criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffers from a mental disease that prevents the person from appreciating the unlawfulness of his or her conduct.[202] Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances.[203] Action taken in self-defence can

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[186] Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), sect. 9, available from https://ihl-databases.icrc.org/en.

[187] International Crimes and International Criminal Court Act of 6 September 2000, sect. 12, available from www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html.

[188] Written comments to the International Law Commission (2015), Spain, citing article 451 of its Criminal Code.

[189] International Criminal Court Act 2001, sect. 65, available from www.legislation.gov.uk/ukpga/2001/17/contents.

[190] Principals, United States Code, Title 10, sect. 950q (2012), available from www.govinfo.gov/content/pkg/USCODE-2014-title10/pdf/USCODE-2014-title10-subtitleA-partII-chap47A-subchapVIII-sec950q.pdf.

[191] Law No. 18.026 on cooperation with the International Criminal Court in the fight against genocide, war crimes and crimes against humanity, 4 October 2006, art. 10, available from www2.ohchr.org/english/bodies/cat/docs/anexoi_ley18026.pdf.

[192] Law No. 26.200 implementing the Rome Statute of the International Criminal Court, 5 January 2007, available from www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123921/norma.htm.

[193] Comprehensive Organic Criminal Code, 2014, available from www.asambleanacional.gob.ec/es/system/files/document.pdf.

[194] Leyes de Guerra [Laws of War], PC-08-01 (public, 1989 ed.), Joint Chiefs of Staff of the Armed Forces, approved by resolution No. 489/89 of the Ministry of Defence, 23 April 1990, sect. 8.07 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ar_rule153).

[195] *Droit des conflits armés et droit international humanitaire, Manuel de l'instructeur en vigueur dans les forces de défense*, Ministry of Defence, Office of the President, General Staff of the Armed Forces (2006), p. 296, sect. 662 (see English translation at www.icrc.org/customary-ihl/eng/docs/v2_cou_cm_rule153).

[196] *Manuel de droits des conflits armés*, Ministry of Defence (2001), p. 113 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule153).

[197] *Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister No. 75 (1990), sect. 14 (*b*) (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ru_rule153).

[198] *Manual on the Application of IHL Rules*, Ministry of Defence (2004), sect. 1.8.8 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_ua_rule153).

[199] *The Law of War on Land being Part III of the Manual of Military Law*, The War Office, HMSO (1958), sect. 631 (see www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule153).

[200] *Department of Defense Law of War Manual*, Office of General Counsel, Department of Defense, sect. 18.23.3.2 (June 2015), available from https://dod.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-june-2015.pdf.

[201] Provisions on command responsibility also appear in the International Convention for the Protection of All Persons from Enforced Disappearance, article 6, paragraph 1, of which provides:

"Each State party shall take the necessary measures to hold criminally responsible at least:

"….

"(*b*) A superior who:

"(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

"(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

"(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

"(*c*) Subparagraph (*b*) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."

[202] See, for example, the Rome Statute of the International Criminal Court, article 31, paragraph 1 (*a*); the Criminal Code of Croatia (footnote 64 above), art. 40; and the Criminal Code of the Republic of Finland (1889) (amended 2012), chap. 3, sects. 4 (2)–(3), available from www.legislationline.org/finland.

[203] See for example, the Rome Statute of the International Criminal Court, article 31, paragraph 1 (*b*); the Criminal Code of Croatia (footnote 64 above), art. 41; and the Criminal Code of Finland (previous footnote), chap. 3, sect. 4 (4).

also preclude responsibility,[204] as well as duress resulting from a threat of imminent harm or death.[205] In some instances, the person must have achieved a certain age to be criminally responsible.[206] The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.[207]

56. At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence that they were ordered by a superior to commit the offence.[208] Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Consequently, in conformity with article 8 and "with the law of all nations", the International Military Tribunal found: "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."[209]

57. Likewise, article 6 of the Charter of the International Military Tribunal for the Far East provides: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[210]

58. The Commission's 1996 draft code of crimes against the peace and security of mankind provides in article 5: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires."[211] The Commission noted in regard to this article:

> the culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of these heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.[212]

59. While article 33 of the Rome Statute of the International Criminal Court allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the exception.[213] The instruments regulating the International Tribunal for the Former Yugoslavia,[214] the International Tribunal for Rwanda,[215] the Special Court for Sierra Leone,[216] the Special Tribunal for Lebanon,[217] the Special Panels for Serious Crimes in East Timor,[218] the Extraordinary Chambers in the Courts of Cambodia,[219] the Supreme Iraqi Criminal Tribunal[220] and the Extraordinary African Chambers within the Senegalese Judicial System[221] all similarly exclude superior orders as a defence. The 2005 ICRC Study of Customary International Humanitarian Law, in Rule 155, provides: "Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered."[222]

60. Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[223] the Inter-American Convention to Prevent and Punish Torture;[224]

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[204] See the Rome Statute of the International Criminal Court, article 31, paragraph 1 (*c*); the Criminal Code of Croatia (footnote 64 above), arts. 29–30; and the Criminal Code of Finland, chap. 4, sect. 4 (footnote 202 above).

[205] See the Rome Statute of the International Criminal Court, article 31, paragraph 1 (*d*); the Criminal Code of Croatia (footnote 64 above), art. 31; and the Criminal Code of Finland (footnote 202 above), chap. 4, sect. 5.

[206] See the Rome Statute of the International Criminal Court, art. 26; the Criminal Code of Croatia (footnote 64 above), art. 10; and the Criminal Code of Finland (footnote 202 above), chap. 3, sect. 4 (1).

[207] See the draft code of crimes against the peace and security of mankind (footnote 134 above), p. 23, and p. 42, art. 15 ("In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law") and the commentary thereto.

[208] See, generally, D'Amato, "National prosecution for international crimes", pp. 288–289; and Nowak and McArthur, *The United Nations Convention against Torture* …, p. 102.

[209] "Judicial decisions: International Military Tribunal (Nuremberg) …", p. 221.

[210] Charter of the International Military Tribunal for the Far East, (Tokyo, 19 January 1946) (amended 26 April 1946), Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. IV (1946–1949), Washington, D.C., Department of State Publications, p. 20, at p. 23.

[211] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 23 (art. 5); see also the 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, paras. 95–127, at p. 375 (Principle IV).

[212] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 24.

[213] For analysis, see Gaeta, "The defence of superior orders"; and Cryer, "International criminal law", pp. 768–769.

[214] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 4.

[215] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 6, para. 4.

[216] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 4.

[217] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 3, para. 3.

[218] UNTAET/REG/2000/15 (see footnote 102 above), sect. 21.

[219] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 29.

[220] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 15.

[221] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 10, para. 5.

[222] See ICRC, Customary IHL Database, "Chapter 43: Practice relating to Rule 155. Defence of superior orders", available from www.icrc.org/customary-ihl/eng/docs/v1_rul_rule155.

[223] Art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

[224] Art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

the Inter-American Convention on the Forced Disappearance of Persons;[225] and the International Convention for the Protection of All Persons from Enforced Disappearance.[226] In the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue. Thus, in evaluating the performance of Guatemala in 2006, the Committee stated: "The State party should amend its legislation in order to explicitly provide that an order from a superior officer or a public authority may not be invoked as a justification of torture."[227] Among other things, the Committee indicated that it was "concerned that the requirement … of the Convention [on this point was] expressed ambiguously in the State party's legislation".[228] In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.[229] For example, when reviewing in 2004 the implementation of the Convention by Chile, the Committee against Torture expressed concern about "[t]he continued provision, in articles … of the Code of Military Justice, of the principle of due obedience, notwithstanding provisions affirming a subordinate's right to protest against orders that might involve committing a prohibited act".[230]

61. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage. Article 5 of the draft code of crimes against the peace and security of mankind indicated this when it stated that action pursuant to an order "may be considered in mitigation of punishment if justice so requires".[231] In its commentary to that provision, the Commission stated:

> a subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does not incur the same degree of culpability as a subordinate who willingly participates in the commission of the crime. The fact that a subordinate unwillingly committed a crime pursuant to an order of a superior to avoid serious consequences for himself or his family resulting from the failure to carry out that order under the circumstances at the time may justify a reduction in the penalty that would otherwise be imposed to take into account the lesser degree of culpability. The phrase "if justice so requires" is used to show that even in such cases the imposition of a lesser punishment must also be consistent with the interests of justice.[232]

62. As suggested by this text, statutes of various international criminal tribunals have recognized the relevance of superior orders at the sentencing stage.[233] However, the Rome Statute of the International Criminal Court does not address whether a superior order is relevant at the sentencing stage. The ICRC Study concluded that "there is extensive State practice to this effect in military manuals, national legislation and official statements", but also found that some States "exclude mitigation of punishment for violations committed pursuant to manifestly unlawful orders".[234]

F. Statute of limitations

63. One possible restriction on the prosecution of a person for crimes against humanity concerns the application of a "statute of limitations" ("period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution.[235] The purpose of such a rule is principally to limit the pursuit of prosecutions to a time when the physical and eyewitness evidence remains fresh and has not deteriorated.

64. No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg Charter or the Charter of the International Military Tribunal for the Far East, or in the constituent instruments of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda or the Special Court for Sierra Leone.[236] By contrast, Control Council Law No. 10, adopted in 1945 by the Allied Powers occupying Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes, and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".[237] Like-

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[225] Art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

[226] Art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72; see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6.

[227] Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 13.

[228] *Ibid.*

[229] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 102.

[230] Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), chap. III, onsideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i). See also *ibid., Sixtieth Session, Supplement No. 44* (A/60/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (*a*) (praising Argentina for declaring its Due Obedience Act "absolutely null and void").

[231] See the draft code of crimes against the peace and security of mankind (footnote 134 above), p. 23.

[232] *Ibid.*, p. 24, para. (5). See also D'Amato, "National prosecution for international crimes", p. 288.

[233] For provisions allowing mitigation at the sentencing stage, see the Nürnberg Charter, article 8; Charter of the International Military Tribunal for the Far East, art. 6 (see footnote 210 above); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 7, para. 4; Statute of the International Tribunal for Rwanda (footnote 100 above), art. 6, para. 4; Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 6, para. 4; and the instrument regulating the Special Panels for Serious Crimes in East Timor, UNTAET/REG/2000/15 (footnote 102 above), sect. 21.

[234] See footnote 222 above.

[235] See, generally, Kok, *Statutory Limitations in International Criminal Law*.

[236] See Schabas, *The International Criminal Court* …), p. 429, and "Article 29".

[237] Control Council Law No. 10 (see footnote 151 above), p. 52, art. II, para. 5.

wise, the Rome Statute of the International Criminal Court expressly addresses the matter, providing that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations" (art. 29). The drafters of the Statute strongly supported this provision as applied to crimes against humanity.[238] Similarly, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia and the instruments regulating the Supreme Iraqi Criminal Tribunal and the Special Panels for Serious Crimes in East Timor all explicitly defined crimes against humanity as offences for which there was no statute of limitations.[239]

65. With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly of the United Nations asserted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".[240] The following year, States adopted the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, which requires State Parties to adopt "any legislative or other means necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of these two types of crimes (art. IV). Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, which uses substantially the same language. These conventions, however, have secured limited adherence; as of 2015, fifty-five States are parties to the 1968 Convention, while eight States are parties to the 1974 Convention.

66. At the same time, there appears to be no State with a law on crimes against humanity which also bars prosecution after a period of time has elapsed.[241] Rather, numerous States have specifically legislated against any such limitation, including Albania, Argentina, Belgium, Bosnia and Herzegovina, Burundi, the Central African Republic, Cuba, Estonia, Ethiopia, France, Germany, Hungary, Israel, Mali, the Netherlands, Niger, Peru, Poland, the Republic of Korea, Latvia, the Russian Federation, Rwanda, Spain, Ukraine, Uruguay and Uzbekistan.[242] For example, in 1964, France enacted a law providing that crimes against humanity as defined by General Assembly resolution 3 (I) of 13 February 1946 (concerning the extradition and punishment of war criminals from the Second World War) and the Nürnberg Charter "are imprescriptible by their nature".[243] In the following decades, France prosecuted several persons for crimes against humanity committed many years earlier, during the Second World War, such as Klaus Barbie, Maurice Papon and Paul Touvier. In the *Barbie* case, the French *Cour de Cassation* determined that "the prohibition on statutory limitations for crimes against humanity is now part of customary law".[244]

67. Other national courts have also addressed questions as to whether allegations of crimes against humanity are time-barred. The Jerusalem District Court in the *Eichmann* case rejected the defendant's argument that his prosecution was time-barred: "Because of the extreme gravity of the crime against the Jewish People, the crime against humanity and war crime, the Israeli legislator has provided that such crimes shall never prescribe."[245] The Special Prosecutor's Office noted during the *Mengistu* trial that, under the Constitution of Ethiopia, "no statutory limitation shall apply to crimes against humanity. This concept emanates from internationally recognized principles".[246] In the *In re Agent Orange Product Liability Litigation* case, a United States federal district court asserted that the Convention on the nonapplicability of statutory limitations to war crimes and crimes against humanity and the Rome Statute of the International Criminal Court "suggest the need to recognize

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[238] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.183/13 (Vol. II)), United Nations publication, Sales No. E.02.I.5, 2nd meeting, paras. 45–74. See also Schabas, *The International Criminal Court* …, p. 469 (citing A/CONF.183/C.1/SR.8, paras. 76 and 82).

[239] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 5; Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 17 (*d*); and the instrument regulating the Special Panels for Serious Crimes in East Timor UNTAET/REG/2000/15 (see footnote 102 above), sect. 17.1. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia was provided jurisdiction over crimes against humanity committed decades prior to its establishment, in 1975–1979, when the Khmer Rouge held power.

[240] General Assembly resolution 2338 (XXII) of 18 December 1967. See also General Assembly resolutions 2712 (XXV) of 15 December 1970 and 2840 (XXVI) of 18 December 1971.

[241] Schabas, *The International Criminal Court*, p. 469.

[242] See Albania, Criminal Code (footnote 59 above), art. 67; Argentina, Law concerning the Imprescriptibility of War Crimes and Crimes Against Humanity (1995); Belgium, Criminal Code (1867, as amended on 5 August 2003), art. 91; Bosnia and Herzegovina, Criminal Code (2003), art. 19; Burundi, Criminal Code (2009), arts. 150 and 155; Central African Republic, Criminal Procedure Code (2010), art. 7 (*c*); Cuba, Criminal Code (footnote 65 above), art. 64, para. 5; Estonia, Criminal Code (2002), sect. 81, para. (2); Ethiopia, Constitution (1994), art. 28, para. 1; France, Criminal Code (1994), art. 213-5; Germany (footnote 68 above), art. 1, sect. 5; Hungary, Act IV of 1978 on the Criminal Code (as amended in 1998), art. 33, para. (2); Israel, Nazis and Nazi Collaborators (Punishment) Law (1950), art. 12; Latvia, Criminal Code of sect. 57 (2000); Mali, Criminal Code (2001), art. 32; the Netherlands, International Crimes Act (2003), sect. 13; Niger, Criminal Code (1961, as amended in 2003), art. 208.8; Peru, Legislative Resolution No. 27998 (2003), art. 1 and Presidential Decree No. 082-2003-RE (2003), art. 1; Poland, Criminal Code (1997), art. 109; Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), art. 6; Russian Federation, Decree on the Punishment of War Criminals (1965); Rwanda, Constitution, art. 13 (2003); Spain, Criminal Code, art. 131 (1995, as amended on 23 June 2010), para. 4; Ukraine, Criminal Code (2010), art. 49, para. 5; Uruguay, Law on Cooperation with the ICC (2006), art. 7; and Uzbekistan, Criminal Code (1994), art. 64. See, generally, ICRC, Practice relating to Rule 160—Statutes of Limitation, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160.

[243] France, Law No. 64-1326 (26 December 1964).

[244] France, *Fédération nationale des déportés et internés résistants et patriotes* et al. *v. Barbie*, Judgment of 20 December 1985, Court of Cassation (Criminal Chamber), ILR, vol. 78 (1988), pp. 125–131.

[245] Israel, *The Attorney-General of the Government of Israel v. Eichmann, Criminal Case No. 40/61*, Judgment of 11 December 1961, District Court of Jerusalem, para. 53. See also Ambos, *Treatise on International Criminal Law*, p. 428.

[246] *Ethiopia v. Mengistu and Others, Reply submitted by the Special Prosecutor in response to the objection filed by counsels by defendants (23 May 1995)*, Ethiopia, Special Prosecutor's Office, sect. 6.1.1.

a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity".[247] The Supreme Court of Argentina has ruled that a statute of limitations will not apply to war crimes and crimes against humanity as a matter of customary international law and *jus cogens* principles.[248]

68. Many treaties addressing other crimes in national law have not contained a prohibition on a statute of limitations. For example, the Commission proposed in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons to include an article 9 reading: "The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State party, that fixed for the most serious crimes under its internal law."[249] States, however, declined to include that provision in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contains no prohibition on the application of a statute of limitations to torture-related offences, but the Committee against Torture has asserted that, taking into account their grave nature, such offences should not be subject to any statute of limitations.[250] Similarly, while the International Covenant on Civil and Political Rights does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.[251]

69. The International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statute of limitations, providing that "[a] State party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings … [i]s of long duration and is proportionate to the extreme seriousness of this offence".[252] The *travaux préparatoires* for the Convention indicates that this provision was intended to distinguish between those offences that might constitute a crime against humanity—for which there should be no statute of limitations—and all other offences under the Convention.[253] Specifically, the drafters of the International Convention for the Protection of All Persons from Enforced Disappearance appeared to hold a consensus opinion that:

> In international law, there should be no statute of limitations for enforced disappearances which constituted crimes against humanity. Where enforced disappearances constituting offences under ordinary law were concerned, the longest limitation period stipulated in domestic law should be applied—or, in any event, a limitation period commensurate with the seriousness of the crime.[254]

70. One of the key issues identified by States for not joining the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity was a concern with the retroactive effect of the prohibition on a statute of limitations. Article 1 of the Convention prohibited a statute of limitations "irrespective of their date of commission" (art. I), thereby requiring States parties to abolish statutory limitations with retroactive effect. An alternative approach to such a prohibition in a new convention would be to prohibit statutory limitations, but not with retroactive effect, either by affirmatively stating as much or by not addressing the issue. Article 28 of the Vienna Convention on the Law of Treaties provides that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".[255] The International Court of Justice applied article 28 in the context of a treaty addressing a crime (torture) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* finding that the "the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned".[256] Thus, without a clearly stated contrary intention, a treaty will generally not apply to actions taken entirely prior to the State's acceptance of the treaty.[257]

71. At the same time, article 28 does not apply to continuing incidents that have not ended before the entry into force of the treaty.[258] As the Commission noted in 1966:

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[247] *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005), p. 63.

[248] Argentina, *Office of the Prosecutor v. Priebke (Erich)*, Case No. P/457/XXXI, Ordinary Appeal Judgment, Request of Extradition, 2 November 1995, Supreme Court.

[249] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, p. 312, at p. 320.

[250] See, for example, Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 44* (A/64/44), chap. III, consideration of reports by States Parties under article 19 of the Convention, Montenegro; and *ibid., Sixty-second Session, Supplement No. 44* (A/62/44), chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Italy, para. 19.

[251] See, for example, Report of the Human Rights Committee, *ibid., Sixty-third Session, Supplement No. 40* (A/63/40), chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report, and public final concluding observations adopted thereon, Panama, para. 7.

[252] Art. 8, para. 1 (*a*). By contrast, the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations (art. VII).

[253] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), paras. 43–46 and 56.

[254] *Ibid.*, para. 56.

[255] See also the draft code of crimes against the peace and security of mankind (footnote 134 above), article 13, paragraph 1, p. 32 ("No one shall be convicted under the present Code for acts committed before its entry into force").

[256] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 98 above), p. 457, para. 100. See also *O. R., M. M. and M. S. v. Argentina*, Communications Nos. 1/1988, 2/1988 and 3/1988, Views of the Committee against Torture of 23 November 1989, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (A/45/44), annex V, p. 112, para. 7.5 (finding that " 'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention").

[257] Crawford, *Brownlie's Principles of Public International Law*, p. 378; Shaw, *International Law*, p. 671; and *Yearbook … 1966*, vol. II, Part II, draft articles on the law of treaties, p. 177, at pp. 211–213, draft article 24 and commentary thereto.

[258] Odendahl, "Article 28", p. 483.

if … an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.[259]

72. The European Court of Human Rights and the Human Rights Committee have both followed this approach, such that if there is a "continuing violation" of human rights, not simply an "instantaneous act or fact" with continuing effects, then the Court and the Committee view the matter as within the scope of their jurisdiction.[260] According to the Court, "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims".[261] The Human Rights Committee has "declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date".[262]

73. Further, while the obligations for the State under a new convention would only operate with respect to acts or facts that arise after the convention enters into force for that State, the convention (at least as currently reflected in the present draft articles) would not address, one way or the other, the manner in which a State applies its law to crimes against humanity arising prior to that time. A State that previously possessed the capacity to prosecute crimes against humanity with respect to acts or facts pre-dating the convention would remain able to do so after entry into force of the convention. In other words, while such prosecutions would fall outside the scope of the convention, the convention would not preclude them. For those States, a relevant limitation on its capacity to prosecute for such crimes might be the date on which the State enacted its national law on crimes against humanity, since international law and most national legal systems preclude punishment for an act that was not criminal at the time it was committed.[263] Even then, however, there is support for the proposition that crimes against humanity committed prior to enactment of a national law criminalizing such conduct nevertheless might be nationally prosecuted, since such acts have been regarded as criminal under international law at least since the Second World War.[264]

G. Appropriate penalties

74. The Commission provided in its 1996 draft Code of crimes against the peace and security of Mankind that "[a]n individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime".[265] The commentary further explained that the "character of a crime is what distinguishes that crime from another crime… The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author." Thus, "while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty."[266]

75. To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The Statute of the International Tribunal for the Former Yugoslavia provides that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" (art. 24, para. 1). Furthermore, the Tribunal is to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (art. 24, para. 2). The Statute of the International Tribunal for Rwanda includes identical language, except that recourse is to be had to "the general practice regarding prison sentences in the courts of Rwanda".[267] Even for convictions for the most serious international crimes of international concern, this can result in a wide range of sentences; thus, the International Tribunal for Rwanda imposed "custodial terms of forty-five, thirty-five, thirty-two, thirty, twenty-five, fifteen, twelve, ten, seven and six years in genocide

[259] *Yearbook … 1966*, vol. II, draft articles on the law of treaties, p. 177, at p. 212, para. (3) of the commentary to draft article 24.

[260] See *Loizidou v. Turkey*, (Article 50) 28 July 1998, ECHR 1998-IV; *Kalashnikov v. Russia*, No. 47095/99, ECHR 2002-VI, para. 111; *Posti and Rahko v. Finland*, No. 27824/95, ECHR 2002-VII, para. 39; *Blečić v. Croatia,* No. 59532/00, 29 July 2004, European Court of Human Rights, paras. 73 *et seq*; and *Gueye* et al. *v. France*, Communication No. 196/1985, Views of the Human Rights Committee, *Official Records of the General Assembly, Forty-Fourth Session, Supplement No. 40* (A/44/40), pp. 189 and 191–192.

[261] *Posti and Rahko* (see previous footnote), para. 39.

[262] *Gueye* et al. (see footnote 260 above), pp. 191–192, para. 5.3.

[263] In this regard, reference is often made to the prohibition of *ex post facto* (after the facts) laws or to the doctrine of *nullum crimen, nulla poena sine praevia lege poenali* ("[there exists] no crime [and] no punishment without a pre-existing penal law [appertaining]").

[264] See, for example, *Kolk and Kislyiy v. Estonia* (dec.), Nos. 23052/04 and 24018/04, ECHR 2006-I (denying applicants' claim that their convictions for crimes against humanity transgressed article 7 of the European Convention on Human Rights, which prohibits retrospective application of criminal law, because "even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by Estonian courts to constitute crimes against humanity under international law at the time of their commission"). See also *Penart v. Estonia,* No. 14685/04, Decision on admissibility of 24 January 2006, European Court of Human Rights (same); *Kononov v. Latvia* [GC], No. 36376/04, ECHR 2010 (same but with respect to war crimes); but see *Vasiliauskas v. Lithuania* [GC], No. 35343/05, ECHR 2015 (finding unlawfully retroactive the application of a national law on genocide committed in the form of killing of a political group, since at the time of the act international treaty law had not included "political group" in the definition of genocide and customary international law was unclear). The Special Tribunal for Lebanon concluded "that individuals are *expected and required to know* that a certain conduct is criminalised in international law: at least from the time that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation", *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging of 16 February 2011*, Case No. STL-11-01/I, Special Tribunal for Lebanon, para. 133.

[265] Draft code of crimes against the peace and security of mankind (see footnote 134 above), art. 3, p. 22.

[266] *Ibid.*, p. 23, para. (3) of the commentary.

[267] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 23, para. 1.

prosecutions".[268] Article 77, paragraph 1, of the Rome Statute of the International Criminal Court also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,[269] the Special Tribunal for Lebanon,[270] the Special Panels for Serious Crimes in East Timor,[271] the Extraordinary Chambers in the Courts of Cambodia,[272] the Supreme Iraqi Criminal Tribunal[273] and the Extraordinary African Chambers within the Senegalese Judicial System.[274]

76. Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. France, for example, may punish crimes against humanity with life in prison "[l]orsqu'ils sont commis en temps de guerre en exécution d'un plan concerté contre ceux qui combattent le système idéologique"[275] ["when committed in time of war pursuant to a concerted campaign against those fighting the ideological system"], as well as when there is "participation à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, de l'un des crime définis"[276] ["participation in a group formed or association established with a view to the preparation, marked by one or more material actions, of one of the defined crimes"]. Other offences constituting crimes against humanity in France, however, are punished by only 10 or 15 years' imprisonment.[277] Austria also "varies [the term of imprisonment] according to the gravity of the specific crime committed. Murder committed in the course of such an attack, for example, is punishable with life imprisonment …, rape with imprisonment of five to fifteen years".[278] The Republic of Korea does the same, providing for a minimum sentence of seven years for murder and five years for any other offence constituting a crime against humanity.[279]

77. Spain also provides for a wide range of possible prison sentences for offences constituting crimes against humanity: 15–20 years if death results; 12–15 years for rape and 4–6 years for any other type of sexual assault; 12–15 years for injuries; 8–12 years for conditions that endanger the lives or seriously impair the health of the victim; 8–12 years for expulsion; 6–8 years for forcible pregnancy; 12–15 years for forced disappearance; 8–12 years for unlawful imprisonment; 4–8 years for torture; 4–8 years for prostitution offences, including trafficking for purposes of sexual exploitation; and 4–8 years for slavery.[280] National law in Finland allows for a sentence between one year and life for the commission of a crime against humanity, with a minimum of eight years if the offender committed an "aggravated" crime against humanity.[281] Switzerland requires a minimum sentence of five years for a crime against humanity, with a potential sentence of life in prison "[s]i l'acte est particulièrement grave"[282] ["if the offence is particularly serious"].

78. A large number of States do not permit the death penalty for any crime, including crimes against humanity (nor do international criminal tribunals since Nuremberg), and many other States that have not abolished it do not apply it in practice. Indeed, many States view application of the death penalty as contrary to human rights law. Even so, a substantial minority of States permit the death penalty, including Bangladesh, Belarus, Botswana, China, Egypt, Ethiopia, India, Indonesia, Iraq, Japan, Jordan, Kuwait, Lebanon, Libya, Malaysia, Nigeria, Oman, Singapore, Thailand, Uganda, Viet Nam, the United Arab Emirates and the United States of America, viewing it as permissible under international law.[283] To date, treaties addressing criminalization of offences in national law have not precluded application of the death penalty, apparently recognizing that the practice of States currently varies in this regard.

79. Indeed, international treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, leave to States parties the discretion to determine the punishment, based on the circumstances of the particular offender and offence.[284] The Convention on the Prevention and Punishment of the Crime of Genocide simply calls for "effective penalties for persons guilty of genocide or any of the other acts enumerated" (art. V). In national practice, the flexible nature of this obligation has led to penalties prescribed for genocide ranging from periods of imprisonment, to life imprisonment, or to the death penalty. There is a variation in the penalties for the five different acts of genocide in Article II (*a*)–(*e*) of the Convention (with killing generally attracting the highest penalties), and variation in the

[268] Schabas, *Genocide in International Law*, pp. 464–465 (citations omitted).

[269] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 19.

[270] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 24.

[271] UNTAET/REG/2000/15 (see footnote 102 above), sect. 10.

[272] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 39.

[273] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 24.

[274] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 24.

[275] Written comments to the International Law Commission (2015), France, citing article 212-2 of its Criminal Code.

[276] *Ibid.*, citing article 212-3 of its Criminal Code.

[277] *Ibid.*, citing article 212-1 of its Criminal Code.

[278] *Ibid.*, Austria.

[279] *Ibid.*, Republic of Korea, citing article 9 of its Criminal Code.

[280] *Ibid.*, Spain, citing article 607 *bis*, paragraph 2 of its Criminal Code. See also *ibid.*, Germany, and Written comments to the International Law Commission (2016), Australia, for examples of other States with various sentence ranges for different types of offences.

[281] *Ibid.*, Finland, citing chapter 11, sections 3–4 of its Criminal Code.

[282] *Ibid.*, Switzerland, citing article 264 (*a*) of its Criminal Code.

[283] For an overview, see Hood and Hoyle, *The Death Penalty*.

[284] See, for example, Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 58 (indicating that "[s]everal delegations welcomed the room for manoeuvre granted to States" in this provision); Cassese, pp. 219–220; see also Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 39* (A/32/39), 13th meeting, pp. 68–69, para. 4 (comments of the United States of America).

different forms of criminal participation (with attempt, conspiracy and direct and public incitement to genocide sometimes attracting lesser penalties, the latter particularly due to concerns about the impact on freedom of expression).[285] According to one writer:

> Most domestic legal systems treat accomplices [to genocide] as harshly as principal offenders, depending on the specific circumstances. Thus, an aider and abettor could be subject to the most severe sanctions. In many judicial systems, attempted crimes are subject to substantially reduced penalties, and the same principle ought to apply with respect to genocide. The offence of direct and public incitement has been treated in domestic legislation as being significantly less serious than the other forms of participation in genocide.[286]

80. The Geneva Conventions for the protection of war victims also provide a general standard but leave to individual States the discretion to set the appropriate punishment, by simply requiring "[t]he High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for … any of the grave breaches of the present Convention".[287]

81. More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be "appropriate." Although the Commission initially proposed the term "severe penalties" for use in its draft articles on diplomatic agents and other protected persons, the term "appropriate penalties" was instead used by States in the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.[288] That term has served as a model for subsequent treaties.[289] At the same time, the provision on "appropriate penalties" in the 1973 Convention was accompanied by language calling for the penalty to take into account the "grave nature" of the offence.[290] The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important "world interests" at stake in punishing such an offence.[291] Since 1973, this approach—that each "State party shall make these offences punishable by the appropriate penalties which take into account their grave nature"—has been adopted for numerous treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[292] In some treaties, the issue of gravity is expressed using terms such as "extreme seriousness", "serious nature" or "extreme gravity" of the offences.[293]

82. Reflecting on such language, one writer has suggested that:

> There is a certain element of intended obscurity in this language …, reflecting the fact that systems of punishment vary from State to State and that, therefore, it would be difficult and undesirable (from the point of view of many States) for the Convention to set down any specific penalties, or range of penalties, for the offences. It could certainly be argued that a convention dealing with a crime of international concern, under which an offender may be prosecuted by a State simply on the basis of custody, should set forth a uniform range of penalties, both for the sake of consistency and to ensure that some punishment is ultimately imposed. However, it seems unlikely that States are ready to accept any such an obligation.[294]

83. Even so, language calling for the penalty to reflect the gravity of the offence serves to emphasize "that the penalties established should be akin to those normally established by Parties for serious, rather than minor, crimes", while still deferring to States' national systems.[295]

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[285] See, for example, *Public Prosecutor and Fifteen anonymous victims v. Van Anraat*, Case No. 22-000509-062, Decision, 9 May 2007, Court of Appeal of The Hague. See also van der Wilt, "Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the *van Anraat* case"; and Saul, "The implementation of the Genocide Convention at the national level", p. 72.

[286] Schabas, *Genocide in International Law: the Crime of Crimes*, p. 470.

[287] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), art. 129; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), art. 146.

[288] See art. 2, para. 2 ("Each State shall make these crimes punishable by appropriate penalties"). For an analysis of why the term "severe" was dropped, see Wood, "The Convention on the Prevention and Punishment of Crimes …", p. 805 (finding that the Commission's proposal of "severe" penalty "had been criticised in so far as it suggested that the punishment should be greater merely because the victim was an internationally protected person").

[289] See Nowak and McArthur, *The United Nations Convention against Torture …*, p. 232. Use of the term "appropriate" rather than "severe" penalties was viewed as preferable during the course of drafting the International Convention against the taking of hostages essentially because there often was no agreement among States as to what constitutes a "severe" penalty at the national level. See the Report of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages (footnote 284 above), 14th meeting, pp. 77–78, para. 25 (Mexico); *ibid.*, p. 80, para. 39 (the Netherlands); and 15th meeting, p. 85, para. 12 (Denmark). Several States during the negotiations indicated a preference for the "appropriate penalties" language because they thought it better reflected a "guarantee of legal fairness"; they worried that more assertive language might lead to an infringement of human rights in national legal systems. *Ibid.*, 13th meeting, p. 72, para. 17 (Iran); *ibid.*, 14th meeting, p. 75, para. 7 (Chile); *ibid.*, pp. 77–78, para. 25 (Mexico); and *ibid.*, 15th meeting, p. 83, para. 3 (Nicaragua). Ultimately, the Convention provided for "appropriate penalties which take into account the grave nature of those offences". See International Convention against the Taking of Hostages, art. 2.

[290] See the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, article 2, paragraph 2 ("make these crimes punishable by appropriate penalties which take into account their grave nature"). See also the Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages (footnote 284 above) pp. 74–75, para. 6.

[291] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, p. 312 at p. 316, para. (12) of the commentary to draft article 2.

[292] Art. 4. See also the Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2 ("appropriate penalties which shall take into account their grave nature"); the International Convention for the Suppression of Terrorist Bombings, art. 4, para. (*b*) ("appropriate penalties which take into account the grave nature of those offences"); the International Convention for the Suppression of the Financing of Terrorism, art. 4, para. (*b*) ("appropriate penalties which take into account the grave nature of the offences"); and the OAU Convention on the Prevention and Combating of Terrorism, 1999, art. 2 (*a*) ("appropriate penalties that take into account the grave nature of such offences").

[293] See, for example, the International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1 ("appropriate penalties which take into account its extreme seriousness"); the Inter-American Convention to Prevent and Punish Torture, art. 6 ("severe penalties that take into account their serious nature"); and the Inter-American Convention on the Forced Disappearance of Persons, art. III ("appropriate punishment commensurate with its extreme gravity").

[294] Lambert, *Terrorism and Hostages in International Law*, p. 102.

[295] *Ibid.*, p. 103. See also Ingelse, *The UN Committee against Torture …*, p. 320; Lambert, *Terrorism and Hostages in International Law*, p. 103; and Nowak and McArthur, *The United Nations Convention against Torture …*, p. 249.

H. Draft article 5. Criminalization under national law

84. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 5. Criminalization under national law*

"1. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting, or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

"2. Each State also shall take the necessary measures to ensure that the following are offences under its criminal law:

"(*a*) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

"(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

"(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;

"(*b*) with respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

"(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

"(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

"(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

"3. Each State also shall take the necessary measures to ensure that:

"(*a*) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate;

"(*b*) an offence referred to in this draft article shall not be subject to any statute of limitations; and

"(*c*) an offence referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature."

Chapter II

Establishment of national jurisdiction

85. Whenever a State adopts a national law that criminalizes an offence, the State must also determine the extent of its national jurisdiction[296] when such offences occur. Thus, a State may establish jurisdiction only when the offence occurs within its territory, or only when one of its nationals commits the offence, or on some other basis, whether singly or in combination. For example, with respect to crimes against humanity, the first report noted that a study of the national laws of 83 States revealed that only 21 of them had established jurisdiction over a non-national who allegedly committed the offence abroad against non-nationals.[297]

86. As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft code of crimes against the peace and security of mankind, "each State party shall take such measures as may be necessary to establish its jurisdiction over the crimes" laid out in the draft code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".[298] The breadth of such jurisdiction was necessary because the "Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction

[296] As a general matter, "jurisdiction" in the context of national law describes the parameters within which a State makes (or "prescribes"), applies, and enforces rules of conduct as they pertain to individuals, and it may come in many forms; see Staker, "Jurisdiction". Even if international law permits the exercise of a certain form of national jurisdiction, any given State may not have enacted national laws that allow for the exercise of such jurisdiction to its fullest extent; see, generally, Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*.

[297] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680, p. 219, para. 61. See also Mitchell, *Aut Dedere, aut Judicare*, paras. 34–35 (finding that "only 52 per cent of the 94 States for whom their jurisdictional position is known have sufficient national legislation to allow for the prosecution of a nonnational who is alleged to have committed crimes against humanity outside the State").

[298] Draft code of crimes against the peace and security of mankind (see footnote 134 above), art. 8, p. 27.

of national courts together with the possible jurisdiction of an international criminal court".[299] The preamble to the Rome Statute of the International Criminal Court provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

87. As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Commission on Human Rights convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective."[300] At the same time, while for most treaties addressing international crimes "[i]t is mandatory for States to 'establish' jurisdiction over the specified offences … that does not carry with it an obligation to exercise that jurisdiction in any particular case".[301] Rather, such treaties typically only obligate a State party to *exercise* its jurisdiction when an alleged offender is present in the State party's territory (see chapter IV of this report), leading either to a submission of the matter to prosecution within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see chapter V of this report).

88. The following analysis explains the types of national jurisdiction that usually must be established under treaties addressing crimes.

A. Types of national jurisdiction over offences

89. As indicated above, a key objective of treaties that address criminal acts is to obligate States to establish national jurisdiction in a manner that makes it difficult for an alleged offender to seek refuge anywhere else in the world. For example, article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obligates each State party to establish several types of national jurisdiction with respect to the crime of torture. The article provides:

> 1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to [in this Convention] in the following cases:
>
> (*a*) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (*b*) When the alleged offender is a national of that State;
>
> (*c*) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8[302] to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

90. Thus, article 5, paragraph 1 (*a*), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction." Article 5, paragraph 1(*b*), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction." Article 5, paragraph 1 (*c*), calls for jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction." Notably, this last type of jurisdiction in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is optional: a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so.

91. Article 5, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in territory under the State's jurisdiction. In such a situation, even if the crime was not committed on its territory, the alleged offender is not its national and the victim(s) of the crime is not its national, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in its territory. This obligation helps prevent an alleged offender from seeking refuge in a State with which the offence otherwise has no connection. In situations where the alleged offender is not present, however, this article does not impose an obligation on the State to establish jurisdiction over the offence.

92. Provisions comparable to article 5 exist in many recent treaties addressing crimes, including the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9). While no convention yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion in the *Arrest Warrant* case that:

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.[303]

93. Establishment of these types of national jurisdiction are also important in supporting the separate provision in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which sets forth an *aut dedere aut judicare* obligation.[304] In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the "system" set up under treaties of this sort:

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[299] *Ibid.*, p. 28, para. (5) of the commentary.

[300] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

[301] McClean, *Transnational Organized Crime...*, p. 167.

[302] Article 8 addresses issues relating to extradition.

[303] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78, para. 51.

[304] Crawford, *Brownlie's Principles of Public International Law*, pp. 469–471; and McClean, *Transnational Organized Crime...*, p. 170.

Whenever a perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.** Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States.[305]

94. Each of these types of jurisdiction is discussed briefly below.

1. When the offence occurs in the State's territory

95. National criminal jurisdiction principally focuses on crimes committed within the territory of the State. Indeed, under the national law of many States, criminal law is often presumed to apply only to conduct occurring within the territory of the State and not to conduct that occurs extraterritorially unless the national law indicates otherwise.[306] International law historically has recognized the permissibly of the State establishing and exercising such "territorial jurisdiction", viewing it as an inherent aspect of State sovereignty.[307]

96. States that have adopted national laws on crimes against humanity invariably establish jurisdiction over such offences when they occur within the State's territory, as may be seen in the written comments provided to the Commission in relation to this topic.[308] Thus, Belgium punishes "*[l]'infraction commise sur le territoire du royaume, par des Belges ou par des étrangers*"[309] (the offence committed in the territory of the Kingdom, by Belgians or by foreigners). The Netherlands "is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case: the crime against humanity has been committed *in* the Netherlands (territoriality principle—Article 2 of the Criminal Code); the crime against humanity has been committed on *board* a vessel or an aircraft registered in the Netherlands (flag principle—Article 3 of the Criminal Code)".[310] The French Penal Code "'*est applicable aux infractions commises sur le territoire de la République. L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire', et dans d'autres cas particuliers concernant les infractions commises à bord des navires battant un pavillon français*"[311] ('is applicable to offenses committed on the territory of the Republic. The offense is considered to be committed in the territory of the Republic where one of its constituent facts took place in this territory', and other special cases concerning offenses committed on board vessels flying a French flag). In Spain, "courts shall have jurisdiction to hear cases involving offences or misdemeanours committed in Spanish territory or on board Spanish ships or aircraft".[312] The Republic of Korea similarly applies its laws on crimes against humanity "to any Korean national or foreigner who commits a crime provided for in this Act within the territory of the Republic of Korea" and "to any foreigner who commits a crime provided for in this Act on board a vessel or aircraft registered in the Republic of Korea, while outside the territory of the Republic of Korea".[313]

97. As noted in some of these examples, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State;[314] indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.[315]

98. Many States that have adopted a statute on crimes against humanity do not expressly address the issue of jurisdiction within that statute. Rather, the national criminal law system is structured so that, once a criminal offence is defined within the national law, territorial jurisdiction automatically exists with respect to that crime. Thus, the Criminal Code of Bulgaria applies "to all crimes committed on the territory of the Republic of Bulgaria".[316] The same is true of, among others, Cuba,[317] Germany,[318] Hungary,[319] Mexico,[320] the Russian Federation[321] and Turkey.[322]

99. Treaties addressing crimes typically obligate States parties to establish territorial jurisdiction over the offence, as was indicated above with respect to article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[323] Similar provi-

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[305] *Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of President Guillaume, p. 39, para. 9.

[306] Bantekas, *International Criminal Law*, p. 332; see also Clapham, *Brierly's Law of Nations*, p. 242; Lambert, *Terrorism and Hostages in International Law*, p. 144; Nowak and McArthur, *The United Nations Convention against Torture* …, pp. 264 and 308; Staker, "Jurisdiction", p. 316; and Thalmann, "National criminal jurisdiction over genocide", p. 237 (citing the *Case of the S.S. "Lotus"*).

[307] See, generally, Clapham, *Brierly's Law of Nations*, p. 242; Crawford, *Brownlie's Principles of Public International Law*, pp. 458–459; Lambert, *Terrorism and Hostages in International Law*, p. 147; Shaw, *International Law*, pp. 474–475; and Dupuy and Kerbrat, *Droit International Public*, p. 602.

[308] In addition to those discussed here, see written comments to the International Law Commission (2015), Finland; *ibid.*, Germany; Criminal Code of Switzerland of 21 December 1937, art. 3, available from www.legislationline.org/Switzerland; and written comments to the International Law Commission (2015), the United Kingdom.

[309] Written comments to the International Law Commission (2015), Belgium, citing article 3 of its Criminal Code.

[310] *Ibid.*, the Netherlands.

[311] *Ibid.*, France.

[312] *Ibid.*, Spain, annex II, art. 23.

[313] *Ibid.*, Republic of Korea, citing article 3 of its Criminal Code.

[314] Bantekas, *International Criminal Law*, p. 337; and Cassese *et al.*, *International Criminal Law* …, p. 275.

[315] See, for example, written comments to the International Law Commission (2015), France; *ibid.*, the Netherlands; *ibid.*, Republic of Korea, citing article 3, paragraphs (1) and (3) of its Criminal Code; and *ibid.*, Spain, annex II, art. 23.

[316] Criminal Code of Bulgaria (see footnote 63 above), art. 3.

[317] Criminal Code of Cuba (see footnote 65 above), art. 4, para. 1.

[318] Criminal Code of Germany of 13 November 1998, sect. 3, available from https://germanlawarchive.iuscomp.org/?p=752.

[319] Criminal Code of the Republic of Hungary (see footnote 70 above), sect. 3, para. (1) (*a*).

[320] Federal Criminal Code of Mexico (see footnote 74 above), arts. 1 and 5.

[321] Criminal Code of the Russian Federation (see footnote 77 above), art. 11.

[322] Criminal Code of Turkey, Law No. 5237 of 26 September 2004, art. 8, para. (2), available from https://legislationline.org/taxonomy/term/14182.

[323] Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide provides that States parties must exercise jurisdiction when the crime is committed within their territory ("Persons charged with genocide or any of the other acts enumerated in [this Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed"). To that end, States parties either implement the treaty obligation directly in their national law or through an implementing statute. For example, the United States provides for jurisdiction over the offences of genocide, as well as incitement,

sions may be found in the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 1 (*a*)–(*b*)); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 1 (*a*)); the 1985 Inter-American Torture Convention (art. 12 (*a*)); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 1 (*a*)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1 (*a*)–(*b*)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1 (*a*)–(*b*)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 1(*a*)–(*b*)); the United Nations Convention against Transnational Organized Crime (art. 15, para. 1 (*a*)–(*b*)); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 1 (*a*)); and the ASEAN Convention on Counter Terrorism (art. VII, para. 1 (*a*)–(*b*)).

100. In drafting what would become the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, the Commission explicitly noted "the generally acknowledged primacy of the principle of territoriality in matters of jurisdiction".[324] As writers have indicated, the territorial basis for jurisdiction is non-controversial and generally goes unchallenged during the drafting of these treaties.[325]

2. When the offence is committed by the State's national

101. National law may also allow for the establishment of jurisdiction over crimes committed outside the State's territory by a national of that State, a type of jurisdiction often referred to as "nationality jurisdiction" or "active personality jurisdiction".[326] As has been noted, "[t]he competence of a State to prosecute its nationals on the sole basis of their nationality—and regardless of the territorial State's competing claim—is based on the allegiance that is owed to one's country of nationality under domestic law".[327]

102. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, most indicated that they provide for such jurisdiction.[328] For example, Belgium has established jurisdiction over "*tout Belge ou toute personne ayant sa résidence principale sur le territoire du royaume qui, hors du territoire du royaume, se sera rendu coupable*"[329] (any Belgian or any person whose main residence is in the territory of the kingdom who, outside the territory of the kingdom, is guilty). The Netherlands "is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case … the crime against humanity has been committed outside the Netherlands *by* a Dutch national (including the situation that the alleged offender has become a Dutch national only after committing the crime) (active nationality principle—Article 2 of the International Crimes Act); the crime against humanity has been committed outside the Netherlands *by* a Dutch resident, under the condition of double criminality (active personality principle—Article 7 (1) [and] (3) of the Criminal Code)".[330] French law similarly has established "*la compétence pénale active des juridictions françaises, lorsque l'auteur est français (Article L 1136 du Code pénal: 'la loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République')*"[331] (active criminal jurisdiction of the French courts, where *the author is French* (Article L 1136 of the Criminal Code: 'French criminal law is applicable to any crime committed by a French national outside the territory of the Republic'). The Republic of Korea can apply its legal provisions on crimes against humanity "to any Korean national who commits a crime provided for in this Act outside the territory of the Republic of Korea".[332]

103. Neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva Conventions for the protection of war victims obligate States parties to establish nationality jurisdiction, although the *travaux préparatoires* of the former suggests a belief that States would exercise nationality jurisdiction over alleged offenders.[333] Even so, nationality jurisdiction is a feature of virtually all contemporary treaties addressing crimes, including the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 1 (*b*)); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 1 (*b*)); the Inter-American Convention to Prevent and Punish Torture (art. 12 (*b*)); the Convention on the Safety of United Nations and Associated

attempt and conspiracy to commit genocide, if "the offense is committed in whole or in part within the United States" (United States Code, Title 18, sect. 1091 (*e*)).

[324] Para. (6) of the commentary to article 8 of the draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 320.

[325] See Clapham, *Brierly's Law of Nations*, p. 242; Lambert, *Terrorism and Hostages in International Law*, p. 144; Nowak and McArthur, *The United Nations Convention against Torture …*, pp. 264 and 308; Shaw, *International Law*, p. 477; and Thalmann, "National criminal jurisdiction over genocide", p. 237.

[326] See Clapham, *Brierly's Law of Nations*, p. 242; Crawford, *Brownlie's Principles of Public International Law*, p. 459; Dupuy and Kerbrat, *Droit International Public*, p. 602; and Shaw, *International Law*, p. 479.

[327] Bantekas, *International Criminal Law*, p. 338. See also Lambert, *Terrorism and Hostages in International Law*, p. 147; Crawford, *Brownlie's Principles of Public International Law*, pp. 459 and 461; Shaw, *International Law*, pp. 279 and 482; and Staker, "Jurisdiction", pp. 318–319.

[328] In addition to those discussed here, see written comments to the International Law Commission (2015), Austria; *ibid.*, Cuba, citing article 5, paragraph 2 of its Criminal Code; *ibid.*, Finland; *ibid.*, Germany, citing section 153f, paragraph (2) 1 of its Criminal Code; *ibid.*, Spain, annex II, art. 23; and *ibid.*, the United Kingdom.

[329] *Ibid.*, Belgium, citing article 6, para. 1, of the Preliminary Title of its Criminal Procedure Code.

[330] *Ibid.*, Netherlands.

[331] *Ibid.*, France.

[332] *Ibid.*, Republic of Korea, citing article 3, para. 2, of its Criminal Code.

[333] See the conclusion of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633], 2 December 1948 (A/C.6/SR.134), pp. 715–718.

Personnel (art. 10, para. 1 (*b*)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV, para. (*b*)); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1 (*c*)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1 (*c*)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 1 (*c*); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 1 (*b*)); and the ASEAN Convention on Counter Terrorism (art. VII, para. 1 (*c*)). The Convention on the Suppression of Unlawful Seizure of Aircraft, however, does not contain such language.

104. Such conventions do not impose an obligation to establish jurisdiction with respect to persons who are not nationals but are legal residents of a State party. As such, it is left to the States parties whether, in their national law, to establish jurisdiction as well with respect to residents.[334] As noted below, however, under such conventions a State party typically is obligated to establish jurisdiction with respect to any alleged offenders who are present in its territory, which includes either residents or stateless persons.

3. When the offence is committed against the State's national

105. National law may also establish jurisdiction over crimes committed outside the State's territory when the victim of the crime is a national of that State, a type of jurisdiction sometimes referred to as "passive personality" or "passive nationality" jurisdiction.[335] The establishment of this type of jurisdiction by States is less common than the establishment of territorial and nationality jurisdiction; some States have established this type of jurisdiction at least for some types of crimes, while others do not, and still others vigorously oppose it. Those in favour argue that such jurisdiction can help fill a jurisdictional gap and that States have a strong interest in protecting their nationals at least against certain types of serious crimes, such as the taking of hostages.[336] Those States opposing such jurisdiction have expressed concerns about promoting such jurisdiction, which might be abused or at least give rise to unnecessary, conflicting jurisdictional claims.[337]

106. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, many indicated that they provide for such jurisdiction.[338] For example, Belgium has established jurisdiction over a grave violation of international humanitarian law "*commise contre une personne qui, au moment des faits, est un ressortissant belge ou un réfugié reconnu en Belgique et y ayant sa résidence habituelle … ou une personne qui, depuis au moins trois ans, séjourne effectivement, habituellement et légalement en Belgique*"[339] (committed against a person who, at the time, is a Belgian citizen or a recognized refugee in Belgium with habitual residence in Belgium … or a person who, for at least three years has been effectively, habitually and legally staying in Belgium). Similarly, "the Netherlands is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity in case … the crime against humanity has been committed outside the Netherlands *against* a Dutch national (passive nationality principle—Article 2 of the International Crimes Act); the crime against humanity has been committed outside the Netherlands *against* a Dutch resident, under the condition of double criminality".[340] French law allows for the exercise "*de la compétence pénale passive lorsque* la victime est française au moment de l'infraction *(Article L 1137 du Code pénal: 'La loi pénale française est applicable à tout crime, ainsi qu'à tout délit puni d'emprisonnement, commis par un Français ou par un étranger hors du territoire de la République lorsque la victime est de nationalité française au moment de l'infraction')*"[341] (of passive criminal jurisdiction when *the victim is French at the time of the offense* (Article L 1137 of the Criminal Code: 'French criminal law is applicable to any crime, as well as any offense punishable by imprisonment, committed by a French person or a foreigner outside the territory of the Republic when the victim is of French nationality at the time of the offense') Finally, the Republic of Korea has established jurisdiction over "any foreigner who commits a crime provided for in this Act against the Republic of Korea or its people outside the territory of the Republic of Korea".[342]

107. Given the uneven State practice with respect to this jurisdiction, its establishment is usually not compelled in treaties addressing crimes; rather, this type of jurisdiction is identified as an option that any given State party may or may not exercise.[343] Such an approach reflects a desire for establishing as much jurisdiction as possible to promote the punishment of offenders, while at the same time preserving and respecting State sovereignty and discretion when responding to harms inflicted on that State's nationals.[344]

108. Neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva

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[334] See, for example, Ireland-Piper, "Prosecutions of extraterritorial criminal conduct and the abuse of rights doctrine", p. 74.

[335] Crawford, *Brownlie's Principles of Public International Law*, p. 461; and Shaw, *International Law*, p. 482.

[336] Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-Third Session, Supplement No. 39* (A/33/39), 23rd meeting, p. 41, para. 15 (France); p. 44, para. 32 (Algeria); and p. 45, para. 33 (Nigeria).

[337] *Ibid.*, p. 39, para. 6 (the Netherlands); p. 40, para. 11 (the United Kingdom); p. 42, para. 20 (Germany); p. 43, para. 24 (United States of America); and p. 44, para. 29 (Union of Soviet Socialist Republics).

[338] In addition to those discussed here, see written comments to the International Law Commission (2015), Austria; *ibid.*, Finland; *ibid.*, Germany, citing sect. 153*f*, para. (2) 2 of its Criminal Code; *ibid.*, Spain, citing article 23, paragraph 4 (*a*), of its Criminal Code; and *ibid.*, Switzerland, citing, art. 264m of its Criminal Code.

[339] *Ibid.*, Belgium, citing art. 10, paragraphs 1 and 1 *bis* of the Preliminary Title of its Criminal Procedure Code.

[340] *Ibid.*, Netherlands.

[341] *Ibid.*, France.

[342] *Ibid.*, Republic of Korea, citing art. 3, para. (4), of its Criminal Code.

[343] *Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 76–77, para. 47 ("Passive personality jurisdiction, for so long regarded as controversial, is now reflected … in the legislation of various countries …, and today meets with relatively little opposition, at least so far as a particular category of offences is concerned").

[344] See Lambert, *Terrorism and Hostages in International Law*, pp. 152–154; and Nowak and McArthur, *The United Nations Convention against Torture …*, pp. 310–312.

Conventions for the protection of war victims obligate States parties to establish "passive personality" jurisdiction, but such jurisdiction is identified as an option in many treaties addressing crimes, including the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 4, para. 1 (*a*)), as amended by the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft;[345] the International Convention against the taking of hostages (art. 5, para. 1 (*d*)); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 1 (*c*)); the Inter-American Convention to Prevent and Punish Torture (art. 12 (*c*)); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 2 (*b*)); the Inter-American Convention on the Forced Disappearance of Persons (art. IV, para. (*c*)); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 2 (*a*)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 2 (*a*)); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 2 (*a*)); the United Nations Convention against Transnational Organized Crime (art. 15, para. 2 (*a*)); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 1 (*c*)); and the ASEAN Convention on Counter Terrorism (art. VII, para. 2 (*a*)).

4. When the alleged offender is present in the State's territory

109. National law may also establish jurisdiction over crimes committed outside the State's territory based solely on the presence of the alleged offender within that territory. As noted above, such jurisdiction is irrespective of nationality, and therefore includes persons who are non-nationals (whether or not resident in the State) as well as stateless persons. With respect to crimes against humanity, the ninth edition of *Oppenheim's International Law* (published in 1992) found that:

> While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.[346]

110. Of those States that responded to the Commission's request for information about their national laws on crimes against humanity, many indicated that they provide for such jurisdiction within their national law.[347] Austria, for example, has jurisdiction over "a foreigner who has his habitual residence on the territory of Austria or is present in Austria and cannot be extradited".[348] Finnish law also "applies to an offence committed outside of Finland where the punishability of the act, regardless of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Crimes against humanity, war crimes and genocide are included in such offences."[349] French law "*est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition ou la remise a été refusée à l'État requérant par les autorités françaises*"[350] (is also applicable to any felony or any offense punishable by at least five years' imprisonment committed outside the territory of the Republic by a foreigner whose extradition or surrender has been denied to the requesting State by the French authorities). Finally, the Republic of Korea also applies jurisdiction "to any foreigner who commits the crime of genocide, etc. outside the territory of the Republic of Korea and resides in the territory of the Republic of Korea".[351] Other States allow for such jurisdiction as well in the context of crimes against humanity, often under the influence of their adherence to the Rome Statute of the International Criminal Court, such as Kenya, Mauritius, South Africa and Uganda.[352] In 2012, the African Union adopted a model law for use by African States that, *inter alia*, provides for jurisdiction to prosecute for crimes against humanity based solely on the presence of the alleged offender "within the territory of the State".[353]

111. Favouring the establishment of such jurisdiction, even in the absence of a treaty, is the argument that doing so furthers the interests of the international community in deterring and punishing international crimes.[354] Even so,

[345] As of 2015, 14 States were party to the protocol, which will enter into force once there are 22 States parties.

[346] Jennings and Watts, *Oppenheim's International Law*, p. 998.

[347] In addition to those discussed here, see Written comments to the International Law Commission (2015), Cuba, citing art. 5, para. 3, of its Criminal Code; *ibid.*, Czech Republic; *ibid.*, Germany, citing sect. 153*f*, para. 2, of its Criminal Code; *ibid.*, Spain; *ibid.*, Switzerland; and *ibid.*, United Kingdom.

[348] *Ibid.*, Austria.

[349] *Ibid.*, Finland.

[350] *Ibid.*, France.

[351] *Ibid.*, Republic of Korea, citing art. 3, para. (5), of its Criminal Code.

[352] See Kenya, International Criminal Courts Act, 2008, sect. 18 (*c*) (2008) (providing that "[a] person who is alleged to have committed an offence under any of sections 9 to 17 of the Act may be tried and punished in Kenya for that offence if … the person is, after commission of the offence, present in Kenya"); Mauritius, International Criminal Court Act 2011, Act No. 27 of 2011, sect. 4, para. (3) (*c*) (providing that "[w]here a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he—… (*c*) is present in Mauritius after the commission of the crime"); South Africa, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, sect. 4, para. (3) (*c*) (providing that "[i]n order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if … (*c*) that person, after the commission of the crime, is present in the territory of the Republic"); and Uganda, International Criminal Court Act, 2010, sect. 18 (*d*) (similarly allowing proceedings against a person for crimes committed outside the territory of Uganda if that "person is, after the commission of the offence, present in Uganda").

[353] See African Union Model National Law on Universal Jurisdiction over International Crimes, document EX.CL/731(XXI)c, articles 4 (*a*) and 8, adopted by the African Union Executive Council at its Twenty-First Ordinary Session, in Addis Ababa (9–13 July 2012). Article 4 (*a*) states in full: "The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State."

[354] See *Furundžija* (footnote 128 above), paragraph 156: "it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its

(*Continued on next page.*)

often such jurisdiction appears to be established pursuant to a treaty obligation. While the Convention on the Prevention and Punishment of the Crime of Genocide did not envisage such jurisdiction, the Geneva Conventions for the protection of war victims provide that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[355]

The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) incorporates this provision by reference (art. 85, para. 1). According to Pictet's *Commentary on the Geneva Conventions of 12 August 1949*, the obligation set forth in the first sentence requires States parties to search for offenders who may be on their territory,[356] not offenders worldwide. Further, as may be seen in the second sentence, this type of jurisdiction is typically linked with a statement that the State's obligation to exercise such jurisdiction may be satisfied by extraditing the person to another State party.

112. Numerous more recent conventions obligate States parties to establish such jurisdiction with respect to the crimes that they address, including the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 2); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3, para. 2); the International Convention against the taking of hostages (art. 5, para. 2); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 12); the Convention on the Safety of United Nations and Associated Personnel (art 10, para. 4); the Inter-American Convention on the Forced Disappearance of Persons (art. IV); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 4); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 4); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 6, para. 4); the United Nations Convention against Transnational Organized Crime (art. 15, para. 4); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2); and the ASEAN Convention on Counter Terrorism (art. VII, para. 3).

113. A well-known example of the exercise of such jurisdiction under a treaty is the *Pinochet* case, where the House of Lords of the United Kingdom found that by virtue of ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory".[357] Yet other examples of the exercise of such treaty-based jurisdiction may be found in various States and regions.[358] Sometimes such jurisdiction is referred to as "universal jurisdiction", but some question the use of that term in this particular context, given the existence of a treaty and of a requirement under the treaty for the presence of the alleged offender in the territory of the State party.[359]

114. At the same time, treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment do not obligate States parties to establish jurisdiction over the alleged offender if he or she is not present in the State's territory. Consequently, national courts are often careful to limit their jurisdiction when implementing such treaties to situations where the alleged offender is present. For example, in the *Bouterse* case, the Supreme Court of the Netherlands made clear that the exercise of jurisdiction (pursuant to the Netherlands Torture Convention Implementation Act) over a person alleged to have committed the crime of torture must be based upon

(*Footnote 354 continued.*)

jurisdiction. … It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes." See also *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction of 10 August 1995, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 42 (noting that the crimes within the jurisdiction of the International Tribunal for the Former Yugoslavia "are not crimes of a purely domestic nature" but "are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State"); and Ingelse, *The UN Committee against Torture* …, pp. 320–321.

[355] See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146. See also ICRC, Customary IHL Database, "Practice relating to Rule 157. Jurisdiction over war crimes", available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule157.

[356] See Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, pp. 365–366.

[357] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Pinochet (Respondent) (on appeal from a Divisional Court of the Queen's Bench Division) and Regina v. Evans and Another and the Commissioner of the Police for the Metropolis and Others (Appellants)* ex parte Pinochet *(Respondent) (on appeal from a Divisional Court of the Queen's Bench Division)*, Opinion of the Lords of Appeal for Judgment in the Case, Opinion of Lord Lloyd of Berwick, p. 28. For views of the Committee against Torture, see CAT/C/SR.354, para. 39 (asserting that "article 5, paragraph 2 … required States parties to take such measures as were necessary to establish jurisdiction over the offences referred to in article 4 in cases where the alleged offender was present in any territory under its jurisdiction and it had decided not to extradite him to another State"); and Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States Parties under article 19 of the Convention, France, para. 13 (asserting "that the State party should remain committed to prosecuting and trying alleged perpetrators of acts of torture who are present in any territory under its jurisdiction, regardless of their nationality").

[358] See for example, Council of the European Union, "The AU–EU Expert Report on the Principle of Universal Jurisdiction", document 8672/1/09 REV 1, Annex, of 16 April 2009, available from https://data.consilium.europa.eu/doc/document/ST%208672%202009%20REV%201/EN/pdf. See also Macedo, *Universal Jurisdiction* …, and Reydams, *Universal Jurisdiction.…*.

[359] Thus, in their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal referred to the "inaccurately termed 'universal jurisdiction' principle in these treaties" (*Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 44). Rather, they indicated that such jurisdiction was better characterized as "an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere" (*ibid.*, pp. 74–75, para. 41).

either a Dutch nationality associated with the proceedings or on the presence of the alleged offender within the Netherlands at the time the prosecution is initiated.[360] As such, the Court rejected exercising jurisdiction over a defendant *in absentia* because there was no direct link with the Dutch legal order, the defendant (Bouterse) was in Suriname and none of the alleged victims were Dutch nationals.[361] Reflecting on such practice, President Guillaume, in his separate opinion in the *Arrest Warrant* case, concluded that none of the relevant treaties "has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".[362]

115. Further, such treaties normally do not seek to resolve the question of whether any particular State party should have primacy in the event that multiple States have national jurisdiction over the criminal offence and wish to exercise such jurisdiction.[363] While some bilateral and regional agreements have sought to address the matter, the issue is complicated in part due to the existence of grounds for refusing to extradite, including with respect to obligations of *non-refoulement*.[364] Rather, such matters often are often resolved though comity and cooperation among the States parties, taking into account the location of the evidence, witnesses, victims and other relevant matters.[365] As a practical matter, the State party in whose territory the alleged offender is present is well situated to proceed with a prosecution if it is willing and able to do so.[366]

116. Finally, treaties containing an obligation to establish jurisdiction whenever an alleged offender is present invariably include a provision that provides an alternative to the exercise of jurisdiction over any particular alleged offender. Most treaties addressing crimes contemplate the alternative of the State extraditing the alleged offender to another State party. Having pre-dated the establishment of contemporary international criminal courts and tribunals, most of these treaties do not expressly contemplate the alternative of surrendering the alleged offender to an international court or tribunal. Recent treaties, however, do expressly recognize this possibility. For example, the International Convention for the Protection of All Persons from Enforced Disappearance expresses this type of jurisdiction as follows in article 9, paragraph 2:

> Each State party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, *unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized**.

B. Not excluding other national jurisdiction

117. As indicated above, article 5, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment makes clear that, while the Convention is obligating each State party to enact certain types of jurisdiction, it is not excluding any other jurisdiction that is available under the national law of that State party.[367] Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, international treaties typically leave open the possibility that a State party may have other jurisdictional grounds upon which to hold an alleged offender accountable.[368] In their joint separate opinion to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited *inter alia* to article 5, paragraph 3, and stated:

> We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.[369]

118. Numerous international and regional instruments contain such a provision, including the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 4); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 5, para. 3); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 3); the International Convention against the taking of hostages (art. 5, para. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 3); the Inter-American Convention to Prevent and Punish Torture (art. 12); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 5); the Inter-American Convention on the Forced Disappearance of Persons (art. X); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 5); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 6); the United Nations Convention against Transnational Organized

[360] Netherlands, *Prosecutor-General of the Supreme Court v. Desiré Bouterse*, Case No. LJN: AB1471, Judgment of 18 September 2001, Supreme Court, paras. 8.2–8.3.5.

[361] *Ibid.*, para. 8.5.

[362] *Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of President Guillaume, pp. 39–40, para. 9. See also *ibid.*, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 44 (finding that "a dispassionate analysis of State practice and Court decisions suggests that no [universal jurisdiction without a territorial nexus] is presently being exercised"); and *ibid.*, p. 76, para. 45 (finding that "virtually all national legislation envisages links of some sort to the forum State" and that "no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction").

[363] See, for example, "The AU–EU Expert Report on the Principle of Universal Jurisdiction" (footnote 358 above), para. 14 ("Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits").

[364] On extradition, see chapter VII on the future programme of work, below.

[365] See, for example, *Kumar Lama v. Regina*, [2014] EWCA Crim.1729 (Court of Appeal) (7 Aug. 2014), para. 71 (3) (the High Court concluding that the "Convention against Torture does not establish a hierarchy of possible jurisdictions or embody any principle of *forum conveniens*. While it is correct that, in any given case, it may be more convenient or effective to prosecute in one jurisdiction rather than another, for example because of the availability of evidence, this is no more than a reflection of the circumstances of the particular case").

[366] At least one writer has argued that "States must take account of a wish to exercise jurisdiction by States which have a stronger claim to exercise jurisdiction" (Ingelse, *The UN Committee against Torture …*, p. 326).

[367] For analysis, see Burgers and Danelius, *The United Nations Convention against Torture*, p. 133.

[368] Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Revised draft United Nations Convention against Transnational Crime (A/AC.254/4/Rev.4), p. 20, footnote 102. See also Lambert, *Terrorism and Hostages in International Law*.

[369] *Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 78–79, para. 51.

Crime (art. 15, para. 6); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 3); and the ASEAN Convention on Counter Terrorism (art. VII, para. 4).

119. One concern in formulating a clause that preserves the ability of a State party to establish or maintain other forms of national jurisdiction is to avoid any implication that the treaty is authorizing such other national jurisdiction, or that such jurisdiction need not conform with applicable rules of international law. For that reason, for example, the International Convention for the Suppression of the Financing of Terrorism contains a clause in its article on jurisdiction that reads as follows: "Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law."[370]

C. Draft article 6. Establishment of national jurisdiction

120. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 6. Establishment of national jurisdiction*

"1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when:

"(*a*) the offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State;

"(*b*) the alleged offender is one of its nationals; and

"(*c*) the victim is one of its nationals and the State considers it appropriate.

"2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person in accordance with draft article 9, paragraph 1.

"3. Without prejudice to applicable rules of international law, this draft article does not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law."

[370] Art. 7, para. 6. See also the United Nations Convention against Corruption, art. 42, para. 6 ("Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law").

Chapter III

General investigation and cooperation for identifying alleged offenders

121. When a situation arises where crimes against humanity may have occurred in territory under the jurisdiction or control of a State, there is value in having that State conduct a general investigation into whether such crimes have occurred or are occurring. Such a general investigation into a possible situation of crimes against humanity (addressed in this chapter) should be contrasted with more the specific investigation into whether a particular person committed crimes against humanity (addressed below in chapter IV). This more general investigation allows the State to determine, as a general matter, whether crimes against humanity have been or are occurring, which may allow the State to take immediate measures to prevent further occurrence, as well as help to establish a general basis for more specific investigations of alleged offenders by that State or States to which those alleged offenders may flee.

122. The idea of conducting an investigation of crimes against humanity where they are committed, as a prelude to prosecution of alleged offenders, has featured in various international instruments. For example, in 1973, the General Assembly of the United Nations adopted the Principles of international co-operation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity, which provide that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[371] Several earlier General Assembly resolutions also recognized the importance of investigating crimes against humanity and called on States to take necessary measures in this regard.[372]

123. This expectation of a State investigating crimes that are thought to have occurred within its territory has featured in numerous treaties, which obligate the State party to investigate whenever there is a reasonable ground

[371] General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 1.

[372] See, for example, General Assembly resolution 2583 (XXIV) of 15 December 1969, preamble and paragraph 1 ("*Convinced* that the thorough investigation of war crimes and crimes against humanity … constitute[s] an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security … 1. *Calls upon* all the States concerned to take the necessary measures for the thorough investigation of war crimes and crimes against humanity"); General Assembly resolution 2712 (XXV) of 15 December 1970, preamble and para. 5 ("*Convinced* that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes—wherever they may have been committed— … are important elements in the prevention of similar crimes now and in the future … 5. *Once again requests* the States concerned, if they have not already done so, to take the necessary measures for the thorough investigation of war crimes and crimes against humanity"); and General Assembly resolution 2840 (XXVI) of 18 December 1971, preamble ("*Firmly convinced* of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity").

to believe that offences covered by the treaty have been committed.[373] For example, article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[e]ach State party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction". That general obligation is different from the State's obligation under article 6, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to undertake a specific inquiry or investigation of the facts concerning a particular alleged offender (addressed in chapter IV of this report). Further, this general "obligation to investigate is not triggered by the fact that a suspected [perpetrator] is on the territory of a State party, but by the suspicion of the competent authorities of a State party that [a relevant] act might have been committed in any territory under its jurisdiction".[374] Hence, this investigation differs because it "must take place *irrespective* of whether the suspect is known or present".[375]

124. Comparable obligations to conduct a general investigation, formulated in various ways, may be found in the Inter-American Convention to Prevent and Punish Torture ("if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process" (art. 8)); the International Convention for the Protection of All Persons from Enforced Disappearance ("Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the [competent authorities] shall undertake an investigation, even if there has been no formal complaint" (art. 12, para. 2)); and the 2011 Council of Europe convention on preventing and combating violence against women and domestic violence ("Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings").[376]

125. This obligation to conduct a general investigation is addressed only to the State in which offences may have occurred; it is not addressed to other States. In the context of crimes against humanity, the State with jurisdiction or control over the territory in which the crime appears to have occurred is best situated to conduct such an initial investigation, so as to determine whether a crime in fact has occurred and, if so, whether governmental forces under its control committed the crime, whether forces under the control of another State did so, or whether it was committed by a non-State organization. Such an investigation can lay the foundation not only for pursuing alleged offenders, but also for helping to prevent recurrence of such crimes by identifying their source.

126. Such an obligation typically requires that the investigation be carried out whenever there is reason to believe or a reasonable ground to believe that the offence has been committed.[377] Indeed, since it is likely that "the more systematic the practice of torture becomes in a given country, the smaller the number of official torture complaints", a violation of article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is possible even if the State has received no complaints from individuals.[378] Likewise, the Committee against Torture maintains that State authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for suspicion".[379]

127. The Committee against Torture has also found violations of article 12 if the State's investigation is not "prompt and impartial".[380] The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay.[381] In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered "that a delay of 15 months before an investigation of allegations of torture is

[373] The Geneva Conventions for the protection of war victims contain a variation on this idea of a general investigation, albeit one focused more on identifying specific offenders. Those Conventions oblige States generally to "search for persons alleged to have committed" grave breaches of the Conventions. See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches"); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50 (same); the Geneva Convention Convention relative to the Treatment of Prisoners of War, art. 129 (same); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146 (same).

[374] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 414.

[375] Ingelse, *The UN Committee against Torture* …, p. 335.

[376] Art. 49, para. 1. See also art. 55, para. 1 ("Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint").

[377] See *Blanco Abad v. Spain*, Communication No. 59/1996, Views of the Committee against Torture adopted on 14 May 1998, para. 8.2, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex X, sect. A.3. See also *Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, decision of 16 November 2005, para. 7.3, *ibid., Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A.

[378] Nowak, "Dignity and physical integrity", p. 246.

[379] *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, Views of the Committee against Torture adopted on 14 November 2003, para. 10.4, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A. See also *Blanco Abad* (footnote 377 above), paras. 8.2–8.6.

[380] See, for example, *Bairamov v. Kazakhstan*, Communication No. 497/2012, Views of the Committee against Torture adopted on 14 May 2014, paras. 8.7–8.8, *ibid., Sixty-ninth Session, Supplement No. 44* (A/69/44), annex XIV.

[381] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 434.

initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention".[382] The rationales underlying the promptness requirement are that physical traces that may prove torture can quickly disappear, and that complaining victims may be in danger of further torture, which a prompt investigation may be able to prevent.[383]

128. The requirement of impartiality generally means that States must proceed with their investigations in a serious, effective and unbiased manner.[384] This requirement is essential, as "any investigation which proceeds from the assumption that no such acts have occurred, or in which there is a desire to protect suspected officials, cannot be considered effective".[385] In some instances, the Committee against Torture has recommended that investigation of offences be "under the direct supervision of independent members of the judiciary".[386] In other instances, it has stated that "[a]ll government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so".[387] The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.[388]

129. Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the International Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations to the International Covenant on Civil and Political Rights.[389] Among other things, the Committee has said:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. … A failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[390]

130. Several regional bodies have also interpreted their legal instruments to contain a duty to conduct a general investigation even when they do not explicitly feature one. For the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), this concept arose in order to deal effectively with extraordinary circumstances in certain regions of Turkey, involving cases of ill-treatment, disappearances and the destruction of a village.[391] In these instances, "the Court has relied upon the evidence of a lack of effective investigation, or of any investigation, by the authorities, as evidence of violations of Article 2 (the right to life), Article 3 (prohibition on torture), Article 5 (the right to liberty and security of person), … Article 8 (the right to home and family life) … [and] Article 13 (the right to an effective remedy)".[392] For example, in the case of *Ergi v. Turkey*, the Court found that the Convention implicitly imposes such a duty so as to ensure that an "effective, independent investigation is conducted" into any deaths alleged to be a result of use of force by agents of the State.[393] The Court reasoned that this requirement is implicit in the "right to life" provision of article 2 of the Convention, when read in conjunction with the general duty under article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention".[394] In part because of "the lack of an adequate and effective investigation", the Court found a violation of article 2 of the Convention.[395] The more recent case of *Bati and Others v. Turkey* confirmed that an investigation must be undertaken if there are sufficiently clear indications that the relevant crime has been committed, even if no complaint has been

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[382] *Halimi-Nedzibi v. Austria*, Communication No. 8/1991, Views of the Committee against Torture adopted on 18 November 1993, para. 13.5, Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), annex V.

[383] *Blanco Abad* (see footnote 377 above), para. 8.2 ("The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear"). See Burgers and Danelius, *The United Nations Convention against Torture*, pp. 144–145.

[384] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 435.

[385] Burgers and Danelius, *The United Nations Convention against Torture*, p. 145.

[386] Consideration of reports submitted by States parties under article 19 of the Convention–Ecuador, Report of the Committee against Torture, *Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 44* (A/49/44), p. 17, para. 105.

[387] Consideration of reports submitted by States parties under article 19 of the Convention–Guatemala, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 44* (A/56/44), p. 34, para. 76 (*d*).

[388] *M'Barek* v. *Tunisia*, Communication No. 60/1996, Views of the Committee against Torture adopted on 10 November 1999, paras. 11.9–11.10, *ibid.*, *Fifty-fifth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A. See also Nowak and McArthur, *The United Nations Convention against Torture* …, p. 435.

[389] See, for example, *Nazriev v. Tajikistan*, Communication No. 1044/2002, Views of the Human Rights Committee adopted on 17 March 2006, para. 8.2, Report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 40*, vol. II (A/61/40 (Vol. II)), annex V, sect. P; *Kouidis v. Greece*, Communication No. 1070/2002, Views of the Human Rights Committee adopted on 28 March 2006, para. 9, *ibid*., sect. T; *Agabekov v. Uzbekistan*, Communication No. 1071/2002, Views of the Human Rights Committee adopted on 16 March 2007, para. 7.2, *ibid., Sixty-second Session, Supplement No. 40*, vol. II (A/62/40 (Vol. II)), annex VII, sect. I; and *Karimov and Nursatov v. Tajikistan*, Communications Nos. 1108/2002 and 1121/2002, Views of the Human Rights Committee adopted on 26 March 2007, para. 7.2, *ibid.*, sect. H.

[390] Human Rights Committee, 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. 15.

[391] Crawford, *Brownlie's Principles of Public International Law*, p. 667 (citing the European Court of Human Rights cases of *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, ECHR 1996-VI; *Timurtaş v. Turkey*, No. 23531/94, Report of the Commission adopted on 19 October 1998, European Commission of Human Rights; *Kurt v. Turkey*, 25 May 1998, ECHR 1998-III; *Çakıcı v. Turkey* [GC], No. 23657/94, ECHR 1999-IV; *Menteş and Others v. Turkey*, 28 November 1997, ECHR 1997-VIII; *Ergi v. Turkey*, 28 July 1998, ECHR 1998-IV; and *Kaya v. Turkey*, 19 February 1998, ECHR 1998-I).

[392] *Ibid.*

[393] See *Ergi* (footnote 391 above), para. 85.

[394] *Ibid.*, para. 82.

[395] *Ibid.*, para. 86.

made.[396] The Inter-American Court of Human Rights has applied a similar concept.[397]

Draft article 7. General investigation and cooperation for identifying alleged offenders

131. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 7. General investigation and cooperation for identifying alleged offenders*

"1. Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reason to believe that a crime against humanity has been or is being committed in any territory under its jurisdiction or control.

"2. If the State determines that a crime against humanity is or has been committed, the State shall communicate, as appropriate, the general findings of that investigation to any other State whenever there is reason to believe that nationals of the other State have been or are involved in the crime. Thereafter, that other State shall promptly and impartially investigate the matter.

"3. All States shall cooperate, as appropriate, to establish the identity and location of persons who may have committed an offence referred to in draft article 5, paragraphs 1 or 2."

[396] *Batı and Others v. Turkey,* Nos. 33097/96 and 57834/00, ECHR 2004-IV (extracts), para. 133.

[397] See Brownlie, *Principles of Public International Law*, p. 579 (citing *Paniagua Morales* et al. and *Extrajudicial Executions and Forced Disappearances v. Peru*).

Chapter IV

Exercise of national jurisdiction when an alleged offender is present

132. Once a crime of international concern occurs and one or more States generally investigate the matter, a State may then obtain or receive information that an alleged offender is present in the State's territory. When this happens, the State usually will conduct a preliminary investigation for the purpose of determining whether to submit the matter to prosecution or to extradite or surrender the alleged offender to other competent authorities. Further, the State may take the alleged offender into custody (or pursue other measures) to ensure the continued presence of the alleged offender. Other States, or perhaps an international tribunal, interested in prosecuting the alleged offender may request extradition or surrender.

133. Both the General Assembly and the Security Council of the United Nations have recognized the importance of such measures in the context of crimes against humanity. Thus, the General Assembly has called upon "all States concerned to take the necessary measures for the thorough investigation of … crimes against humanity … and for the detection, arrest, extradition and punishment of all persons … guilty of crimes against humanity who have not yet been brought to trial or punished".[398] Similarly, it has asserted that "refusal by States to co-operate in arrest, extradition, trial and punishment of persons guilty of … crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law".[399] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for … crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation".[400]

134. Treaties addressing crimes typically set forth rights and obligations relating to the investigation and possible detention of an alleged offender when the person is present in the territory of a State party. For example, article 10 of the International Convention for the Protection of All Persons from Enforced Disappearance, which is derived from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "with some simplifications",[401] provides in paragraphs 1 and 2 that, upon reviewing information made available to it concerning an alleged offender, a State party shall conduct a preliminary investigation, shall (if necessary) take the alleged offender into custody, and shall notify other relevant States as to the measures it has taken and whether it intends to exercise its jurisdiction in the matter. Reviewing such a provision in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[402] the International Court of Justice has explained that their purpose is "to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the objective and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts".[403]

135. Such an approach when an alleged offender is present is viewed as foundational to making any such

[398] General Assembly resolution 2583 (XXIV) of 15 December 1969, para. 1.

[399] General Assembly resolution 2840 (XXVI) of 18 December 1971, para. 4.

[400] Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

[401] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 89.

[402] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 98 above), p. 450, para. 72 ("incorporating the appropriate legislation into domestic law … would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts …, a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution").

[403] *Ibid.*, p. 451, para. 74. See also Nowak and McArthur, *The United Nations Convention against Torture* …, p. 337 (explaining such State obligations in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

treaty effective and has not been controversial when treaties of this kind are drafted.[404] The following discussion focuses on the three main elements of a treaty provision on this issue: the obligations to conduct a preliminary investigation; to ensure continuing presence of the alleged offender; and to notify other States with an interest in the alleged offender. A fourth element sometimes present in such articles—a right for a non-national alleged offender to communicate with his or her consular officer—is addressed in chapter VI with respect to "fair treatment of an alleged offender."

A. Conducting a preliminary investigation

136. Once a State obtains or receives information that an alleged offender is present in territory under the State's jurisdiction or control, a common step is to conduct a preliminary investigation of the matter. If the information is received from another State or some other source, then the preliminary investigation may include confirming the identity and location of the person. In any event, such a preliminary investigation will allow the State to establish the facts relevant for deciding whether the matter is to be submitted to prosecution within that State, or whether the alleged offender is to be extradited or surrendered to other competent authorities.

137. This preliminary investigation should be contrasted with the more general investigation addressed in chapter IV of this report. That investigation seeks to determine, at a general level, whether a crime against humanity has occurred or is occurring and, if so, who the offenders may be and where they may be located. Here, in light of having determined where a particular alleged offender may be located, the State where the alleged offender is present conducts a preliminary investigation with respect to that specific person for the purpose of confirming his or her identity, determining whether a prosecutable offence exists, and then deciding whether to submit the matter to prosecution or to extradite or surrender.[405] Conducting a preliminary investigation also helps to ensure application of the "fundamental principle of fairness and equality" to the accused by confirming that there is a reasonable basis upon which to hold the accused for prosecution or extradition or surrender.[406] At the same time, this preliminary investigation should be contrasted with a full investigation that will occur as a part of an actual prosecution, either in the State where the alleged offender is found, or in a State or by a tribunal to whom the person is extradited or surrendered.

138. The national criminal laws of States typically provide for such preliminary investigation to determine whether a prosecutable offence exists. Norway, for example, provides that "[a] criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists".[407] The purpose of this investigation is "to obtain the necessary information … for deciding whether an indictment should be preferred", among others.[408] Other States, such as the Russian Federation[409] and Ukraine,[410] similarly require a preliminary investigation for all potential criminal matters.

139. While the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims contain no obligation to conduct a preliminary investigation, contemporary treaties addressing crimes typically do contain such an obligation. These treaties include the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 2); the International Convention against the taking of hostages (art. 6, para. 1); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 8); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 1); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 1); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 2); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 2).

140. The International Court of Justice has emphasized the importance of such a preliminary investigation in the context of article 6, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, finding that it is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who have the task of drawing up a case file conduct the investigation and collect facts and evidence; "this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned".[411] The Court has further noted that "the choice of means for conducting the inquiry remains in the hands of the States Parties", but that "steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case".[412]

B. Ensuring continuing presence

141. Taking an individual into custody who is alleged to have committed a serious offence, pending an investigation to determine whether the matter should be submitted to prosecution, is a common step in national criminal proceedings, in particular to avoid further criminal acts

[404] Lambert, *Terrorism and Hostages in International Law*, p. 168.

[405] Nowak and McArthur, *The United Nations Convention against Torture …*, p. 340.

[406] *Ibid.*, p. 342.

[407] Norway, Criminal Procedure Act of 22 May 1981 No. 25, with subsequent amendments, the latest made by Act of 30 June 2006 No. 53, section 224, available from www.legislationline.org/norway.

[408] *Ibid.*, sect. 226.

[409] Criminal Procedural Code of the Russian Federation, No. 174-FZ of 18 December 2001 (as amended 1 March 2012), chap. 21, available from www.legislationline.org/Russian-Federation.

[410] Criminal Procedure Code of Ukraine enacted by the Law of 28 December 1960 (as amended in 2010), art. 111, available from www.legislationline.org/Ukraine.

[411] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 98 above), p. 453, para. 83.

[412] *Ibid.*, p. 454, para. 86. For a generalized discussion of this case and its import, see Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, pp. 75–76.

and to avoid a risk of flight by the alleged offender. For example, German law provides that "[r]emand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest… A ground for arrest shall exist if on the basis of certain facts … considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight)".[413] Comparable provisions exist in many other jurisdictions, such as Norway,[414] the Russian Federation,[415] Switzerland,[416] Ukraine[417] and the United States of America.[418] Furthermore some States, such as Germany, specifically allow for such detention when "an accused [is] strongly suspected … of having committed a criminal offence pursuant to … the Code of Crimes against International Law".[419]

142. Treaties addressing crimes typically include a provision setting forth an obligation to ensure continuing presence of the alleged offender, if necessary by taking him or her into custody. While the Convention on the Prevention and Punishment of the Crime of Genocide does not contain such a provision, the Geneva Conventions for the protection of war victims indirectly address the matter by obligating each State party to bring persons alleged to have committed grave breaches "before its own courts".[420] More contemporary treaties expressly oblige States parties to take the alleged offender into custody or to take such other legal measures as are necessary to ensure his or her presence. These treaties include the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 1); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 1); the International Convention against the taking of hostages (art. 6, para. 1); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 1); the Convention on the Safety of United Nations and Associated Personnel (art. 13, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 2); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 2); the United Nations Convention against Transnational Organized Crime (art. 16, para. 9); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 1); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 3).

143. In treaties containing an obligation to ensure continuing presence, the overall objective is to keep the alleged offender in the State party's territory "for the time necessary to enable extradition or criminal proceedings to commence".[421] The primary option is usually "arrest and detention, i.e. police custody up to a few days followed by pre-trial detention and/or detention pending deportation".[422] Whether detention is required for the entire pre-trial or deportation period will depend on the facts of the case, including the likelihood of flight or destruction of evidence.[423] If ongoing detention is deemed unnecessary by the State party, then some writers maintain that the State party must take other "legal measures" to ensure the presence of the suspect at trial. To fulfil their obligations under such treaties, "States parties are expected to take the same measures as are provided for in their national law in the case of any ordinary offence of a serious nature", which may include "house arrest, release on bail, the confiscation of travel documents, an obligation to report regularly to the police and similar restrictions on freedom of movement".[424]

144. Of course any "action taken by a State in this regard 'must be considered in light of the requirement … that there be grounds to believe that the alleged offender has committed one or more of the crimes set forth'".[425] While a State party has wide latitude to assess whether taking an alleged offender into custody is necessary, it is bound to act in good faith in the exercise of that discretion.[426] In so doing, States should "examine … the conditions laid down in [their] national law relating, in particular, to the degree of suspicion required and to the existence of a danger of flight".[427] As long as they do not interfere with "the general obligation to extradite or prosecute", States parties may also consider national legal time limits relating to detention to determine whether that detention should continue.[428] Ultimately, the obligation is "on the State party in whose territory [the alleged offender] is found … to take the appropriate measures to prevent his escape pending that State's decision on whether he should be extradited

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[413] Code of Criminal Procedure of Germany of 7 April 1987 (as amended 31 October 2008), sect. 112, available from www.legislationline.org/Germany.

[414] Norway, Criminal Procedure Act of 22 May 1981 No. 25 (see footnote 407 above), sect. 171.

[415] Criminal Procedural Code of the Russian Federation, No. 174-FZ of 18 December 2001 (see footnote 409 above), arts. 91 and 108.

[416] Criminal Procedure Code of Switzerland of 5 October 2007 (status as of 1 January 2015), arts. 225–226, available from www.legislationline.org/Switzerland.

[417] Criminal Procedure Code of Ukraine enacted by the Law of 28 December 1960 (see footnote 410 above), art. 98-1, available from www.legislationline.org/Ukraine.

[418] United States Code, Title 18, section 3142 (*e*)–(*f*) (1).

[419] Code of Criminal Procedure of Germany of 7 April 1987 (see footnote 413 above), sect. 112.

[420] See the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146.

[421] Lambert, *Terrorism and Hostages in International Law*, p. 173. See *Yearbook … 1972*, vol. II, document A/8710/Rev.1, draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, p. 312, at p. 317.

[422] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 338.

[423] *Ibid.*, p. 339.

[424] *Ibid.*, pp. 338–339. See also Burgers and Danelius, *The United Nations Convention against Torture*, p. 135.

[425] Lambert, *Terrorism and Hostages in International Law*, p. 170 (citing *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 312, at p. 317 (commentary to article 5 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons).

[426] Burgers and Danelius, *The United Nations Convention against Torture*, p. 134; and Lambert, *Terrorism and Hostages in International Law*, pp. 168 and 171.

[427] Burgers and Danelius, *The United Nations Convention against Torture*, p. 134.

[428] *Ibid.*

or the case submitted to its competent authorities for the purpose of prosecution".[429]

145. The Committee against Torture considered this obligation in the context of an alleged offender, Ely Ould Dah, who was arrested and indicted in France in 1999, but then released pending trial. Mr. Ould Dah fled France and was tried, convicted, and sentenced *in absentia*. The Committee expressed regret "that the State party did not take the necessary steps to keep Mr. Ould Dah in its territory and ensure his presence at his trial", pursuant to its obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The recommendation was "that, where the State party has established its jurisdiction over acts of torture in a case in which the alleged perpetrator is present in any territory under its jurisdiction, it should take the necessary steps to have the person concerned taken into custody or to ensure his or her presence".[430]

C. Notifying other interested States

146. In the absence of a treaty relationship, there is little authority to support the proposition that a State exercising its criminal jurisdiction is under an obligation to notify other States that may have an interest in the proceedings (leaving aside the consular notification obligation in chapter VI, section D, of this report). In treaties relating to crimes, however, it is common to include a provision obligating a State party that has taken an alleged offender into custody (or taken such other legal measures as are necessary to ensure his or her presence) to notify other interested States parties, meaning those States parties who also may exercise national jurisdiction to prosecute the alleged offender (for example, based on "territorial", "nationality" or "passive personality" jurisdiction). Typically, such notification must indicate the general findings of its preliminary investigation, the measures that have been taken by the State party (such as detention of the alleged offender) and whether the State party intends to exercise its jurisdiction to submit the matter to prosecution.

147. Although the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims do not contain such a provision, more contemporary treaties do. Such treaties include the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 4); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 1); the International Convention against the taking of hostages (art. 6, paras. 2 and 6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 4); the Convention on the Safety of United Nations and Associated Personnel (art 13, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 6); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 6); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 2); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 6).

148. Such an obligation "is of a general character" and should be "made even where there is already a firm intention to prosecute the person concerned in the State where he was arrested".[431] The obligation serves the important purpose of enabling other "States to decide whether or not they wish to request extradition from the custodial State. In addition, the State whose national the alleged [perpetrator] is might be enabled to take appropriate measures of diplomatic or consular protection".[432]

D. Draft article 8. Exercise of national jurisdiction when an alleged offender is present

149. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"Draft article 8. Exercise of national jurisdiction when an alleged offender is present

"1. If a State obtains or receives information indicating that a person present in territory under its jurisdiction or control may have committed an offence referred to in draft article 5, paragraphs 1 or 2, the State shall immediately carry out a preliminary investigation to establish the relevant facts with respect to that person.

"2. If the circumstances so warrant, the State shall take the person into custody or take such other legal measures as are necessary to ensure his or her presence during the investigation and at criminal, extradition or surrender proceedings. The custody and other legal measures shall be as provided for in the law of that State, but shall be in conformity with international law and maintained only for such time as is reasonable.

"3. The State shall notify the States referred to in draft article 6, paragraph 1, of the general findings of its preliminary investigation, of the circumstances warranting any detention, and whether it intends to submit the matter to its competent authorities for the purpose of prosecution."

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[429] Para. (1) of the commentary to article 5 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. 312, at p. 317.

[430] Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States Parties under article 19 of the Convention, France, para. 14.

[431] Burgers and Danelius, *The United Nations Convention against Torture*, p. 135. See also Lambert, *Terrorism and Hostages in International Law*, pp. 174–175 (citing *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 312, at p. 318 (noting a twofold purpose to this requirement, namely that "it is desirable to notify States that are carrying on a search for the alleged offender that he has been found" and that "it will permit any State with a special interest in the particular crime committed to determine if it wishes to request extradition and to commence the preparation of necessary documents and the collection of the required evidence")).

[432] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 341. See also Burgers and Danelius, *The United Nations Convention against Torture*, p. 135; and Lambert, *Terrorism and Hostages in International Law*, p. 183.

Chapter V

Aut dedere aut judicare

150. The "obligation to extradite or prosecute", commonly referred to as the principle of *aut dedere aut judicare*, is an obligation that calls upon a State in which an alleged offender is present either to submit the alleged offender to prosecution within the State's own national system or to extradite him or her to another State that is willing to do so within its national system. This obligation is contained in numerous multilateral treaties addressing crimes.[433]

151. At times, the General Assembly of the United Nations has invoked the *aut dedere aut judicare* principle when calling upon States to deny refuge to offenders for different kinds of offences, often relating to terrorism.[434] Similarly, the Security Council of the United Nations has referred to the principle on many occasions.[435] In none of these instances has the subject been crimes against humanity, although some of these resolutions have related to offences that in certain circumstances may constitute crimes against humanity, such as enforced disappearance or to the protection of civilians or United Nations personnel in armed conflict. The International Court of Justice has not addressed the customary international law status of the principle of *aut dedere aut judicare*, but some of its judges have done so in separate opinions.[436]

152. The Commission's 1996 draft code of crimes against the peace and security of mankind defined crimes against humanity in article 18 and further provided, in article 9, that "[w]ithout prejudice to the jurisdiction of an international criminal court, the State party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual".[437] The commentary to this provision stated in part:

> (2) Article 9 establishes the general principle that any State in whose territory an individual alleged to have committed a crime set out in articles 17 to 20 of part two is bound to extradite or prosecute the alleged offender. … The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.
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> (3) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime". This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.
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> (4) The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition. …
>
> (5) Whereas the sufficiency of evidence required to institute national criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. …
>
> (6) The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action.
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> …
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> (8) The introductory clause of article 9 recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution. Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court.[438]

153. In 2014, the Commission adopted the final report of its Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which touched upon but did not resolve whether there existed such an obligation in customary international law, including with respect to crimes against humanity. The report stated:

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[433] See, generally, Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", *Yearbook … 2010*, vol. II (Part One), document A/CN.4/630. See also Bassiouni and Wise, *Aut Dedere Aut Judicare*.

[434] See, for example, the following General Assembly resolutions: 34/145 of 17 December 1979; 38/130 of 19 December 1983; 40/61 of 9 December 1985; 42/159 of 7 December 1987; 44/29 of 4 December 1989; 46/51 of 9 December 1991; 47/133 of 18 December 1992; 49/60 of 9 December 1994; 51/210 of 17 December 1996; 51/60 of 12 December 1996; 54/164 of 17 December 1999; and 61/133 of 14 December 2006. See also the following reports of the Secretary-General on measures to eliminate international terrorism: A/56/160 of 3 July 2001 and A/60/228 of 12 August 2005.

[435] See, for example, the following Security Council resolutions: 1267 (1999); 1269 (1999); 1333 (2000); 1456 (2003); 1502 (2003); 1566 (2004); 1624 (2005); 1674 (2006); and 1738 (2006).

[436] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at p. 24, para. 2 (Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley: "in general international law there is no obligation to prosecute in default of extradition"); p. 38, para. 12 (Dissenting Opinion of Judge Bedjaoui: same); p. 69 (Dissenting Opinion of Judge Weeramantry: "The principle *aut dedere aut judicare* is an important facet of a State's sovereignty over its nationals and the well-established nature of this principle in customary international law is evident"); and p. 82 (Dissenting Opinion of Judge Ajibola: same). For an analysis, see Bassiouni and Wise, *Aut Dedere Aut Judicare*, pp. 58–69. In the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal acknowledged the importance of the principle of *aut dedere aut judicare*, especially as it relates to crimes against humanity, but did not address its status as customary international law (*Arrest Warrant of 11 April 2000* (see footnote 303 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), pp. 78–79, paras. 51–52).

[437] Draft code of crimes against the peace and security of mankind (see footnote 134 above), p. 30.

[438] *Ibid.* pp. 31–32.

(54) When the Commission adopted the draft code in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law … . Since the completion of the 1996 draft code, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.

(55) The Commission notes that in 2012 the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* ruled that it had no jurisdiction to entertain the claims of Belgium relating to the alleged breaches by Senegal of obligations under customary international law because at the date of filing by Belgium of the Application the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law. Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.[439]

154. At the same time, the Commission observed "that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity".[440]

155. As noted at the outset of this chapter, an *aut dedere aut judicare* obligation is contained in numerous multilateral treaties addressing crimes. Some of these treaties impose an obligation upon a State party to submit the matter to prosecution only if that State party refuses to surrender the alleged offender following a request for extradition from another State party.[441] Other treaty provisions impose such an obligation whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition.[442] Under either approach, the State party's obligation can be satisfied by agreeing to extradition of the alleged offender.[443]

156. The latter approach is the most common in treaties and the dominant formula for this approach derives from the (Hague) Convention on the Suppression of Unlawful Seizure of Aircraft, and therefore is commonly referred to as the "Hague formula". Article 7 of the Convention reads:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

157. Although regularly termed the obligation to extradite or "to prosecute", the obligation imposed by the Convention on the Suppression of Unlawful Seizure of Aircraft is to "to submit the case" to prosecution, meaning to submit the matter to prosecutorial authorities who may or may not seek an indictment. If the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.[444] The *travaux préparatoires* of the Convention indicate that the formula established "the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution".[445]

158. No reservations have been made to the 1970 Convention on the Suppression of Unlawful Seizure of Aircraft that affect the provisions related to *aut dedere aut judicare*. Moreover, the Hague formula is reflected in approximately three quarters of the multilateral treaties drafted since 1970 that include an obligation to extradite or submit to prosecution.[446] Many of these treaties

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[439] *Yearbook … 2014*, vol. II (Part Two), para. 65 (citing the judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 98 above), p. 462, para. 122).

[440] *Ibid*. See also Akhavan, "The universal repression of crimes against humanity before national jurisdictions".

[441] See, for example, International Convention for the Suppression of Counterfeiting Currency, art. 9 ("The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence"). See also Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, arts. 7–8; the Convention for the Prevention and Punishment of Terrorism, art. 9; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, art. 9; the Single Convention on Narcotic Drugs, 1961, art. 36, para. 2 (*a*) (iv); and the Convention on Psychotropic Substances, art. 22, para. 2 (*a*) (iv).

[442] See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; the Geneva Convention relative to the Treatment of Prisoners of War, art. 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

Although no reservations have been made to the Geneva Conventions for the protection of war victims concerning this *aut dedere aut judicare* provision, this particular formulation has received little support in other treaties. The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) is the only other multilateral convention to use this formula, which it does by *renvoi* (art. 85, paras. 1 and 3, and art. 88, para. 2). See Survey of multilateral conventions (footnote 433 above), para. 59.

[443] See Survey of multilateral conventions (footnote 433 above), para. 126. See also the judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (footnote 98 above), p. 422, Separate Opinion of Judge Yusuf, at p. 559.

[444] See Survey of multilateral conventions (footnote 433 above), para. 147.

[445] Statement of [Chair] Gilbert Guillaume (delegate from France), ICAO [International Civil Aviation Organization] Legal Committee, *Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Doc. 8877-LC/161), para. 15, 30th meeting (3 March 1970), 17th Sess. (Montreal, 9 February–11 March 1970).

[446] See Survey of multilateral conventions (footnote 433 above), para. 108. These conventions include (in chronological order): Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), art. 7; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), art. 7; International Convention against the Taking of Hostages (1979), art. 8; Convention on the Physical Protection of Nuclear Material (1979), art. 10; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art. 7; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), art. III; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 10, para. 1; United Nations Convention against Illicit Traffic in Narcotic

replicate the Convention on the Suppression of Unlawful Seizure of Aircraft verbatim or almost verbatim, with few or modest substantive changes, while others are more loosely based on the Hague formula. Examples include the Convention for the suppression of unlawful acts against the safety of civil aviation;[447] the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[448] the International Convention against the taking of hostages;[449] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[450] the Convention on the Safety of United Nations and Associated Personnel;[451] the International Convention for the Suppression of Terrorist Bombings;[452] the International Convention for the Suppression of the Financing of Terrorism;[453] the United Nations Convention against Transnational Organized Crime;[454] the United Nations Convention against Corruption;[455] the International Convention for the Suppression of Acts of Nuclear Terrorism;[456] the International Convention for the Protection of All Persons from Enforced Disappearance;[457] and the ASEAN Convention on Counter Terrorism.[458]

Drugs and Psychotropic Substances (1988), art. 6, para. 9; International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), art. 13; Convention on the Safety of United Nations and Associated Personnel (1994), art. 14; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), art. 10, para. 3; International Convention for the Suppression of Terrorist Bombings (1997), art. 8; the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999), art. 1, para. 1; International Convention for the Suppression of the Financing of Terrorism (1999), art. 10, para. 1; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), art. 5, para. 5; United Nations Convention against Transnational Organized Crime (2000), art. 16, para. 10; United Nations Convention against Corruption, art. 44, para. 11; the International Convention for the Suppression of Acts of Nuclear Terrorism, art. 11; and International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 11.

[447] Art. 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State").

[448] Art. 7 ("The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State").

[449] Art. 8, para. 1 ("The State party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State").

[450] Art. 7 ("1. The State party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1").

[451] Art. 14 ("The State party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State").

[452] Art. 8, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[453] Art. 10, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[454] Art. 16, para. 10 ("A State party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution").

[455] Art. 44, para. 11 ("A State party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution").

[456] Art. 11, para. 1 ("The State party in the territory of which the alleged offender is present shall, in cases to which [the article on jurisdiction] applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State").

[457] Art. 11 ("1. The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1").

[458] Art. XIII, para. 1 ("The Party in the territory of which the alleged offender is present shall, in cases to which Article VII of this Convention applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the domestic laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the domestic laws of that Party").

159. The Hague formula also can be found in many regional conventions.[459] In fact, the 1957 European Convention on Extradition (art. 6, para. 2) served as a model for the Convention on the Suppression of Unlawful Seizure of Aircraft.[460] Fifty States have ratified that Convention, including all member States of the Council of Europe, as well as three non-European States (Israel, the Republic of Korea, and South Africa).

160. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed the Hague formula in the context of article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the [Convention on the Suppression of Unlawful Seizure of Aircraft], signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute") was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] and Article 7 of the [Convention on the Suppression of Unlawful Seizure of Aircraft]). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven…

…

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.

…

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is "to make more effective the struggle against torture" (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

…

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.[461]

161. The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;[462] referral of the matter to a regional organization;[463] or difficulties with implementation under the State's internal law.[464]

162. The idea of satisfying the State party's obligation by surrendering the alleged offender to an international court or tribunal (sometimes referred to as a "third alternative" or as part of the "triple alternative") has also arisen in recent years, especially in conjunction with the establishment of the International Criminal Court and other international and special courts and tribunals.[465] For example, the International Convention for the Protection of All Persons from Enforced Disappearance, in article 11, paragraph 1, provides:

The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

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[459] See Survey of multilateral conventions (footnote 433 above), para. 108. These conventions include (in chronological order): Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (1971), art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (1977), arts. 8 and 9, paras. 2–3; European Convention on the Suppression of Terrorism (1988), art. 7; Inter-American Convention to Prevent and Punish Torture (1985), art. 14; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987), art. 4; Inter-American Convention on the Forced Disappearance of Persons (1994), art. 6; Inter-American Convention on International Traffic in Minors (1994), art. 9; Inter-American Convention against Corruption (1996), art. XIII, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (1997), art. XIX, para. 6; Arab Convention on the Suppression of Terrorism (1998), art. 6; Criminal Law Convention on Corruption (1999), art. 27, para. 5; Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999), art. 6; Convention on Cybercrime (2001), art. 24, para. 6; African Union Convention on Preventing and Combating Corruption (2003), art. 15, para. 6; Council of Europe Convention on the Prevention of Terrorism (2005), art. 18; Council of Europe Convention on Action against Trafficking in Human Beings (2005), art. 31, para. 3; and Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism (2007), art. 13, para. 1.

[460] ICAO [International Civil Aviation Organization] Legal Committee, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft (Document 8877-LC/161), 36th meeting (3 March 1970), 17th Session, Montreal, 9 February–11 March 1970), p. 69, para. 33; and Guillaume, "Terrorisme et droit international", pp. 354 and 368.

[461] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 98 above), pp. 454–461, paras. 90–91, 94–95, 114–115 and 120.

[462] *Ibid.*, p. 460, para. 112.

[463] *Ibid.*

[464] *Ibid.*, p. 460, para. 113.

[465] *Yearbook … 2014*, vol. II (Part Two), p. 99, para. (27).

163. The phrase "international criminal tribunal" used in such a formulation is intended to encompass not only the International Criminal Court, but also *ad hoc* international criminal tribunals and special courts or tribunals that combine international and national law.[466] The phrase "whose jurisdiction it has recognized" would appear to be unnecessary, although it implicitly acknowledges that not all States have accepted the jurisdiction of the same international criminal tribunals and therefore that the capacity to surrender to such tribunals will vary by State.

164. Most treaties containing the Hague formula also include a clause to the effect that the "authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State party".[467] The objective of such a clause is to help avoid any possibility of the situation being exploited for political reasons, resulting in trials on the basis of spurious accusations and fabricated evidence, and thereby leading to frictions between States.[468] Thus, in these proceedings, "normal procedures relating to serious offences, both in the extradition and criminal proceedings, and the normal standards of evidence shall apply".[469]

165. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance add a further sentence which provides that, in situations where the State party's jurisdiction is based solely on the presence of the alleged offender, the standards of evidence required for prosecution and conviction shall be no less stringent than the standards which apply in other States that have jurisdiction (for example, jurisdiction based on territoriality or nationality). This sentence seeks to ensure that alleged offenders are not prosecuted by a third State on the basis of insufficient or inadequate evidence. According to some writers, if the evidence in the third State is insufficient, and the territorial or national State is not able or willing to supply the necessary evidence, the third State should extradite the alleged offender where possible to a jurisdiction where the evidence exists, or should delay proceedings in order to negotiate a solution with the concerned States.[470] A practical difficulty with such an obligation, however, is the assumption that prosecutors and judges in a State party can readily ascertain and apply the standards of evidence required for prosecution and conviction that apply in other States parties having jurisdiction over the matter.

Draft article 9. *Aut dedere aut judicare*

166. As previously noted, in 2014 the Commission observed "that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity".[471] In this context, the Commission also recalled that it had placed on its programme of work the present topic, "which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes".[472] Moreover, the Commission recommended "that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime".[473] Finally, the Commission characterized as one of the essential elements of a contemporary *aut dedere aut judicare* formula, a provision for the "third alternative" (in other words, the notion that the obligation may be satisfied by surrendering the alleged offender to a competent international tribunal), noting in particular article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.[474]

167. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 9.* Aut dedere aut judicare

"1. If a person alleged to have committed an offence referred to in draft article 5, paragraphs 1 and 2, is found in any territory under the jurisdiction or control of a State, that State shall submit the matter to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal.

"2. If the State submits the matter to its competent authorities for the purpose of prosecution, those authorities shall decide whether and how to prosecute in the same manner as they would for any ordinary offence of a serious nature under the law of that State."

[466] See *ibid.*, pp. 100–101, para. (35); and Scovazzi and Citroni, *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 303.

[467] See footnotes 447 to 456 above.

[468] Nowak and McArthur, *The United Nations Convention against Torture* …, p. 365.

[469] *Ibid.*, p. 366, citing Burgers and Danelius, *The United Nations Convention against Torture*, p. 38.

[470] *Ibid.*, p. 366.

[471] *Yearbook … 2014*, vol. II (Part Two), final report on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)", p. 92, para. 65, at p. 96, para. (14); see also *ibid.*, p. 100, para. (31).

[472] *Ibid.*, p. 100, para. (31).

[473] *Ibid.*, p. 100, para. (33).

[474] *Ibid.*, pp. 100–101, paras. (34)–(36).

Chapter VI

Fair treatment of an alleged offender

168. All States contain within their national law protections of one degree or another for persons who they investigate, detain, try and punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to "fair treatment", "due process", "judicial guarantees" or "equal protection". Such protections are extremely important in ensuring that the extraordinary power of the State's criminal justice apparatus is not

improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State's allegations before an independent court (hence, allowing for an "equality of arms").

169. Such protections are now well recognized in international criminal law and human rights law.[475] At the most general level, such protections are identified in the 1948 Universal Declaration of Human Rights, which provides in article 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[476] Further, article 11 provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" and that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".[477]

170. The principal statement of a universal character with respect to such guarantees appears in article 14 of the International Covenant on Civil and Political Rights. Article 14 sets forth a series of rights, including that: (*a*) all persons shall be equal before the courts and tribunal; (*b*) every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law; (*c*) the press and the public may be excluded from the trial only for specified reasons; (*d*) any judgment rendered in a criminal case shall be made public except in limited circumstances; (*e*) every person charged with a criminal offence shall be presumed innocent until proved guilty according to law; (*f*) every person is to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge; (*g*) every person must have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his own choosing; (*h*) every person shall be tried without undue delay; (*i*) every person has a right to be tried in his or her presence, and to defend himself in person or through legal assistance of his own choosing (and to be informed of this right and provided legal assistance if justice so requires); (*j*) every person may examine, or have examined, the witnesses against him or her; (*k*) every person may have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; (*l*) every person may not be compelled to testify against himself or herself, or to confess guilt; (*m*) juvenile persons shall be tried using procedures that take account of their age and the desirability of promoting their rehabilitation; (*n*) everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law; and (*o*) no one shall be tried or punished again for an offence for which he has already been finally convicted or acquitted (the principle of *ne bis in idem* ("not twice the same thing") or as protection from "double jeopardy"). The purpose of article 14 of the International Covenant on Civil and Political Rights, obviously, is to ensure the proper administration of justice to an alleged offender.[478]

171. As a general matter, instruments establishing or setting standards for an international court or tribunal generally seek to replicate with some degree of specificity the kinds of standards set forth in article 14 of the International Covenant on Civil and Political Rights, while instruments that address national laws typically provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14.

172. The Nürnberg Charter contained an article on a "fair trial for defendants" which addressed elements such as the clarity of the indictment, the language of the proceedings, the right to counsel and the right of the defence to access to evidence (art. 16). The Commission's 1954 draft code of offences against the peace and security of mankind[479] contained no article on protections for the alleged offender. In the 1996 draft code of crimes against the peace and security of mankind, however, article 11 lists several protections to be accorded to individuals charged with a crime against the peace and security of mankind.480 In its commentary to article 11, the Commission distinguished the 1954 draft code, which "did not address the procedures to be followed in the investigation and prosecution of alleged perpetrators" because

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[475] Doswald-Beck, "Fair trial, right to, international protection", p. 1104 ("The right to a fair trial has, since the Universal Declaration of Human Rights … become established as one of the fundamental pillars of international law to protect individuals against arbitrary treatment.").

[476] General Assembly resolution 217 A (III) of 10 December 1948. See also Lehtimaja and Pellonpää, "Article 10".

[477] General Assembly resolution 217 A (III) of 10 December 1948.

[478] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

[479] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para 54.

[480] Specifically, article 11 provides:

"*Judicial guarantees*

"1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

"(*a*) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

"(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(*d*) To be tried without undue delay;

"(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

"(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(*h*) Not to be compelled to testify against himself or to confess guilt.

"2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law." Draft code of crimes against the peace and security of mankind (see footnote 134 above), pp. 33–36.

it was "envisaged as an instrument of substantive criminal law to be applied by a national court or possibly an international criminal court in accordance with the rules of procedure and evidence of the competent national or international jurisdiction".[481] In regards to the 1996 draft code of crimes against the peace and security of mankind, however, the Commission:

> considered that an instrument of a universal character, such as the Code, should require respect for the international standard of due process and fair trial set forth in article 14 of the International Covenant on Civil and Political Rights. The essential provisions of article 14 of the Covenant are therefore reproduced in article 11 to provide for the application of these fundamental judicial guarantees to persons who are tried by a national court or an international court for a crime against the peace and security of mankind contained in the Code.[482]

173. The instruments regulating the International Tribunal for the Former Yugoslavia,[483] the International Tribunal for Rwanda,[484] the Special Court for Sierra Leone,[485] the Special Tribunal for Lebanon,[486] the Special Panels for Serious Crimes in East Timor,[487] the Extraordinary Chambers in the Courts of Cambodia,[488] the Supreme Iraqi Criminal Tribunal[489] and the Extraordinary African Chambers within the Senegalese Judicial System[490] contain various provisions addressing protections for defendants. With respect to the International Criminal Court, the Rome Statute of the International Criminal Court contains articles devoted to *nullem crimen sine lege* (art. 22), *nulla poena sine lege* (art. 23), exclusion of jurisdiction over persons under eighteen (art. 26), rights of persons during an investigation (art. 55), trial in the presence of the accused (art. 63), presumption of innocence (art. 66) and rights of the accused (art. 67). The last of these articles catalogues in considerable detail protections for the defendant, akin to those contained in article 14 of the International Covenant on Civil and Political Rights.[491]

174. By contrast, most treaties addressing crimes or specific types of human rights violations within a national legal system, such as torture, do not repeat these myriad protections for an alleged offender. Instead, such treaties contain a provision that expresses general obligations of protection for the alleged offender, which essentially cross-reference to the more detailed protections contained in other instruments or in customary international law. A good example of such a provision may be found in the Convention on the Safety of United Nations and Associated Personnel, which provides in article 17 (Fair treatment):

> 1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.
>
> 2. Any alleged offender shall be entitled:
>
> (*a*) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and
>
> (*b*) To be visited by a representative of that State or those States.

175. The following subsections address these elements of fair treatment, fair trial, human rights protections generally, and the right to communicate with one's State of nationality or other relevant State.

A. Fair treatment

176. As noted above, most treaties addressing crimes or specific types of human rights violations within a national legal system do not repeat the myriad human rights protections for an alleged offender, but instead contain a provision that expresses general obligations of protection. Often this takes the form of obligating the State to accord "fair treatment" to the alleged offender at all stages of the proceeding.

177. Examples of such a "fair treatment" provision may be found in the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[492] the International Convention against the taking of hostages;[493] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[494] the Convention for the suppression of unlawful acts against the safety of maritime navigation;[495] the Convention on the rights of the child;[496] International Convention Against the Recruitment, Use,

[481] *Ibid.*, p. 33, para. (1) of the commentary to draft article 11.

[482] *Ibid.*, p. 34, para. (6) of the commentary to draft article 11.

[483] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 21.

[484] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 20.

[485] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 17.

[486] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 16.

[487] UNTAET/REG/2000/15 (see footnote 102 above), sects. 12– 13.

[488] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), arts. 33 new–35 new.

[489] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 20.

[490] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 21.

[491] See, for example, Zappalà, "The rights of the accused", p. 1325; and Schabas, "Article 67", pp. 845–868.

[492] Art. 9 ("Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings").

[493] Art. 8, para. 2 ("Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present").

[494] Art. 7, para. 3 ("Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings").

[495] Art. 10, para. 2 ("Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present").

[496] Art. 40, para. 2 (*b*) ("Every child alleged as or accused of having infringed the penal law has at least the following guarantees: … (iii): "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians").

Financing and Training of Mercenaries;[497] the International Convention for the Suppression of Terrorist Bombings;[498] the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;[499] the International Convention for the Suppression of the Financing of Terrorism;[500] the United Nations Convention against Transnational Organized Crime;[501] the United Nations Convention against Corruption;[502] the International Convention for the Suppression of Acts of Nuclear Terrorism;[503] the International Convention for the Protection of All Persons from Enforced Disappearance;[504] and the ASEAN Convention on Counter Terrorism.[505]

178. These conventions do not define the term "fair treatment",[506] but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the International Covenant on Civil and Political Rights. Thus, when crafting article 8 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission asserted that the formulation of "fair treatment at all stages of the proceedings" was "intended to incorporate all the guarantees generally recognized to a detained or accused person", and that "[a]n example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights".[507] Further, the Commission noted that the "expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense".[508] Finally, the Commission also explained that the formulation of "all stages of the proceedings" is "intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case".[509]

179. A broad reference to "fair treatment" rather than to specific rights also avoids having to repeat the range of rights to which any individual is entitled under international human rights law and, as such, avoids inadvertent limitation of those rights. For example, the *travaux préparatoires* of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment indicate that for this reason the drafters rejected the proposal by the Netherlands to provide to alleged torturers the narrower "guarantees of a fair and equitable trial" in favour of the broader "fair treatment at all stages of the proceedings" language of Sweden.[510] According to the *travaux préparatoires*, this broader formulation encompassed all of the fair trial obligations articulated in article 14 of the International Covenant on Civil and Political Rights and ensured protection to the alleged offender at both pre-trial and trial stages of the proceedings.[511] Likewise, the drafters of the International Convention for the Protection of All Persons from Enforced Disappearance used the "fair treatment" construction as the template for its article addressing defendant's rights, also in order not to limit the range of rights.[512]

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[497] Art. 11 ("Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account").

[498] Art. 14 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights").

[499] Art. 17, para. 2 ("Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law").

[500] Art. 17 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law").

[501] Art. 16, para. 13 ("Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State party in the territory of which that person is present").

[502] Art. 44, para. 14 ("Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present").

[503] Art. 12 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights").

[504] Art. 11, para. 3 ("Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law").

[505] Art. VIII, para. 1 ("Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the laws of the Party in the territory of which that person is present and applicable provisions of international law, including international human rights law").

[506] Lambert, *Terrorism and Hostages in International Law*, p. 204.

[507] 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. 312, at p. 320, draft article 8 and the commentary thereto. See also Costello, "International terrorism and the development of the principle *aut dedere aut judicare* ", p. 492 ("if there has been any breach of the rights referred to in Article 14 of the International Covenant [on Civil and Political Rights], in respect to a person charged with an offense under the [Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents], it would be open to a Contracting State to allege that there has been a breach of a State's obligations under Article 9 of that Convention").

[508] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 312, at p. 320.

[509] *Ibid.*

[510] Nowak and McArthur, *The United Nations Convention against Torture …*, pp. 366–367.

[511] *Ibid.*, p. 367 ("the suspected torturer must enjoy all guarantees of a fair trial as stipulated in Article 14" of the International Covenant on Civil and Political Rights).

[512] See, for example, Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 91.

B. Fair trial

180. The concept of "fair treatment" is generally regarded as including within it a right to a fair trial. As discussed below, however, the right to a fair trial is considered so important that some treaties addressing crimes have made a point of identifying both a right to "fair treatment" and to a "fair trial."

181. Among the protections accorded by States under their national laws to persons being tried for a criminal offence is the right to a fair trial.[513] Such a right is identified in article 10 of the Universal Declaration of Human Rights, which provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[514] Similar provisions exist in regional human rights declarations, such as the American Declaration of the Rights and Duties of Man,[515] the Cairo Declaration on Human Rights in Islam[516] and the Charter of Fundamental Rights of the European Union.[517]

182. Article 14, paragraph 1, of the International Covenant on Civil and Political Rights also identified this specific right stating, *inter alia*, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (art. 14, para. 1). Likewise, regional human rights treaties also provide for such a right, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms;[518] the American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 8); the African Charter on Human and Peoples' Rights (art. 7); and the Arab Charter on Human Rights.[519]

183. The Human Rights Committee found this right to a fair trial to be "a key element of human rights protection" and a "procedural means to safeguard the rule of law".[520] Among other things, the Committee stated in 2007 in its general comment No. 32:

> 18. The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. …
>
> 19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. …
>
> …
>
> 21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.
>
> …
>
> 25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any

[513] See, generally, Weissbrodt and Wolfrum, *The Right to a Fair Trial*. See also ICRC, Customary IHL Database, "Practice relating to Rule 100. Fair trial guarantees", available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule100 (providing national legislation for Afghanistan, Argentina, Armenia, Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Burundi, Cambodia, Canada, China, Colombia, Congo, Cook Islands, Croatia, Cyprus, the Democratic Republic of the Congo, Denmark, Estonia, Ethiopia, Finland, France, Georgia, Germany, Hungary, India, Iraq, Ireland, Israel, Jordan, Kenya, Lithuania, Luxembourg, Malawi, Malaysia, Mali, Mauritius, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Papua New Guinea, Peru, Poland, the Republic of Korea, the Republic of Moldova, Romania, Rwanda, Senegal, Serbia, Seychelles, Singapore, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Tajikistan, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Vanuatu, the Bolivarian Republic of Venezuela, the former Yugoslavia and Zimbabwe).

[514] General Assembly resolution 217 A (III) of 10 December 1948.

[515] Adopted at the Ninth International Conference of American States, held in Bogota in 1948, *International Conferences of American States, Second Supplement, 1942–1954*, Washington, D.C., Pan American Union, 1958, p. 262, art. XVIII ("Right to a fair trial: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights) and art. XXVI ("Right to due process of law: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment").

[516] Adopted at the Islamic Conference of Foreign Ministers held in Cairo from 31 July to 5 August 1990. An English translation is available in Status of preparation of publication, studies and documents for the World Conference on Human Rights, note by the Secretariat, addendum: Contribution of the Organisation of the Islamic Conference (A/CONF.157/PC/62/Add.18). Article 19 (*e*) reads: "A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence").

[517] Art. 47 ("Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law").

[518] Art. 6 (Right to a fair trial). For analysis of the Convention's right to a fair trial, see *Golder v. the United Kingdom*, 21 February 1975, European Court of Human Rights, *Judgments and Decisions*: Series A, No. 18, para. 28.

[519] Adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (for the English version, see *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147). Article 13, paragraph 1, provides that "[e]verybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations").

[520] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (see footnote 478 above), para. 2. See also Bair, *The International Covenant on Civil and Political Rights and its (First) Optional Protocol*, p. 56.

direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.

…

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.[521]

184. The right of the defendant to a fair trial is also expressly recognized in the statutes of many international criminal tribunals. Thus, the Nürnberg Charter included such a right (art. 16), which was acknowledged in the Commission's Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[522] Similarly, the right to a fair trial appears in the Statute of the International Tribunal for the Former Yugoslavia,[523] the Statute of the International Tribunal for Rwanda[524] and the Rome Statute of the International Criminal Court (art. 67, para. 1). The same is true for the instruments regulating the Special Court for Sierra Leone,[525] the Special Tribunal for Lebanon,[526] the Extraordinary Chambers in the Courts of Cambodia,[527] the Supreme Iraqi Criminal Tribunal[528] and the Extraordinary African Chambers within the Senegalese Judicial System.[529]

185. Notably, article 3, paragraph 1 (*d*) common to the Geneva Conventions for the protection of war victims prohibits "the passing of sentences … without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples", and the Geneva Convention relative to the Treatment of Prisoners of War (art. 130), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (art. 147) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (art. 85, para. 4 (*e*)) consider depriving a protected person of a fair trial in international armed conflict to be a grave breach. It is also listed as a war crime in the Statute of the International Tribunal for the Former Yugoslavia,[530] the Statute of the International Tribunal for Rwanda[531] and the Rome Statute of the International Criminal Court (art. 8, paras. 2 (*a*) (vi) and (*c*) (iv)).

186. As previously noted, most treaties addressing crimes or specific types of human rights violations within a national legal system, such as torture, do not repeat the myriad protections for an alleged offender, but instead contain a broad obligation that the States parties accord "fair treatment" to the alleged offender at all stages of the proceeding. That obligation is understood as including a guarantee that the alleged offender will receive a fair trial. Yet, in some treaties the relevant provision also independently highlights the right to a fair trial before a competent, independent, and impartial court or tribunal.

187. Thus, the Convention on the Safety of United Nations and Associated Personnel refers to both "fair treatment" and a "fair trial" (art. 17). Similarly, the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict indicates that "any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment *and a fair trial** in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favourable to such person than those provided by international law" (art. 17, para. 2). Likewise, the International Convention for the Protection of All Persons from Enforced Disappearance supplements the general guarantee of "fair treatment" with a further sentence, which states, in article 11, paragraph 3: "Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law." Although some delegations to the negotiations of this convention found this second sentence unnecessary, several others viewed it as important to acknowledge this specific right.[532]

188. The Human Rights Committee, in its general comment No. 32 (2007), also addressed the issue of whether a fair trial could include trial by the use of military courts. It stated at paragraph 22:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that

[521] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (see footnote 478 above), paras. 18–19, 21, 25 and 28. Various decisions by the Committee with respect to petitions also shed light on the Committee's view as to the meaning of article 14, paragraph 1. See, for example, *Gridin v. Russian Federation*, Communication No. 770/1997, Views of the Human Rights Committee (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40,* vol. I (A/55/40 (Vol. I)), annex IX, sect. O), para. 8.2. For an academic commentary, see Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*, p. 284.

[522] *Yearbook … 1950*, vol. II, document A/1316, paras. 95–127, at p. 375 (principle V provides that "[a]ny person charged with a crime under international law has the right to a fair trial on the facts and law").

[523] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 21, para. 2.

[524] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 20, para. 2.

[525] Statute of the Special Court for Sierra Leone (see footnote 101 above), art. 17, para. 2

[526] Statute of the Special Tribunal for Lebanon (see footnote 170 above), art. 16, para. 2.

[527] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (see footnote 103 above), art. 33 new.

[528] Statute of the Iraqi Special Tribunal (see footnote 104 above), art. 20.

[529] Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (see footnote 105 above), art. 21, para. 2.

[530] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (see footnote 99 above), art. 2 (*f*).

[531] Statute of the International Tribunal for Rwanda (see footnote 100 above), art. 4 (*g*).

[532] Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 95.

such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[533]

189. Like the International Covenant on Civil and Political Rights, virtually all treaties addressing crimes or specific types of human rights violations within a national legal system do not prohibit the use of military courts to try alleged offenders. The one exception is the Inter-American Convention on the Forced Disappearance of Persons, which contains such a prohibition.[534] An explanation for that prohibition may relate to the specific offence of forced disappearance, which the Inter-American Court of Human Rights said in 2009 "can never be considered as a legitimate and acceptable means for compliance with a military mission".[535] The 1992 Declaration on the Protection of All Persons from Enforced Disappearance, which influenced the 1994 Inter-American Convention, provided that alleged offenders "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts".[536] Even so, such a prohibition was not included in the International Convention for the Protection of All Persons from Enforced Disappearance, nor has it appeared in any other global treaty, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[537] As such, a 2004 report of the International Commission of Jurists found that: "With the exception of the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons, there are no specific norms, of either a treaty-based or declaratory nature, within international human rights law relating to military offences, military jurisdiction or military 'justice'."[538]

190. Further, the report of the International Commission of Jurists—as a part of a survey of national laws worldwide[539]—noted that "[m]ilitary jurisdiction and 'military justice' exist as institutions in many countries. It also remains common practice in many parts of the world for military personnel who have committed human rights violations to be tried in military courts".[540] At the same time, the International Commission of Jurists found "trends" within national legal systems toward either the abolition or at least reform of military courts, such as by strengthening the role of civilian judges in military courts, bringing their procedures into line with the rules of procedure used in ordinary courts, or precluding the use of military courts to try civilians.[541] Along those lines, the United Nations Commission on Human Rights in 2006 reviewed and affirmed the draft principles governing the administration of justice through military tribunals ("Decaux principles"),[542] which set forth various means for reforming military courts. Among other things, the Decaux principles provide that "[m]ilitary courts should, in principle, have no jurisdiction to try civilians"[543] and that "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".[544] Similarly, notwithstanding the lack of a prohibition on the use of military courts in the International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearances asserted in 2015:

[533] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (see footnote 478 above), para. 22.

[534] Art. IX. As of September 2015, 15 States are parties to this convention.

[535] *Radilla-Pacheco v. Mexico, Case No. 777/01,* Judgment, 23 November 2009, Inter-American Court of Human Rights, Series C, No. 209, para. 227.

[536] Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 16, para. 2.

[537] Separately, the report of the Independent Expert to update the set of principles to combat impunity, containing the 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), included in principle 29 a restriction on the jurisdiction of military tribunals "solely to specifically military offences committed by military personnel, to the exclusion of human rights violations", but that set of principles was not adopted by the Commission on Human Rights.

[538] International Commission of Jurists, *Military Jurisdiction and International Law*, p. 17.

[539] *Ibid.*, pp. 169–378 (surveying the laws of 30 States).

[540] *Ibid.*, p. 158.

[541] *Ibid.*, pp. 158–164. For examples in Latin America of constitutional restrictions on the use of military courts, limiting their jurisdiction solely to offences of a military nature (and excluding international crimes), see: Plurinational State of Bolivia, Nueva Constitución Política del Estado (2009), art. 180, para. III ("La jurisdicción ordinaria no reconocerá fueros, privilegios ni tribunales de excepción. La jurisdicción militar juzgará los delitos de naturaleza militar regulados por la ley" ["Ordinary jurisdiction will not recognize jurisdictions, privileges or tribunals of exception. Military jurisdiction will judge the crimes of a military nature regulated by law"]); Ecuador, Constitución de la República del Ecuador 2008, art. 160 ("Los miembros de las Fuerzas Armadas y de la Policía Nacional serán juzgados por los órganos de la Función Judicial; en el caso de delitos cometidos dentro de su misión específica, serán juzgados por salas especializadas en materia militar y policial, pertenecientes a la misma Función Judicial. Las infracciones disciplinarias serán juzgadas por los órganos competentes establecidos en la ley" ["Members of the Armed Forces and the National Police will be tried by the Judicial Branch; in the case of crimes committed as part of their specific mission, they will be tried by specialized military and police chambers belonging to the same Judicial Branch. Disciplinary infractions shall be tried by the competent bodies established by law"]); El Salvador, Constitución de la República de El Salvador (1983) (as amended), art. 216 ("Gozan del fuero militar los miembros de la Fuerza Armada en servicio activo por delitos y faltas puramente militares" ["Members of the Armed Forces on active service for purely military crimes and offences come under military jurisdiction"]); Paraguay, Constitución Nacional, 1992, art. 174 ("Los tribunales militares solo juzgarán delitos o faltas de carácter militar, calificados como tales por la ley, y cometidos por militares en servicio activo. Sus fallos podrán ser recurridos ante la justicia ordinaria" ["Military courts will only try crimes or offences of a military nature, qualified as such by law, and committed by military personnel on active duty. Their judgments may be appealed before the ordinary courts"]). See also International Commission of Jurists, *Military Jurisdiction and International Law*, pp. 164–168.

[542] Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, to the Commission on Human Rights (E/CN.4/2006/58).

[543] *Ibid.*, principle 5.

[544] *Ibid.*, principle 9.

"Taking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance".[545]

191. Some national laws that specifically address crimes against humanity preclude the use of military courts for the prosecution of alleged offenders.[546] Concerns regarding the use of military courts tend to focus on the propriety of prosecuting gross human rights violations in such courts (such as for forced disappearances in the International Convention for the Protection of All Persons from Enforced Disappearance),[547] on the rights and protections afforded to persons brought to trial before military courts, on the use of such courts to prosecute persons other than military personnel of the State,[548] or on problems associated with the military justice system of particular States. At the same time, such reforms normally leave in place the ability of military personnel to be prosecuted before military courts for "military crimes", especially when committed in time of armed conflict.

192. While such developments at the national and international levels remain ongoing, they may suggest an emerging view that the guarantee of a "fair trial" means that a military court, tribunal, or commission should not be used to try persons alleged to have committed crimes against humanity, unless the alleged offender is a member of the military forces and the offence was committed in connection with an armed conflict.

[545] *Official Records of the General Assembly, Seventieth Session, Supplement No. 56* (A/70/56), Annex III, para. 10.

[546] See, for example, Uruguay, Law No. 18.026 of 25 September 2006, article 11 ("Los crímenes y delitos tipificados en la presente ley no podrán considerar como cometidos en el ejercicio de funciones militares, no serán considerados delitos militares y quedará excluida la jurisdicción militar para su juzgamiento" ["The crimes and offences specified in this law may not be considered as committed in the exercise of military functions, shall not be considered as military offences and they shall not be prosecuted under military jurisdiction"]).

[547] See, for example, Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 44* (A/65/44), chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Colombia, para. 16 ("The State party should put an immediate stop to these crimes and comply fully with its obligation to ensure that gross human rights violations are investigated impartially under the ordinary court system, and that the perpetrators are punished. The gravity and nature of the crimes clearly show that they fall outside military jurisdiction"); and Amnesty International, *Fair Trial Manual*, p. 218 (calling for the use of military courts only to try military personnel for breaches of military discipline, not for any crime under international law, including war crimes and crimes against humanity).

[548] See, for example, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 40*, vol. I (A/54/40 (Vol. I)), chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant, Chile, para. 205 (recommending that Chilean law "be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature"); *Durand and Ugarte v. Peru*, Judgment, 16 August 2000, Inter-American Court of Human Rights, Series C, No. 68, para. 117; *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, Inter-American Court of Human Rights, Series C, No. 122, para. 202; and Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Working Group on Arbitrary Detention, Addendum–Mission to Equatorial Guinea (A/HRC/7/4/Add.3), para. 100 (*f*).

C. Full protection of human rights

193. In addition to according to an alleged offender fair treatment in the course of any proceedings or measures taken against him or her, and in particular according to him or her a fair trial, an alleged offender is also entitled to the broader protections that always exist with respect to his or her human rights. Such rights are set forth in the wide range of provisions contained in global human rights treaties, such as the International Covenant on Civil and Political Rights and in the various regional human rights treaties,[549] and are addressed as well in other instruments.[550]

194. Given the possibility that an alleged offender may be taken into custody and may be interrogated, particular mention is merited as to the obligations of States under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention, among other things, provides that "[e]ach State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (art. 2, para. 1). The Convention further provides that "[e]ach State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture … when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 16, para. 1).

195. No doubt for this reason, treaties addressing crimes have often included in the "fair treatment" provision some additional reference to "full protection of his or her rights",[551] "enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present",[552] "enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights"[553] or similar formulations.

D. Communication with the State of nationality or other relevant State

196. If a State takes into custody an alleged offender who is not of that State's nationality, the alleged offender may wish to contact a representative of his or her State, in particular consular officials who may assist on various issues, including retention of counsel and translation. The 1963 Vienna Convention on Consular Relations provides in article 36, paragraph 1 (*b*), that:

[549] See footnotes 516–517 above, the American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 8) and the African Charter on Human and Peoples' Rights (art. 7).

[550] See, for example, Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948; American Declaration of the Rights and Duties of Man (see footnote 515 above); Cairo Declaration on Human Rights in Islam (see footnote 516 above); and Charter of the Fundamental Rights of the European Union.

[551] Convention on the Safety of United Nations and Associated Personnel, art. 17.

[552] International Convention against the Taking of Hostages, art. 8, para. 2.

[553] International Convention for the Suppression of Terrorist Bombings, art. 14.

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

197. Further, article 36, paragraph 1 (*c*), provides in part that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation".[554]

198. When the Commission developed the draft article that ultimately contained these provisions, it did so based on existing consular practice operating under bilateral agreements and under customary international law. As of 2015, 177 States are party to the Vienna Convention on Consular Relations. Further, many States incorporate comparable provisions in their bilateral agreements.[555] Even in the absence of a treaty, "[t]he practice of states shows that the right of a diplomatic agent or a consular officer to interview an imprisoned national is usually conceded".[556] This is the case because "it is abundantly clear" that any denial of this consultative right "would be in violation of the principles of international law and as such wrongful".[557]

199. Notwithstanding the widespread adherence to the Vienna Convention on Consular Relations and the existence of comparable provisions in other treaties and in customary international law, treaties addressing crimes typically reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights). While the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims did not contain a provision of this type, many contemporary treaties do, such as the Convention on the Suppression of Unlawful Seizure of Aircraft (art. 6); the Convention for the suppression of unlawful acts against the safety of civil aviation (art. 6, para. 3); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 6, para. 2); the International Convention against the taking of hostages (art. 6, para. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 3); the Convention on the Safety of United Nations and Associated Personnel (art. 17, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 7, para. 3); the International Convention for the Suppression of the Financing of Terrorism (art. 9, para. 3); the OAU Convention on the Prevention and Combating of Terrorism, 1999 (art. 7, para. 3); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 3); and the ASEAN Convention on Counter Terrorism (art. VIII, para. 4).

200. The Commission has noted that the obligation to permit a person in custody to communicate with his or her State is "designed to safeguard the rights of the alleged offender".[558] Furthermore, writers have explained that the right to communicate with a consular representative serves as protection against the potential for State abuse, allowing for a determination "of whether a prisoner is receiving humane treatment and enjoying other procedural rights guaranteed by international law".[559]

E. Draft article 10. Fair treatment of the alleged offender

201. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 10. Fair treatment of the alleged offender*

"1. Any person against whom legal measures are being taken in connection with an offence referred to in draft article 5, paragraphs 1 and 2, shall be provided at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

"2. Any such person taken into custody by a State that is not of his or her nationality shall be:

"(*a*) permitted to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

"(*b*) permitted to be visited by a representative of that State or those States; and

"(*c*) informed without delay of his or her rights under this subparagraph."

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[554] See also Lambert, *Terrorism and Hostages in International Law*, pp. 180–181.

[555] See, for example, Consular Convention between the Socialist Republic of Vietnam and the People's Republic of China, signed at Beijing on 19 October 1998, S.S. No. 5 TO Gazette No. 37/2001, art. 39, available from www.doj.gov.hk/en/external/pdf/lawdoc/cavietnam_e.pdf. For 39 bilateral agreements between the United Kingdom and other States, see Police and Criminal Evidence Act 1984, Code C: Code of Practice for the detention, treatment and questioning of persons by police officers, Annex F—Countries with which bilateral consular conventions or agreements requiring notification of the arrest and detention of their nationals are in force as at 1 April 2003, available from www.gov.uk/government/uploads/system/uploads/attachment_data/file/117588/pace-code-c.pdf. For 59 bilateral agreements between the United States and other States, see Department of Homeland Security, Bureau of Immigration and Customs Enforcement, 8 CFR Part 236.1 (e), *Federal Register*, vol. 72, No. 10 (17 January 2007).

[556] Sen, *A Diplomat's Handbook of International Law and Practice*, p. 372.

[557] *Ibid.*; see also Schwarzenberger, *International Law*, p. 194.

[558] See Lambert, *Terrorism and Hostages in International Law*, p. 177 (citing *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 318).

[559] *Ibid.*

Chapter VII

Future programme of work

202. The subsequent programme of work on the topic will be for the members of the Commission elected for the quinquennium 2017–2021. A possible timetable would be for a third report to be submitted in 2017, which could address issues such as rights and obligations applicable to the extradition of the alleged offender; rights and obligations applicable to mutual legal assistance in connection with criminal proceedings; the obligation of *non-refoulement* in certain circumstances; dispute settlement and monitoring mechanisms; and conflict avoidance with treaties such as the Rome Statute of the International Criminal Court.

203. A fourth report, to be submitted in 2018, could address all further matters, as well as a draft preamble and draft concluding articles to a convention.

204. If such a timetable is maintained, it is anticipated that a first reading of the entire set of draft articles could be completed by 2018 and a second reading could be completed by 2020.

Annex I

Draft articles provisionally adopted by the Commission at its sixty-seventh session[1]

Article 1. Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2. General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3. Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation or forcible transfer of population;

(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) torture;

(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;

(*h*) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(*i*) enforced disappearance of persons;

(*j*) the crime of apartheid;

(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(*b*) "extermination" includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the

[1] See *Yearbook … 2015*, vol. II (Part Two), pp. 33 *et seq.*, para. 116.

accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(*f*) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4. Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(*a*) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(*b*) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[2]

[2] The placement of this paragraph will be addressed at a later stage.

Annex II

Draft articles proposed in the second report

Draft article 5. Criminalization under national law

1. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting, or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

2. Each State also shall take the necessary measures to ensure that the following are offences under its criminal law:

(*a*) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;

(*b*) with respect to superior and subordinate relationships not described in paragraph (*a*), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. Each State also shall take the necessary measures to ensure that:

(*a*) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate;

(*b*) an offence referred to in this draft article shall not be subject to any statute of limitations; and

(*c*) an offence referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

Draft article 6. Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when:

(*a*) the offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State;

(*b*) the alleged offender is one of its nationals; and

(*c*) the victim is one of its nationals and the State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person in accordance with draft article 9, paragraph 1.

3. Without prejudice to applicable rules of international law, this draft article does not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law.

Draft article 7. General investigation and cooperation for identifying alleged offenders

1. Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reason to believe that a crime against humanity has been or is being committed in any territory under its jurisdiction or control.

2. If the State determines that a crime against humanity is or has been committed, the State shall communicate, as appropriate, the general findings of that investigation to any other State whenever there is reason to believe that nationals of the other State have been or are involved in the crime. Thereafter, that other State shall promptly and impartially investigate the matter.

3. All States shall cooperate, as appropriate, to establish the identity and location of persons who may have committed an offence referred to in draft article 5, paragraphs 1 or 2.

Draft article 8. Exercise of national jurisdiction when an alleged offender is present

1. If a State obtains or receives information indicating that a person present in territory under its jurisdiction or control may have committed an offence referred to in draft article 5, paragraphs 1 or 2, the State shall immediately carry out a preliminary investigation to establish the relevant facts with respect to that person.

2. If the circumstances so warrant, the State shall take the person into custody or take such other legal measures as are necessary to ensure his or her presence during the investigation and at criminal, extradition or surrender proceedings. The custody and other legal measures shall be as provided for in the law of that State, but shall be in conformity with international law and maintained only for such time as is reasonable.

3. The State shall notify the States referred to in draft article 6, paragraph 1, of the general findings of its preliminary investigation, of the circumstances warranting any detention, and whether it intends to submit the matter to its competent authorities for the purpose of prosecution.

Draft article 9. Aut dedere aut judicare

1. If a person alleged to have committed an offence referred to in draft article 5, paragraphs 1 and 2, is found in any territory under the jurisdiction or control of a State, that State shall submit the matter to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal.

2. If the State submits the matter to its competent authorities for the purpose of prosecution, those authorities shall decide whether and how to prosecute in the same manner as they would for any ordinary offence of a serious nature under the law of that State.

Draft article 10. Fair treatment of the alleged offender

1. Any person against whom legal measures are being taken in connection with an offence referred to in draft article 5, paragraphs 1 and 2, shall be provided at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person taken into custody by a State that is not of his or her nationality shall be:

(*a*) permitted to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(*b*) permitted to be visited by a representative of that State or those States; and

(*c*) informed without delay of his or her rights under this subparagraph.

CRIMES AGAINST HUMANITY

[Agenda item 9]

DOCUMENT A/CN.4/698

Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission

Memorandum by the Secretariat

[*Original: English*]
[*18 March 2016*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Charter of the Organization of American States (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
Protocol of Amendment to the Charter of the Organization of American States—"Protocol of Buenos Aires" (Buenos Aires, 27 February 1967)	*Ibid*., vol. 721, annex A, No. 1609, p. 322.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	*Ibid*., vol. 75, Nos. 970–973, p. 31.
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)	*Ibid*., No. 970, pp. 31 *et seq.*
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, pp. 85 *et seq.*
Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949)	*Ibid*., No. 972, pp. 135 *et seq.*
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid*., No. 973, pp. 287 *et seq*.
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.
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.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 11 May 1994)	*Ibid*., vol. 2061, No. 2889, p. 7.
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004)	*Ibid.*, vol. 2677, No. 2889, p. 3.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	*Ibid*., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989)	*Ibid*., vol. 1642, annex A, No. 14668, p. 414.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	*Ibid*., vol. 1015, No. 14861, p. 243.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	*Ibid*., vol. 1035, No. 15410, p. 167.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	*Ibid*., vol. 1249, No. 20378, p. 13.
Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (New York, 6 October 1999)	*Ibid*., vol. 2131, No. 20378, p. 83.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid*., vol. 1520, No. 26363, p. 217.
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 10 June 1998)	Document OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), reproduced in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, p. 1040.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002)	*Ibid.*, vol. 2375, No. 24841, p. 237.

	Source
Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, Colombia, 9 December 1985)	Organization of American States, *Treaty Series*, No. 67.
Convention on the Rights of the Child (New York, 20 November 1989)	United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3.
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)	*Ibid.*, vol. 2173, No. 27531, p. 222.
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000)	*Ibid.*, vol. 2171, No. 27531, p. 227.
Optional Protocol to the Convention on the Rights of the Child on a communications procedure (New York, 19 December 2011)	*Ibid.*, vol. 2983, No. 27531, p. 131.
Inter-American Convention on the Forced Disappearance of Persons (Belém, 9 June 1994)	Organization of American States, *Treaty Series*, No. 68.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2225, No. 39574, p. 209.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2237, No. 39574, p. 319.
Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination (Nairobi, 29 November 2006)	Available from www.icglr.org/index.php/en/the-pact.
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.

Introduction

1. At its sixty-sixth session (2014), the International Law Commission decided to include the topic "Crimes against humanity" in its programme of work.[1] At its sixty-seventh session (2015), the Commission requested that the Secretariat prepare a memorandum providing information on existing treaty-based monitoring mechanisms which might be of relevance to its future work on the topic.[2] The present memorandum has been prepared in fulfilment of that request.

2. In his first report, the Special Rapporteur identified a number of multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to acts which were considered relevant for the Commission's work on the topic.[3] The present memorandum provides a survey of provisions in these multilateral conventions that institute monitoring mechanisms. A number of further instruments have been added to the survey on the basis of their relevance to the present memorandum, including optional protocols to the above-mentioned multilateral conventions, and regional treaties pertaining to human rights that contain treaty-based monitoring mechanisms. Each of the universal and regional monitoring mechanisms identified and described in the present memorandum plays a unique role within its sphere of competence. Comparative analysis has been carried out exclusively on the basis of the text of the relevant treaty provisions, and no judgments made or implied regarding the relative merits of the various mechanisms and their functioning.

3. The present memorandum focuses exclusively on the text of the relevant treaties and does not address their application or their interpretation by the respective monitoring institutions. Furthermore, the memorandum examines only the institutions established by the relevant treaties and does not address provisions, such as compromissory clauses, involving other institutions.[4] Similarly, the scope

[1] *Yearbook … 2014*, vol. II (Part Two), p. 164, para. 266.

[2] *Yearbook … 2015*, vol. II (Part Two), p. 33, para. 115.

[3] *Ibid.*, vol. II (Part One), document A/CN.4/680, paras. 65–75.

[4] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, art. 22; the Convention on the Prevention and Punishment of the Crime of Genocide, art. IX; the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. XII; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1; the Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 1; the United Nations Convention against Transnational Organized Crime, art. 35, para. 2; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 2; and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 1. Furthermore, the present memorandum does not address dispute settlement provisions involving other third-party mechanisms, such as good offices; see the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 11; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 11; the Geneva Convention relative to the Treatment of Prisoners of War, art. 11; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 12.

of the present memorandum does not extend to monitoring mechanisms whose mandates are derived from instruments other than the relevant treaties, such as the special procedures of the Human Rights Council operating on the basis of resolutions of the Council.[5] Finally, the memorandum is concerned only with mechanisms that monitor the implementation or application of the relevant treaties by the States parties.[6]

4. Chapter I of the present memorandum includes a typology of the various institutions established by the relevant treaties to monitor their implementation. Chapter II describes the various procedures that such institutions may undertake in this regard. Annex I contains a chronological list of the treaties considered in the memorandum and the monitoring institutions thereby established, while annex II contains a synoptic table of the monitoring procedures exercised by the institutions under review.

[5] See Human Rights Council resolution 5/1 of 18 June 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 53* (A/62/53), chap. IV, sect. A).

[6] Therefore, the present memorandum does not consider the various instruments instituting international criminal courts and tribunals, with the exception of the provisions of the Rome Statute of the International Criminal Court concerning the Assembly of States Parties; see chap. II, sect. D, below.

Chapter I

Typology of relevant institutions

5. The present chapter provides an overview of the types of institutions established by (or resorted to) in the relevant treaties. It examines their institutional features, including their composition, mandate and reporting obligations. On the basis of the terminology employed by the respective treaties, such institutions can be classified into the following categories: (*a*) committees; (*b*) commissions; (*c*) courts; and (*d*) meetings of States parties.

A. Committees

6. A number of the treaties under review have established committees of independent experts. These include, in order of establishment: the Committee on the Elimination of Racial Discrimination, established under article 8, para. 1, of the International Convention on the Elimination of All Forms of Racial Discrimination; the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights and vested with further competence by the first and Second Optional Protocols thereto;[7] the Committee on the Elimination of Discrimination against Women, established under article 17, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women and vested with further competence by the Optional Protocol thereto;[8] the Committee against Torture, established under article 17, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee on the Rights of the Child, established under article 43, paragraph 1, of the Convention on the Rights of the Child, which also monitors the implementation of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and which was vested with further competence by the Optional Protocol to the Convention on the Rights of the Child on a communications procedure;[9] the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter, "Subcommittee on Prevention"), established under article 2, paragraph 1, of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Committee on Enforced Disappearances, established under article 26, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance. In addition, the Regional Committee of the International Conference on the Great Lakes Region for the Prevention and Punishment of Genocide, War Crimes, Crimes against Humanity and All Forms of Discrimination was established under articles 26, paragraph 1, and 27 of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, adopted by the International Conference on the Great Lakes Region on 29 November 2006.

1. Composition

7. All committees mentioned above are composed of nationals of the States parties to their constitutive instruments.[10] With the exception of the Regional Committee of the International Conference on the Great Lakes Region, committee members are nominated and elected

[7] For the purposes of the present memorandum, even though the first and Second Optional Protocols to the International Covenant on Civil and Political Rights were not mentioned in the first report of the Special Rapporteur, the Protocols will be considered, given their relationship to the International Covenant on Civil and Political Rights and their relevance to the subject matter.

[8] For the purposes of the present memorandum, this instrument will be considered, given its relationship to the Convention on the Elimination of All Forms of Discrimination against Women and its relevance to the subject matter.

[9] For the purposes of the present memorandum, this instrument will be considered, owing to its relationship to the Convention on the Rights of the Child and its relevance to the subject matter.

[10] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; International Covenant on Civil and Political Rights, art. 28, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 2; Convention on the Rights of the Child, art. 43, para. 2; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6, para. 2 (*a*); Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, art. 27; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 2.

by the States parties to the respective instrument.[11] The above-mentioned treaties also specify that committee members must demonstrate certain individual qualities, such as high moral standing or character;[12] competence in the field relevant to the treaty;[13] and commitment to impartiality and to serve in their personal capacity.[14] The treaties in question also highlight some requirements with respect to the overall composition of their respective committees, with reference to the concepts of equitable geographical distribution,[15] representation of the different forms of civilization,[16] representation of the principal legal systems,[17] or balanced gender representation.[18] Further, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment points out the "usefulness of nominating persons [to the Committee against Torture] who are also members of the Human Rights Committee".[19]

2. Mandate

8. Two of the above-mentioned committees enjoy a general mandate to consider the progress made "in the implementation of"[20] or in "the realization of the obligations undertaken in"[21] their respective conventions. The mandates of other committees may be implied from their functions[22] as set out in their constitutive treaties and, where applicable, the optional protocols to the main treaty.[23] Overall, committees usually exercise the following functions: examination of reports submitted by States parties;[24] adoption of general comments/recommendations;[25] con-

[11] Members of the Regional Committee of the International Conference on the Great Lakes Region are endorsed by the Summit of the International Conference on the Great Lakes Region (the supreme organ of the Conference), on the recommendation of the Regional Inter-Ministerial Committee (the executive organ of the Conference) (Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, arts. 27 and 30). See also International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, paras. 2 and 4; International Covenant on Civil and Political Rights, arts. 29, para. 1, and 30, para. 4; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, paras. 2 and 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, paras. 2 and 3; Convention on the Rights of the Child, art. 43, paras. 2 and 5; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, paras. 1 and 2.

[12] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; International Covenant on Civil and Political Rights, art. 28, para. 2, which uses "high moral character"; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; Convention on the Rights of the Child, art. 43, para. 2; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 2, which uses "high moral character"; Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, art. 27, para. 1, which uses "high moral standards"; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1, referring to "high moral character".

[13] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1, making reference to "experts"; International Covenant on Civil and Political Rights, art. 28, para. 2; Convention on Discrimination against Women, art. 17, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; Convention on the Rights of the Child, art. 43, para. 2; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 2; Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, art. 27, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1.

[14] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1, which makes reference to "acknowledged impartiality" and that the members "shall serve in their personal capacity"; International Covenant on Civil and Political Rights, arts. 28, para. 3, and 38, which sets forth an obligation on the members to make a solemn declaration before taking up their duties that they will perform their functions impartially and conscientiously; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; Convention on the Rights of the Child, art. 43, para. 2; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 6, which expressly states that the members shall not only serve in their individual capacity, but also "be independent and impartial and shall be available to serve the Subcommittee on Prevention of Torture efficiently"; Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, arts. 27 and 32, referring to the members' "impartiality" in addition to sitting in their personal capacity; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1, which makes express reference to serving "in their personal capacity and be independent and impartial".

[15] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; International Covenant on Civil and Political Rights, art. 31, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1; Convention on the Rights of the Child, art. 43, para. 2.

[16] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; International Covenant on Civil and Political Rights, art. 31, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 3.

[17] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 3; Convention on the Rights of the Child, art. 43, para. 2.

[18] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1.

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 2.

[20] Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1.

[21] Convention on the Rights of the Child, art. 43, para. 1.

[22] See chapter II of the present memorandum, below.

[23] This is the case of the Human Rights Committee and of the Committee on the Rights of the Child.

[24] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9; International Covenant on Civil and Political Rights, art. 40; Convention on the Elimination of All Forms of Discrimination against Women, art. 18; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19; Convention on the Rights of the Child, art. 44; International Convention for the Protection of All Persons from Enforced Disappearance, art. 29.

[25] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2 (makes reference to "general recommendations"); International Covenant on Civil and Political Rights, art. 40, para. 4 (makes reference to "general comments"); Convention on the Elimination of All Forms of Discrimination against Women, art. 21 (makes reference to "general recommendations"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3 (makes reference to "general comments"); Convention on the Rights of the Child, art. 45 (*d*) (makes reference to "general recommendations").

sideration of individual complaints;[26] assessment of inter-State complaints;[27] inquiries and/or visits;[28] urgent action requests;[29] and bringing information to the attention of assemblies.[30] The mandate of the Subcommittee on Prevention is limited to the monitoring of places of detention in States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and provision of advice on preventive mechanisms,[31] while the Regional Committee of the International Conference on the Great Lakes Region[32] is entrusted with the prevention of crimes of genocide, war crimes and crimes against humanity in the region. Certain other procedures, such as the early warning mechanisms of the International Convention on the Elimination of All Forms of Racial Discrimination, have emerged from the practice of the institutions analysed.[33]

9. To foster effective implementation of their mandates, some committees are explicitly authorized by their constitutive instruments to seek cooperation with other committees, organs, offices or agencies. For example, the Committee on the Rights of the Child may invite the United Nations Children's Fund and other competent bodies to provide expert advice or submit reports in relevant areas.[34] It may also, through the General Assembly, request the Secretary-General to undertake studies on specific issues relating to the rights of the child.[35] Furthermore, together with certain other committees, the Committee on the Rights of the Child is mandated to transmit to competent bodies reports from States parties that contain a request or indicate a need for technical advice or assistance.[36] Similarly, the Subcommittee on Prevention and the Committee on Enforced Disappearances are explicitly instructed to execute their mandates in cooperation with international, regional and national institutions.[37]

10. The committees typically report on their activities on an annual[38] or biennial[39] basis. Most of those committees submit their reports to the General Assembly of the United Nations, either directly[40] or through another United Nations organ, such as the Secretary-General[41] or the Economic and Social Council.[42] In addition, the Committee against Torture and the Committee on Enforced Disappearances report directly to the States parties to their respective conventions.[43] The Subcommittee on Prevention of Torture submits an annual report to the Committee

[26] International Convention on the Elimination of All Forms of Racial Discrimination, art. 14; first Optional Protocol to the International Covenant on Civil and Political Rights, art. 1; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, arts. 1 and 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22; International Convention for the Protection of All Persons from Enforced Disappearance, art. 31; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5.

[27] International Convention on the Elimination of All Forms of Racial Discrimination, art. 11; International Covenant on Civil and Political Rights, art. 41; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21; International Convention for the Protection of All Persons from Enforced Disappearance, art. 32; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12.

[28] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 33; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13.

[29] International Convention for the Protection of All Persons from Enforced Disappearance, art. 30.

[30] *Ibid*., art. 34.

[31] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 4 and 11 (*b*). The mandate may be divided primarily into two functions: visits to States parties to the Protocol, during which the Subcommittee may visit places where individuals may be deprived of their liberty; and the advisory function, involving assistance and advice to the States parties on the establishment of a national preventive mechanism, as well as advice and assistance to the States parties and to the national preventive mechanism regarding the work of the mechanism.

[32] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All forms of Discrimination, arts. 26, para. 1, and 38. As a result, the Protocol confers on the Regional Committee of the International Conference on the Great Lakes Region the responsibility to: review situations in the member States of the International Conference on the Great Lakes Region; collect and analyse information; alert the Summit of the Conference in order for it to take urgent measures to prevent potential crimes; suggest specific measures to fight impunity; contribute to awareness-raising and education on peace and reconciliation through regional and national programmes; recommend policies and measures to guarantee the rights of victims; monitor national programmes for the disarmament, demobilization, rehabilitation, repatriation and reinstallation of former child soldiers and combatants; and carry out any other task entrusted in it by the Inter-Ministerial Committee (*ibid*., art. 38).

[33] According to the Guidelines for the Early Warning and Urgent Action Procedure (Report of the Committee on the Elimination of Racial Discrimination, Seventieth session (19 February–9 March 2007), Seventy-first session (30 July–17 August 2007), *Official Records of the General Assembly, Sixty-second session, Supplement No. 18* (A/62/18), annex III, para. 1), in 1993 "the Committee on the Elimination of Racial Discrimination adopted a working paper on the prevention of racial discrimination, including early warning and urgent procedures (A/48/18, annex III). Since 1993, the Committee has adopted numerous decisions under these procedures and made recommendations to States parties to the International Convention on the Elimination of All Forms of Racial Discrimination as well as, through the Secretary-General, to the Security Council for action to prevent serious violations of the Convention, in particular those that could lead to ethnic conflict and violence". See also report of the Committee on the Elimination of Racial Discrimination, A/48/18, annex III, and note by the Secretary-General on effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, A/47/628, annex, Report of the fourth meeting of persons chairing the human rights treaty bodies, para. 44.

[34] Convention on the Rights of the Child, art. 45 (*a*).

[35] *Ibid*., art. 45 (*c*).

[36] *Ibid*., art. 45 (*b*).

[37] See, respectively, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 11 (*c*); and International Convention for the Protection of All Persons from Enforced Disappearance, art. 28.

[38] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; International Covenant on Civil and Political Rights, art. 45; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 24; International Convention for the Protection of All Persons from Enforced Disappearance, art. 36, para. 1.

[39] Convention on the Rights of the Child, art. 44, para. 5.

[40] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 24; International Convention for the Protection of All Persons from Enforced Disappearance, art. 36, para. 1.

[41] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2.

[42] International Covenant on Civil and Political Rights, art. 45; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child, art. 44, para. 5.

[43] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 24; International Convention for the Protection of All Persons from Enforced Disappearance, art. 36, para. 1.

against Torture[44] and the Regional Committee of the International Conference on the Great Lakes Region reports to the ordinary session of the Inter-Ministerial Committee of the International Conference on the Great Lakes Region preceding the ordinary session of the Summit.[45]

B. Commissions

11. A number of the treaties under review vest monitoring functions in commissions. These include: the *ad hoc* conciliation commissions that may be established under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights through their respective committees and in the specific cases listed in those conventions;[46] the Inter-American Commission on Human Rights,[47] performing monitoring functions under the Pact of San José;[48] the Commission on Human Rights (superseded by the Human Rights Council),[49] a subsidiary body of the Economic and Social Council of the United Nations, which was entrusted by the International Convention on the Suppression and Punishment of the Crime of Apartheid to monitor its implementation;[50] and the African Commission on Human and Peoples' Rights, established under the African Charter on Human and Peoples' Rights, under the auspices of the African Union (formerly the Organization of African Unity).[51] Furthermore, the International Humanitarian Fact-Finding Commission was established under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).[52]

12. It should also be recalled that the European Commission of Human Rights, established by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights") upon its entry into force in 1954, was abolished by Protocol 11 to the Convention in 1998.[53]

1. Composition

13. The composition of the above-mentioned commissions varies. The *ad hoc* conciliation commissions under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights are established only in response to particular disputes.[54] This approach affects their composition. Both the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights provide for five-member commissions, none of whose members may be a national of the States parties involved in the dispute.[55] Members are appointed by the Chair of the Committee on the Elimination of Racial Discrimination or by the Human Rights Committee, respectively. They do not necessarily have to be members of the respective committees, but they must be nationals of States parties to the respective conventions and, in the case of the International Covenant on Civil and Political Rights, of States that have deposited a declaration accepting the competence of the Human Rights Committee to receive and consider inter-State communications under article 41.[56] Moreover, the States parties concerned must consent to the appointment of the members; if they fail to reach agreement on the composition of the Commission within three months, the Committee on the Elimination of Racial Discrimination or the Human Rights Committee, respectively, may elect the remaining commission members by secret ballot with a two-thirds majority from among their own members.[57]

14. The Inter-American Commission on Human Rights consists of seven members from different States members of the Organization of American States (OAS),[58] who are elected for four-year terms by the OAS General Assembly to represent all its member countries.[59] Similarly, the African Charter on Human and Peoples' Rights provides that the 11 members of the African Commission on Human and Peoples' Rights, who serve six-year periods and must be nationals of different States parties to the Charter, are to be "chosen from amongst African personalities" by the Assembly of Heads of State and Government of the African Union.[60]

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[44] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, para. 3.

[45] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, art. 42.

[46] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12; International Covenant on Civil and Political Rights, art. 42.

[47] The Inter-American Commission on Human Rights was first established by resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago de Chile (12–18 August 1959), Final Act, OAS document OEA/Ser.C/II.5 (1960), p. 10. It was incorporated into article 112 (currently article 106) of the Charter of the Organization of American States by the Protocol of Buenos Aires (art. XI). Following the entry into force of the Pact of San José on 18 July 1978, the General Assembly of OAS approved, in October 1979, the Statute of the Inter-American Commission on Human Rights, OAS resolution 447 (IX-0/79), *Official Records of the Organization of American States*, OEA/Ser.P/IX.0.2/80, vol. I, p. 88.

[48] Pact of San José, art. 33.

[49] See General Assembly resolution 60/251 of 15 March 2006.

[50] In 1995, the Commission on Human Rights, stating that "apartheid as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid no longer exists anywhere" and that "potential situations of practices of racial segregation that might exist outside South Africa" would be covered by the International Convention on the Elimination of All Forms of Racial Discrimination, decided to "suspend meetings of the Group of Three as from the date of adoption of the present resolution". See Commission on Human Rights resolution 1995/10 of 17 February 1995, contained in Commission on Human Rights, Report on the Fifty-first Session (30 January–10 March 1995), Economic and Social Council, *Official Records, 1995, Supplement No. 4* (E/1995/23-E/CN.4/1995/176), chap. II, sect. A, p. 55.

[51] African Charter on Human and Peoples' Rights, art. 30.

[52] Protocol I, art. 90.

[53] The references to the European Convention on Human Rights in the present memorandum refer to the Convention as amended by Protocol Nos. 11 and 14.

[54] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*); International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[55] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, paras. 1 (*a*) and (*b*) and 2; International Covenant on Civil and Political Rights, art. 42, paras. 1 and para. 2.

[56] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, paras. 1 (*a*) and 2; International Covenant on Civil and Political Rights, art. 42, paras. 1 (*a*) and 2.

[57] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1; International Covenant on Civil and Political Rights, art. 42, para. 1.

[58] Pact of San José, arts. 34 and 36, para. 2.

[59] *Ibid.*, arts. 34, 35, 36, para. 1, and 37. Members are eligible for re-election once.

[60] African Charter on Human and Peoples' Rights, arts. 30 to 34 and 36.

15. The International Convention on the Suppression and Punishment of the Crime of Apartheid vested the Commission on Human Rights with monitoring tasks, but also instructed the Chair of the Commission to appoint a "group" of three Commission members, who were representatives of the States parties to the Convention, to consider reports submitted by States parties.[61] If there were fewer than three representatives of States parties to the Convention among the members of the Commission, the Secretary-General of the United Nations, after consulting all States parties to the Convention, should designate to the "group" one or more representatives of States parties that were not members of the Commission.[62] Although the Convention is still in force, the "group of three" suspended its functions in 1995.[63]

16. The International Humanitarian Fact-Finding Commission is a permanent body of 15 members who are elected from the nationals of the States parties to Protocol I to the Geneva Conventions. It undertakes enquiries through specially constituted chambers consisting of seven members.[64] Five members of the chambers are appointed by the President of the Commission from among its ranks, while the parties to the dispute each appoint one additional *ad hoc* member. Protocol I provides that none of the members of the chambers can be a national of one of the parties to the conflict.[65]

17. The treaties under review typically provide that the members of the commissions must serve in their personal capacity,[66] be impartial,[67] be of high moral standing[68] and/or possess appropriate qualifications.[69] The Pact of San José and Protocol I to the Geneva Conventions further require equitable geographical distribution of Commission members.[70]

2. Mandate

18. The above-mentioned treaties also contain different provisions regarding the competence of the respective commissions.

19. The *ad hoc* conciliation commissions under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights are established to resolve inter-State matters related to the provisions or obligations under the respective treaties that could not be resolved to the satisfaction of the States parties in dispute.[71] The good offices of the *ad hoc* conciliation commissions are to be made available to the States concerned "with a view to an amicable solution of the matter on the basis of respect" for the relevant treaty.[72] In the case of the International Covenant on Civil and Political Rights, it is clear that the States parties concerned must consent prior to the appointment of the commission (art. 42, para. 1 (*a*)). The International Convention on the Elimination of All Forms of Racial Discrimination does not contain an equivalent provision.

20. The Pact of San José provides that the Inter-American Commission on Human Rights, together with the Inter-American Court of Human Rights, "have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties" to the Pact of San José.[73] The Inter-American Commission on Human Rights has as its main function "to promote respect for and defense of human rights".[74] It is vested with a wide range of functions and powers, for instance, to develop an awareness of human rights among the peoples of America, make recommendations to States members of OAS, request information on the measures adopted by States parties, provide advisory services to States parties when requested and within the limits of its possibilities, and take action on individual petitions and inter-State communications before cases may proceed to the Inter-American Court of Human Rights (if the Court has jurisdiction).[75]

21. When it was operating,[76] the "group of three" established within the Commission on Human Rights by virtue of the International Convention on the Suppression and Punishment of the Crime of Apartheid was responsible for considering the reports submitted by the States parties to the Convention "on the legislative, judicial, administrative or other measures" they adopted to give effect to the provisions of the Convention.[77] In addition, the Commission on Human Rights was entrusted by the International Convention on the Suppression and Punishment of the Crime of Apartheid to request United Nations organs to "draw its attention to complaints" filed before the Committee on the Elimination of Racial Discrimination concerning acts enumerated in the Convention that constituted "the crime of apartheid";[78] prepare a "list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for [the crime of apartheid], as well as those against whom legal proceedings have been undertaken by States Parties to the Convention";[79] and "request information from the competent United Nations organs concerning measures taken by

[61] International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. IX, para. 1, and X, para. 1.

[62] *Ibid.*, art. IX, para. 2.

[63] See footnote 50 above.

[64] Protocol I, art. 90, paras. 1 (*a*) and 3 (*a*).

[65] *Ibid*., art. 90, para. 3 (*a*).

[66] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 2; Pact of San José, art. 36, para. 1; International Covenant on Civil and Political Rights, art. 42, para. 2; Protocol I, art. 90, para. 1 (*c*); African Charter on Human and Peoples' Rights, art. 31, para. 2.

[67] Protocol I, art. 90, para. 1 (*a*); African Charter on Human and Peoples' Rights, art. 31, para. 1.

[68] Pact of San José, art. 34; Protocol I, art. 90, para. 1 (*a*); African Charter on Human and Peoples' Rights, art. 31, para. 1.

[69] Pact of San José, art. 34; Protocol I, art. 90, para. 1 (*d*); African Charter on Human and Peoples' Rights, art. 31, para. 1.

[70] Pact of San José, art. 35; Protocol I, art. 90, para. 1 (*d*).

[71] International Convention on the Elimination of All Forms of Racial Discrimination, arts. 11, para. 1, and 12; International Covenant on Civil and Political Rights, arts. 41, para. 1, and 42, para. 1 (*a*).

[72] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*); International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[73] Pact of San José, art. 33.

[74] *Ibid.*, art. 41.

[75] *Ibid.*, arts. 41, 44, 48, 50 and 61, para. 2.

[76] See footnote 50 above.

[77] International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. VII and IX.

[78] *Ibid*., arts. II and X, para. 1 (*a*).

[79] *Ibid*., art. X, para. 1 (*b*).

the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for [crimes of apartheid] who are believed to be under their territorial and administrative jurisdiction".[80]

22. Under the terms of Protocol I to the Geneva Conventions, the International Humanitarian Fact-Finding Commission has competence to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol", and to "[f]acilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol".[81] The Commission is also empowered, "[i]n other situations", to institute an inquiry at the request of a party to the conflict if the other party or parties concerned consent to such inquiry.[82] The competence of the Commission is optional, in accordance with article 90, paragraph 2 (*a*), of Protocol I, as any party "may at the time of signing, ratifying or acceding" to Protocol I, or at any other subsequent time, declare that it recognizes *ipso facto* and without special agreement, in relation to any other party accepting the same obligation, the competence of the Commission "to enquire into allegations" by such other party. The inquiries are undertaken by a chamber set up within the framework of the Commission, in accordance with article 90, paragraph 3, of Protocol I.

23. The African Commission on Human and Peoples' Rights was established to "promote human and peoples' rights and ensure their protection in Africa".[83] The African Charter on Human and Peoples' Rights confers various functions on the Commission for that purpose, including the following: to "undertake studies and researches on African problems in the field of human and peoples' rights" and "encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments";[84] to formulate principles and rules "aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations";[85] and to cooperate with other African and international institutions.[86] The Commission can also interpret the provisions of the Charter "at the request of a State party, an institution of the [African Union] or an African Organization recognized by the [African Union]".[87] The Charter further provides that the Commission may perform any other functions entrusted to it by the Assembly of Heads of State and Government[88] and that it "may resort to any appropriate method of investigation; it may hear from the Secretary General of the [African Union] or any other person capable of enlightening it".[89] Additionally, it provides that the Commission may deal with inter-State communications related to allegations of violations of the provisions of the Charter[90] and with other communications "relating to human and peoples' rights".[91]

24. In terms of reporting obligations, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights report periodically on their activities to the OAS General Assembly and the Assembly of Heads of State and Government of the African Union, respectively.[92] As explained above, the International Convention on the Suppression and Punishment of the Crime of Apartheid made use of the functions of the Commission on Human Rights to monitor the implementation of the convention.[93] The Commission on Human Rights would submit to the Economic and Social Council a report on the work of each session, containing a summary of recommendations and a statement of issues requiring action by the Economic and Social Council.[94]

C. Courts

25. Three regional conventions adopted under the auspices of regional intergovernmental organizations establish permanent judicial institutions to monitor the conduct of their respective States parties in the implementation of the treaties: the European Court of Human Rights, established by the European Convention on Human Rights) to "ensure the observance of the engagements undertaken by the High Contracting Parties" to the European Convention on Human Rights and the protocols thereto;[95] the Inter-American Court of Human Rights, established by the Pact of San José to "have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties" to the Convention;[96] and the African Court on Human and Peoples' Rights, established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which complements "the protective mandate of the African Commission on Human and Peoples' Rights".[97]

1. Composition

26. The number of judges at the European Court of Human Rights is equal to that of the parties to the European Convention on Human Rights, and they are

[80] *Ibid*., para. 1 (*c*). See also art. II for the definition of the term "the crime of apartheid".

[81] Protocol I, art. 90, para. 2 (*c*).

[82] *Ibid*., para. 2 (*d*).

[83] African Charter on Human and Peoples' Rights, art. 30.

[84] *Ibid*., art. 45, para. 1 (*a*).

[85] *Ibid*., para. 1 (*b*).

[86] *Ibid*., para. 1 (*c*).

[87] *Ibid*., art. 45, para. 3. The language used by this provision actually makes reference to the Organization of African Unity, which was replaced by the African Union.

[88] *Ibid*., art. 45, para. 4.

[89] *Ibid*., art. 46.

[90] *Ibid*., art. 47.

[91] *Ibid*., art. 56.

[92] Pact of San José, art. 41 (*g*); and African Charter on Human and Peoples' Rights, arts. 54 and 59, para. 3.

[93] See footnote 50 above.

[94] Rules of Procedure of the Functional Commissions of the Economic and Social Council, rule 37. Available from www.ohchr.org/Documents/HRBodies/CHR/RoP.pdf.

[95] European Convention on Human Rights, art. 19.

[96] Pact of San José, art. 33. The Inter-American Commission on Human Rights is also competent, as explained above.

[97] Protocol to the African Charter on Human and Peoples' Rights, art. 2.

elected by the Parliamentary Assembly of the Council of Europe from lists of three candidates proposed by each State party.[98] The Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights draw a fixed number of judges from the States members of their respective organizations.[99] Judges of the Inter-American Court of Human Rights[100] are elected by States parties to the Pact of San José. Judges of the African Court on Human and Peoples' Rights are elected by the African Union, which may include States not party to the Protocol to the African Charter on Human and Peoples' Rights.[101] All instruments provide that the judges must be of high moral character[102] and sit in their individual capacity.[103]

2. Jurisdiction

27. The three courts have jurisdiction over matters related to the interpretation and application of their respective treaties.[104] In the case of the African Court on Human and Peoples' Rights, its jurisdiction also extends to the interpretation and application of "any other relevant Human Rights instrument ratified by the States concerned".[105]

28. The instruments differ to a great extent on the issue of acceptance of the courts' jurisdiction. While the jurisdiction of the European Court of Human Rights is compulsory, the Pact of San José contains an optional clause for the acceptance of the jurisdiction of the Inter-American Court of Human Rights.[106] Article 62 of the Pact of San José sets forth that a State "may, upon depositing its instrument of ratification or adherence to [the Pact], or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court"; the declaration may be made "unconditionally, on the condition of reciprocity, for a specified period, or for specific cases"; and the jurisdiction of the court comprises all cases concerning the interpretation and application of the convention, provided that the States parties to the case recognize or have recognized such jurisdiction, whether by special declaration or agreement. Only the States parties to the Protocol to the African Charter on Human and Peoples' Rights are subject to the jurisdiction of the African Court on Human and Peoples' Rights.

29. The judgments of all three courts are final. However, while judgments of the Inter-American Court of Human Rights[107] and the African Court on Human and Peoples' Rights[108] are not subject to appeal, judgments of chambers of the European Court of Human Rights may be referred to the Grand Chamber for a final ruling.[109] States parties to the regional conventions undertake to abide by the judgments in any case to which they are parties.[110]

30. Regarding advisory jurisdiction, the European Convention on Human Rights vested the European Court of Human Rights with the power to give advisory opinions on "legal questions concerning the interpretation of the Convention and the Protocols thereto",[111] at the request of the Committee of Ministers of the Council of Europe. The Pact of San José indicates that the States members of OAS, as well as the organs listed in chapter X of the Charter of the Organization of American States, "may consult the Court regarding the interpretation of [Pact] or of other treaties concerning the protection of human rights in the American States".[112] Further, at the request of an OAS member State, the Court "may provide that State with opinions regarding the compatibility of any of its domestic laws" with the convention itself and other treaties concerning the protection of human rights in the American States.[113] The African Court on Human and Peoples' Rights may provide an opinion on any legal matter relating to the African Charter on Human and Peoples' Rights or any other relevant human rights instruments, provided that the matter is not being examined by the African Commission on Human and Peoples' Rights, and "[a]t the request of a Member State of the [African Union], the [African Union], any of its organs, or any African organization recognized by the [African Union]".[114]

31. The European Convention on Human Rights allows for inter-State and individual applications to be brought before the Court.[115] The Pact of San José, however, only allows for States and the Inter-American Commission on Human Rights to submit a case to the Court.[116] The Protocol to the African Charter on Human and Peoples' Rights entitles the following entities to submit a case to the African Court on Human and Peoples' Rights: the

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[98] European Convention on Human Rights, arts. 20 and 22.

[99] See Pact of San José, art. 52, para. 1, and Protocol to the African Charter on Human and Peoples' Rights, art. 11, para. 1.

[100] Pact of San José, art. 53, para. 1.

[101] Protocol to the African Charter on Human and Peoples' Rights, arts. 11 and 14.

[102] European Convention on Human Rights, art. 21, para. 1; Pact of San José, art. 52, para. 1, which uses the term "highest moral authority"; Protocol to the African Charter on Human and Peoples' Rights, art. 11, para. 1.

[103] European Convention on Human Rights, art. 21, para. 2; Pact of San José, art. 52, para. 1; Protocol to the African Charter on Human and Peoples' Rights, art. 11, para. 1.

[104] European Convention on Human Rights, art. 32; Pact of San José, art. 62, para. 1; Protocol to the African Charter on Human and Peoples' Rights, art. 3, para. 1.

[105] Protocol to the African Charter on Human and Peoples' Rights, art. 3, para. 1.

[106] Pact of San José, arts. 44, 45, para. 1, and 62.

[107] *Ibid*., art. 67.

[108] Protocol to the African Charter on Human and Peoples' Rights, art. 28, para. 2.

[109] European Convention on Human Rights, arts. 43, para. 1, and 44, para. 1.

[110] *Ibid*., art. 46, para. 1; Pact of San José, art. 68, para. 1; Protocol to the African Charter on Human and Peoples' Rights, art. 30. The execution of judgments of those regional courts is monitored by, respectively: the Committee of Ministers of the Council of Europe (European Convention on Human Rights, art. 46, paras. 2–5); the General Assembly of OAS (Pact of San José, art. 65); and the Assembly of Heads of States and Government of the African Union, through the Council of Ministers and through the annual report of the African Court on Human and Peoples' Rights (Protocol to the African Charter on Human and Peoples' Rights, arts. 29, para. 2, and 31).

[111] European Convention on Human Rights, art. 47.

[112] Pact of San José, art. 64, para. 1.

[113] *Ibid*., para. 2.

[114] Protocol to the African Charter on Human and Peoples' Rights, art. 4, para. 1.

[115] European Convention on Human Rights, arts. 33 and 34.

[116] Pact of San José, art. 61, para. 1.

African Commission on Human and Peoples' Rights; "the State Party, which had lodged a complaint to the Commission"; "the State Party against which the complaint has been lodged at the Commission"; "the State Party whose citizen is a victim of human rights violation"; and African intergovernmental organizations.[117] The Protocol further envisages that a State party may request the permission of the African Court on Human and Peoples' Rights to join when it "has an interest in a case".[118] Lastly, the African Court on Human and Peoples' Rights may entitle "relevant" non-governmental organizations with observer status before the African Commission on Human and Peoples' Rights and individuals "to institute cases directly before it",[119] as long as the State party has made a declaration accepting the competence of the African Court on Human and Peoples' Rights to receive such cases.[120] It is expressly stated that the African Court on Human and Peoples' Rights may not receive a petition under such a provision if it involves a State party that has not made the aforementioned declaration.[121]

D. Meetings of States parties

32. Some of the treaties under review assign monitoring functions to be performed during meetings of their respective States parties. These include "review meetings" under the Convention on the Safety of United Nations and Associated Personnel;[122] "meetings of the High Contracting Parties" under Protocol I;[123] the "Assembly of States Parties [to the Rome Statute]" under the Rome Statute of the International Criminal Court;[124] and the "Conference of the Parties" under the United Nations Convention against Transnational Organized Crime.[125]

33. In terms of composition, the meetings referred to above consist of all the States parties to the relevant convention. The Rome Statute specifies that each State party has one representative, who may be accompanied by alternates and advisers.[126] In addition, States that have signed but not ratified the Rome Statute or the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court[127] may be observers in the Assembly.[128]

34. At the request of one or more States parties, and if approved by a majority of States parties, review meetings under the Convention on the Safety of United Nations and Associated Personnel and meetings of the High Contracting Parties under Protocol I are convened by the Secretary-General of the United Nations or by the depository of the Protocol, respectively.[129] Conversely, the Assembly of States Parties to the Rome Statute and the Conference of the Parties to the United Nations Convention against Transnational Organized Crime meet on a regular basis, typically annually or biennially.[130]

35. The mandates of the meetings are generally set out in broad terms. For example, the meeting of States parties to the Convention on the Safety of United Nations and Associated Personnel convenes "to review the implementation of the Convention, and any problems encountered with regard to its application",[131] while the meetings of High Contracting Parties to Protocol I "consider general problems concerning the application of the [Geneva] Conventions and of the Protocol".[132]

36. In similarly broad language, the United Nations Convention against Transnational Organized Crime convenes its Conference of the Parties "to combat transnational organized crime and to promote and review the implementation of [the] Convention".[133] However, the Convention also instructs the Conference to agree upon the mechanisms for achieving those objectives, including facilitating activities and exchange of information, engaging in international cooperation and periodic review of the implementation of the Convention, and making recommendations to improve the Convention and its implementation.[134] The Convention instructs States parties to supply the Conference of the Parties, as well as possible supplemental review mechanisms, with the requisite information to fulfil those tasks.[135]

37. The mandate of the Assembly of States Parties to the Rome Statute is even more detailed, providing that the Assembly shall, *inter alia*, provide management oversight to the Presidency, the Prosecutor and the Registrar; consider and decide the budget for the International Criminal Court; decide on the number of judges; and consider any question relating to non-cooperation with the Court.[136] If necessary, the Assembly of States Parties to the Rome Statute may establish subsidiary bodies, such as an independent oversight mechanism for inspection, evaluation and investigation of the Court.[137]

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[117] Protocol to the African Charter on Human and Peoples' Rights, art. 5, para. 1.

[118] *Ibid*., para. 2.

[119] *Ibid*., para. 3.

[120] *Ibid*., art. 34, para. 6.

[121] *Ibid*.

[122] Convention on the Safety of United Nations and Associated Personnel, art. 23.

[123] Protocol I, art. 7.

[124] Rome Statute, art. 112.

[125] United Nations Convention against Transnational Organized Crime, art. 32.

[126] Rome Statute, art. 112, para. 1.

[127] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998*, vol. I, *Final documents* (A/CONF.183/13), p. 65.

[128] Rome Statute, art. 112, para. 1.

[129] Convention on the Safety of United Nations and Associated Personnel, art. 23, and Protocol I, art. 7.

[130] Article 112, paragraph 6, of the Rome Statute provides that the Assembly of States Parties shall meet annually; article 32, paragraph 2, of the United Nations Convention against Transnational Organized Crime instructs the Secretary-General of the United Nations to convene the Conference of the Parties not later than one year following the entry into force of the Convention. Following its entry into force on 29 September 2003, the Conference of the Parties met three times on an annual basis; following its meeting in 2006 it has met on a biennial basis.

[131] Convention on the Safety of United Nations and Associated Personnel, art. 23.

[132] Protocol I, art. 7.

[133] United Nations Convention against Transnational Organized Crime, art. 32, para. 1.

[134] *Ibid*., para. 3.

[135] *Ibid*., paras. 4–5.

[136] Rome Statute, art. 112, para. 2. On the issue of non-cooperation, see also art. 87, paras. 5 (*b*) and 7.

[137] *Ibid*., art. 112, para. 4.

Chapter II

Typology of monitoring procedures

38. The present chapter aims at describing the procedures that may be performed by the institutions presented in chapter I above. In the light of the terminology employed in the relevant treaties, the procedures that have been examined for the purposes of the present memorandum may be categorized as follows: (*a*) reports; (*b*) individual complaints, applications or communications; (*c*) inter-State communications; (*d*) inquiries and visits; (*e*) urgent action; and (*f*) information provided at meetings of States parties.[138]

A. Reports

1. Frequency of required reports

39. Reporting procedures are included as a monitoring mechanism for the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (art. 9); the International Covenant on Civil and Political Rights (art. 40); the Pact of San José (art. 42); the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. VII);[139] the Convention on the Elimination of All Forms of Discrimination against Women (art. 18); the African Charter on Human and Peoples' Rights (art. 62); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 19); the Inter-American Convention to Prevent and Punish Torture (art. 17); the Convention on the Rights of the Child (art. 44); and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 29).

40. Except for the Inter-American Convention to Prevent and Punish Torture[140] and the International Convention on the Suppression and Punishment of the Crime of Apartheid,[141] which are silent as to the frequency of reports, all the treaties under review impose an obligation on States parties to submit reports according to a set time frame. The frequency varies. The International Convention on the Elimination of All Forms of Racial Discrimination requires that States parties submit a report within one year after the entry into force of the Convention and thereafter every two years and whenever the Committee on the Elimination of Racial Discrimination so requests.[142] The International Covenant on Civil and Political Rights requires that States parties submit reports within one year of the entry into force of the Covenant and thereafter whenever the Human Rights Committee so requests.[143] In contrast, the Pact of San José stipulates that States parties transmit to the InterAmerican Commission on Human Rights a copy of the reports and studies that they submit annually to the Inter-American Economic and Social Council and to the Inter-American Council for Education, Science and Culture,[144] and that they provide the Inter-American Commission on Human Rights with information whenever requested.[145] The Convention on the Elimination of All Forms of Discrimination against Women stipulates that States parties are required to submit the reports within one year after the entry into force of the Convention for the State concerned, and thereafter at least every four years and whenever the Committee on the Elimination of Discrimination against Women so requests.[146] The African Charter on Human and Peoples' Rights requires States parties to submit reports "every two years" from the date of entry into force of the Charter.[147] The States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment undertook to submit reports within one year after the entry into force of the Convention, and thereafter every four years on any new measures taken and such other reports as the Committee against Torture may request.[148] The States parties to the Convention on the Rights of the Child are to submit their reports within two years of the entry into force of the Convention for the State party concerned, and thereafter every five years.[149] In turn, the International Convention for the Protection of All Persons from Enforced Disappearance requires that States parties submit their reports within two years after the entry into force of the Convention for the State party concerned.[150]

2. Subject matter of the reports and recipients thereof

41. In relation to the subject matter of the reports, the International Convention on the Elimination of All Forms of Racial Discrimination provides that the reports submitted to the Secretary-General of the United Nations for consideration by the Committee on the Elimination of Racial Discrimination are to focus "on the legislative, judicial, administrative or other measures which [the States] have adopted and which give effect to the provisions" of the Convention.[151] The International Covenant on Civil and Political Rights contains a similar provision, affirming that all reports are to be submitted to the Secretary-General of the United Nations, who transmits them to the Human Rights Committee for consideration. According to the Covenant, the reports should focus "on the measures [the States parties to the Covenant] have adopted which

[138] The present memorandum discusses those procedures separately; in practice, they may at times be applied simultaneously or sequentially.

[139] See footnote 50 above.

[140] Inter-American Convention to Prevent and Punish Torture, art. 17.

[141] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. VII, para. 1.

[142] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 1.

[143] International Covenant on Civil and Political Rights, art. 40, para. 1.

[144] Pact of San José, art. 42.

[145] *Ibid.*, art. 43.

[146] Convention on the Elimination of All Forms of Discrimination against Women, art. 18, para. 1.

[147] African Charter on Human and Peoples' Rights, art. 62.

[148] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 1.

[149] Convention on the Rights of the Child, art. 44, para. 1.

[150] International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 1.

[151] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 1.

give effect to the rights recognized herein and on the progress made in the enjoyment of those rights"[152] and "shall indicate the factors and difficulties, if any, affecting the implementation of the … Covenant".[153] It should be highlighted that the Second Optional Protocol to the Covenant requires that the reports to the Human Rights Committee include "information on the measures that [the States parties to the Second Optional Protocol] have adopted to give effect" to the Protocol.[154]

42. The Pact of San José envisages an obligation of States parties to transmit to the Inter-American Commission on Human Rights a copy of the reports and studies that they submit annually to the Inter-American Economic and Social Council and to the Inter-American Council for Education, Science and Culture "so that the [Inter-American Commission on Human Rights] may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States".[155] In addition, States parties are also bound to provide the InterAmerican Commission on Human Rights with information "as to the manner in which their domestic law ensures the effective application of any provisions of [the Pact of San José]" upon request by the Commission.[156]

43. As a result of the distinct monitoring system of the International Convention on the Suppression and Punishment of the Crime of Apartheid,[157] the Convention envisages copies of the reports submitted by the States parties being "transmitted through the Secretary-General of the United Nations to the Special Committee on *Apartheid*".[158] The reports would then be considered by a group consisting of three members of the Commission on Human Rights, appointed by the Chair of the Commission on Human Rights.[159] The group would meet either before the opening or after the closing of the session of the Commission on Human Rights to consider the reports.[160] The reports would be "on the legislative, judicial, administrative or other measures that [the States parties to the Convention] have adopted and that give effect to the provisions" of the International Convention on the Suppression and Punishment of the Crime of Apartheid.[161]

44. The Convention on the Elimination of All Forms of Discrimination against Women adopts similar language to that found in the International Convention on the Suppression and Punishment of the Crime of Apartheid regarding the substance of the reports. States parties to the Convention on the Elimination of All Forms of Discrimination against Women undertake to submit "a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the [Convention] and on the progress made in this respect"; additionally, States parties may indicate "factors and difficulties affecting the degree of fulfilment of obligations" under the Convention.[162] The reports are submitted to the Secretary-General for consideration by the Committee on the Elimination of Discrimination against Women.[163] The Committee meets annually in order to consider the reports submitted by the States parties.[164]

45. The African Charter on Human and Peoples' Rights stipulates that the reports shall be "on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed" by the Charter.[165] The provision is silent in relation to the recipients of the reports, although, in practice, they are submitted to the African Commission on Human and Peoples' Rights.

46. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States parties are required to submit reports "on the measures they have taken to give effect to their undertakings under this Convention".[166] The Inter-American Convention to Prevent and Punish Torture stipulates that the States parties undertake to "inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention".[167] It further establishes that the Inter-American Commission on Human Rights "will endeavour in its annual report to analyze the existing situation in the member States of the Organization of American States in regard to the prevention and elimination of torture".[168] Similarly, the Convention on the Rights of the Child provides that the States parties "undertake to submit … reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights"[169] and "shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations" under the Convention.[170] Reports should also contain sufficient information to provide the Committee on the Rights of the Child with a comprehensive understanding of the implementation of the Convention in the State concerned.[171] In addition, the Committee on the Rights of the Child may request further information from the States parties

[152] International Covenant on Civil and Political Rights, art. 40, para. 1.

[153] *Ibid*., para. 2.

[154] Second Optional Protocol to the International Covenant on Civil and Political Rights, art. 3.

[155] Pact of San José, art. 42.

[156] *Ibid.*, art. 43.

[157] See footnote 50 above.

[158] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. VII, para. 2. The Special Committee against Apartheid was established by General Assembly resolution 1761 (XVII) of 6 November 1962 and terminated, owing to the conclusion of its mandate, by General Assembly resolution 48/258 of 23 June 1994.

[159] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IX, para. 1.

[160] *Ibid*., para. 3.

[161] *Ibid*., art. VII, para. 1.

[162] Convention on the Elimination of All Forms of Discrimination against Women, art. 18.

[163] *Ibid*., art. 18, para. 1.

[164] *Ibid*., art. 20, para. 1.

[165] African Charter on Human and Peoples' Rights, art. 62.

[166] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 1.

[167] Inter-American Convention to Prevent and Punish Torture, art. 17.

[168] *Ibid.*

[169] Convention on the Rights of the Child, art. 44, para. 1.

[170] *Ibid*., para. 2.

[171] *Ibid*. The Convention on the Rights of the Child also determines that a State party that has submitted a comprehensive initial report to the Committee on the Rights of the Child need not, in its subsequent reports, repeat basic information previously provided (art. 44, para. 3).

relevant to the implementation of the Convention.[172] In turn, the International Convention for the Protection of All Persons from Enforced Disappearance requires States parties to submit reports "on the measures taken to give effect to [their] obligations" under the Convention.[173] The Committee on Enforced Disappearances can also request States parties to provide additional information on the implementation of the Convention .[174] As regards the addressees of the reports, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance determine that the reports are submitted to the Committee against Torture and to the Committee on Enforced Disappearances, respectively, through the Secretary-General of the United Nations,[175] who transmits or makes them available to all States parties to the respective conventions.[176] The reports of the States parties to the Convention on the Rights of the Child are submitted to the Committee on the Rights of the Child through the Secretary-General of the United Nations,[177] although the States parties are also required to make their reports widely available to the public in their own countries.[178]

3. Outcome of the reporting procedure

47. Regarding the outcome of the reporting procedure under the International Covenant on Civil and Political Rights, the Human Rights Committee, after studying the reports, transmits general comments, as it may consider appropriate, to the States parties, as well as to the Economic and Social Council, along with the copies of the reports.[179] As pointed out above, the Inter-American Commission on Human Rights may "watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States" upon receipt of the reports submitted by the States parties.[180] The Committee against Torture makes general comments on reports of States parties, as it may consider appropriate, and forwards those to the State party concerned, which in turn may respond to the Committee.[181] The Committee on Enforced Disappearances considers the reports and issues comments, observations or recommendations, as it may deem appropriate, that are communicated to the State party concerned, which may respond to them on its own initiative or at the request of the Committee.[182] The International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women contain substantially similar provisions, stipulating that their relevant committees may "make suggestions and general recommendations based on the examination of [the] reports and information received from the States Parties" in their annual report to the General Assembly, together with comments transmitted by the States parties, if any.[183] Under the Convention on the Rights of the Child, the Committee on the Rights of the Child transmits, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, "any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications".[184] The Committee on the Rights of the Child can also "make suggestions and general recommendations" based on information received from the States parties by means of their report, which must be transmitted to any State party concerned and reported to the General Assembly, together with comments, if any, from the States parties.[185] The African Charter on Human and Peoples' Rights does not require the submission of reports.

B. Individual complaints, applications or communications

48. Individual complaints or applications procedures are envisaged in many of the treaties under review: the European Convention on Human Rights (art. 34); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 14); the first Optional Protocol to the International Covenant on Civil and Political Rights; the Pact of San José (art. 44); the African Charter on Human and Peoples' Rights (art. 56); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22); the Second Optional Protocol to the International Covenant on Civil and Political Rights (art. 5); the Inter-American Convention on the Forced Disappearance of Persons (art. XIII); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention for the Protection of All Persons from Enforced Disappearance (art. 31); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (art. 5).

1. Access

49. The European Convention on Human Rights provides that the European Court of Human Rights may receive applications from "any person, non-governmental organisation or group of individuals claiming to be the

[172] *Ibid.*, art. 44, para. 4.

[173] International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 1.

[174] *Ibid*., para. 4.

[175] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 1.

[176] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 2.

[177] Convention on the Rights of the Child, art. 44, para. 1.

[178] *Ibid*., para. 6.

[179] International Covenant on Civil and Political Rights, art. 40, para. 4.

[180] Pact of San José, art. 42.

[181] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3.

[182] International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 3.

[183] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1.

[184] Convention on the Rights of the Child, art. 45 (*b*).

[185] *Ibid*., art. 45 (*d*).

victim of a violation by one of the High Contracting Parties of the rights set forth in the [Convention] or the Protocols thereto".[186]

50. The Pact of San José contains an equivalent provision, stating that "[a]ny person or group of persons, or any non-governmental entity" may lodge with the Inter-American Commission on Human Rights petitions "containing denunciations or complaints of violation" of the Pact by a State party.[187] The Pact also regulates the submission of cases to the Inter-American Court of Human Rights. Under article 61, the States parties to the Pact and the InterAmerican Commission on Human Rights have the right to submit a case to the Inter-American Court of Human Rights, if the procedure before the Inter-American Commission on Human Rights has been completed and subject to a declaration of the State party recognizing the Court's jurisdiction. The same procedures apply to the Inter-American Convention on the Forced Disappearance of Persons, which dictates that "the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the [Pact of San José]".[188]

51. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance contain similar provisions. They afford the States parties to the respective conventions the option to declare that they recognize the competence of their respective committees to "receive and consider communications from", "or on behalf of",[189] individuals "or groups of individuals",[190] subject to their jurisdictions claiming "to be victims of a violation" "of the rights"[191] or "of [the] provisions" of the respective convention,[192] by a State party that has declared that it recognizes the competence of the relevant committee. The International Convention on the Elimination of All Forms of Racial Discrimination further stipulates that a State party that has made such declaration "may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights" set forth in the Convention on Racial Discrimination and who have exhausted other available local remedies.[193] Under the Convention on Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the declarations may be withdrawn by a State party at any time by notification to the Secretary-General of the United Nations, but any communications procedures pending before the respective committees shall not be affected by the withdrawal.[194]

52. The International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child adopt a different approach in relation to the acceptance of the relevant committee's jurisdiction. Only the States parties to the first Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure recognize the competence of the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, respectively, to receive and consider communications.[195] Thus, a communication is considered only if it concerns a State party to the respective optional protocols.[196]

53. The first Optional Protocol to the International Covenant on Civil and Political Rights provides that the communications must be from "individuals subject to its jurisdiction who claim to be victims of a violation" by the State party concerned of any of the rights set forth in the International Covenant on Civil and Political Rights.[197]

54. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, on the other hand, provides that the communications "may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party".[198]

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[186] European Convention on Human Rights, art. 34.

[187] Pact of San José, art. 44. The non-governmental entity must be legally recognized in one or more OAS member States.

[188] Inter-American Convention on the Forced Disappearance of Persons, art. XIII. See also art. XIV.

[189] Only the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22, para. 1) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 31, para. 1) foresee petitions "on behalf of".

[190] Only the International Convention on the Elimination of All Forms of Racial Discrimination foresees the possibility of "or groups of individuals" (art. 14, para. 1).

[191] Only the International Convention on the Elimination of All Forms of Racial Discrimination envisages "of the rights" (*ibid.*).

[192] Only the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22, para. 1) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 31, para. 1) envisage "of [the] provisions".

[193] International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 2.

[194] *Ibid*., para. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 8.

[195] First Optional Protocol to the International Covenant on Civil and Political Rights, art. 1; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5. The Second Optional Protocol to the International Covenant on Civil and Political Rights stipulates in article 5 that, with respect to the States parties to the first Optional Protocol, "the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the [Second Optional Protocol], unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession."

[196] First Optional Protocol to the International Covenant on Civil and Political Rights, art. 1; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 3; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 1, para. 3.

[197] First Optional Protocol to the International Covenant on Civil and Political Rights, art. 1.

[198] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 2.

55. The Optional Protocol to the Convention on the Rights of the Child on a communications procedure envisages that communications "may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party": the Convention on the Rights of the Child; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[199]

56. The African Charter on Human and Peoples' Rights contains a general provision stating that the African Commission on Human and Peoples' Rights may consider communications "other than those of States parties" to the Charter.[200] According to article 47 of the Charter regarding inter-State communications, which applies also to such individual communications, the claim must pertain to violation of "the provisions of the Charter" and shall relate "to human and peoples' rights".[201] The Protocol to the African Charter on Human and Peoples' Rights allows access to the African Court on Human and Peoples' Rights of "cases and disputes submitted to it concerning the interpretation and application of" the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights and any other relevant human rights instrument ratified by the States concerned.[202]

2. Admissibility criteria

57. All the treaties under review prescribe as one of the admissibility criteria the requirement of exhaustion of domestic remedies.[203] As a general rule, local remedies do not have to be exhausted where there are no reasonably available local remedies to provide effective redress or the possibility of such redress, or where there is undue delay in the remedial process. For example, the International Convention on the Elimination of All Forms of Racial Discrimination, the first Optional Protocol to the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure[204] envisage an exception when the application of the domestic remedies is unreasonably or unduly prolonged or when it is unlikely to bring effective relief. The Pact of San José recognizes exceptions to the requirement when the legislation of the State concerned does not afford due process of law for the protection of the right that has allegedly been violated; when the party alleging violation has been denied access to the remedies under domestic law or has been prevented from exhausting them; and when there has been unwarranted delay in rendering a final judgment under the domestic remedies.[205]

58. The additional admissibility criteria before the European Court of Human Rights include that the application cannot be anonymous, that the matter cannot be substantially the same as a matter that has already been examined by the Court or "has already been submitted to another procedure of international investigation or settlement and contains no relevant new information", that the application must be compatible with the provisions of the European Convention on Human Rights and its protocols, and that it cannot be manifestly ill founded, or an abuse of the right of individual application. In addition, an application may be rejected if the Court considers that the applicant "has not suffered a significant disadvantage", unless respect for human rights as defined in the Convention and the protocols thereto "requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".[206]

59. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the first Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure generally present very similar provisions in terms of additional admissibility criteria.

60. The International Convention on the Elimination of All Forms of Racial Discrimination establishes the following additional admissibility criteria: the petitioner has the right to communicate the matter to the Committee on the Elimination of Racial Discrimination within six

[199] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5, para. 1.

[200] African Charter on Human and Peoples' Rights, art. 55.

[201] *Ibid*., arts. 47 and 56.

[202] Protocol to the African Charter on Human and Peoples' Rights, art. 3, para. 1.

[203] European Convention on Human Rights, art. 35, para. 1; International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 7 (*a*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 5 (*b*); first Optional Protocol to the International Covenant on Civil and Political Rights, arts. 2 and 5, para. 2 (*b*); Pact of San José, art. 46, para. 1 (*a*); African Charter on Human and Peoples' Rights, art. 56, para. 5; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 31, para. 2 (d); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*e*).

[204] International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 7 (*a*); first Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 2 (*b*); African Charter on Human and Peoples' Rights, art. 56, para. 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 5 (*b*); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 31, para. 2 (*d*); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*e*).

[205] Pact of San José, art. 46, para. 2.

[206] European Convention on Human Rights, art. 35.

months in the event of failure to obtain satisfaction from the body established or indicated by the State party;[207] and the communications cannot be anonymous, but the identity of the individual or groups of individuals concerned can only be revealed to the relevant State party with the petitioner's express consent.[208]

61. The Pact of San José requires that in order for the Inter-American Court of Human Rights to hear a case, the procedures before the Inter-American Commission on Human Rights must have been completed.[209] In turn, the admissibility criteria envisaged in the Pact for a case to be admitted before the Inter-American Commission on Human Rights are similar to those of the European Convention on Human Rights, described above.

62. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure contain admissibility criteria similar to both the European Convention on Human Rights and to the International Convention on the Elimination of All Forms of Racial Discrimination, in addition to the exhaustion of domestic remedies. They provide that anonymous communications, as well as communications considered to be an abuse of the right of submissions of communications or to be incompatible with the provisions of the treaty (and/or the protocol),[210] will be considered inadmissible, and that the communication cannot be the same as a matter that has already been, or is being, examined under another procedure of international investigation or settlement.[211] The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure further lay down that communications are not admissible if they are manifestly ill-founded or not sufficiently substantiated, or if the facts that are subject of the communication occurred prior to the entry into force of the protocol for the State party concerned.[212] Finally, the last two criteria envisaged in the Optional Protocol to the Convention on the Rights of the Child on a communications procedure determine that the communications are not admissible if they are not in writing and if they are not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.[213]

63. In that respect, the first Optional Protocol to the International Covenant on Civil and Political Rights establishes that anonymous communications, or communications that are deemed an abuse of the right of submission, or that are incompatible with the Covenant, are not admissible;[214] likewise, if the matter is being examined under another procedure of international investigation or settlement, the communication cannot be considered by the Human Rights Committee.[215]

64. The Pact of San José contains analogous provisions regarding additional admissibility criteria. It sets forth the following requirements:[216] the petition must be lodged within six months from the date on which the party alleging violation was notified of the final judgment;[217] the subject of the petition is not pending in another international proceeding for settlement; and the petition must contain the name, nationality, profession, domicile and signature of the person or persons or of the legal representative of the entity lodging the petition. In addition, the petition will be considered inadmissible if any of such requirements are not met; if the petition does not state facts that tend to establish a violation of the rights guaranteed under the Pact; if the statements of the petitioner indicate that the petition is manifestly groundless or obviously out of order; or if the petition is substantially the same as one previously considered by the Inter-American Commission on Human Rights or by another international organization.[218]

65. The Protocol to the African Charter on Human and Peoples' Rights states that the African Court on Human and Peoples' Rights "shall rule on the admissibility of cases taking into account the provisions of article 56 of [the African Charter on Human and Peoples' Rights]".[219] Article 56 of the African Charter on Human and Peoples' Rights, in turn, lists certain admissibility criteria, some of which are not common to the other treaties mentioned above: indication of the author;[220] compatibility with the Charter of the African Union or with the African Charter on Human and Peoples' Rights;[221] not being written in "disparaging or insulting language directed against the State concerned and its institutions or to the [African Union]";[222] not being based "exclusively on news disseminated through the mass media";[223] being submitted within

[207] International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 5.

[208] *Ibid.*, para. 6 (*a*).

[209] Pact of San José, art. 61, para. 2.

[210] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 2; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*c*).

[211] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 5 (a); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4, para. 2 (*a*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 31, para. 2 (*c*); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*d*).

[212] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4, para. 2; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*f*) and (*g*).

[213] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (*b*) and (*h*).

[214] First Optional Protocol to the International Covenant on Civil and Political Rights, art. 3.

[215] *Ibid.*, art. 5, para. 2 (*a*).

[216] Pact of San José, art. 46, para. 1.

[217] The exceptions applicable to the exhaustion of domestic remedies, as cited in paragraph 57 above, also apply for this criterion. See Pact of San José, art. 46, para. 2.

[218] Pact of San José, art. 47.

[219] African Charter Protocol, art. 6, para. 2.

[220] African Charter on Human and Peoples' Rights, art. 56, para. 1.

[221] *Ibid.*, para. 2.

[222] *Ibid.*, para. 3.

[223] *Ibid.*, para. 4.

a "reasonable period from the time the local remedies are exhausted or from the date the [African Commission on Human and Peoples' Rights] is seized of the matter";[224] and not dealing with cases that have been settled by the States involved in accordance with "the principles of the Charter of the United Nations, or the Charter of the [African Union] or the provisions of the [African Charter on Human and Peoples' Rights]".[225] Such admissibility criteria are also applicable for cases to be received and examined by the African Court on Human and Peoples' Rights, according to article 6 of the Protocol to the African Charter on Human and Peoples' Rights.

3. Outcome of the procedure

66. In relation to the outcome of the procedures, the Committee on the Elimination of Racial Discrimination forwards its "suggestions and recommendations", if any, to the State party concerned and to the petitioner,[226] while the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on Enforced Disappearance and the Committee on the Rights of the Child forward their "views" to the State party concerned and to the individual/author of the communication.[227] The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child may also transmit "recommendations", if any, to the parties concerned together with their "views".[228] The State party is required to submit to the Committee on the Elimination of Discrimination against Women and to the Committee on the Rights of the Child, as the case may be, a written response within six months, including information on any action taken in light of the views and recommendations of the relevant committee, and the State party may be invited to submit further information about any measures it has taken.[229]

67. The Inter-American Commission on Human Rights is required to draw up a report containing a statement of the facts and either the solution reached, in case the parties reach a friendly settlement, or its conclusions, with proposals and recommendations if applicable, in case a friendly settlement is not reached.[230] In case a friendly settlement is reached, the report is to be transmitted to the petitioner and to the States parties to the Pact of San José, and then communicated to the Secretary General of OAS for publication.[231] Conversely, if a settlement is not reached, the report will be transmitted to the States concerned, "which shall not be at liberty to publish it".[232] If the matter is not settled, or submitted by the Inter-American Commission on Human Rights or by the State concerned to the Inter-American Court of Human Rights within three months after transmittal of the report, the Inter-American Commission on Human Rights may set forth its opinion and conclusions concerning the question submitted for its consideration, including prescription of measures to be taken by the State concerned to remedy the situation.[233]

68. The African Commission on Human and Peoples' Rights may make "recommendations as it deems useful" in its report to the States concerned and to the Assembly of Heads of State and Government.[234] The matter may also be brought to the attention of the Assembly of Heads of State and Government in specific cases.[235]

69. As indicated above,[236] the judgments pronounced by the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights are final and binding upon the parties (except insofar as appeals procedures before the Grand Chamber of the European Court of Human Rights are concerned).

C. Inter-State claims and communications procedures

70. The following treaties establish inter-State claims and communications procedures: the European Convention on Human Rights (art. 33); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11); the International Covenant on Civil and Political Rights (art. 41); the Pact of San José (art. 45); the African Charter on Human and Peoples' Rights (art. 47); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21); the Second Optional Protocol to the International Covenant on Civil and Political Rights (art. 4); the Inter-American Convention on the Forced Disappearance of Persons (art. XIII); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 32); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (art. 12).

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[224] *Ibid.*, para. 6.

[225] *Ibid.*, para. 7.

[226] International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 7 (*b*).

[227] First Optional Protocol to the International Covenant on Civil and Political Rights, article 5, paragraph 4, using "individual"; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22, paragraph 7, using "individual"; International Convention for the Protection of All Persons from Enforced Disappearance, article 31, paragraph 5, using "author of a communication"; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 7, paragraph 3, using "parties concerned"; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 10, paragraph 5, using "parties concerned".

[228] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 7, para. 3; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 10, para. 5.

[229] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 7, para. 4 (article 7, paragraph 5, further establishes that the additional information may be included, as deemed appropriate by the Committee on the Elimination of Discrimination against Women, in the State party's periodical reports under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 11 (the provision also establishes that the additional information may be included, as deemed appropriate by the Committee on the Rights of the Child, in the State party's periodical reports as envisaged in the Convention on the Rights of the Child and in the protocols thereto).

[230] Pact of San José, arts. 49–50.

[231] *Ibid.*, art. 49.

[232] *Ibid.*, art. 50, para. 2.

[233] *Ibid.*, art. 51.

[234] African Charter on Human and Peoples' Rights, arts. 52–53.

[235] *Ibid.*, art. 58.

[236] See chap. I, sect. C 2, above.

71. The European Convention on Human Rights stipulates that "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party".[237] The procedure is similar to that for individual complaints considered above, except that the only admissibility criterion applicable to inter-State claims relates to the exhaustion of local remedies.[238] In addition, a High Contracting Party may submit written comments and take part in hearings in individual complaint procedures where one of it nationals is an applicant or when it is invited by the President of the Court to do so.[239]

72. As indicated above, both the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights envisage the creation of an *ad hoc* conciliation commission to resolve matters between States.[240] Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination establishes that when a "State Party considers that another State Party is not giving effect" to the provisions of the Convention, "it may bring the matter to the attention" of the Committee on the Elimination of Racial Discrimination.[241]

73. The International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure contain substantially similar provisions in relation to inter-State communications. The International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide, respectively, that the competence of the Human Rights Committee and the Committee against Torture "to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations" under the respective treaty is subject to a declaration of the State party recognizing the relevant committee's competence to that effect.[242] The Optional Protocol to the Convention on the Rights of Child on a communications procedure indicates that a State party to the protocol "may, at any time, declare that it recognizes the competence of the [Committee on the Rights of the Child] to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations" under any of the following: the Convention on the Rights of the Child; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[243] Moreover, those treaties stipulate that communications may be received and considered only if submitted by a State party that has made a declaration recognizing the relevant committee's competence, and that no communication can be received if it concerns a State party that has not made such a declaration.[244] The International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure allow States parties to withdraw such a declaration at any time, without prejudice to the "consideration of any matter" that is the subject of a communication already transmitted.[245]

74. The African Charter on Human and Peoples' Rights grants the African Commission on Human and Peoples' Rights the competence to deal with inter-State communications regarding violations of the provisions of the Charter.[246]

75. In terms of the procedure to be followed, the International Convention on the Elimination of All Forms of Racial Discrimination adopts a slightly different approach from that of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee on the Elimination of Racial Discrimination transmits the communication to the State party concerned, which then submits written explanations or statements clarifying the matter and the remedy, if any, that it may have taken.[247] If the matter is not adjusted to the satisfaction of both parties and one party refers the matter once more to the Committee, the Committee will deal with the matter after ascertaining that "all available domestic remedies have been invoked and exhausted", except if the application of the remedies is unreasonably prolonged.[248] In accordance with the International Covenant on Civil and Political Rights and with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a State party that considers that another State party is not giving effect to the provisions of the relevant treaty may bring the matter, by written

[237] European Convention on Human Rights, art. 33.

[238] *Ibid*., art. 35, para. 1.

[239] *Ibid*., art. 36, paras. 1–2.

[240] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12; International Covenant on Civil and Political Rights, art. 42.

[241] International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, para. 1.

[242] International Covenant on Civil and Political Rights, art. 41, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1. Article 4 of the Second Optional Protocol to the International Covenant on Civil and Political Rights provides that, with respect to the States parties to the International Covenant on Civil and Political Rights that have made a declaration under article 41 thereof, "the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession".

[243] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 1.

[244] International Covenant on Civil and Political Rights, art. 41, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 2.

[245] International Covenant on Civil and Political Rights, art. 41, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 2; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 4.

[246] African Charter on Human and Peoples' Rights, art. 47.

[247] International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, para. 1.

[248] *Ibid.*, para. 3.

communication, to the attention of the latter.[249] The receiving State is then required to provide the sending State with an explanation or any other statement in writing clarifying the matter, including information on remedies, if any.[250] If the matter is not adjusted to the satisfaction of both parties, either State has the right to refer the matter to the relevant committee.[251]

76. The African Charter on Human and Peoples' Rights envisages two possible avenues for a State to refer the matter to the African Commission on Human and Peoples' Rights.[252] First, the Charter provides that, if a State party to the Charter has reason to believe that another State party to the Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter.[253] If, within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State has the right to submit the matter to the Commission through its chair and shall notify the other States involved.[254] Second, the Charter allows a State party to "refer the matter directly to the Commission" if it "considers that another State party has violated the provisions of the Charter".[255] The communication must also be addressed to the "[Chair], to the Secretary General of the [African Union] and the State concerned".[256] The Commission may then ask for information from the States concerned and, "after having tried all appropriate means to reach an amicable solution", is required to issue a report stating the facts and its findings.[257] The report is then sent "to the States concerned and communicated to the Assembly of Heads of State and Government"[258] and the Commission may make "recommendations as it deems useful".[259]

77. The Human Rights Committee and the Committee against Torture can deal with a matter referred to them only after having ascertained that all domestic remedies have been invoked and exhausted, as long as the application of the remedies is not unreasonably prolonged or is unlikely to bring effective relief.[260] The African Charter on Human and Peoples' Rights expressly provides that the African Commission on Human and Peoples' Rights can only deal with the communication "after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged".[261]

78. In relation to the outcome of the procedure, the Human Rights Committee and the Committee against Torture submit a report within 12 months of the referral of the matter. If a solution has been reached, the report is limited to a brief statement of the facts and the solution reached. If, however, a solution is not reached, the report will contain a brief statement of facts together with the written submissions and record of the oral submissions of the parties.[262] In any case, the report is communicated to the States parties concerned.[263]

79. The Optional Protocol to the Convention on the Rights of the Child on a communications procedure does not contain procedural provisions in relation to interState communications similar to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, those treaties do provide for the respective committees to make available their good offices to the States parties concerned "with a view to a friendly solution of the matter".[264]

80. As to the establishment of *ad hoc* conciliation commissions under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, their provisions, while similar in some respects, differ considerably in terms of the course of action to be followed by the respective committees and the commissions.

81. In accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, after the Committee on the Elimination of Racial Discrimination "has obtained and collated all the information it deems necessary", its chair appoints an *ad hoc* conciliation commission.[265] The *ad hoc* conciliation commission makes its good offices available "with a view to an amicable solution of the matter" on the basis of respect for the Convention.[266] Once the *ad hoc* conciliation commission has considered the matter fully, it prepares and submits to the Chair of the Committee on the Elimination of Racial Discrimination "a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such

[249] International Covenant on Civil and Political Rights, art. 41, para. 1 (*a*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*a*).

[250] International Covenant on Civil and Political Rights, art. 41, para. 1 (*a*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*a*).

[251] International Covenant on Civil and Political Rights, art. 41, para. 1 (*b*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*b*).

[252] African Charter on Human and Peoples' Rights, arts. 47–49.

[253] *Ibid*., art. 47.

[254] *Ibid*., art. 48.

[255] *Ibid*., art. 49.

[256] *Ibid*.

[257] *Ibid*., arts. 51, para. 1, and 52.

[258] *Ibid*., art. 52.

[259] *Ibid*., art. 53.

[260] International Covenant on Civil and Political Rights, art. 41, para. 1 (*c*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*c*).

[261] African Charter on Human and Peoples' Rights, art. 50.

[262] International Covenant on Civil and Political Rights, art. 41, para. 1 (*h*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*h*).

[263] International Covenant on Civil and Political Rights, art. 41, para. 1 (*h*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*h*).

[264] International Covenant on Civil and Political Rights, art. 41, para. 1 (*e*); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1 (*e*); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 3.

[265] International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*).

[266] *Ibid.*

recommendations as it may think proper for the amicable solution of the dispute".[267] The report is communicated to the parties to the dispute, which have three months to inform the Chair of the Committee on the Elimination of Racial Discrimination "whether or not they accept the recommendations contained in the report".[268] The Chair also is required to communicate the report and the declarations of the States parties concerned to the other States parties to the Convention on the Elimination of All Forms of Racial Discrimination.[269] The competence of the Committee on the Elimination of Racial Discrimination in relation to inter-State communications applies to all States parties to the Convention.

82. According to the International Covenant on Civil and Political Rights, if the dispute is not resolved to the satisfaction of the States parties concerned, the Human Rights Committee may appoint, with the prior consent of the States concerned, an *ad hoc* conciliation commission with a view to reaching an amicable solution of the matter.[270] The *ad hoc* conciliation commission considers the matter and submits a report to the Chair of the Human Rights Committee for communication to the States parties concerned. If the *ad hoc* conciliation commission is unable to complete its consideration of the matter within 12 months, it is required to confine its report to a brief statement of the status of its consideration of the matter. If "an amicable solution to the matter on the basis of respect for human rights as recognized in the [International Covenant on Civil and Political Rights] is reached", the *ad hoc* conciliation commission confines its report to a brief statement of the facts and of the solution reached; if a solution within such terms is not reached, the report of the *ad hoc* conciliation commission includes its findings on all questions of fact relevant to the issues between the parties, and its views on the possibilities of an amicable solution of the matter, together with the written submissions and a record of the oral submissions made by the parties. If the report of the *ad hoc* conciliation commission is submitted pursuant to those terms, the parties are required to notify the Chair of the Human Rights Committee within three months of the receipt of the report as to "whether or not they accept the contents of the report".[271]

83. The Pact of San José provides that the competence of the Inter-American Commission on Human Rights "to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right" set forth in the Pact is subject to a declaration of the State party recognizing the Commission's competence to that effect.[272] Moreover, the communications may be admitted and examined only if they are presented by a State party that has made such a declaration and may not be admitted if they are presented against a State party that has not made the declaration.[273] Notably, the Pact stipulates that the declarations may be "valid for an indefinite time, for a specified period, or for a specific case".[274]

84. The Inter-American Convention on the Forced Disappearance of Persons provides that "the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the [Pact of San José] and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights".[275]

85. The procedure applicable to inter-State communications before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights is the same as the one applicable to individual petitions.[276] The admissibility criteria of interState communications are substantially the same as those applicable to the individual petitions to the Inter-American Commission on Human Rights.[277] It is to be noted that, as in the case of individual petitions, the requirement for exhaustion of local remedies is not applicable when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated, when the party alleging violation has been denied access to the remedies under domestic law or has been prevented from exhausting them, or when there has been unwarranted delay in rendering a final judgment.[278]

86. The International Convention for the Protection of All Persons from Enforced Disappearance stipulates that a State party "may at any time declare that it recognizes the competence of the [Committee on Enforced Disappearances] to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention".[279] The provision also prescribes that communications may not be received if they concern or if they are submitted by a State that has not made such a declaration.[280]

D. Inquiries and visits

87. The following treaties contain procedures of inquiries and/or visits: the European Convention on Human Rights (art. 52); Protocol I to the Geneva Conventions (art. 90); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 20); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (art. 8); the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading

[267] *Ibid.*, art. 13, para. 1 (*a*).

[268] *Ibid.*, para. 2.

[269] *Ibid.*, para. 3.

[270] International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[271] *Ibid*., para. 7.

[272] Pact of San José, art. 45, para. 1.

[273] *Ibid*., para. 2.

[274] *Ibid*., para. 3.

[275] Inter-American Convention on the Forced Disappearance of Persons, art. XIII.

[276] See chap. II, sect. B, of the present memorandum.

[277] Pact of San José, arts. 46–47. See chap. II, sect. B, of the present memorandum; the only requirement that is not common to both procedures, as it is not applicable to inter-State communications, is the individualization of the petitioner by name, nationality, profession, domicile and signature.

[278] Pact of San José, art. 46, para. 2.

[279] International Convention for the Protection of All Persons from Enforced Disappearance, art. 32.

[280] *Ibid.*

Treatment or Punishment; the International Convention for the Protection of All Persons from Enforced Disappearance (art. 33); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (art. 13).

1. Inquiries

88. The Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on Enforced Disappearances and the Committee on the Rights of the Child may initiate an inquiry upon receipt of reliable information indicating serious, grave or systematic violations by a State party of their respective constitutive instruments.[281]

89. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure contain substantially similar provisions in relation to inquiries. The Committee against Torture, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child can designate one or more of their members to conduct an inquiry and to report back.[282] The Committee against Torture can initiate such a procedure if it receives reliable information appearing to contain well-founded indications that "torture is being systematically practised in the territory of a State party" to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and after taking into account any observations that may have been submitted by the State party concerned, upon invitation of the Committee against Torture, as well as any other reliable information available to it.[283] The Committee on the Elimination of Discrimination against Women can initiate an inquiry if it receives reliable information indicating "grave or systematic violations by a State Party of rights set forth in the [Convention on the Elimination of All Forms of Discrimination against Women]", and after taking into account any observations that may have been submitted by the State party concerned, upon invitation of the Committee on the Elimination of Discrimination against Women, as well as any other reliable information available to it.[284] The Committee on the Rights of the Child can initiate an inquiry after receiving reliable information indicating "grave or systematic violations by a State party of rights set forth in the [Convention on the Rights of the Child] or in the Optional Protocols thereto on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict", and after taking into account any observations that might have been submitted by the State party concerned, upon invitation of the Committee on the Rights of the Child, as well as any other reliable information available to it.[285]

90. The three above-mentioned treaties provide that the inquiries can include a visit to the State party's territory, should the State agree to it and if warranted.[286] The findings of the inquiry are to be transmitted to the State party concerned by the relevant committee, together with any comments, suggestions or recommendations.[287] In the case of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the State party concerned must or may be invited to submit its observations to the relevant committee within six months of receiving the findings, comments and recommendations.[288] The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child can invite the State party concerned, if necessary, after the end of such six-month period, to inform it of the measures taken in response to the inquiry.[289]

91. The procedure is conducted confidentially and the cooperation of the State party concerned is sought at all times.[290] The Committee against Torture and the Committee on the Rights of the Child, after consultations with the State party concerned, may include a summary of the results of the proceedings in its annual report.[291] The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child can invite the State party concerned to include in its periodical

[281] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 33 (the Convention refers to "undertake a visit" rather than inquiry); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13.

[282] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 2; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 2; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 2.

[283] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, paras. 1–2.

[284] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, paras. 1–2.

[285] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, paras. 1–2.

[286] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 3; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 2; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 2.

[287] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 4; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 3; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 4.

[288] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 4; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 14, para. 1, which also makes reference to measures "envisaged". The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not contain an equivalent provision on the matter.

[289] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 9, para. 2.

[290] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 5; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 5; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 3.

[291] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 5; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 6.

report details or further information of any measures taken in response to an inquiry.[292]

92. The approach of the International Convention for the Protection of All Persons from Enforced Disappearance differs from that of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. It provides that the Committee on Enforced Disappearances, after consultation with the State party concerned, may "request one or more of its members to undertake a visit and report back to it without delay" if it receives "reliable information indicating that a State Party is seriously violating the provisions [of the International Convention for the Protection of all Persons from Enforced Disappearance]".[293] The Committee on Enforced Disappearances "shall notify" the State party concerned of its intention to undertake a visit, which may be postponed or cancelled if the State party concerned presents "a substantiated request" to that effect.[294] On the other hand, if the State party agrees to the visit, it is required to work together with the Committee on Enforced Disappearances to define the modalities thereof.[295] Following the visit, the Committee on Enforced Disappearances must communicate to the State party concerned its observations and recommendations.[296]

93. The International Humanitarian Fact-Finding Commission, established in accordance with article 90 of Protocol I to the Geneva Conventions, may have the competence to inquire into any facts alleged to be a grave breach as defined in the Geneva Conventions and Protocol I or other serious violation of the Conventions or the Protocol, depending on the recognition of such competence by the relevant States parties to the Protocol.[297] Protocol I also sets forth that, in other situations, the Commission "shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned".[298] The inquiries are undertaken by a chamber composed of members of the Commission and *ad hoc* members.[299] The Commission is required to submit to the parties concerned a report on the findings of fact of the chamber conducting the inquiry, with such recommendations as it may deem appropriate.[300] Unless all the parties to the conflict request the Commission to do so, the Commission cannot report its findings publicly.[301]

94. The European Convention on Human Rights contains a provision regarding inquiries by the Secretary General of the Council of Europe. It states that, upon receipt of a request from the Secretary General, any party to the European Convention on Human Rights "shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention".[302]

2. Visits

95. In relation to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it should be highlighted that one of the primary functions of the Subcommittee on Prevention is to undertake visits to States parties to the Protocol. The other primary function is closely linked to advising and providing assistance to States parties on the implementation of the Protocol, in particular on the establishment, or on the work, of national preventive mechanisms.

96. Article 1 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that the objective of the Protocol is "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment".[303] Accordingly, the Subcommittee on Prevention of Torture may visit any State party to the Protocol.

97. Each State party to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment undertakes to set up, designate or maintain at the domestic level one or several "visiting bodies", referred to as national preventive mechanisms.[304] The States parties also undertake to allow visits by the Subcommittee on Prevention and by the national preventive mechanisms "to any place under its jurisdiction and control where persons are or may be deprived of their liberty … with a view to strengthening, if necessary, the protection of these persons".[305] The States parties to the Protocol further agree to grant to the Subcommittee on Prevention unrestricted access to a range of information and places. Objections to visits may be made "only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit".[306] The Subcommittee is also able to interview, in private, persons deprived of their liberty and any other person who in its view may be able to assist it with relevant information.[307]

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[292] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 9, para. 1; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 14, para. 2.

[293] International Convention for the Protection of All Persons from Enforced Disappearance, art. 33, para. 1.

[294] *Ibid.*, paras. 2–3.

[295] *Ibid.*, para. 4.

[296] *Ibid.*, para. 5.

[297] Protocol I, art. 90, para. 2 (*a*) and (*c*) (i).

[298] *Ibid.*, para. 2 (*d*).

[299] *Ibid.*, para. 3 (*a*).

[300] *Ibid.*, para. 5 (*a*).

[301] *Ibid.*, para. 5 (*c*).

[302] European Convention on Human Rights, art. 52.

[303] Under article 13, paragraph 1, of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Subcommittee on Prevention of Torture "shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate". Article 13, paragraph 4, provides that the Subcommittee on Prevention of Torture, if it deems appropriate, "may propose a short follow-up visit after a regular visit".

[304] *Ibid.*, art. 3.

[305] *Ibid.*, art. 4, para. 1.

[306] *Ibid.*, art. 14, para. 2.

[307] *Ibid.*, para. 1 (*d*).

98. In relation to the national preventive mechanisms, the Subcommittee on Prevention advises and assists States parties in their establishment when necessary; maintains contact with the national preventive mechanisms and offers them training and technical assistance with a view to strengthening their capacities; advises and assists them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture or other cruel, inhuman or degrading treatment or punishment; and makes recommendations and observations to the States parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.[308]

99. The Subcommittee on Prevention conducts such visits and makes recommendations to States parties concerning the protection of persons deprived of their liberty.[309] Its recommendations and observations are communicated to the State party in confidence and, if relevant, to the national preventive mechanism. The Subcommittee on Prevention publishes its report, together with any comments of the State party concerned, whenever requested to do so by that State party.[310] In case the State party refuses to cooperate with the Subcommittee, or to take steps to "improve the situation in the light of the recommendations", the Committee against Torture may decide, at the request of the Subcommittee and after the State party has had the opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee.[311]

100. In view of the above, the Subcommittee on Prevention may conduct three types of visits: regular country visits to places of detention where persons may be deprived of their liberty;[312] country follow-up visits, after a country visit;[313] and national preventive mechanisms advisory visits, aimed at supporting and reinforcing the national preventive mechanisms' mandate through advice, assistance and capacity-building activities.[314]

E. Urgent action

101. Article 30 of the International Convention for the Protection of All Persons from Enforced Disappearance establishes an urgent action procedure before the Committee on Enforced Disappearances to trace a disappeared person.

102. Relatives of a disappeared person (or their legal representatives, counsel or any person authorized by them) may submit a request to the Committee on Enforced Disappearances that "a disappeared person should be sought and found", as a matter of urgency.[315] The Committee on Enforced Disappearances only considers the request if it is not manifestly unfounded; it does not constitute an abuse of the right of submissions of such request; it has already been duly presented to the competent bodies of the State party concerned; it is not incompatible with the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance; and the same matter is not being examined under another procedure of international investigation or settlement of the same nature.[316]

103. The Committee on Enforced Disappearances can transmit recommendations to the State party concerned, taking into account any information that may have been provided by the State upon the Committee's solicitation. The recommendations may include a request for the State party to take all the necessary measures to locate and protect the person concerned, as well as to inform the Committee, within a specified period of time, of the measures taken.[317]

104. The Committee on Enforced Disappearances is required to inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State party as it becomes available.[318] The Committee must continue its efforts to work with the State party concerned as long as "the fate of the person sought remains unresolved".[319]

F. Information provided at meetings of States parties

105. The African Charter on Human and Peoples' Rights provides that, if it appears to the African Commission on Human and Peoples' Rights "that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights", the Commission shall draw the attention of the Assembly of Heads of State and Government "to these special cases".[320] The Assembly of Heads of State and Government may request the Commission to "undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations".[321] Further, in cases of emergency, the Commission can submit the matter to the Chair of the Assembly of Heads of State and Government, who may request "an in-depth study".[322]

106. The International Convention for the Protection of All Persons from Enforced Disappearance establishes that, if the Committee on Enforced Disappearances "receives information which appears to it to contain well-founded indications that enforced disappearance is being practised

[308] *Ibid.*, art. 11 (*b*).

[309] *Ibid.*, art. 11 (*a*).

[310] *Ibid.*, art. 16, paras. 1–2.

[311] *Ibid.*, para. 4.

[312] *Ibid.*, arts. 11 (*a*) and 13, paras. 1–3.

[313] *Ibid.*, art. 13, para. 4.

[314] *Ibid.*, art. 11 (*b*). The Subcommittee also conducts more general short visits (so-called "Optional Protocol advisory visits") to advise States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and assist them in fully implementing their obligations. These are broadly based on the functions envisaged in the Optional Protocol) arts. 2, para. 4, and 12 (*d*)). See www.ohchr.org/EN/HRBodies/OPCAT/Pages/AdvisoryVisits.aspx.

[315] International Convention for the Protection of All Persons from Enforced Disappearance, art. 30, para. 1.

[316] *Ibid.*, para. 2.

[317] *Ibid.*, para. 3.

[318] *Ibid.*

[319] *Ibid.*, para. 4.

[320] African Charter on Human and Peoples' Rights, art. 58, para. 1.

[321] *Ibid.*, para. 2.

[322] *Ibid.*, para. 3.

on a widespread or systematic basis in the territory under the jurisdiction of a State Party [to the Convention]", the Committee may, after seeking from the State party concerned all relevant information on the situation, bring the matter to the urgent attention of the General Assembly of the United Nations, through the Secretary-General.[323]

107. According to the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, the Regional Committee of the International Conference on the Great Lakes Region is responsible, *inter alia*, for alerting the Summit of the International Conference on the Great Lakes Region in order for it to take urgent measures to prevent potential instances of genocide, war crimes and crimes against humanity on the basis of the information it collects and analyses.[324]

[323] International Convention for the Protection of All Persons from Enforced Disappearance, art. 34.

[324] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination, art. 38, para. 2 (*b*)–(*c*).

Annex I

Treaties and institutions

No.	*Treaty*	*Date of adoption*	*Monitoring institutions*	*Reference*
1.	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)	4 November 1950	European Court of Human Rights Secretary General of the Council of Europe	United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.
2.	International Convention on the Elimination of All Forms of Racial Discrimination	21 December 1965	Committee on the Elimination of Racial Discrimination Ad hoc conciliation commissions	United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.
3.	International Covenant on Civil and Political Rights	16 December 1966	Human Rights Committee *Ad hoc* conciliation commissions	United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.
4.	Optional Protocol to the International Covenant on Civil and Political Rights	16 December 1966	Human Rights Committee (see International Covenant on Civil and Political Rights)	United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.
5.	American Convention on Human Rights “Pact of San José, Costa Rica”	22 November 1969	Inter-American Commission on Human Rights Inter-American Court of Human Rights	United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123.
6.	International Convention on the Suppression and Punishment of the Crime of Apartheid	30 November 1973	“Group of three” of the Commission on Human Rights	United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243.
7.	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)	8 June 1977	International Humanitarian Fact-Finding Commission Meetings of the High Contracting Parties	United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.
8.	Convention on the Elimination of All Forms of Discrimination against Women	18 December 1979	Committee on the Elimination of Discrimination against Women	United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13.
9.	African Charter on Human and Peoples’ Rights	27 June 1981	African Commission on Human and Peoples’ Rights	United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.
10.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 December 1984	Committee against Torture	United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.
11.	Inter-American Convention to Prevent and Punish Torture	9 December 1985	Inter-American Commission on Human Rights (see Pact of San José)	OAS, *Treaty Series*, No. 67.
12.	Convention on the Rights of the Child	20 November 1989	Committee on the Rights of the Child	United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3.
13.	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	15 December 1989	Human Rights Committee (see International Covenant on Civil and Political Rights)	United Nations, *Treaty Series*, vol. 1642, annex A, No. 14668, p. 414.

No.	Treaty	Date of adoption	Monitoring institutions	Reference
14.	Inter-American Convention on the Forced Disappearance of Persons	9 June 1994	Inter-American Commission on Human Rights (see Pact of San José)	OAS, *Treaty Series*, No. 68.
15.	Convention on the Safety of United Nations and Associated Personnel	9 December 1994	Meeting of the States parties	United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363.
16.	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	10 June 1998	African Court on Human and Peoples' Rights	Document OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), reproduced in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, p. 1040.
17.	Rome Statute of the International Criminal Court	17 July 1998	Assembly of States Parties to the Rome Statute	United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.
18.	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	6 October 1999	Committee on the Elimination of Discrimination against Women (see Convention on the Elimination of All Forms of Discrimination against Women)	United Nations, *Treaty Series*, vol. 2131, No. 20378, p. 83.
19.	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	25 May 2000	Committee on the Rights of the Child (see Convention on the Rights of the Child)	United Nations, *Treaty Series*, vol. 2173, No. 27531, p. 222.
20.	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	25 May 2000	Committee on the Rights of the Child (see Convention on the Rights of the Child)	United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227.
21.	United Nations Convention against Transnational Organized Crime	15 November 2000	Conference of the Parties to the Convention	United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209.
22.	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	18 December 2002	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture National preventive mechanisms	United Nations, *Treaty Series*, vol. 2375, No. 24841, p. 237.
23.	Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination	29 November 2006	Regional Committee of the International Conference on the Great Lakes Region of Africa for the Prevention and the Punishment of Genocide, War Crimes, Crimes against Humanity and All Forms of Discrimination	Available from www.icglr.org/images /LastPDF/Protocol_on_Crime_Prevention_and _Punishment_of_the_Crime_of_Geno.pdf.
24.	International Convention for the Protection of All Persons from Enforced Disappearance	20 December 2006	Committee on Enforced Disappearances	United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.
25.	Optional Protocol to the Convention on the Rights of the Child on a communications procedure	19 December 2011	Committee on the Rights of the Child (see Convention on the Rights of the Child)	United Nations, *Treaty Series*, vol. 2983, No. 27531, p. 131.

ANNEX II

MONITORING PROCEDURES

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)	European Court of Human Rights	Court: number of judges equal to that of High Contracting Parties (art. 20)		Individual applications (art. 34)	Inter-State applications (art. 33)		Advisory jurisdiction (art. 47)
	Secretary General of the Council of Europe					Inquiries by the Secretary General (art. 52)	
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination	Committee: 18 experts (art. 8, para. 1)	Reports by States parties (*a*) within one year after the entry into force of the Convention for the State concerned; (*b*) thereafter every two years (art. 9, para. 1)	Individual communications, upon declaration by States parties (art. 14, para. 1)	Inter-State communications (art. 11, para. 1)		
	Ad hoc conciliation commissions	Commission: 5 members (art. 12, para. 1)			Unresolved interState communications (art. 12, para. 1)		
International Covenant on Civil and Political Rights	Human Rights Committee	Committee: 18 members (art. 28, para. 1)	Reports by States parties (*a*) within one year of the entry into force of Covenant for the State party concerned; (*b*) thereafter whenever the Committee so requests (art. 40, para. 1))		Inter-State communications, upon declaration by States Parties (art. 41, para. 1)		
	Ad hoc conciliation commissions	Commission: 5 members (art. 42, para. 1–2)			Unresolved interState communications (art. 42 (1) (*a*))		
Optional Protocol to the International Covenant on Civil and Political Rights	Human Rights Committee (see International Covenant on Civil and Political Rights)			Individual communications (art. 1)			

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
American Convention on Human Rights "Pact of San José, Costa Rica"	Inter-American Commission on Human Rights	Commission: 7 members (art. 34)	Copies of reports by States parties to Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture (art. 42)	Individual petitions (art. 44)	Inter-State communications, upon declaration by States parties (art. 45, para. 1)		
	Inter-American Court of Human Rights	Court: 7 judges (art. 52, para. 1)		Submissions by the Commission on the basis of individual petitions (art. 61, para. 1)	Inter-State cases unresolved by the Commission, upon declaration by States parties or by special agreement (art. 61, para. 1, 62)		Advisory jurisdiction (art. 64, paras. 1–2)
International Convention on the Suppression and Punishment of the Crime of Apartheid	"Group of three" appointed by the Chair of the Commission on Human Rights	"Group": three members of the Commission on Human Rights (art. IX, para. 1))	Periodic reports by States parties to the "group" (art. VII, para. 1) and to the Special Committee on Apartheid (art. VII, para. 2)				
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)	International Humanitarian Fact-Finding Commission	Commission: 15 members (art. 90, para. 1 (*a*))				Inquiries by a chamber consisting of five members of the Commission and two *ad hoc* members (art. 90, para. 3)	
	Meetings of the High Contracting Parties	Meeting: at the request of one or more of the High Contracting Parties (art. 7)					Consider general problems concerning the application of the Geneva Conventions and the Protocol (art. 7)
Convention on the Elimination of all Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women	Committee: 23 experts (art. 17, para. 1)	Reports by States parties: (*a*) within a year after the entry into force of the Convention; (*b*) thereafter at least every 4 years (art. 18, para. 1)				

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
African Charter on Human and Peoples' Rights	African Commission on Human and Peoples' Rights	Commission: 11 members (art. 31, para. 1)	Reports by States parties every two years (art. 62)	Communications from entities other than States parties (art. 55)	Inter-State communications (art. 47)		
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee against Torture	Committee: 10 experts (art. 17, para. 1)	Reports by States parties within one year after the entry into force of the Convention; thereafter every four years (art. 19, para. 1)	Individual communications, upon declaration by States parties (art. 22, para. 1)	Inter-State communications, upon declaration by States parties (art. 21, para. 1)	Confidential inquiries and visits (art. 20, paras. 2–3)	
Inter-American Convention to Prevent and Punish Torture	Inter-American Commission on Human Rights (see Pact of San José)		Information by States parties (art. 17)				
Convention on the Rights of the Child	Committee on the Rights of the Child	Committee: 10 experts (art. 43, para. 2)	Reports by States parties (a) within two years of the entry into force of the Convention; (b) thereafter every five years. (art. 44, para. 1)				International cooperation with specialized agencies, the United Nations Children's Fund and other competent bodies (art. 45)
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	Human Rights Committee (see International Covenant on Civil and Political Rights)		Information on measures relating to the Protocol to be included in reports of States parties under art. 40 of the Covenant (art. 3)	Individual communications with respect to States parties to the first Optional Protocol to the Covenant, unless a contrary statement is made (art. 5)			
Inter-American Convention on the Forced Disappearance of Persons	Inter-American Commission on Human Rights (see Pact of San José)			Individual communications (art. XIII)	Inter-State communications (art. XIII)		

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
Convention on the Safety of United Nations and Associated Personnel	Meeting of the States Parties	Review meeting: all States parties (art. 23)					
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	African Court on Human and Peoples' Rights	Court: 11 judges (art. 11, para. 1)		Individual petitions and petitions from non-governmental organizations with observer status before the African Commission on Human and Peoples' Rights, either by submission of the African Commission on Human and Peoples' Rights (art. 5, para. 1 (*a*), or directly upon declaration by States parties (arts. 5, para. 3, and 34, para. 6)	Inter-State communications (art. 5, paras. 1–2)		Advisory jurisdiction (art. 4, para. 1)
Rome Statute of the International Criminal Court	Assembly of States Parties to the Rome Statute	Assembly: one representative for each State party (art. 112, para. 1)	Court refers findings of State non-cooperation (arts. 87, paras. 5 and 7, and 112, para. 2 (*f*)				Establishment of subsidiary bodies for inspection, evaluation and investigation of the Court (art. 112, para. 4)
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women (see Convention on the Elimination of All Forms of Discrimination against Women)		Information on the measures taken in response to an inquiry to be included in the report under art. 18 of the Convention on the Elimination of All Forms of Discrimination against Women (art. 9, para. 1)	Individual communications (art. 2)			Request to States parties to take interim measures (art. 5, para. 1)

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Committee on the Rights of the Child (see Convention on the Rights of the Child)		Reports by States parties within two years following the entry into force of the Protocol (art. 8, para. 1) Information relating to the implementation of the Protocol to be included in the reports of State parties under art. 44 of the Convention (art. 8, para. 2) Reports by other States parties every five years (art. 8, para. 2)				
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Committee on the Rights of the Child (see Convention on the Rights of the Child)		Reports by States parties within two years following the entry into force of the Protocol (art. 12, para. 1) Information relating to the implementation of the Protocol to be included in the reports of States parties under art. 44 of the Convention on the Rights of the Child (art. 12, para. 2) Reports by other States parties every five years (art. 12, para. 2)				
United Nations Convention against Transnational Organized Crime	Conference of the Parties to the Convention	Conference: all States parties (art. 32, para. 1)	Information by States parties (art. 32, para. 5)				
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture	Subcommittee: 25 members (10 members prior to the 50th ratification) (arts. 2, paras. 1, and 5, para. 1)				Visits to any place where persons are or may be deprived of their liberty (arts. 4, para. 1, and 11 (*a*))	

Treaty	*Institutions*	*Type (committee, commission, court, assembly, meeting or conference) and composition*	*Reporting procedure*	*Individual complaints, applications or communications*	*Inter-State applications or communications*	*Inquiries and visits*	*Other procedures (urgent actions, information to assemblies, etc.) or other remarks*
	National preventive mechanisms	Visiting body (Art. 3)				Visits to any place where persons are or may be deprived of their liberty (art. 4, para. 1)	
Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination	Regional Committee of the International Conference on the Great Lakes Region for the Prevention and Punishment of Genocide, War Crimes, Crimes against Humanity and All Forms of Discrimination	Committee: one person from each member State (art. 27, para. 1)					Alerting the Summit of the Conference to take urgent measures (art. 38, para. 2 (*b*)-(*c*))
International Convention for the Protection of All Persons from Enforced Disappearance	Committee on Enforced Disappearances	Committee: 10 experts (art. 26, para. 1)	Reports by States parties within two years following the entry into force of the Convention (art. 29)	Individual communications, upon declaration by States parties (art. 31, para. 1)	Inter-State communications, upon declaration by States parties (art. 32)	Inquiries and visits (art. 33)	Urgent actions (art. 30) Information to the United Nations General Assembly (art. 34)
Optional Protocol to the Convention on the Rights of the Child on a communications procedure	Committee on the Rights of the Child (see Convention on the Rights of the Child)		Follow-up procedure relating to any action taken by States Parties as regards recommendations of the Committee and implementation of friendly settlements (art. 11)	Individual communications (art. 5)	Inter-State communications, upon declaration of States parties (art. 12, para. 1)	Inquiries and visits (art. 13, para. 2)	Request to States parties to take interim measures (art. 6, para. 1)

JUS COGENS

[Agenda item 10]

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First report on *jus cogens*, by Mr. Dire Tladi, Special Rapporteur*

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CONTENTS

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Multilateral instruments cited in the present report

	Source
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, *Official Journal*, No. 1, February 1920, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, p. 31.
Treaty of Guarantee (Nicosia, 16 August 1960)	*Ibid.*, vol. 382, No. 5475, p. 3.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.

Works cited in the present report

Alexidze, Levan

"Legal nature of *jus cogens* in contemporary international law", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172 (1982), pp. 219–270.

Barnidge, Robert P., Jr,

"Questioning the legitimacy of *jus cogens* in the global legal order", *Israel Yearbook on Human Rights*, vol. 38 (2008), pp. 199–226.

Bianchi, Andrea

"Human rights and the magic of *jus cogens*", EJIL, vol. 19 (2008), pp. 491–508.

Bisazza, Patrizia

"Les crimes à la frontière du *jus cogens*", *in* Laurent Moreillon *et al.*, eds., *Droit pénal humanitaire*, Geneva, Helbing and Lichtenhahn, 2006, pp. 163–182.

Boisson de Chazournes, Laurence

"Commentaire", *in* Rosario Huesa Vinaixa and Karel 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, pp. 75–80.

Brierly, J. L.

The Law of Nations: An Introduction to the International Law of Peace, 6th ed., Humphrey Waldock, ed. Oxford, Clarendon, 1963.

Cançado Trindade, Antônio Augusto

"*Jus cogens:* The determination and the gradual expansion of its material content in contemporary international case-law", *Curso de Derecho International*, vol. 35 (2008), pp. 3–29.

Cassese, Antonio

"For an enhanced role of *jus cogens*", *in* Antonio Cassese, ed., *Realizing Utopia: The Future of International Law*, Oxford, Oxford University Press, 2012, pp. 158–171.

Christenson, Gordon A.

"*Jus cogens*: Guarding interests fundamental to international society", *Virginia Journal of International Law*, vol. 28 (1988), pp. 585–648.

Conklin, William E.

"The peremptory norms of the international community", EJIL, vol. 23 (2012), pp. 837–861.

Costelloe, Daniel

"Legal consequences of peremptory norms in international law", PhD thesis, University of Cambridge, 2013.

Criddle, Evan, and Evan Fox-Decent

"A fiduciary theory of *jus cogens*", *Yale Journal of International Law*, vol. 34 (2009), pp. 331–388.

Czapliński, Władysław

"*Jus cogens* and the law of treaties", *in* Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order:* Jus cogens *and Obligations* Erga Omnes. Leiden, Martinus Nijhoff, 2005, pp. 83–98.

Danilenko, Gennady M.

Law-making in the International Community. Dordrecht, Martinus Nijhoff, 1993.

"International *jus cogens:* Issues of law-making", EJIL, vol. 2 (1991), pp. 42–65.

de Martens, G. F., ed.

Précis du droit des gens moderne de l'Europe, Paris, Guillaumin et Cie, 1864.

Dubois, Dan

"The authority of peremptory norms in international law: State consent or natural law?", *Nordic Journal of International Law*, vol. 78 (2009), pp. 133–176.

Dupuy, Pierre-Marie, and Yann Kerbrat

Droit international public, 11th ed. Paris, Dalloz, 2012.

Forteau, Mathias

"Regional international law", *in* Rudiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, 2006, online edition. Available from http://opil.ouplaw.com/home/MPIL.

Frowein, Jochen

"*Ius cogens*", *in* Rudiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, vol. VI, Oxford, Oxford University Press, 2012, pp. 443–446.

Gaja, Giorgio

"*Jus cogens* beyond the Vienna Convention", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172 (1982), pp. 271–316.

Glennon, Michael J.

"De l'absurdité du droit impératif (*jus cogens*)", RGDIP, vol. 110 (2006), pp. 529–536.

Gómez Robledo, Antonio

El Ius Cogens Internacional: Estudio Histórico crítico. Mexico City, Universidad Nacional Autónoma de México, 1982.

Green, James A.

"Questioning the peremptory status of the prohibition of the use of force", *Michigan Journal of International Law*, vol. 32 (2011), pp. 215–258.

Grotius, Hugo

Rights of War and Peace in Three Books: Wherein Are Explained, the Law of Nature and Nations, and the Principal Points Relating to Government. Paris, 1652, J. Barbeyrag, trans., 1738.

HALL, William Edward

A Treatise on International Law, 8th ed. Oxford, Clarendon, 1924.

HAMEED, Asif

"Unravelling the mystery of *jus cogens* in international law", *British Yearbook of International Law*, vol. 84 (2014), pp. 52–102.

Lord Lloyd of HAMPSTEAD and M. D. A. FREEMAN

Lloyd's Introduction to Jurisprudence, 5th ed. London, Stevens and Sons, 1985.

HANNIKAINEN, Lauri

Peremptory Norms (Jus cogens) in International Law: Historical Development, Criteria, Present Status. Helsinki, Finnish Lawyers' Publishing Company, 1988.

JACOVIDES, Andrew

"Treaties conflicting with peremptory norms of international law and the Zurich-London 'agreements' ", *in* Andrew Jacovides, ed., *International Law and Diplomacy: Selected Writings by Ambassador Andrew Jacovides*, Leiden, Martinus Nijhoff, 2011, pp. 17–56.

JANIS, Mark W.

"The nature of *jus cogens*", *in* Larry May and Jeff Brown, eds. *Philosophy of Law: Classic and Contemporary Readings*, Chichester, Wiley-Blackwell, 2010, pp. 184–186.

International Law, 5th ed. New York, Aspen, 2008.

"The nature of *jus cogens*", *Connecticut Journal of International Law*, vol. 3 (1988), pp. 359–363.

JELLINEK, Georg

Die Rechtliche Natur der Staatenverträge: Ein Beitrag zur Juristischen Construction des Völkerrechts. Vienna, Alfred Hölder, 1880.

KADELBACH, Stefan

"*Jus cogens*, obligations *erga omnes* and other rules: The identification of fundamental norms", *in* Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order:* Jus cogens *and Obligations* Erga Omnes. Leiden, Martinus Nijhoff, 2005, pp. 21–40.

KAMTO, Maurice

"La volonté de l'État en droit international", *Collected Courses of the Hague Academy of International Law*, vol. 310 (2004), pp. 9–428.

KASER, Max

Das Römische Privatrecht. Munich, C. H. Becksche Verlagsbuchhandlung, 1955.

KELSEN, Hans

"The pure theory of law: Its method and fundamental concepts", Charles H. Wilson, transl., *The Law Quarterly Review*, vol. 50 (1934), pp. 474–498.

KOHLER, Josef

Grundlagen des Völkerrechts. Stuttgart, Verlag Von Ferdinand Enke, 1918.

KOLB, Robert

Peremptory International Law: Jus cogens*—A General Inventory*. Oxford, Hart, 2015.

"Conflits entre normes de *jus cogens*", *in* Nicolas Angelet *et al.*, eds., *Droit du pouvoir, pouvoir du droit : melanges offerts à Jean Salmon*. Brussels, Bruylant, 2007, pp. 481–506.

KOSKENNIEMI, Martti

The Politics of International Law. Oxford, Hart, 2011.

From Apology to Utopia: The Structure of International Legal Argument (Reissue with a new Epilogue). Cambridge, Cambridge University Press, 2005.

KRITSIOTIS, Dino

"On the possibilities of and for persistent objection", *Duke Journal of Comparative and International Law*, vol. 21 (2010), pp. 121–142.

LINDERFALK, Ulf

"The effect of *jus cogens* norms: Whoever opened Pandora's box, did you ever think about the consequences?", EJIL, vol. 18 (2007), pp. 853–871.

LORENZEN, Ernest G.

"Commercial arbitration—International and interstate aspects", *Yale Law Journal*, vol. 43 (1934), pp. 716–765.

MAGALLONA, Merlin M.

"The concept of *jus cogens* in the Vienna Convention on the Law of the Treaties", *Philippine Law Journal*, vol. 51 (1976), pp. 521–542.

Lord MCNAIR

The Law of Treaties. Oxford, Clarendon, 1961.

NIPPOLD, Otfried

Der völkerrechtliche Vertrag—Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht. Bern, K. J. Wyss, 1894.

O'CONNELL, Mary Ellen

"*Jus cogens:* International law's higher ethical norms", *in* Donald Earl Childress III, ed., *The Role of Ethics in International Law.* New York, Cambridge University Press, 2012, pp. 78–98.

OPPENHEIM, Lassa

International Law: A Treatise, vol. I, *Peace*. London, Longmans, Green and Co, 1905.

ORAKHELASHVILI, Alexander

Peremptory Norms in International Law. Oxford, Oxford University Press, 2006.

PAULUS, Andreas L.

"*Jus cogens* in a time of hegemony and fragmentation: An attempt at a re-appraisal", *Nordic Journal of International Law*, vol. 74 (2005), pp. 297–334.

PELLET, Alain

"Conclusions", *in* Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order:* Jus cogens *and Obligations* Erga Omnes, Leiden, Martinus Nijhoff, 2005, pp. 417–424.

PETSCHE, Markus

"*Jus cogens* as a vision of the international legal order", *Penn State International Law Review*, vol. 29 (2010), pp. 233–274.

PHILLIMORE, Sir Robert

Commentaries upon International Law, vols. I–II, 3rd ed. Dublin, Hodges, Foster and Co., 1879.

PILLET, Antoine

"Le droit international public, ses éléments constitutifs, son domaine, son objet", RGDIP (1894), pp. 1–32.

RIVIER, Raphaële

Droit international public, 2nd ed. Paris, Presses universitaires de France, 2013.

ROHR, Aldana

La Responsabilidad Internacional del Estado por Violación al Jus cogens. Buenos Aires, SGN Editora, 2015.

ROUGIER, Antoine

"La théorie de l'intervention d'humanité", RGDIP, vol. XVII (1910), pp. 468–526.

Rozakis, Christos L.

The Concept of Jus cogens *in the Law of Treaties.* Amsterdam, North-Holland Publishing, 1976.

Saul, Matthew

"Identifying *jus cogens* norms: The interaction of scholars and international judges", *Asian Journal of International Law*, vol. 5 (2015), pp. 26–54.

Schmahl, Stefanie

"An example of *jus cogens:* The status of prisoners of war", *in* Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order:* Jus cogens *and Obligations* Erga Omnes. Leiden, Martinus Nijhoff, 2005, pp. 41–67.

Simma, Bruno

"The contribution of Alfred Verdross to the theory of international law", EJIL, vol. 6 (1995), pp. 33–54.

Sohn, Louis B.

"The new international law: Protection of the rights of individuals rather than States", *American University Law Review*, vol. 32 (1981), pp. 1–64.

Stephan, Paul B.

"The political economy of *jus cogens*", *Vanderbilt Journal of Transnational Law*, vol. 44 (2011), pp. 1073–1104.

Šturma, Pavel

"Human rights as an example of peremptory norms of general international law", *in* Pavel Šturma *et al.*, eds., *International and Internal Mechanisms of Fundamental Rights Effectiveness,* Waldkirchen, RW&W Science and New Media, 2015, pp. 11–21.

Suy, Eric

"The concept of *jus cogens* in public international law", *in Papers and Proceedings: Report of a Conference in Lagonissi, Greece, April 1966* (Geneva, 1967), pp. 17–78.

Thirlway, Hugh

The Sources of International Law. Oxford, Oxford University Press, 2014.

Tladi, Dire, and Polina Dlagnekova

"The will of the State, consent and international law: Piercing the veil of positivism", *Southern African Public Law*, vol. 21 (2006), pp. 111–122.

Tomuschat, Christian

"The Security Council and *jus cogens*", *in* Enzo Cannizzaro, ed., *The Present and Future of* Jus cogens, Rome, Sapienza, 2015, pp. 7–98.

"Reconceptualizing the debate on *jus cogens* and obligations *erga omnes:* Concluding observations", *in* Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order:* Jus cogens *and Obligations* Erga Omnes, Leiden, Martinus Nijhoff, 2005, pp. 425–436.

Tunkin, Grigory

"*Jus cogens* in contemporary international law", *University of Toledo Law Review*, vol. 3 (1971), pp. 107–118.

de Vattel, Emer

Law of Nations, or Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns. 1758, C. G. and J. Robinson, transls., London, 1797.

Verdross, Alfred

"Forbidden treaties in international law: Comments on Professor Garner's report on 'The law of treaties' ", AJIL, vol. 31 (1937), pp. 571–577.

"*Jus dispositivum* and *jus cogens* in international law", AJIL, vol. 60 (1966), pp. 55–63.

Vidmar, Jure

"Norm conflicts and hierarchy in international law: Towards a vertical international legal system?", *in* Erika de Wet and Jure Vidmar, eds., *Hierarchy in International Law: The Place of Human Rights,* Oxford, Oxford University Press, 2012, pp. 13–41.

Weil, Prosper

"Le droit international en quête de son identité: Cours général de droit international public", *Collected Courses of the Hague Academy of International Law, 1992-VI,* vol. 237 (1992), pp. 9–370.

Weisburd, A. Mark

"The emptiness of the concept of *jus cogens*, as illustrated by the war in Bosnia-Herzegovina", *Michigan Journal of International Law*, vol. 17 (1995), pp. 1–52.

Whiteman, Marjorie M.

"*Jus cogens* in international law, with a projected list", *Georgia Journal of International and Comparative Law*, vol. 7 (1977), pp. 609–628.

Introduction

1. During its sixty-sixth session, in 2014, the Commission decided to place the topic "*Jus cogens*" on its long-term programme of work.[1] The General Assembly, at its sixty-ninth session, took note of the inclusion of the topic on the Commission's long-term programme of work.[2] At its sixty-seventh session, in 2015, the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[3] The General Assembly has since taken note of this development.[4]

2. This first report serves two primary purposes and proposes three draft conclusions identifying the scope of the topic and setting out the general nature of *jus cogens* international law. The first purpose of the report is to set out the Special Rapporteur's general approach on the topic and, on that basis, to obtain the views of the Commission on the preferred approach. The second purpose is to give a general overview of conceptual issues relating to *jus cogens*. Both the general approach and the conceptual issues will necessarily be provisional. They will need to be reassessed and, perhaps, adjusted as work on the topic continues. In other words, the work on the topic will necessarily need to be fluid and flexible to allow for adjustment as the project proceeds.

3. The first purpose of the report concerns methodological questions relating to the overall consideration of the

[1] *Yearbook … 2014*, vol. II (Part Two), p. 164, para. 268 and annex. An earlier proposal, by Mr. Andreas Jacovides, to include the topic on the Commission's programme of work is contained in *Yearbook …1993*, vol. II (Part One), document A/CN.4/454, at p. 213.

[2] General Assembly resolution 69/118 of 10 December 2014, para. 8.

[3] *Yearbook … 2015*, vol. II (Part Two), p. 13, para. 21.

[4] General Assembly resolution 70/236 of 23 December 2015, para. 7.

topic. There are a number of methodological questions that the nature of the topic raises. First among these is the chronological order in which the main issues identified in the syllabus will be addressed.[5] The second issue concerns the relative weight to be accorded to various materials. There is far more literature on the subject of *jus cogens* than there is State practice or jurisprudence. This raises the question of how the Commission is to approach the materials for the purpose of arriving at conclusions. A third methodological question concerns whether the project should aim to provide, as indicated in the syllabus, an illustrative list of norms that currently qualify as *jus cogens* or whether it would be best not to include such a list. Finally, the report will also cover, as a methodological issue, the work programme.

4. The second purpose, providing a general overview of the conceptual issues, is more substantive. It concerns, principally, the nature and definition of *jus cogens*. While there are other conceptual issues, such as the relationship between *jus cogens* and *erga omnes* obligations or the relationship between *jus cogens* and non-derogation, that could have been addressed in the present report, the Special Rapporteur felt it prudent to address those issues in subsequent reports. The relationship between *erga omnes* obligations and *jus cogens* will be considered as part of the consequences or effects of *jus cogens*, while the issue of non-derogation clauses in human rights treaties will be treated in the second report on the identification of norms having a peremptory character. The present report is, therefore, limited to identifying the core nature of *jus cogens*. This question will be addressed on the basis of a brief historical survey of *jus cogens*, the practice of States, the previous work of the Commission, jurisprudence and the literature. As already stated, questions of definition and, in particular, of the nature of *jus cogens*, will need to be revisited as the project proceeds and more practice is evaluated.

5. Prior to addressing the questions identified above and in order to provide an important context, the report will begin in chapter I by briefly surveying the views expressed by States in relation to the inclusion of this topic on the agenda of the Commission. Chapter II of the report will then address, briefly, the methodological questions identified above. Chapter III will provide a historical evolution of *jus cogens*, with a view to revealing its current nature and identifying its core elements. Chapter IV will provide a general synthesis of the nature of *jus cogens* and offer a working definition. Chapter V looks at the form of the Commission's product on the topic. Chapter VI will propose three draft conclusions, while chapter VII will set out the future work programme.

[5] The syllabus identified four main issues for considerations, namely: (*a*) the nature of *jus cogens*; (*b*) requirements for the identification of *jus cogens*; (*c*) an illustrative list of norms; (*d*) the consequences or effects of *jus cogens*. See *Yearbook … 2014*, vol. II (Part Two), annex, p. 173, para. 13.

Chapter I

Debate in the Sixth Committee on the topic

6. It is useful to begin by setting out that, on the whole, States were welcoming of the decision of the Commission to include the topic, first in its long-term programme of work and subsequently in its current programme of work. To illustrate, in 2014, of the 18 statements commenting on the Commission's decision to include the topic in its long-term programme of work, 13, representing 48 States, expressed support for the inclusion. Two States were ambiguous. Poland proposed an additional topic connected to *jus cogens*, namely the duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of *jus cogens*, without expressing a view on the current topic,[6] while Japan expressed both scepticism and interest in the topic.[7] Only three States, namely France, the Netherlands and the United States of America, expressed doubts as to the viability and appropriateness of the Commission taking up the topic.[8]

7. Similarly, in 2015, a large number of States expressed support in the Sixth Committee for the inclusion of the topic on the agenda of the Commission.[9] A few, however, continued to express reservations concerning the Commission's decision to include the topic on its agenda.[10] Some States, including those generally supportive of the work on the topic, stated that the Commission should approach it with caution.[11]

8. A significant number of States noted that, while there was general acceptance of the concept of *jus cogens*, its precise scope and content remained unclear.[12] Many of these States took the view that the Commission's study of the topic could help bring clarity to international law

[6] A/C.6/69/SR.20, para. 30.

[7] *Ibid.*, para. 50.

[8] The United States "did not believe it would be productive for the Commission to add the topic of *jus cogens* to its agenda", *ibid.*, para. 123. France was "sceptical about the possibility of reaching a consensus on the topic", A/C.6/69/SR.22, para. 37. In the view of the Netherlands "[i]t was hard to determine a specific need among States with regard to the codification or progressive development of the notion of *jus cogens*": A/C.6/69/SR.20, para. 13.

[9] See, e.g., Ecuador (on behalf of the Community of Latin American and Caribbean States (CELAC)), A/C.6/70/SR.17, para. 32; Peru, *ibid.*, para. 51; Romania, *ibid.*, para. 96; United Kingdom of Great Britain and Northern Ireland, A/C.6/70/SR.18, para. 9; Japan, *ibid.*, para. 23; and El Salvador, *ibid.*, para. 50.

[10] In addition to the three States that expressed reservations at the sixty-ninth session, see the statement by Israel, *ibid.*, para. 6. See also China, *ibid.*, para. 19, which requests the Commission to "collect information on State practice before undertaking an in-depth study on the topic"; also the Netherlands, A/C.6/70/SR.17, para. 78; United States, A/C.6/70/SR.19, para. 20; France, A/C.6/70/SR.20, para. 25.

[11] See, e.g., Spain, A/C.6/70/SR.18, para. 60.

[12] See, e.g., Austria, A/C.6/69/SR.19, para. 110; Finland (on behalf of the Nordic States), *ibid.*, para. 86; Japan, A/C.6/69/SR.20, para. 50; and Slovakia, *ibid.*, para. 76. South Africa stated that "the concept of *jus cogens* norms remained nebulous": *ibid.*, para. 109. France noted the "disagreement about the theoretical underpinnings of *jus cogens*, its scope of application and its content remained widespread": A/C.6/69/SR.22, para. 37.

relating to *jus cogens*.[13] There have, however, been differences in points of emphasis. Some States took the view that all four elements identified in the syllabus should be addressed.[14] Many States took the view that the greatest contribution that the Commission could make to the understanding of *jus cogens* was on the requirements for the elevation of a norm to the status of *jus cogens*.[15]

9. There was, however, more divergence on whether the Commission should provide an illustrative list. Several States, including those generally supportive of the topic, raised some concern about the illustrative list. The Nordic States, while noting the Commission's proviso that an illustrative list would by definition not be exhaustive, expressed concern that producing an illustrative list would entail a risk that other equally important rules of international law would in effect be given an inferior status.[16] In a similar vein, Spain suggested that the production of a list, even if carefully qualified as an illustrative list, would come to be seen as a *numerus clausus*.[17] South Africa, in its statement, raised the question whether an illustrative list would, even if it were reliable at the time of its publication, eventually be incomplete.[18] Nonetheless, a number of States felt that producing an illustrative list would provide an important contribution to international law. Slovakia said that it "looked forward to seeing *jus cogens* norms identified".[19] Austria similarly expressed the view that the Commission "should establish an illustrative list of norms which had achieved the status of *jus cogens*".[20] For Ireland, equally as important as identifying which norms had reached the level of *jus cogens*, was the question which norms had not reached that level.[21] New Zealand, however, adopted a wait-and-see approach, suggesting that basic work on the requirements for elevation to the status of *jus cogens* should "form the basis for consideration of whether it would be productive to undertake the even more difficult task of developing an illustrative list of norms that had achieved the status of *jus cogens*".[22]

10. Many delegations reflected on the growth of jurisprudence on the topic of *jus cogens*. Finland, on behalf of the Nordic States, referred to decisions at both "the international and national levels" invoking *jus cogens*.[23] It was felt that the consideration of this topic by the Commission would help judges, especially judges in domestic courts, in understanding the concept of *jus cogens*, which was now invoked more and more frequently.[24] The question of judicial practice has, however, raised an important methodological question. Some States suggested that the consideration of the topic should be based on relevant State practice rather than judicial practice. Indeed, the statement by the United States, expressing non-support of the project, was based partly on the fact that the syllabus, while containing a helpful overview of the treatment of *jus cogens* by the International Court of Justice, referenced few examples of actual State practice.[25] This may suggest that if the Commission does embark on the topic, it should do so on the basis of actual State practice rather than solely on the basis of judicial practice. Other States, most notably the Nordic States, expressed the view that the consideration of the topic should be based on judicial practice, in particular the jurisprudence of the International Court of Justice.[26]

11. Most States recognized that the importance of the topic required that the Commission approach it with care and sensitivity. Trinidad and Tobago, for example, while welcoming the inclusion of the project in the long-term programme of work of the Commission, stressed that it "should be addressed with due care and circumspection".[27] The Special Rapporteur agrees with these words of caution and intends to take great care in ensuring that his reports reflect contemporary practice and do not stray into untested theories. In particular, it should be emphasized that the object of the Commission's study of the topic is not to resolve theoretical debates—although these will necessarily have to be referred to—but rather to provide a set of conclusions that reflect the current state of international law relating to *jus cogens*.

[13] See, e.g., Nordic States, A/C.6/69/SR.19, para. 86. See also Ireland ("[t]he Commission's work would help to elucidate what was—and, equally important, what was not—encompassed within the concept of *jus cogens*"), *ibid.*, para. 178; El Salvador, A/C.6/69/SR.20, para. 91; South Africa, *ibid.*, para. 109; New Zealand, A/C.6/69/SR.21, para. 33; and Cyprus, A/C.6/69/SR.24, para. 70.

[14] See, e.g., statement by Austria, A/C.6/69/SR.19, para. 110; statement by Ireland, *ibid.*, para. 178. See also statement by Romania, *ibid.*, para. 146.

[15] See South Africa, A/C.6/69/SR.20, para. 109. See also Nordic States, A/C.6/69/SR.19 , para. 86 (the Commission's work might contribute "to clarifying the exact legal content of *jus cogens*, including the process by which international norms might qualify as peremptory norms"). The Netherlands, though not supportive of the project, noted that there "might be merit in providing a broad overview of the way in which it was determined that *jus cogens* was conferred on a particular rule": Netherlands, A/C.6/69/SR.20, para. 14.

[16] Nordic States, A/C.6/69/SR.19, para. 87.

[17] Spain, A/C.6/69/SR.21, para. 42.

[18] South Africa, A/C.6/69/SR.20, para. 113.

[19] Slovakia, *ibid*., para. 76.

[20] Austria, A/C.6/69/SR.19), para. 110.

[21] Ireland, *ibid*., para. 178.

[22] New Zealand, A/C.6/69/SR.21, para. 33.

[23] Nordic States, A/C.6/69/SR.19, para. 85. For other statements suggesting existence of jurisprudence on *jus cogens*, see South Africa, A/C.6/69/SR.20, paras. 108–110; United States, *ibid*., para. 123; Republic of Korea, A/C.6/69/SR.21, para. 46.

[24] See Nordic States, A/C.6/69/SR.19, para. 85, and South Africa, A/C.6/69/SR.20, para. 109. See also Romania, A/C.6/69/SR.19, para. 146.

[25] See United States, A/C.6/69/SR.20, para. 123.

[26] See Nordic States, A/C.6/69/SR.19, para. 85.

[27] Trinidad and Tobago, A/C.6/69/SR.26, para. 118. See also Japan, A/C.6/69/SR.20, para. 50 ("[t]he Commission should therefore proceed prudently and on solid bases"); New Zealand, A/C.6/69/SR.21, para. 33 (which called for a "careful and detailed analysis by the Commission"); and Republic of Korea, *ibid*., para. 46.

Chapter II

Methodological approach

12. The syllabus identifies four substantive elements to be addressed by the Commission, namely, the nature of *jus cogens*, the requirements for the elevation of a norm to the status of *jus cogens*, the establishment of

an illustrative list of norms of *jus cogens* and the consequences or effects of *jus cogens*. All of these issues are, in some way, interrelated. The nature of *jus cogens* will undoubtedly influence the requirements. The theoretical underpinnings of *jus cogens* will influence the rules applicable to the elevation of a norm to the status of a norm of *jus cogens*. A positive law approach, for example, is more likely to be associated with the so-called double-consent theory,[28] while a natural law approach is likely to rely on values independent of the will of States.[29] Moreover, both the nature of *jus cogens* and the requirements for elevation of a norm to that status are central to a determination of which norms constitute *jus cogens*. Yet much would be learned about the nature and the requirements of *jus cogens* from an analysis of some norms that qualify as *jus cogens*. As will become evident, the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention") defines *jus cogens* in terms of its consequences—"a norm from which no derogation is permitted".[30] Thus, the question of the consequences also influences and is influenced by the other three elements.

13. The interconnected nature of the elements identified in the syllabus raises a methodological question about the sequence of the study of the topic; it might be said to depend on whether a deductive or an inductive approach is adopted. In the view of the Special Rapporteur, it is not necessary to adopt a firm approach on this methodological question. Rather, recognizing the interconnected nature of the elements, the Special Rapporteur intends to adopt a fluid and flexible approach. At times draft conclusions, either proposed or adopted, will need to be reconsidered in the light of new determinations on subsequent elements. To avoid unnecessary complications, the adaptations can be done prior to the adoption of draft conclusions on first reading. Bearing this in mind, the Special Rapporteur intends to follow the sequence of the elements as proposed in the syllabus.

14. One methodological issue that arises from the debates in the Sixth Committee is whether the work of the Commission should be based on State practice, jurisprudence or writings. As described above, the question of the role of State practice may explain, at least partly, the hesitance of some States to fully embrace the topic.[31] In the view of the Special Rapporteur, there is no need to depart from the Commission's normal method of work. The Commission should proceed according to the established practice of considering a variety of materials and sources in an integrated fashion. As is customary, the Commission approaches its topics by conducting a thorough analysis of State practice in all its forms,[32] judicial practice, literature and any other relevant material. As is the case with the other topics, the Commission will need to assess the particular weight to be given to the various materials.

15. As discussed above, delegations in the Sixth Committee have expressed differing views concerning the proposal to provide an illustrative list. Some States expressed concern that an illustrative list, no matter how carefully the Commission explained that it was only an illustrative list, would still come to be seen as a closed list. However, in the view of the Special Rapporteur, the Commission should not refrain from producing an illustrative list only because, despite clear explanations to the contrary, such a list might be misinterpreted as being an exhaustive list.

16. Nonetheless, there may be different reasons to reconsider the illustrative list. The topic, as proposed in the syllabus, is inherently about process and methodology rather than the content of specific rules and norms. In other words, like the Commission's consideration of the topic of customary international law, it is not concerned with the substantive rules; rather, the present topic is concerned with the process of the identification of the rules of *jus cogens* and its consequences. An illustrative list might have the effect of blurring the fundamentally process-oriented nature of the topic by shifting the focus of discussion towards the legal status of particular norms, as opposed to the identification of the broader requirements and effects of *jus cogens*.

17. However, even without providing an illustrative list, the Commission would need to provide some examples of *jus cogens* norms in order to provide some guidance about which norms constitute *jus cogens*. In other words, by addressing various elements of the topic, such as the nature of *jus cogens*, the criteria for elevation to the status of *jus cogens* and the consequences of *jus cogens*, the Commission would, in the commentaries, need to provide examples to substantiate its conclusions. In this way there would, even if indirectly, be an illustrative list. The Commission may even decide, at the end of its consideration of the topic, to collect the examples used in the commentaries of norms of *jus cogens* and place them in an annex as an illustrative compilation of norms that have been referred to. The Special Rapporteur would be grateful for the views of the Commission—and indeed Member States—on this very important question. In particular, comments might focus on whether to have such an annex at all and, if so, how to determine which examples to refer to; for example, whether to refer only to norms which the Commission agreed met the criteria for *jus cogens*, to all norms that had been used by the Commission to exemplify aspects of *jus cogens* or to norms in court judgements that the Commission had relied upon.

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[28] See, e.g., Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, p. 12 ("Art. 53 requires a 'double consent' "); Vidmar "Norm conflicts and hierarchy in international law …", p. 25.

[29] See, e.g., Janis, "The nature of *jus cogens*" [*Philosophy of Law: Classical and Contemporary Readings*].

[30] Art. 53 of the 1969 Vienna Convention. See Kolb, *Peremptory International Law:* Jus cogens, p. 2 ("[i]n other words, *jus cogens* is defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation").

[31] See United States, A/C.6/69/SR.20, para. 123.

[32] According to draft conclusion 6 [7] of the draft conclusions on the identification of customary international law, provisionally adopted by the Drafting Committee, "[f]orms of State Practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts". See A/CN.4/L.869.

Chapter III

Historical evolution of the concept of *jus cogens*

A. Period before the Second World War

18. The nature of *jus cogens* in modern international law is shaped by what can be described as a rich history. Some authors trace the rise of the *jus cogens* in international law to the first half of the twentieth century, often referring to the influential work of Alfred Verdross.[33] Both the concept or idea and the principle that international law contains within it the fundamental norms that cannot be derogated fromcan, however, be traced much further back.[34] A caveat is necessary here. While the historical analysis below may have some influence on the identification of some elements of *jus cogens*, the primary purpose of this historical survey is only to identify developments that have contributed to the evolution of *jus cogens*. Some of the developments, while perhaps similar to *jus cogens*, will themselves not constitute *jus cogens*. The conclusion should not be reached that the developments are themselves illustrations of peremptory norms in international law. Rather, they laid the groundwork for the acceptance of peremptory norms in international law.

19. It appears that the idea of non-derogable rules of law has its antecedents in classical Roman law. The term *jure cogente* (*jus cogens*) itself first appears, albeit in an unrelated context, in the *Digest* of Justinian.[35] However, the idea of rules from which no derogation was permitted can itself be found in Roman law. In several passages in the Digest, there appears the observation that "*Jus publicum privatorium pactis mutari non potest*", meaning, "private pacts cannot derogate from public law".[36] According to Kaser, "*jus publicum*" has a wider meaning than "public law" and refers to all those rules from which individuals may not depart by separate agreements.[37] Put another way, *jus publicum* referred to rules from which no derogation, even by agreement, was permitted—what may be termed *jus cogens*.[38] Similarly, the Codex of Justinian states: "*Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est*",[39] which means "agreements contrary to laws or constitutions, or contrary to good morals, have no force". This idea that agreements contrary to good morals have no force of law played a role in the emergence of *jus cogens*.

20. In a 1965 report by eminent jurists, including Eric Suy, it is stated that the term *jus cogens* could be found "in no text prior to the 19th century" but that the idea of a superior law, from which no derogation was permitted "runs like a thread through the whole theory and philosophy of law".[40] The report traces the first use of the phrase *jus cogens* to the pandectists—a nineteenth century German movement that was devoted to the study of Justinian's *Digest* (also known as the Pandects)—who accepted "as self-evident the distinction between '*jus cogens*' and '*jus dispositivum*'".[41]

21. However, the idea that there are some rules of international law that apply independent of the will of States existed much earlier than the nineteenth century and is often credited to writers such as Hugo de Groot (commonly known to international lawyers as "Grotius"), Emer de Vattel and Christian Wolff.[42] Those writers represented natural law thinking, which itself can be traced to Greek philosophy, which presupposed the existence of a "body of laws" that was "fundamental and unchangeable and often unwritten".[43] The first chapter of the first book of Grotius's *De Jure Belli Ac Pacis* is littered with references to immutable law, which in his view was natural law.[44] In an often quoted passage, he stated, that "the law of nature is so unalterable that God himself cannot change it … For instance then, since God cannot effect, that twice two should not be four, so neither can he, that what is intrinsically evil, should not be evil".[45] He identifies not only that the law of nature is unchangeable, but also that it is "just" and "universal".[46] Vattel, building on Grotius's

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[33] Petsche, "*Jus cogens* as a vision of the international legal order" (2010), pp. 238–239. See also Alexidze, "The legal nature of *jus cogens* …", p. 228, noting that "in the theory of international law the term *jus cogens* has appeared rather recently (from the beginning of the 1930s)". See Verdross, "Forbidden treaties in international law …". But see Stephan, "The political economy of *jus cogens*", p. 1081, footnote 21, that the earliest reference to *jus cogens* in the Westlaw database is in Lorenzen, "Commercial arbitration—International and interstate aspects". See also Frowein, "*Ius Cogens*", p. 443, stating that "from the perspective of international law as understood in the first part of the 20th century, *ius cogens* seemed hardly conceivable, since at that time the will of States was taken as paramount".

[34] For a detailed history of the concept or idea and the term *jus cogens*, see Suy, "The concept of *jus cogens* in public international law".

[35] See *Digestum Novum, Pandectarum Iuris Civilis Tomus Tertius, Sextae Partis Reliquum* (1560), D. 39.5 Pr 1.29, in which Papinius states: "Donari videtur quod nullo jure cogente conceditur" (loosely translated as a "Donation is that which is given other than by virtue of right").

[36] *Digestum Vetus, Pandectarum Ivris Civilis Tomus Primus, primam; Secundam, Tertiam Partes* (1560) D. II 14.38. The quote also appears at D. XI 7.20.

[37] Kaser, *Das Römische Privatrecht*, pp. 174–175.

[38] Suy, "The concept of *jus cogens* in public international law", p. 18.

[39] *Domini Nostri Sacratissimi Principis Iustiniani Codex, Libri Secundus*, 2.3.6.

[40] Suy, "The concept of *jus cogens* in public international law", p. 19.

[41] *Ibid.*

[42] See Alexidze, "The legal nature of *jus cogens* …", p. 228, who states: "the fathers of the bourgeois science of international law—Francisco de Vitoria, Francisco Suarez, Ayala Balthazar, Alberico Gentili, Hugo Grotius—stressed the peremptory character of rules of natural law, placing it above positive law." See also Jacovides, "Treaties conflicting with peremptory norms of international law …", p. 18.

[43] Lord Lloyd of Hampstead and Freeman, *Lloyd's Introduction to Jurisprudence*, pp. 107. For a full history of the evolution, see *ibid.*, pp. 106 *et seq.*

[44] *Grotius, Rights of War and Peace in Three Books*.

[45] *Ibid.*, book 1, chap. I, sect. X.5. See also book 1, chap. I, sect. XVII ("it follows, that what the law allows, cannot be contrary to the law of nature").

[46] *Ibid.*, book 1, chap. I, sect. XVII ("since the law of nature … is perpetual and unchangeable, nothing could be commanded by God, who can never be unjust, contrary to this law"); book 1, chap. I, sect. X.6 ("though … the law of nature, which always remains the same, is not changed; but the things concerning which the law of nature determines [may undergo some changes]"); book 1, chap. I, sect. III.1 ("Now that is unjust which is repugnant to the nature of society of reasonable creatures"); book 1, chap. I, sect. XII ("law of nature, which is generally believed to be [universal] by all, or at least, the most civilized nations.

doctrine, states that the "necessary law of nations is immutable" and that because of this, States "can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release from the observance of it".[47] This, he continues, "is the principle by which we may distinguish lawful conventions or treaties from those that are not lawful, and innocent and rational customs from those that are unjust or censurable".[48] Natural law thinkers, who dominated the doctrinal landscape of the seventeenth century, readily accepted the idea that natural law was immutable and that positive law—treaty law and customary international law—had to be consistent with natural law.[49]

22. The rise of the positivist law approach to international law in the nineteenth century saw the emergence of sovereignty and the will of the State as the dominant theory to understanding international law and its binding force.[50] In turn, natural law theories, and with them the idea of immutable law, gradually receded into the background. Yet natural law approaches to international law, even in the era of positivism, had not been totally eradicated and could be seen in the legal literature of the nineteenth and twentieth centuries.[51] Hannikainen identifies writers who, in the nineteenth century, relied on natural law thinking—or at any rate on elements outside of positive law—as well as those that relied on positive law for the idea that there were rules of international law that protected the interests of the international community which it was not possible to contract out of, that is, from which no derogation was permitted.[52] Moreover, even with the rise of positivism, the idea that there were certain rules that served the common interest persisted.[53] To this end, Alexidze points out that the "positivists of the nineteenth and twentieth centuries, except some most radical ones …, did not accept full freedom of the will of States making a treaty and attached peremptory character to 'universally recognized by civilized States' basic principles (origins) of international law".[54] In 1880, Georg Jellinek wrote that a treaty can be invalid if its obligations are impossible to perform, and that impossibility consists of both physical and moral impossibility.[55] This ambivalence of positivism towards the ideal of an "immutable law" is aptly explained by Hans Kelsen in his "The pure theory of law".[56] Otfried Nippold, for example, recognizes that immoral treaties, such as treaties permitting slavery, would be invalid under international law.[57] However, this conclusion is based entirely on positive law, and existing treaties.[58] Hannikainen himself, having assessed the literature of the period prior to

For a universal effect requires a universal cause. And there cannot well be any other cause assigned for this general opinion, that what is called common sense.").

[47] Vattel, *Law of Nations, or Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns*, sects. 8–9.

[48] *Ibid.*

[49] See Brierly, *The Law of Nations* …, pp. 18–20.

[50] On the rise of positivism in international law, and its influence on law-making, see Tladi and Dlagnekova, "The will of the State, State consent and international law …", pp. 112 *et seq*.

[51] See, e.g., Gómez Robledo, *El Ius Cogens Internacional: Estudio Histórico crítico*, p. 14, referring to the writings of Christian Friedrich Glück and Bernhard Windscheid.

[52] Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, pp. 45–48. Writers who, according to Hannikainen advanced natural law, or natural law-like, explanations for rules that could not be derogated from included the following: Phillimore, *Commentaries upon International Law*, de Martens, *Precis du droit de gens* …, Kohler, *Grundlagen des Völkerrechts*. Writers who, according to Hannikainen, explained the idea of compelling rules using positive law doctrines include Nippold, *Der völkerrechtliche Vertrag* ….

[53] Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, p. 35. See also Oppenheim, *International Law: A Treatise*, p. 528, and Hall, *A Treatise on International Law*, pp. 382–383 (asserting that "fundamental principles of international law" may "invalidate[], or at least render[] voidable," conflicting international agreements). See also Tomuschat, "The Security Council and *jus cogens*", p. 11, who more cautiously states that "[e]ven during the 19th century when the old natural law justifications for law had been definitively abandoned and increasingly the doctrine of positivism had been embraced in the sense that international law emerges from the coordinated will of States, some authors held that there was some hierarchically superior layer of norms which set limits on the treaty-making power of States."

[54] Alexidze, "The legal nature of *jus cogens* …", p. 229. See, e.g., Pillet, "Le droit international public, ses éléments constitutifs, son domaine, son objet", p. 21, who invokes a "droit absolu et impérieux" ["an absolute and compelling law"], which is the "le droit commun de l'humanité" ["the common law of humanity"]. Pillet, *ibid*., p. 14, does not equate this common law of humanity with classical natural law, in part because "la pratique des nations a toujours reconnu et observé" the common law of humanity ["the practice of nations has always recognized and observed" the common law of humanity]. See also Rougier, "La théorie de l'intervention d'humanite", p. 468, whose postulation about "l'existence d'une règle de droit supérieure aux legislations positives, le droit humain" ["the existence of a rule of law superior to positive law, human law"] might sound like an invocation of natural law, declares, p. 490, that "la notion de droit naturel, beaucoup plus morale que juridique, ne permettait pas d'arriver à une precision suffisante dans la détermination des actes que permettait ou prohibait cette règle suprême" ["the notion of natural law much more moral than legal did not allow the achievement of sufficient accuracy in determining the acts that are permitted or prohibited by the supreme rule"].

[55] Jellinek, *Die Rechtliche Natur der Staatenverträge* …, pp. 59–60 ("Daher kann ein Vertrag nur zu Stande kommen, wenn eine zulässige *causa* vorhanden ist. Dass nur das rechtlich und sittlich Mögliche gewollt werden darf, ergibt sich vor Allem aus der Erwägung dass man durch die Zulässigkeit des rechtlich und sittlich Unmöglichen als Vertragsinhaltes dem Völkerrecht den Boden unter den Füssen wegzieht. Alles völkerrechtliche Unrecht könnte ja sonst dadurch zum Rechte erhoben werden, dass man es zum rechtsgiltigen Inhalt eines Vertrages erhebt … und das ganze Vertragsrecht wäre somit illusorisch. Was insbesondere das sittlich Mögliche anbelangt, so folgt die ausschliessliche Zulässigkeit derselben als Vertragsinhalt aus dem ethischen Charakter des Rechts, welches seiner Natur nach nie das aus dem ethischen Gebiete gänzlich Ausgewiesene billigen darf. " ["Therefore a treaty can only be concluded, if a permissible *causa* exists. The reason why one must only want the legally and morally possible derives primarily from the consideration that by permitting the legally and morally impossible as the content of the treaty one would pull the rug out from under the feet of international law. Otherwise, every injustice under international law could be elevated to law by elevating it to the legally binding content of a treaty … and the entire international law could become just an illusion. With regard to the morally possible, its exclusive permissibility as the content of a treaty follows from the ethical character of law, which by its nature must not approve of what is completely rejected by the ethical domain"]). See also Tomuschat, "The Security Council and *jus cogens*", pp. 11–12, discussing the work of Wilhelm Heffter, who similarly relied on legal and moral impossibility as a positive law basis for the invalidity of treaties.

[56] Kelsen, "The pure theory of law …", pp. 483–484, para. 10 ("Law is, indeed, no longer presumed to be an eternal and absolute category … The idea of an absolute legal value, however, is not quite lost but lives on in the ethical notion of justice to which positivist jurisprudence continues to cling …The science of law is not yet wholly positivistic, though predominantly so").

[57] Nippold, *Der völkerrechtliche Vertrag* …, p. 187.

[58] *Ibid.* ("Die Beispiele welche die völkerrechtliche Geltung jenes Postulates beweisen sollen, dürfen nur aus positiven Vertragen geschöpf werden. Sobald man anfängt, selbst Beispiele zu konstruiren, predigt man 'Naturrecht'." ["The examples, which ought to prove the validity of these posits under international law, must only be acquired from positive treaties. As soon as one starts to construct examples by oneself, one starts to preach 'natural law'"]).

the end of the Second World War, makes the following observation about the idea of peremptory norms:

> it *cannot* be *concluded* that doctrine offered weighty evidence for the illegality or invalidity of treaties having an unlawful object. However, there was a great deal of insistence on the illegality or invalidity of such treaties, revealing the conviction of many writers that there were *certain norms* of an absolute character protecting vital common interests of States and the international order and permitting no derogation.[59]

23. The essence of the statement is that, while there were many doctrinal assertions about the illegality of treaties on the basis of non-derogable rules, there was little evidence in the form of State practice to support those assertions. Nonetheless, Hannikainen's account suggests that writings postulating non-derogability decreased, both in terms of quantity and intensity.[60] True though this may be, Hannikainen himself identified that already in the nineteenth century the prohibition of piracy was a deeply entrenched rule and that "[p]irates were generally considered as *hostis humani generis* (enemies of mankind)."[61] Presumably, therefore, States could not agree, even at that stage, to enter into treaties to facilitate the commission of piracy. On the historical fact of performance of immoral treaties concluded in history as State practice, Jellinek notes that the "legal effect flowing from this is as insignificant as the legal effect under private law that follows from the fact that a myriad of unethical contracts are concluded and performed".[62] Thus, even in the positive law-dominated era of the late nineteenth and early twentieth centuries, before the First World War, the idea of rules which States could not contract out of, seems to have been accepted, at least in the doctrine.

24. The period after the First World War saw a resurgence of the doctrine of higher norms. The adoption of the Covenant of the League of Nations played a significant role in the mainstreaming of the idea of non-derogable rules as an important stream of international law thinking. Hannikainen, for example, illustrates peremptory norms, or something akin to it, by referring to the Covenant of the League of Nations.[63] There are, of course, a number of provisions in the Covenant of the League of Nations that resonate with ideas of peremptoriness, which is not to say they are *jus cogens*. First, as can be seen from the historical evolution described above, the idea of "community" or "common interest" is an important element of any understanding of non-derogability—whether based on natural or positive law ideas. Article 11 of the Covenant declares that "war or threat of war … is … a matter of common concern to the whole League". More importantly, Article 20 of the Covenant provided that the Covenant abrogated all obligations inconsistent with its terms and that members would not "enter into any engagements inconsistent" with the terms of the Covenant. Being itself a treaty rule, applicable only to parties to the treaty and subject to amendment and even abrogation by any later agreement, Article 20 could not be advanced as an example of peremptoriness, at least in the classical understanding of *jus cogens*. Nonetheless, it is an important illustration of the evolution in State practice of non-derogability based on core values of the international community. This evolution was captured, in the period between the wars, by Alfred Verdross's famous article about forbidden treaties. Basing his approach on natural law, he wrote that "[n]o juridical order can … admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community".[64] Indeed Verdross, himself a member of the Commission, stated that the Commission's texts on *jus cogens* in the draft articles were influenced by this article.[65] Stephan writes that it was the horrors of the Second World War, and Nazi atrocities in particular, that compelled legal scholars to "try on the concept [of *jus cogens*] as a means of grappling" with these atrocities.[66]

25. In addition to the literature, and the limited State practice referred to by Hannikainen, there was also some judicial practice referring to peremptory norms. The separate opinion of Judge Schücking in the *Oscar Chinn* case before the Permanent Court of International Justice in 1934 explicitly refers to *jus cogens*.[67] In his opinion, Judge Schücking determined a treaty to be invalid on account of its inconsistency with another rule of international law, found in the General Act of Berlin.[68] He admits that the "doctrine of international law in regard to questions of this kind is not very highly developed".[69] Nonetheless, he states, it is possible

> to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.[70]

While this is non-derogation on the basis of a treaty, binding not universally but on participants to a prior treaty, it does reflect an openness to the idea of non-derogability.

26. *Jus cogens* was also invoked in an arbitral award under the French-Mexican Claims Commission, in the *Pablo Nájera* case.[71] In that award, the Claims Commission interpreted Article 18 of the Covenant of the League of Nations—a provision requiring registration of treaties—as a rule having "le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la

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[59] Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, pp. 48–49.

[60] *Ibid.*

[61] *Ibid.*, p. 36.

[62] Jellinek, *Die Rechtliche Natur der Staatenverträge*, p. 59 ("so folgt daraus so wenig die Rechtsnatur solcher Verträge, als dieselbe für das Privatrecht daraus folgt, dass factisch unzählige von der Rechtsordnung nicht anerkannte, unsittliche Verträge geschlossen und gehalten werden").

[63] Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, pp. 114–116.

[64] Verdross, "Forbidden treaties in international law …", p. 572.

[65] See Verdross, "*Jus dispositivum* and *jus cogens* in international law", p. 55.

[66] Stephan, "The political economy of *jus cogens*", p. 1081. See also Frowein, "*Ius Cogens*", p. 443.

[67] *Oscar Chinn case*, Judgment, 12 December 1934, Permanent Court of International Justice, General List No. 61, *Series A/B, No. 63, P.C.I.J. Reports*, p. 65, Separate opinion of Judge Schücking, p. 148.

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*, p. 149.

[71] *Pablo Nájera (France) v. United Mexican States*, French–Mexican Claims Commission, Decision No. 30-A, 19 October 1928, UNRIAA, vol. V (Sales No. 1952.V.3), pp. 466–508, at p. 470.

Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens*).”[72] Of course, the Claims Commission held that the rule only applied as between members of the League of Nations and that it did not apply in relations between members and non-members.[73] This determination by the Claims Commission, while not based on the contemporary understanding of *jus cogens* norms, is important for its acceptance of the idea that there are, as a matter of principle, rules from which no derogation is permitted.

27. While there was little practice to support the notion of non-derogable rules—and the practice that can be found related to non-derogation clauses in treaties and not typical *jus cogens*—the idea that there were some rules which States could not contract out of, was largely accepted, at least in the literature, even before the Second World War. What may have been in dispute was the basis of the principle, but not the principle itself.

B. Post-Second World War period prior to the adoption of the 1969 Vienna Convention

28. In the period after the Second World War, the most significant development relating to *jus cogens* was the adoption of the 1969 Vienna Convention and the work of the Commission that led to it. Like Article 20 of the Covenant of the League of Nations, Article 103 of the Charter of the United Nations is an example of a non-derogation provision.[74] As mentioned with respect to the Covenant, Article 103 is a treaty rule specifying priority, and not *per se* a norm *jus cogens*. Nonetheless, it too might be said to illustrate acceptance of hierarchy in international law. It was, however, the work of the Commission, together with the subsequent adoption of the 1969 Vienna Convention, that served to solidify the concept of *jus cogens* as part of the body of international law. It is important, therefore, to briefly describe the evolution of what eventually became article 53 of the 1969 Vienna Convention, through the debates within the Commission, the observations of States on the text of the Commission and the debates at the United Nations Conference on the Law of Treaties. While there are other provisions of the Convention on *jus cogens*—article 64 (emergence of new peremptory norms) and article 66, subparagraph (*a*) (disputes concerning the interpretation and application articles 53 and 64)—the focus for the purposes of this first conceptual report is on the text that became article 53, because it is that provision that provides a framework for the nature of *jus cogens* as presently understood.

29. It was in the third report of Sir Gerald Fitzmaurice—the eighth report on the law of treaties overall—that the term “*jus cogens*” first appeared.[75] In that report, Fitzmaurice proposed two provisions that invoked *jus cogens*. The text proposed by Fitzmaurice recognized that for a treaty to be valid “it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*”.[76] The text recognized that States may always, *inter se*, depart from rules of international law by means of an *inter se* agreement—*jus dispositivum*.[77] However, departure from such general rules of international law would be permissible only if the general rule in question was not one in the nature of *jus cogens*.[78] In explaining the rule, Fitzmaurice refers to the distinction between mandatory rules (*jus cogens*) and those rules “the variation or modification of which under an agreed régime is permissible”—the latter being *jus dispositivum*.[79] The commentary explains that, as a general rule, States can agree to modify generally applicable rules in their relations with each other.[80] It was, the commentary explained, “only as regards rules of international law having a kind of *absolute and non-rejectable character* (which admit of no ‘option’)”* that the question of invalidity of a treaty arises.[81]

30. While Fitzmaurice’s report mentioned *jus cogens*, the notion of the invalidity of a treaty on account of inconsistency with international law appeared earlier in the fourth report on the topic, namely in Sir Hersch Lauterpacht’s first report.[82] The provision proposed by Lauterpacht declared that a treaty would be void if, firstly, its performance involves an “act which is illegal under international law” and, secondly, if it is so declared by the International Court of Justice.[83] While, in his commentary, Lauterpacht echoes the sentiment that the principle as formulated “is generally,—if not universally—admitted”, it is treated with great caution.[84] He addresses the invalidity of a treaty that violates the rights of a third party and concludes that the “the true reason of” the invalidity in such cases is that such treaties have, as an object, “an act which is illegal according to customary international law”.[85] However, even where the treaty does not directly affect the interests of third States it may still be illegal.[86] For Lauterpacht, the basis of the illegality is that such treaties violate rules that have acquired “the complexion of generally accepted—and, to that extent, customary—rules of international law”.[87] In this regard, Lauterpacht’s conception of an illegal treaty is one that is inconsistent with international law. Yet that might suggest that a treaty cannot depart from rules of customary international law. Such a proposition could not be supported in international law. To resolve this apparent contradiction, Lauterpacht explains that the test for illegality “is not inconsistency with customary international law *pure and simple**” but rather “inconsistency with such overriding principles of international law which may be regarded as constituting

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[72] *Ibid.* [article 18 “has the character of a rule of law from which States, members of the League of Nations, are not free to derogate by special derogations among themselves (*jus cogens*)”].

[73] *Ibid.*, p. 472.

[74] Article 103 of the Charter provides that “obligations under the … Charter shall prevail” over obligations “under any other international agreement”.

[75] See *Yearbook … 1958*, vol. II, document A/CN.4/115, under the title “legality of the object”, pp. 26–27.

[76] Draft art. 16, para. 2, *ibid.*, p. 26.

[77] Draft art. 17, *ibid.*, p. 27.

[78] *Ibid.*

[79] Para. 76 of the commentary, *ibid.*, p. 40.

[80] *Ibid.*

[81] *Ibid.*

[82] *Yearbook … 1953*, vol. II, document A/CN.4/63, p. 90.

[83] Draft art. 15, *ibid.*, p. 154.

[84] Para. 1 of the commentary to draft art. 15, *ibid.*

[85] Para. 2, *ibid.*

[86] Para. 3, *ibid.*

[87] *Ibid.*, p. 155.

principles of international public policy (*ordre international public*)".[88]

31. Following on from Fitzmaurice, Sir Humphrey Waldock, the last Special Rapporteur for the Commission's work on the law of treaties, similarly proposed text on the illegality of a treaty because of inconsistency with norms of *jus cogens*.[89] In the respective draft article, Sir Humphrey Waldock proposed that a treaty "is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*".[90] In the commentary to the provision, he notes that, while the concept of *jus cogens* is controversial,[91] the "view that in the last analysis there is no international public order—no rule which States cannot at their own free will contract out of—has become increasingly difficult to sustain".[92] Nonetheless, he cautions that rules having the character of *jus cogens* are the exception rather than the rule.[93]

32. The idea that a treaty is void if it is inconsistent with fundamental rules of international law was generally welcomed within and beyond the Commission.[94] Members of the Commission felt that the principle of invalidity of a treaty on account of inconsistency with *jus cogens* was important.[95] While there were differences of opinion concerning the drafting and the legal and theoretical basis, the basic proposition itself was not questioned.[96] In 1966, expressing satisfaction at the approval by Governments of the Commission's texts, Mr. Yasseen noted that the "concept of *jus cogens* in international law was unchallengeable and … [n]o specialist in international law could contest the proposition that no two States could come to an agreement to institute slavery or to permit piracy, or that any formal agreement for either purpose was other than void".[97] As a result, in its commentary to the version of the text that eventually became article 50 of the draft articles on the law of treaties,[98] the Commission stated that "in *codifying** the law of treaties it must take *the position that today** there are certain rules and principles from which States are not competent to derogate by a treaty arrangement".[99] Similarly, in the commentary to draft article 50, the Commission stated that the view that there "is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain".[100] The Commission, thus clearly sought to show that the text it was putting forward was not *lex ferenda* but *lex lata*.

33. The view of the Commission, that international law as it stood at the time of the adoption of the draft articles on the law of treaties recognized the existence of general rules of international law from which no derogation was permitted, was widely shared by States both during the work of the Commission and at the Vienna Conference. In its comments to the Commission, for example, the Netherlands endorsed the principle underlying the provision.[101] Similarly, Portugal considered that the position adopted by the Commission was a "balanced one".[102] While it is impossible to reproduce all the comments expressing support, it is safe to say that almost all States expressed support.

34. While the comments of States were generally supportive, some States expressed reservations. However, with the exception of one State, none expressed objection

[88] Para. 4, *ibid.*

[89] *Yearbook …1963*, vol. II, documents A/CN.4/156 and Add.1–3, p. 36.

[90] Draft art. 13, *ibid.*, p. 52.

[91] Para. 1 of the commentary, *ibid.*

[92] *Ibid.*

[93] Para. 2 of the commentary, *ibid.*, p. 53 ("Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty").

[94] See, e.g., Alexidze, "The legal nature of *jus cogens* …", p. 230.

[95] See, e.g., *Yearbook … 1963*, vol. I, 682nd meeting, para. 18, where Mr. Rosenne stated that the principle was, from a political and moral standpoint, "of capital importance". See also, *ibid.*, 683rd meeting, para. 37, where Mr. Yasseen stated that the principle "was as important as it was delicate"; *ibid.*, para. 44, Mr. Tabibi opining that no "State could ignore certain rules of international law"; *ibid.*, para. 64, where Mr. Pal stated that "there could be no doubt that an international public order existed now and that certain principles of international law had the character of *jus cogens*"; *ibid.*, 684th meeting, para. 6, where Mr. Lachs observed that the concept of *jus cogens* "was a vital one for contemporary international law".

[96] See, e.g., *ibid.*, 683rd meeting, para. 29, where Mr. Briggs questioned the use of the term "*jus cogens*" and went on to propose that the text of draft article 13 be redrafted as: "A treaty is void if its object is in conflict with a peremptory norm of general international law from which no derogation is permitted except by a subsequently accepted norm of general international law". Similarly, Mr. Amado suggested that a reference to a "fundamental rule of law" might be more appropriate: *ibid.*, 684th meeting, para. 16. On the question of the philosophical basis, see Mr. de Luna, *ibid.*, 684th meeting, paras. 58 *et seq.* See also, *ibid.*, 685th meeting, para. 19, where Mr. de Luna, having listened to the debates concerning the philosophical basis of *jus cogens*, makes the following observations: "It was generally acknowledged that *jus cogens* formed part of positive law; it was disagreement over the content of positive law which was the source of the difficulty. If the term 'positive law' was understood to mean rules laid down by States, then *jus cogens* was by definition not positive law. But if 'positive law' was understood to mean the rules in force in the practice of the international community, then *jus cogens* was indeed positive law." See also Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 337.

[97] *Yearbook … 1966*, vol. I (Part I), 828th meeting, para. 26.

[98] Commentary to draft article 37 of the draft articles on the law of treaties provisionally adopted by the Commission, *Yearbook …1963*, vol. II, document A/5509, para. 17, p. 189, at p. 198.

[99] Para. (1) of the commentary, *ibid.*

[100] Para. (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, p. 177, para. 38, at p. 247. The same paragraph of the commentary also states as follows: "in codifying the law of treaties it must start from the basis that today there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character."

[101] Fifth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook …1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 21.

[102] *Ibid.* See also, as examples, the views of the United States, *ibid.*, p. 21 ("the concept embodied in this article would, if properly applied, substantially further the rule of law in international relations"); Algeria, *ibid.* ("[t]he Algerian delegation endorses the approach of the Commission to the question of *jus cogens*"); Brazil, *ibid.* ("whatever doctrinal divergencies there may be, the evolution of international society since the Second World War shows that it is essential to recognize the peremptory nature of certain rules"); Czechoslovakia, *ibid.*, p. 22 ("that provision is largely supported by State practice and international law and is endorsed by many authorities"); Ecuador, *ibid.* ("endorses the initiative of the Commission in including a violation of *jus cogens* as a ground for invalidating a treaty"); France, *ibid.* ("is one of the genuinely key provisions of the draft articles"); Ghana, *ibid.* ("endorses the Commission's approach to the concept of *jus cogens*"); and Philippines, *ibid.* ("welcomes the Commission's decision to recognize the existence of peremptory norms of international law").

to the provision.[103] The United Kingdom, for example, while not objecting to the idea of illegality on account of inconsistency with a peremptory rule, cautioned that "its application must be very limited".[104] Iraq, for its part, noted that the difficulties of transposing the hierarchy of law from domestic law to international law, where, it noted, whether "a rule is conventional or customary does not determine its value".[105] Nonetheless, Iraq submitted that, while great caution must be taken, "the notion of *jus cogens* is indisputable" in international law.[106] Only one State, Luxembourg, expressed disapproval of the provision.[107] Luxembourg took the view that the provision was likely to create confusion.[108] It stated that it interpreted the provision as being designed to "introduce as a cause of nullity criteria of morality and 'public policy' such as [were] used in internal law" and it questioned "whether such concepts [were] suitable for transfer to international relations which [were] characterized by the lack of any authority, political or judicial, capable of imposing on all States standards of international justice and morality".[109] Other than Luxembourg, no State questioned the basic proposition of the Commission that international law, as it stood at the time, provided for the nullity of treaties that were incompatible with some fundamental norms. On the basis of the overwhelming support for the position, the Commission adopted draft article 50, which provided as follows:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[110]

35. Draft article 50 of the Commission's text is the precursor of what is now article 53 of the 1969 Vienna Convention. The pattern of support for the principle behind draft article 50 can be observed in the negotiating history of what became article 53 of that Convention. The Soviet Union, for example, stated that "[t]reaties that conflicted with [*jus cogens*] … must be regarded as void *ab initio*", noting that this notion was recognized, not only by the Commission, but also by "eminent jurists".[111] Similarly, Mexico stated that the "character of [*jus cogens*] was beyond doubt",[112] while Israel stated that "the very notion of *jus cogens* was an accepted element of contemporary positive international law".[113]

36. There were, however, some States that, though supportive of the text, expressed or implied some doubt about whether it was part of *lex lata*.[114] On the whole, however, States at the Vienna Conference accepted the idea of *jus cogens* as part of international law and the discussions pertained more to the basis for *jus cogens* and deliberations on drafting suggestions. As Czechoslovakia observed, the disagreement over article 50 of the Commission's draft articles on the law of treaties pertained to "how *jus cogens* could be defined so as to protect the stability of contractual

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[103] Para. (1) of the commentary to draft article 50, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 177, para. 38, at p. 247 ("[m]oreover, if some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of today").

[104] *Yearbook …1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 22.

[105] *Ibid.*, p. 22.

[106] *Ibid.*, pp. 20–21.

[107] *Ibid.*, p. 20. See *contra* Tunkin, "*Jus cogens* in contemporary international law", p. 112 ("However, the comments by Governments of the United States, United Kingdom, France and some other countries … indicated that these governments were actually against the article on *jus cogens*").

[108] *Yearbook … 1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 20.

[109] *Ibid.*

[110] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 177, para. 38, at p. 183.

[111] Mr. Khlestov (Soviet Union), *Official Records of the United Nations Conference on the Law of 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; United Nations publication, Sales No. E.68.V.7), 52nd meeting of the Committee of the Whole, 4 May 1968, para. 3.

[112] Mr. Suárez (Mexico), *ibid.*, paras 6–8. See also Mr. Castrén (Finland), *ibid.*, para. 11 ("article 50 correctly stated an important principle, which must be retained in the draft"); Mr. Yasseen (Iraq), *ibid.*, para. 21 ("[T]he contents of article 50 were an essential element in any convention on the law of treaties. The article expressed a reality by setting forth the consequences in the realm of treaty law of the existence of rules of *jus cogens*. The existence of such rules was beyond dispute. No jurist would deny that a treaty which violated such rules as prohibition of the slave-trade was null and void."); Mr. Mwendwa (Kenya), *ibid.*, para. 28 ("by including in the draft a provision on *jus cogens*, the International Law Commission had at one and the same time recognized a clearly existing fact and made a positive contribution to the codification and progressive development of international law"); Mr. Fattal (Lebanon), *ibid.*, para. 42 ("almost all jurists and almost all States were agreed in recognizing the existence of a number of fundamental norms of international law from which no derogation was permitted, and on which the organization of international society was based"); Mr. Ogundere (Nigeria), *ibid.*, para. 48 ("[i]nternational morality had become accepted as a vital element of international law, and eminent jurists had affirmed the principle of the existence of *jus cogens*, based on the universal recognition of an enduring international public policy deriving from the principle of a peremptory norm of general international law"); Mr. Ruiz Varela (Colombia), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 26 ("in principle the entire world recognized the existence of a public international order consisting of rules from which States could not derogate"); Mr. Nahlik (Poland), *ibid.*, para. 32 ("[t]he hierarchy of rules in contemporary international law … was a logical outcome of the modern development of international law … [and] could no longer be doubted"); Mr. Jacovides (Cyprus), *ibid.*, para. 68, ("[i]n recognizing the existence of a corresponding rule in public international law the International Law Commission had made a very great contribution both to the codification and to the progressive development of international law"); Mr. de la Guardia (Argentina), *ibid.*, 54th meeting of the Committee of the Whole, 6 May 1968, para. 22 ("[T]he existence of *jus cogens* was disputed by writers. Nevertheless, he was prepared to admit that a general international law from which States could not derogate did in fact exist; to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality."); Mr. de Castro (Spain), *ibid.*, 55th meeting of the Committee of the Whole, 7 May 1968, para. 1 ("[T]he existence of peremptory rules of international law might seem so obvious that even to mention them would be superfluous. But the International Law Commission had been right to include article 50 in the draft convention, in view of the insistence of a minority on either denying the existence of *jus cogens* altogether, or severely restricting its scope."); Mr. Fleischhauer (Germany), *ibid.*, para. 31 ("only a few speakers had denied the existence of certain rules of *jus cogens* in international law and said that his delegation was equally of the opinion that such rules existed in international law").

[113] Mr. Rosenne (Israel), *ibid.*, 54th meeting of the Committee of the Whole, 6 May 1968, para. 36.

[114] Mr. Àlvarez Tabio (Cuba), *ibid.*, 52nd meeting, 4 May 1968, para. 34 ("article 50 represented an important contribution to the progressive development of international law and his delegation strongly supported it"); Mr. Fattal (Lebanon), *ibid.*, para. 42 ("[i]n spite of ideological difficulties, a shared philosophy of values was now emerging"); Mr. Ratsimbazafy (Madagascar), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 21 ("once the notion was established and recognized as such, it would become increasingly important in the law and life of the international community").

relations".[115] The majority of amendments proposed to the draft article and, as a consequence, a significant portion of the deliberation centred around substantive and procedural rules for identifying rules of *jus cogens*. France, for example, which has often been seen as the main opponent of *jus cogens* at the Conference, did not oppose the principle but rather insisted on clarity.[116] In unequivocal support for the notion of *jus cogens*, France declared at the Conference that "[t]he substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what [persons] of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person".[117] French concerns with the Commission's draft article 50, which were shared by some other delegations, centred on the criteria for identifying these rules to avoid abuse of *jus cogens* through unilateral invocation.[118] The concerns of the United States are equally instructive in this regard. The United States "accepted the principle of *jus cogens* and its inclusion in the convention".[119] In its view, however, "a State could not seek release from a treaty by suddenly adopting a unilateral idea of *jus cogens* in its international rules, and could not pretend to assert against other States its own opinion of the higher morality embodied in *jus cogens*".[120] It, like France, had therefore proposed an amendment to more explicitly provide for the criteria to identify *jus cogens* norms.[121] The United Kingdom, similarly, did "not dispute that international law now contained certain peremptory norms, in the sense in which that term was used in article 50".[122] Nonetheless, it "viewed with concern the uncertainty to which article 50 would give rise, in the absence of a sufficiently clear indication of the means of identifying the peremptory norms in question".[123] Thus, while there was certainly a great deal of debate and some concern expressed about the *jus cogens* provision, this related more to the detail and application of the rule embodied in text than the rule itself. To address the concerns of uncertainty raised by some States, the Conference adopted article 66, subparagraph (*a*), which permits a party to a dispute involving the interpretation or application of a *jus cogens*-related provision in the 1969 Vienna Convention, to "submit [the dispute] to the International Court of Justice for a decision".

37. There were, however, a handful of States at the Vienna Conference that expressed reservations about the principle of *jus cogens* itself. The position of Turkey was that the notion of *jus cogens* and the manner it had been articulated in the Commission's draft articles "were entirely new".[124] In its view, draft article 50 was concerned "not with a well-established rule, but with a new rule by means of which an attempt was being made to introduce into international law, through a treaty, the notion of 'public policy'—*ordre public*."[125] For that reason, Turkey stated that it could not support the inclusion of the provision.[126] Similarly, Australia, having pointed to the lack of practice on *jus cogens*, declared that in "the absence of any comprehensive list or any clear definition, even by illustration, of what norms of general international law would have the character of *jus cogens*, the Australian Government concluded that it would be wrong to include the article in the present terms, in a convention on the law of treaties".[127]

38. It should be clear from the above that, at the time of the adoption of the 1969 Vienna Convention, both members of the Commission and States, with few exceptions, generally accepted the idea of *jus cogens*. Moreover, writers at the time also generally accepted that there were some rules of general international law that States could not contract out of. McNair, for example, writing five years before the adoption of the Commission's draft articles on the law of treaties, observed that it was "difficult to imagine any society … whose law sets no limit whatever to freedom of contract".[128] The same is true, he

[115] Mr. Smejkal (Czechoslovakia), *ibid.*, 55th meeting of the Committee of the Whole, 7 May 1968, para. 24.

[116] Mr. de Bresson (France), *ibid.*, 54th meeting of the Committee of the Whole, 6 May 1968, para. 27 (France "could hardly formulate an objection to such [*jus cogens*]").

[117] *Ibid.*, para. 32.

[118] *Ibid.*, para. 28 ("[t]he problem, which was on the ill-defined borderline between morality and law, was that of knowing which principles it was proposed to recognize as having such serious effects as to render international agreements void, irrespective of the will of the States which had concluded them"); *ibid.*, para. 29 ("The 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."). See also Mr. Rey (Monaco), *ibid.*, 56th meeting of the Committee of the Whole, 7 May 1968, para. 32 ("Monaco welcomed the introduction of *jus cogens* into positive international law, but was anxious about the use that might be made of it"); Mr. Dons (Norway), *ibid.*, para. 37 ("The article gave no 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. Consequently, it would seriously impair the stability and security of international treaty relations."); Mr. Evrigennis (Greece), *ibid.*, 52nd meeting of the Committee of the Whole, 4 May 1968, para. 18 ("[t]here was universal recognition of the existence of a *jus cogens* corresponding to a given stage in the development of international law, but there were still some doubts about its content"). See, however, Mr. Bolintineanu (Romania), *ibid.*, 54th meeting of the Committee of the Whole, 6 May 1968, para. 58 (he "did not consider that there was any sound basis for the argument that it would be difficult to establish objectively the content of *jus cogens* and that there was a risk that that content would be determined arbitrarily by each State") and Mr. Koutikov (Bulgaria), *ibid.*, para. 70 (he "was surprised that other delegations had hesitated to accept the principle stated in article 50 purely because its scope could not yet be defined. No major principle governing international life had ever before had to wait until all its possible practical applications had been catalogued in detail before it was proclaimed a principle"). Similarly, Mr. Fattal (Lebanon), 52nd meeting of the Committee of the Whole, 4 May 1968, para. 45, responding to the fears of abuse, stated that it "was nothing new; any norm of international law could be used for such a pretext".

[119] Mr. Sweeney (United States), *ibid.*, 52nd meeting of the Committee of the Whole, 4 May 1968, para. 16.

[120] *Ibid.*, para. 15.

[121] *Ibid.*, para. 17.

[122] Mr. Sinclair (United Kingdom), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 53.

[123] *Ibid.* See also Mr. Fujisaki (Japan), *ibid.*, 55th meeting of the Committee of the Whole, 7 May 1968, para. 30 ("[h]is delegation firmly believed that no State should be entitled to have recourse to article 50 without accepting the compulsory jurisdiction of the [International] Court [of Justice]").

[124] Mr. Miras (Turkey), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 1.

[125] *Ibid.*, para. 6.

[126] *Ibid.*, para. 8.

[127] Mr. Harry (Australia), *ibid.*, 55th meeting of the Committee of the Whole, 7 May 1968, para. 13.

[128] McNair, *Law of Treaties*, pp. 213–214.

continued, of international law, even "though judicial and arbitral sources do not furnish much guidance upon the application of these principles".[129]

39. In addition, there were instances, even before the adoption of the Commission's draft articles or the 1969 Vienna Convention, when States invoked the potency of *jus cogens*. In 1964, for example, Cyprus contested, on the basis of the notion of peremptory norms, the validity of the Treaty of Guarantee between Cyprus, the United Kingdom, Greece and Turkey of 1960.[130] Furthermore, while the International Court of Justice had not, in this period, applied *jus cogens*, it was clearly a concept on its radar. The Court itself, without ruling on *jus cogens*, referred to it in the *North Sea Continental Shelf* cases.[131] The concept of *jus cogens* has, moreover, been explicitly invoked in individual opinions of the judges of the International Court of Justice. Judge Fernandes, for example, declared, as an exception to the *lex specialis* rule, that "[s]everal rules cogentes prevail over any special rules".[132] Judge Tanaka declared in his dissenting opinion in the *South West Africa (Second Phase)*, that "the law concerning the protection of human rights may be considered to belong to the *jus cogens*".[133] There is even evidence of *jus cogens* being invoked in domestic courts in the period leading up to the adoption of the 1969 Vienna Convention.[134]

40. After extensive deliberations showing general support for the idea of peremptory norms, the Vienna Conference adopted a slightly modified version of the Commission's text as article 53:[135]

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law 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.

41. This brief historical analysis illustrates that, at least up to the adoption of the Convention in 1969, the idea of peremptory rules of international law had been part of international law. States that questioned its inclusion in the 1969 Vienna Convention did so not out of belief that peremptory norms were not part of international law, but rather out of concern for the lack of clarity about the particular norms that had achieved the status of *jus cogens*. As described in paragraph 36 above, that particular problem was addressed by the inclusion of a dispute settlement provision permitting recourse to the International Court of Justice in the event of a dispute concerning *jus cogens*. It has survived the various phases of the development of international law and withstood different philosophical conceptions advanced to explain the basis of international law and its binding character. The historical analysis also shows, however, that the content and criteria for peremptory rules have, particularly during the codification phase that led to the adoption of the 1969 Vienna Convention, been elusive.

[129] *Ibid.*, p. 214.

[130] Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, p. 148. For a full discussion, see Jacovides, "Treaties conflicting with peremptory norms of international law …", especially pp. 39 *et seq.*

[131] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at p. 42, para. 72 ("[w]ithout attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties").

[132] *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6, dissenting opinion of Judge *ad hoc* Fernandes, para. 29.

[133] *South West Africa, Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6, dissenting opinion of Judge Tanaka, p. 298. See also *North Sea Continental Shelf* (footnote 131 above), dissenting opinion of Judge Tanaka, p. 182, declaring that reservations in conflict with a principle of *jus cogens* would be null and void. See, further, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, *I.C.J. Reports 1958*, p. 55, separate opinion of Judge Moreno Quintana, pp. 106–107, recognizing a number of rules as having "a peremptory character and a universal scope".

[134] See, e.g., Germany, *Beschluss des Zweiten Senats* [Decision of the Second Senate], 7 April 1965, Federal Constitutional Court (BVerfGE), 18, 441 (449), where the German Constitutional Court upheld a treaty, *inter alia*, because a rule relied upon to impugn a provision "würde nicht zu den zwingenden Regeln des Völkerrechts gehören" ["would not belong to mandatory rules of international law"].

[135] The Commission also included article 64 (on the emergence of a new peremptory norm of general international law ("*jus cogens*")) and article 71 (consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law).

Chapter IV

Legal nature of *jus cogens*

42. While the idea of *jus cogens* as part of international law, that is, *lex lata*, is not seriously questioned,[136] the criteria for its identification and its content have been the subject of disagreement. The differences of view as to the criteria for the identification of norms of *jus cogens* and some of the norms that constitute *jus cogens* have largely flowed from a philosophical difference on the foundations of *jus cogens* and differing interpretations of its content. A number of foundational bases, ranging from natural law doctrine to positivism, have been advanced to explain *jus cogens*. While it is not the objective of either the present report or the consideration of the topic, to resolve the theoretical debates concerning *jus cogens*, any attempt to distil criteria for its identification—and indeed its consequences—must be based on the appreciation of the theoretical debate surrounding its foundations. The debates, therefore, cannot be avoided. Moreover, even if not providing "the solution" to theoretical debate, the work of the Commission must be based on a sound and practical understanding of the nature of *jus cogens*, which necessitates a study of some of the theoretical bases that have been advanced. It is against such background that the present chapter surveys the theoretical debate concerning *jus cogens*.

[136] Šturma, "Human rights as an example of peremptory norms of general international law", p. 12.

43. The legal nature of *jus cogens* involves more than the theoretical or philosophical underpinnings of the concept. It concerns, in addition, the role of *jus cogens* beyond the 1969 Vienna Convention, which has already been recognized by the Commission.[137] While *jus cogens* is generally accepted as part of international law, there remain those who doubt its position in positive international law.[138] A brief commentary on its position in international law, taking into account developments since the adoption of the 1969 Vienna Convention is therefore called for.

A. Place of *jus cogens* in international law

44. The criticisms of and objections to *jus cogens* have been considered in various publications.[139] While, as has been noted, the number of those questioning the notion is fast diminishing,[140] it is still necessary to make clear that *jus cogens* is firmly established as part of current international law. The arguments advanced for showing that it is not—and in some instances should not be—part of international law vary. Orakhelashvili, for example, identifies lack of practice[141] and fear for the sanctity of treaties and incompatibility with *pacta sunt servanda* as arguments that have been advanced against *jus cogens*.[142] Similarly, Kolb identifies, as objections to *jus cogens*, the critique that the idea of *jus cogens* is simply not compatible with the nature and structure of international law,[143] that *jus cogens* is not recognized in the international legal order,[144] that, as a practical matter, *jus cogens* is without any real effect[145] and that *jus cogens* may undermine the foundations of the international legal order.[146]

45. It is not necessary to advance theoretical assertions in response to the various criticisms, which in any event have been ably addressed elsewhere.[147] What is important for the purposes of the Commission's work is whether *jus cogens* finds support in the practice of States and jurisprudence of international and national courts—the currency of the Commission's work.[148] While the views expressed in literature help to make sense of the practice and, may provide a framework for its systematization, it is State and judicial practice that should guide us. As described in the previous chapter, the widespread belief of States was that *jus cogens* formed part of international law at the time of the adoption of the 1969 Vienna Convention.

46. Since the adoption of the 1969 Vienna Convention, probably because of its adoption, references to *jus cogens* by States and in judicial decisions have increased manifold. The explicit references to *jus cogens* in the judicial practice of the International Court of Justice alone have been telling. Since the adoption in 1969 of the Vienna Convention, there have been 11 explicit references to *jus cogens* in majority judgments or orders of the International Court of Justice, all of which have assumed (or at least appear to assume) the existence of *jus cogens* as part of modern international law.[149] In the *Military*

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[137] See, e.g., arts. 26 and 40 of the articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex (the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77); commentary to draft guidelines 3.1.5.4 and 4.4.3 of the Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), para. 2, at pp. 225 *et seq.* and p. 294, respectively; "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr. 1 and Add.1) (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 374; and para. (33) 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, *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251, at p. 182.

[138] See, e.g., Glennon, "De l'absurdité du droit imperatif (*jus cogens*)"; Weisburd, "The emptiness of the concept of *jus cogens*, as illustrated by the war in Bosnia-Herzegovina"; Christenson, "*Jus cogens*: Guarding interests fundamental to international society"; Barnidge, "Questioning the legitimacy of *jus cogens* in the global legal order". See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, dissenting opinion of Judge *ad hoc* Sur, p. 606, para. 4 ("[L]et us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established.").

[139] See, e.g., Kolb, *Peremptory International Law:* Jus cogens, pp. 15–29. See also Orakhelashvili, *Peremptory Norms in International Law*, pp. 32–35.

[140] Linderfalk, "The effect of *jus cogens* norms …", p. 855.

[141] Orakhelashvili, *Peremptory Norms in International Law*, p. 32, citing Guggenheim.

[142] *Ibid.*, citing Schwarzenberger.

[143] See Kolb, *Peremptory International Law:* Jus cogens, pp. 15–22. Kolb in fact identifies several critiques, which all appear to be a variation of the incompatibility critique. They are as follows: first, the idea of *jus cogens* presupposes a "a superior authority entrusted with the task of enforcing those norms", which is not the case in international law (*ibid*., pp. 16–18); second, that *jus cogens* presupposes that there is a distinction between "general legislature" and the "subjects" of international law, which is not the case in international law since the law-makers, States, are also the subjects of international law (*ibid*., pp. 18–21); third, that the idea of *jus cogens* presupposes a hierarchy of norms, and international law is yet too underdeveloped to have such a hierarchy of norms (*ibid*., pp. 21–22).

[144] *Ibid.*, p. 23.

[145] *Ibid.*, pp. 23–24.

[146] *Ibid.*, pp. 25–27. Kolb notes that there are various strands to this critique of *jus cogens*, including that it "carries with it the danger that some elites, with their own hidden agendas, pretend to speak out for the international community (thereby hiding their interests behind lofty words) and impose their own vision of a suitable ideology under the lenitive and permissive guise of peremptory norms". See also South Africa, A/C.6/66/SR.13, para. 7 ("some legal commentators had pointed out [that] the concepts of *jus cogens* and of obligations *erga omnes*, which were central to the principle of universal jurisdiction, in practice were often used as instruments in hegemonic struggles"). Cf. Tomuschat, "The Security Council and *jus cogens*", p. 20, suggesting that "powerful States have never been friends of *jus cogens*. They realize that the consequences of *jus cogens* may lead to a shift of balance in favour of the international judiciary." Interestingly, in formulating its objections to the formulation of the Commission's text on *jus cogens*, France suggested that the lack of clarity would be to the detriment of the "weak[er]" States. See Mr. de Bresson (France), A/CONF.39/11, 54th meeting of the Committee of the Whole, 6 May 1968, para. 28.

[147] See Kolb, *Peremptory International Law:* Jus cogens, pp. 15 *et seq.*, and Orakhelashvili, *Peremptory Norms in International Law*, pp. 32 *et seq.*

[148] See statement by the United States, A/C.6/70/SR.19, para. 20 ("[G]iven the relative paucity of case law on the subject, he urged the Commission to focus on treaty practice, notably under the rules reflected in the Vienna Convention, and on other State practice that illuminated the nature and content of *jus cogens*, the criteria for its formation and the consequences flowing therefrom. Only research and analysis grounded in the views expressed by States was likely to add substantial value.").

[149] For recent references by the Court to *jus cogens*, see the following cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v.*

and Paramilitary Activities case, for example, the Court, without explicitly endorsing the idea of *jus cogens*, stated that both States and the Commission viewed the prohibition of the use of force as *jus cogens*.[150] To the extent that there is ambivalence in the Court's statement about *jus cogens*, it appears more directed at whether the prohibition qualifies as jus cogens rather than at the idea of *jus cogens* itself.[151] The advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provides yet another example of the Court's acceptance of *jus cogens* without deciding on it.[152] Although the Court states that there is "no need for the Court to pronounce on this matter", this is explicitly because, in the Court's assessment, the question before it did not call for answering "the question of the character of the humanitarian law which would apply to the use of nuclear weapons".[153] But the Court, in explicitly expounding on the character of *jus cogens*, appears to accept it as part of international law.[154] The Court was much more unequivocal in its acceptance of *jus cogens* as part of current international law in the *Armed Activities on the Territory of the Congo*, where the Court not only refers to *jus cogens*, but identifies the prohibition of genocide as "assuredly" having the character of *jus cogens*.[155]

47. In addition to express mentions in the majority decisions or opinions of the International Court of Justice, there have been, in total, 78 express mentions of *jus cogens* in individual opinions of the members of the Court.[156] It has also been explicitly recognized in the jurisprudence of other international courts and tribunals.[157] In *Kayishema*, for example, the International Criminal Tribunal for Rwanda stated that "the [prohibition of the] crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*".[158] Similarly in *Nyiramasuhuko*, the Appeals Chamber of the Tribunal noted that the discretion of the Security Council in defining crimes against humanity was "subject to respect for peremptory norms of international law (*jus cogens*)".[159] *Jus cogens* also finds expression in decisions of domestic courts.[160] In *Yousuf v. Samantar*, for example, the United States Court of Appeals for the Fourth Circuit stated that "as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign".[161] Similarly, the High Court of Kenya, in *Kenya Section of the International Commission of Jurists v. Attorney General* held that "the duty to

Serbia and Montenegro), Judgment, *I.C.J. Reports 2007*, p. 43, at pp. 104–120, paras. 147–184; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010*, p. 403; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, at pp. 140 *et seq.*, paras. 92 *et seq.*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal* (footnote 138 above), paras. 99–100; *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. 46–47, para. 87.

[150] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at p. 100, para. 190 (*jus cogens* "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law [and] [t]he International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter 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*'").

[151] Cf. Green, "Questioning the peremptory status of the prohibition of the use of force", p. 223 ("[i]t is the view of the present writer that the Court concluded here that the prohibition of the use of force was a peremptory norm, although it must be said that others have a different interpretation of this passage").

[152] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226.

[153] *Ibid.*, para. 83.

[154] *Ibid.* ("[t]he question whether a norm is part of the *jus cogens* relates to the legal character of the norm").

[155] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, *I.C.J. Reports 2006*, p. 6, at pp. 31–32, para. 64.

[156] Examples of individual opinions since the adoption of 1969 Vienna Convention include: *Barcelona Traction, Light and Power Company, Limited*, Judgment, *I.C.J. Reports 1970*, p. 3, separate opinion of Judge Ammoun, p. 304 ("[t]hus, through an already lengthy practice of the United Nations, the concept of *jus cogens* obtains a greater degree of effectiveness, by ratifying, as an imperative norm of international law, the principles appearing in the preamble to the Charter"); *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, separate opinion of Vice-President Ammoun, pp. 89 *et seq.* ("rightly viewed the act of using force with the object of frustrating the right of self-determination as an act of aggression, which is all the more grave in that the right of self-determination is a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances"); *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, dissenting opinion of Judge Schwebel, para. 88 ("[w]hile there is little agreement on the scope of *jus cogens*, it is important to recall that in the International Law Commission and at the Vienna Conference on the Law of Treaties there was general agreement that, if *jus cogens* has any agreed core, it is Article 2, paragraph 4"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, *I.C.J. Reports 1993*, p. 325, separate opinion of Judge Lauterpacht, para. 100 ("This is because the prohibition of genocide … has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*."); *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, separate opinion of Judge Ranjeva, p. 131 ("the *jus cogens* falls within the province of positive law"); *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, *I.C.J. Reports 2010*, p. 310, dissenting opinion of Judge Cançado Trindade, p. 381 ("[t]he basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*").

[157] See, e.g., *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*; *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, Arbitral Tribunal, UNRIAA (United Nations publication, Sales No. E.93.V.3), vol. XX, p. 119 (English translation contained in annex to the Application instituting proceedings of the Government of the Republic of Guinea-Bissau, 23 August 1989).

[158] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber, International Criminal Tribunal for Rwanda, *Reports of Orders, Judgements and Decision 1999*, vol. II, p. 824, at p. 880, para. 88.

[159] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015, Appeals Chamber, International Criminal Tribunal for Rwanda, para. 2136.

[160] See, famously, United Kingdom, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, House of Lords, [2000] 1 *Appeal Cases*, p. 147.

[161] United States, *Yousuf v. Samantar*, Judgment, 2 November 2012, United States Court of Appeals, 699 F.3d 763, 776–777 (Fourth Circuit, 2012), p. 19. See also United States, *Farhan Mohamoud Tani Warfaa v. Yusuf Abdi Ali*, Judgment, 1 February 2016, United States Court of Appeals for the Fourth Circuit, No. 14-1880, p. 18, declining to overturn the holding in *Samantar*.

prosecute international crimes has developed into jus-cogens and customary international law".[162] The South African Constitutional Court, for its part, noted that a "State's duty to prevent impunity … is particularly pronounced with respect to those norms, such as the prohibition on torture, that are widely considered peremptory and therefore non-derogable".[163] The idea of peremptory norms in international law is also reflected in regional judicial and quasi-judical practice.[164] In the *Case of Expelled Dominicans and Haitians*, the Inter-American Court of Human Rights stated that the "principle of equal and effective protection of the law and non-discrimination" were *jus cogens*.[165]

48. States too have routinely relied on *jus cogens* or peremptory norms in a variety of forums. Over and above statements specifically on the Commission's work on the law of treaties, there have been many statements on the topic before, for example, the General Assembly, in particular the Sixth Committee.[166] Similarly, States have also routinely appealed to *jus cogens* in their statements before the Security Council.[167] Statements before international courts and tribunals—where States are often motivated more by achieving a particular outcome—should be approached with some caution. Nonetheless, it is telling that States frequently refer to *jus cogens* in pleadings before international courts and tribunals and the Special Rapporteur is aware of no case before an international court or tribunal in which a State has disputed the notion of *jus cogens* as part of current international law.[168] What is more telling, however, is that even when it would be in the best interest of States to deny *jus cogens* in given cases, they have not done so.[169] References to *jus cogens* in practice have not been limited only to individual statements. United Nations organs themselves, in resolutions, have endorsed the concept as part of international law. Excluding resolutions relating to the Commission's work in which *jus cogens* appeared, the General Assembly has referred to the *jus cogens* in at least 12 resolutions, mainly in the area of torture.[170] It is also worth pointing

[162] Kenya, *Kenya Section of the International Commission of Jurists v. Attorney General & Another*, Judgment, 28 November 2011, High Court of Kenya, [2011] *Kenya Law Reports*, p. 14.

[163] South Africa, *National Commissioner of the South African Police Service v. the Southern African Human Rights Litigation Centre and Others*, Judgment, 30 October 2014, South African Constitutional Court, 2014 (12) *BCLR* 1428 (CC), para. 4. See also Germany, *East German Expropriation case: Mr. von der M*, judgment, 26 October 2004, German Constitutional Court, BvR/955/00 ILDC 66 (DE), para. 97 ("the Basic Law also adopts the gradual recognition of the existence of mandatory provisions … not open to disposition by the States (*ius cogens*)"); Greece, *Prefecture of Voiotia v. Federal Republic of Germany*, Judgment, 4 May 2000, Supreme Court, Case No. 11/2000, holding that crimes committed by the SS unit against civilian populations of a Greek village violated *jus cogens* norms. See further Italy, *Ferrini v. Republica Federale di Germania*, Case No. 5044/04, Judgment, 11 March 2004, Court of Cassation, where the Court accepted that deportation and forced labour are international crimes belonging to *jus cogens.*

[164] See, for example, *Al-Adsani v. the United Kingdom* [Grand Chamber], No. 35763/97, ECHR 2001-XI; see also *Stichting Mothers of Srebrenica and Others v. Netherlands* (dec.), No. 65542/12, ECHR 2013 (extracts), para. 4.3.9; *Case of Expelled Dominicans and Haitians v Dominican Republic*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2014, Inter-American Court of Human Rights, Series C, No. 282, para. 264 ("[r]egarding the right to nationality, the Court reiterates that the *jus cogens* … requires States … to abstain from establishing discriminatory regulations"). See also *Mohammed Abdullah Saleh Al-Asad v. Republic of Djibouti*, communication No. 383/10, Decision, African Commission on Human and Peoples' Rights, para. 179. For a detailed assessment of the jurisprudence of the Inter-American and European Courts, see Šturma, "Human rights as an example of peremptory norms of general international law", pp. 15 *et seq.*

[165] *Case of Expelled Dominicans and Haitians* (see previous footnote), para. 264. See also *Case of Mendoza et al v. Argentina*, Judgment (Preliminary objections, merits and reparations), 14 May 2013, Inter-American Court of Human Rights, Series C, No. 260, para. 199 ("[f]irst, the Court reiterates its case law to the effect that, today, the absolute prohibition of torture, both physical and mental, is part of international *jus cogens*").

[166] There are, of course, countless statements on *jus cogens* in the context of the Commission's work, in particular its work on the law of treaties. However, *jus cogens* has featured prominently in other contexts. See, for example, Kazakhstan, A/C.6/63/SR.7, para. 55 ("favoured the strict and unconditional observance of peremptory norms of international law, which formed the foundation of the modern world order, and supported the efforts of the international community to resolve important issues of the day on the basis of international law"); Azerbaijan, A/C.6/63/SR.8, para. 12; and Tunisia, A/C.6/64/SR.12, para. 16.

[167] See, for example, Mr. Nisirobi (Japan), 2350th meeting of the Security Council on 3 April 1982, S/PV.2350, para. 68 ("We stress … that this is not only one of the most fundamental principles of the Charter, but one of the most important norms of general international law, from which the international community permits no derogation. The principle of the non-use of force is, in other words, a peremptory norm of international law."); Mr. Elaraby (Egypt), 3505th meeting of the Security Council on 28 February 1995, S/PV.3505, p. 12 ("On the legal side, there is a consensus in the international community that there exist [peremptory] norms of international law better known as *jus cogens*. These norms cannot be violated."); Mr. Koštunica (Serbia and Montenegro), 5289th meeting of the Security Council on 24 October 2005, S/PV.5289, p. 10 ("we are not discussing the non-binding obligations of States, but, rather, the most stringent norms of international law—the *jus cogens* norms—respect for which is a *sine qua non* for the international community as a whole to function"); Mr. Adekanye (Nigeria), 5474th meeting of the Security Council on 22 June 2006, S/PV.5474, p. 20 (Resumption 1) ("[A] situation in which persons or entities are included on a list before the affected States are informed is against both the peremptory norms of fair trial and the principle of the rule of law. Nigeria is therefore opposed to any breach of those peremptory norms."); Mr. Mayoral (Argentina), 5679th meeting of the Security Council on 22 May 2007, S/PV.5679, p. 38 ("[T]he fight against terrorism must be carried out with legal mechanisms based on international criminal law and its basic principles. Let us recall that these are *ius cogens* norms of international law, and thus we cannot set them aside."); Mr. Al-Nasser (Qatar), 5779th meeting of the Security Council on 14 November 2007, S/PV.5779, p. 25 ("Article 103 of the Charter provides that obligations under the Charter prevail over other obligations, but this does not mean that they prevail over or supersede [peremptory] norms of *jus cogens*").

[168] See for example, statement by Counsel for Belgium in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Oral Proceedings, 13 March 2012 (CR 2012/3), para. 3.

[169] For example, while Germany sought to limit the effects of *jus cogens* in the *Jurisdictional Immunities of the States* case, its own statement not only did not dispute the existence of *jus cogens* but in fact positively asserted the character of certain norms as *jus cogens*. See, for example, the Memorial of the Federal Republic of Germany in *Jurisdictional Immunities of the State*, 12 June 2009, para. 86, where Germany states: "Undoubtedly, for instance, *jus cogens* prohibits genocide." See also statement by Counsel for Senegal, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Oral Proceedings, 15 March 2012 (CR 2012/4), para. 39; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Counter-Memorial of Senegal, 23 August 2011, para. 51.

[170] See, e.g., third preambular para. of General Assembly resolution 68/156 of 18 December 2013 on torture and other cruel, inhuman or degrading treatment or punishment ("*Recalling also* that the prohibition of torture is a peremptory norm of international law and that international, regional and domestic courts have recognized the prohibition of cruel, inhuman or degrading treatment or punishment as customary international law"); third preambular para. of General Assembly resolutions 60/148 of 16 December 2005, 61/153 of 19 December 2006 and

out that, since the adoption of the draft articles on the law of treaties, the Commission has itself recognized *jus cogens* and its effects, even beyond treaty law.[171]

49. Thus, while there may well be academic debates about the existence, in current international law, of *jus cogens*, States themselves have not questioned its existence. Even the three States that were unconvinced about the Commission taking up the current topic have not questioned the idea of *jus cogens* itself.[172] As pointed out by Paulus, "the concept of *jus cogens* seems to have lost its controversial character" and "the last consistent opponent among States, France, is said to be willing to make its peace with the concept".[173] For the purposes of the Commission's work on the topic, this debate may well contribute to uncovering some of the intricacies of *jus cogens*, but it should not overshadow the starting point, namely that international law recognizes that there are some rules from which no derogation is permissible.

B. Theoretical basis for the peremptory character of *jus cogens*

50. As is clear from the above, one of the most enduring elements of the *jus cogens* debate has been the theoretical basis of the peremptoriness of *jus cogens* norms. At different points in the evolution of the concept of *jus cogens*, different theoretical approaches have been advanced to explain the peremptory nature of *jus cogens* norms under international law. There are two main schools of thoughts that seek to explain the nature of *jus cogens*, namely natural law and positivism.[174] In addition to these more general theories, other theories have been advanced. Nonetheless, it is the natural and positive law theories that have dominated the doctrinal debate and it is useful to begin the assessment by a brief sketch and an assessment of those theories. The objective of this analysis is not to resolve the positive law/natural law debate. As with the positive law/natural law debate in the context of international law in general, it is probably not possible to resolve it, nor is it necessary. The various theories advanced to explain *jus cogens* are analysed and assessed with a view to identifying the core character of the concept of *jus cogens*. A caveat is necessary here: there is no natural law theory to *jus cogens*, just as there is no positive law theory to *jus cogens*; there are, rather, natural law theories and positivist theories. However, time and space do not permit a detailed account of each—at any rate a theoretical treatise is not the objective here. Instead, broad brushstrokes of each school of thought are provided.

51. It is useful to begin with the natural law approach, since *jus cogens*, undoubtedly, has its roots in the natural law approach to international law (see chap. III, sect. A, above).[175] Moreover, to the extent that *jus cogens* implies hierarchy, then natural law, which is premised on the idea of higher norms, whether derived from divinity, reason or some other source of morality, would seem to be a natural basis for *jus cogens*.[176] Adherents of the natural law approach include Mark Janis and Mary Ellen O'Connell.[177] These scholars note that the idea of international rules superior to and beyond the reach of State consent (or free will of the State) can only be explained through the natural law idea of superior law, which is based on morality and values.

52. While the natural law approach, with its historical links to the emergence of and resemblance to *jus cogens*, is attractive, it is not without its difficulties.[178] The primary difficulty remains the question of who determines the content of natural law. As O'Connell notes, "[c]ontemporary natural law theory still seems to suffer from reliance on the subjective opinion of scholars, judges, or Government officials".[179] Similarly, Kolb, critiquing the natural law approach, states that "each one

62/148 of 18 December 2007, on torture and other cruel, inhuman or degrading treatment or punishment ("*Recalling* also that a number of international, regional and domestic courts, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, have recognized that the prohibition of torture is a peremptory norm of international law and have held that the prohibition of cruel, inhuman or degrading treatment or punishment is customary international law").

[171] See examples cited above in footnote 137.

[172] See chap. I above.

[173] Paulus, "*Jus cogens* in a time of hegemony and fragmentation …", pp. 297–298. See, however, Tomuschat, "The Security Council and *jus cogens*", p. 18 ("[y]et, Articles 53 and 64 still remain among the few controversial provisions of the [1969 Vienna Convention] which embody the idea of progressive development of the law").

[174] Hameed, in "Unravelling the mystery of *jus cogens* in international law", suggests that the rival theories should be seen rather as "consent-based" and "non-consent-based" and that the current discourse is based on a misunderstanding of positivism in international law. See especially p. 55.

[175] See also Danilenko, *Law-making in the International Community*, p. 214, and Simma, "The contribution of Alfred Verdross to the theory of international law", p. 50. See further Orakhelashvili, *Peremptory Norms in International Law*, pp. 37–38 ("Arguably 'the conception of *jus cogens* will remain incomplete as long as it is not based on philosophy of values like natural law' as *jus cogens* grew out of the naturalist school … *Jus cogens* is similar to natural law in that it is not the product of the will of States and hence not comprehensible through a strict positivist approach.").

[176] On the hierarchical implication of *jus cogens*, see Danilenko, *Law-making in the International Community*, p. 211. See also Thirlway, *The Sources of International Law*, p. 155 ("the concept of peremptory norms implies a hierarchy of norms: a rule of *jus cogens* by definition prevails over a contrary treaty provision"). See also Dupuy and Kerbrat, *Droit International Public*, p. 323, about a new logic ("celle, révolutionnaire, de l'objectivisme inhérent à la notion de normes impératives, lesquelles s'imposent aux États devenus ainsi, au sens le plus littéral, *sujets* d'un ordre juridique alors doté d'une hiérarchie normative, dominée par le *jus cogens*" ["the revolutionary logic of, objectivism inherent in the notion of peremptory norms, which are binding on States, causes them to become, in the most literal sense, *subjects* of a legal order that has a normative hierarchy dominated by *jus cogens*"]). See further Rivier, *Droit International Public*, p. 565.

[177] See, e.g., Janis, "The nature of *jus cogens*" [*Connecticut Journal of International Law*], p. 361 ("[t]he distinctive character essence of *jus cogens* is such, I submit, as to blend the concept into traditional notions of natural law"); Janis, *International Law*, pp. 66 *et seq.*; Sohn, "The new international law …", pp. 13–14, referring to *jus cogens* as "practically immutable"—language reminiscent of natural law doctrine; Dubois, "The authority of peremptory norms in international law …", p. 134 ("the conclusion reached is that, in any coherent theory of the authority of peremptory norms, one must inevitably have recourse to some conception of natural law"). See also O'Connell, "*Jus cogens* …", especially p. 97.

[178] See, for discussion of these, Kolb, *Peremptory International Law:* Jus cogens, p. 31. See also Weil, "Le droit international en quête de son identité …", p. 274; Kamto, "La volonté de l'Etat en droit international", p. 353.

[179] O'Connell, "*Jus cogens* …", pp. 86–87. At p. 79, describing the approach of many natural law adherents, she states "[c]urrently, it appears that judges and scholars simply consult their own consciences when identifying *jus cogens* norms."

of us can postulate norms of justice [but the] question whether these norms are part of the positive law … is still not settled".[180] Apart from the question of indeterminacy, natural law approaches to *jus cogens* inevitably come up against the text of the 1969 Vienna Convention—unless one is to accept that that too is invalid. As Kolb notes, by providing that peremptory norms may only be modified by other peremptory norms, article 53 recognizes that norms of *jus cogens* are not "immutable"—a hallmark of natural law.[181] Similarly, if natural law existed independent of time and space—immutability—then article 64 of the 1969 Vienna Convention, which recognizes that "new peremptory norm(s)" may emerge, would be curious to say the least.[182] An additional issue with natural law approaches to *jus cogens* may be the requirement in article 53 that it be "recognized by the international community of States"—suggesting some role for the "will" of States in the emergence of a *jus cogens* norm.

53. Many contemporary writers, thus, view *jus cogens* from the positivist school.[183] Positive law, at its purest, is based on the idea of the free will of States and that it is only through consent that international law is made. Thus, States cannot be bound by rules to which they have not consented.[184] Under a positivist approach to *jus cogens*, norms can only achieve *jus cogens* status once consented to in some way by States. But this seems contrary to, or at least at odds with, the idea of higher set of norms from which no derogation, even if by consent or will of States, is permissible.[185] *Jus cogens* has, after all, even been said to be a revolution against "le froid cynisme positiviste" ["cold positivist cynicism"].[186] Moreover, it is difficult to understand why, if States have the free will to make any rules, some rules cannot be derogated from by consent.[187] Even if there were a way to address the question of emergence of peremptory rules through consent—or consensus—it is not clear why those States that have joined in the consensus could not later withdraw their consent, thus damaging the consensus.[188] Whether, as has been suggested, an acceptance of customary international law as the basis for *jus cogens* is an expression of a positive law approach will be the subject of the Special Rapporteur's second report.[189]

54. It should come as little surprise that support for both approaches can be found in judicial practice. The judgments of the International Court of Justice themselves have been less than clear on the basis for *jus cogens*. At times, the Court has appeared to advance a natural law approach to *jus cogens*, while at other times the Court has seemed to rely on positivist and consent-based thinking.[190] Individual opinions of the judges of the Court have been similarly diverse. Many such opinions have expressed *jus cogens* as a rejection of positivism and an embrace of the immutable, natural law approach while others have advanced a positive law approach to *jus cogens*.[191]

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[180] Kolb, *Peremptory International Law:* Jus cogens, p. 31.

[181] *Ibid.*, p. 32. On immutability, see the authorities cited in footnote 46.

[182] Saul, "Identifying *jus cogens* norms …", p. 31 ("natural law theories are centred on the identification of certain fixed natural law values, including those related to innate human needs, whereas the number and nature of *jus cogens* norms is assumed to develop in accordance with the changing nature of the international community").

[183] See Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 339. See, e.g., Tunkin, "*Jus cogens* in contemporary international law", p. 115 ("[i]t is my feeling that norms of general international law having the character of *jus cogens* may be created and are actually created by agreement between States as are other norms of general international law").

[184] See Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 339.

[185] See, e.g., Rivier, *Droit International Public*, p. 565 ("L'introduction du droit impératif en droit international est une révolution … Avec le droit impératif, l'accord de volonté n'est plus en toutes hypothèses un mécanisme créateur de droit. La validité des relations dépend aussi de leur contenu. Une définition matérielle du droit est ainsi consacrée, et l'on passe d'une conception traditionnelle du droit international à un modèle objectif dans lequel l'Etat souverain est assujetti à des exigences matérielles supérieures à sa volonté." ["The introduction of peremptory norms in international law is a revolution …With peremptory norms, consensus *ad idem* is no longer in any case a mechanism for the creation of law. The validity of relations also depends on their content. A substantive definition of law is thus established, and we move from a traditional conception of international law to an objective model in which the sovereign State is subject to material obligations higher than its will."]).

[186] Pellet, "Conclusions", p. 419.

[187] *Ibid.* Explaining the natural law theory critique of positivist approaches to *jus cogens*, Kolb, *Peremptory International Law:* Jus cogens, p. 30, states that it "is rooted in precisely that consent or will of States which *jus cogens* is there to limit or even brush aside. It would therefore be circular to explain *jus cogens* on the basis of consent or will." See also, generally, Tladi and Dlagnekova, "The will of the State, State consent and international law …", p. 112.

[188] Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 342.

[189] For the view that customary international law as the basis of *jus cogens* necessarily implies a positive law approach see *ibid.*, p. 339 ("[t]he leading positivist theory of *jus cogens* conceives of peremptory norms as customary law that has attained peremptory status through State practice and *opinio juris*").

[190] Although the Court in *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at p. 23, does not describe the prohibition against genocide as *jus cogens*, it seems to describe the prohibition in terms that suggest it is so and, moreover, in a way that places less weight on the consent of States as an element of law (The Court recognizes "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 … The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' …its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."). See also *ibid.*, p. 24, where the Court states that the prohibition of genocide has "moral and humanitarian principles [as] its basis". See further *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, 14 December 1999, International Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, p. 399, at p. 433, para. 60, where the Tribunal asserts that in the *Reservations to the Genocide Convention* advisory opinion, the International Court of Justice placed the crime of genocide on the level of *jus cogens*. Yet, in perhaps the Court's clearest invocation of *jus cogens*, *Questions relating to the Obligation to Prosecute or Extradite* (footnote 138 above), para. 99, the Court adopted what might be interpreted as a consent-based approach to the identification of *jus cogens*, at least to the extent that customary international law is seen as consent based ("[t]hat prohibition is grounded in a widespread international practice and on the *opinio juris* of States"). Similarly, the Court's tentative reference to the prohibition of the use of force as part of *jus cogens* in the *Military and Paramilitary Activities, Merits* (see footnote 150 above), para. 190, is based on, in addition to the Commission's work, the acceptance of the prohibition by States. There the Court cites frequent reference to the prohibition being *jus cogens* by representatives of States and the fact that both parties to the dispute accept the prohibition as part of *jus cogens*.

[191] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (footnote 152 above), declaration of Judge Bedjaoui, para. 13 ("A token of all these developments is the place which international law

55. The jurisprudence of other courts and tribunals is equally inconclusive about the basis of the binding nature of *jus cogens* norms. In *Furundžija*, for example, the International Tribunal for the Former Yugloslavia linked the *jus cogens* nature of the prohibition of torture to the values underlying the prohibition.[192] On the other hand, decisions of that Tribunal have also highlighted the acceptance by States of *jus cogens* norms.[193] The Inter-American Court of Human Rights, in one of its earliest decisions invoking *jus cogens*, adopted an apparently natural law approach, juxtaposing "the voluntarist conception of international law" with "the ideal of construction of an international community with greater cohesion … in the light of law and in search of justice", with the latter reflecting a move "from *jus dispositivum* to *jus cogens*".[194] Similarly, the Court's earlier decisions on the *jus cogens* nature of torture focused on the nature and gravity of torture rather than any State consent to the prohibition.[195] Nonetheless, in several decisions, the Inter-American Court has tended to focus on the consent and consensus as a basis for the *jus cogens* character of certain norms.[196] Moreover, several decisions of the Inter-American Court have suggested that, contrary to the immutability of the natural law approach, *jus cogens* norms evolve.[197] The support for both consent and natural law approaches can similarly be observed in domestic jurisprudence.[198]

now accords to concepts such as obligations *erga omnes*, rules of *jus cogens* … The resolutely positivist, voluntarist approach of international law still current at the beginning of the century … has been replaced by an objective conception of international law."); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, *I.C.J. Reports 1996*, p. 595, dissenting opinion of Judge *ad hoc* Kreća, para. 43 ("[*j*]*us cogens* creates grounds for a global change in relations of State sovereignty to the legal order in the international community and for the establishment of conditions in which the rule of law can prevail over the free will of States"); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 303, separate opinion of Judge Ranjeva, para. 3 ("[o]nly the impact of norms of *jus cogens* can justify any impugnment of the consensus principle"); *Armed Activities on the Territory of the Congo* (footnote 155 above), separate opinion of Judge *ad hoc* Dugard, para. 10; *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim (footnote 156 above), dissenting opinion of Judge Cançado Trindade, paras. 134 *et seq.* and 141 ("State consent and *jus cogens* are as antithetical as they could possibly be"). A distinctly positive law approach is visible in the separate opinion of Judge Schücking in the *Oscar Chinn* case (see footnote 67 above), p. 149, where the *jus cogens* character of a norm is based on agreement of States to the particular rule and an undertaking that such a rule would not be altered by some of them; see also *Barcelona Traction* (footnote 156 above), separate opinion of Judge Ammoun, pp. 311–312. See, especially, *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, dissenting opinion of Judge de Castro, p. 388, ("[t]he idea that the Moscow Treaty, by its nature, partakes of customary law or *ius cogens* is laid open to some doubt by its want of universality").

[192] See, e.g., *Furundžija* (footnote 157 above), para. 153 ("[b]ecause of the importance of the values [the prohibition of torture] it protects, this principle has evolved into a peremptory norm or *jus cogens*"). See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment and Opinion, 5 December 2003, Trial Chamber I, International Tribunal for the Former Yugoslavia, available from www.icty.org/en/case/galic, para. 98. See also *Jelisić* (footnote 190 above), para. 60, where the Tribunal adopted the value-based definition of the prohibition of genocide advanced by the definition of genocide of the International Court of Justice.

[193] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, Trial Chamber II, International Tribunal for the Former Yugoslavia, available from www.icty.org/en/case/stakic, para. 500 ("[i] t is widely accepted that the law set out in the Convention forms part of customary international law and constitutes *jus cogens*"). See also *Jelisić* (footnote 190 above), para. 60, where, with respect to the crime of genocide, the Court refers to the fact that the Genocide Convention has become "one of the most widely accepted international instruments relating to human rights".

[194] *Constantine* et al. *v. Trinidad and Tobago*, Judgment (Preliminary Objections), 1 September 2001, Inter-American Court of Human Rights, Series C, No. 82, para. 38.

[195] *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, Inter-American Court of Human Rights, Series. C, No. 114, para. 143 ("[t]here is an international legal system that absolutely forbids all forms of torture … and this system is now part of *ius cogens*"); see also *Gómez-Paquiyauri Brothers v. Peru*, Judgment (Merits, Reparations and Costs), 8 July 2004, Inter-American Court of Human Rights, Series C, No. 110, para. 112, and *Maritza Urrutia v. Guatemala*, Judgment (Merits, Reparations and Costs), 27 November 2003, Series C, No. 103, para. 92. A similar trend can be observed in early decisions on the *jus cogens* nature of forced disappearances. See, e.g., *Goiburú* et al. *v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, Inter-American Court of Human Rights, Series C, No. 153, para. 84 ("faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate … has attained the status of *jus cogens*").

[196] *Osorio Rivera and Family Members v. Peru*, Judgment (Preliminary objections, merits, reparations and costs), 26 November 2013, Inter-American Court of Human Rights, Series C, No. 274, para. 112, where the Court determined that the prohibition of enforced disappearance has achieved *jus cogens* status on the basis of, *inter alia*, "international agreement"; *Mendoza* (see footnote 165 above), para. 199, where the Court advanced, as the basis for *jus cogens* nature of the prohibition of torture "universal and regional treaties" which "establish this prohibition and the non-derogable right not to be subjected to any form of torture" as well as "numerous international instruments [that] establish that right and reiterate the same prohibition, even under international humanitarian law". Similarly, in *Almonacid-Arellano* et al. *v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, Series C, No. 153, paras. 98–99, the Court concludes that in 1973 the prohibition of crime against humanity was already *jus cogens* on the basis of several General Assembly resolutions and common article 3 of the Geneva Conventions for the protection of war victims.

[197] See, e.g., *Nadege Dorzema* et al. *v. Dominican Republic*, Judgment (Merits, Reparations and Costs), 24 October 2012, Inter-American Court of Human Rights, Series C, No. 251, para. 225 ("[a]t the current stage of the evolution of international law, the basic principle of equality and non-discrimination has entered the domain of *jus cogens*"). See also *Atala Riffo and Daughters v. Chile*, Judgment (Merits, Reparations and Costs), 24 February 2012, Inter-American Court of Human Rights, Series C, No. 239, para. 79. See, especially, *Dacosta Cadogan v. Barbados*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 September 2009, Inter-American Court of Human Rights, Series C, No. 204, para. 5 ("[t]he day must come when universal consensus—which for now does not appear to be near—establishes the prohibition of capital punishment within the framework of *jus cogens*, as in the case with torture").

[198] For an apparently natural law approach, see United States, *Siderman v. Argentina*, Judgment, 22 May 1992, United States Court of Appeals, Ninth Circuit, 965 F.2d 699, especially p. 715, which defines and discusses the nature of *jus cogens* in international law, its relationship to and distinction from customary international law (*jus dispositivum*), particularly the place (or lack thereof) of consent in the formation of *jus cogens* norms, and the superiority of *jus cogens* over other norms of international law ("While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of States. A State that persistently objects to a norm of customary international law … is not bound by that norm … In contrast *jus cogens* …is derived from values taken to be fundamental by the international law community … the fundamental and universal norms constituting *jus cogens* transcend such consent."). See also *Kenya Section of the International Commission of Jurists v. Attorney General & Another* (footnote 162 above), p. 14. For what appears to be a more positivist approach, see the opinion of Lord Hope in *Pinochet* (footnote 160 above), p. 247, referring to *Siderman v. Argentina* as evidence of "widespread agreement" of the *jus cogens* character of torture.

56. The analysis above illustrates that international courts and tribunals have viewed neither of the two dominant theories used to explain the binding nature of *jus cogens* as being, on their own, sufficient.[199] There are, of course, other theories that have been advanced to explain the nature of *jus cogens*.[200] Some of these, however, do not seek to explain so much the binding nature of *jus cogens* but rather to describe the type of norms that can qualify as *jus cogens*.[201] Explaining *jus cogens* as public order norms (*ordre public*), for example, tells us less about the source of their peremptoriness, and more about the nature of the obligations in question.[202] Put another way, describing the prohibition of genocide or the use of force as a public order norm does not tell us why it is peremptory, but only that those norms reflect fundamental values of the international community. The peremptory nature of public order norms could themselves be explained by either consent or non-consent based theories.

57. Other theories, upon closer inspection, represent variations of the dominant theories.[203] Kolb's alternative theory of *jus cogens*, for example, appears to be an application of the positivist approach.[204] Kolb advances, as an alternative theory, the idea that *jus cogens* is a "legal technique engrafted by the legislator onto a certain number of international norms in order to protect them from fragmentation into particular legal acts enjoying priority application *inter partes* because of the *lex specialis* principle".[205] Whether the particular "types" or categories of *jus cogens* norms identified by Kolb are justified relates to the identification of *jus cogens*,[206] which will be the topic of the second report. More relevant for the present discussion, that is, understanding the peremptory or non-derogability of *jus cogens* norms, is that Kolb's theory itself presupposes a decision of the "legislature" or States and, thus, adopts a positivistic or consent-based leaning.[207]

58. Criddle's and Fox-Decent's fiduciary theory of *jus cogens*, which has as its stated purpose to move away from both natural and positive law, is equally open to question, both in terms of whether it is really a move away from the dominant theories and in terms of its substance.[208] According to this theory, "a fiduciary principle governs the relationship between the State and its people, and this principle requires the State to comply with peremptory norms".[209] First, while the fiduciary duty is aimed, *inter alia*, at addressing the vague notions of "international conscience" or a "superior order of legal norms",[210] it is itself equally vague. More important, the notion that *jus cogens* is based on a fiduciary relationship between a State and its subjects would simply not be able to address many generally accepted norms of *jus cogens* since these prohibit conduct against not only a State's own subjects. For example, genocide is no less a violation of *jus cogens* if committed against the nationals of another State. In fairness, Criddle and Fox-Decent do suggest that "States owe every individual subject to State power a fiduciary obligation to respect their human rights", but this explains neither why such an obligation flows from *jus cogens* nor how violations of *jus cogens* that do not *per se* constitute violations of human rights are covered by this theory.[211] Moreover, any theory that seeks to explain *jus cogens* in terms of the relationship between the State and individual would find it difficult to explain the prohibition on the use of force as *jus cogens*, since that prohibition relates to inter-State relationships and not, at least not directly, State to individual relationships.

59. No single theory has yet adequately explained the uniqueness of *jus cogens* in international law, that is, the peremptoriness of certain obligations. It may even be, as suggested by Koskenniemi, advancing a general theory of sources, that the binding and peremptory force of *jus cogens* is best understood as an interaction between natural law and positivism.[212] Speaking of sources and

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[199] See, e.g., Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 332 ("Positivists' efforts to link peremptory norms to State consent are unconvincing because they do not explain why a majority of States within the international community may impose legal obligations on a dissenting minority. While natural law theories circumvent this persistent objector problem, they struggle to specify analytical criteria for identifying peremptory norms.").

[200] See Kolb, *Peremptory International Law:* Jus cogens, pp. 30 *et seq.*

[201] The most important of these, *jus cogens* as public order norms (*ordre public*), is discussed further below. Others include *jus cogens* as rules of international constitutional law, and rules for conflict of successive treaties.

[202] See, for discussion, Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 344.

[203] For example, although Kolb suggests that Judge Cançado Trindade advances a separate, alternative theory of a new *jus gentium*, in fact a close reading of Cançado Trindade's individual opinions and works reveals that this is also based on a natural law understanding of *jus cogens.* See, e.g., Cançado Trindade, "*Jus cogens:* The determination and the gradual expansion of its material content in contemporary international case-law", p. 6 ("[t]his latter [the *jus gentium*] does not emanate from the inscrutable 'will' of the States, but rather, in my view, from human conscience"). See, for an example of one of many dissenting and separate opinions of Judge Cançado Trindade, *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim (footnote 156 above), dissenting opinion, para. 139 ("and no one would dare today deny that the 'principles of humanity' and the 'dictates of the public conscience' invoked by the Martens clause belong to the domain of *jus cogens*").

[204] See, generally, Kolb, "Conflits entre normes de *jus cogens*", and *Peremptory International Law:* Jus cogens.

[205] Kolb, *Peremptory International Law:* Jus cogens, p. 9. Cf. Bianchi, "Human rights and the magic of *jus cogens*", p. 495 ("[t]o hold that *jus cogens* is nothing but a legal technique aimed at preserving the formal integrity of the system by characterizing as inderogable some of its procedural norms is tantamount to overlooking what the function performed by *jus cogens* was meant to be").

[206] Kolb, *Peremptory International Law:* Jus cogens, pp. 46–57, identifies three types of *jus cogens* norms or, as he states, "in clearer terms, three reasons which may lead a norm to be non-derogable or unfragmentable". These are, public order *jus order* norms, or fundamental norms of international law (although he accepts this type of *jus cogens* with some hesitation); public utility *jus cogens* and logical *jus cogens.* Elsewhere, Kolb identified four types of *jus cogens*, the additional type being the peremptory law of the Charter of the United Nations as set out in Article 103. See Kolb, "Conflits entre normes de *jus cogens*", pp. 486 *et seq.*

[207] Kolb, *Peremptory International Law:* Jus cogens, p. 9. Indeed, even for public order *jus cogens*, Kolb scoffs at the "lofty sentiments and sometimes fairy-tale adoration" of "'the fundamental rules of international community'" (*ibid.*, p. 47).

[208] See, generally, Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*".

[209] *Ibid.*, p. 347.

[210] *Ibid.*, p. 348.

[211] *Ibid.*, p. 359. At p. 333, the authors accept that the prohibition of "military aggression" qualifies as *jus cogens*, particularly where such aggression does not result in human rights violations.

[212] See Koskenniemi, *From Apology to Utopia* …, pp. 307 *et seq.*, especially at p. 308 ("neither contrasting position can be consistently preferred because they also rely on each other"). At p. 323, specifically on *jus cogens*, he says: "Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent.

the natural/positive law debate, Koskenniemi states that "[n]aturalism needs positivism to manifest its content in an objective fashion", while "[p]ositivism needs natural law in order to answer the question 'why does behaviour, will or interest create binding obligations'?"[213] Indeed, it is not necessary for this project to resolve the theoretical debate. Nonetheless, the theoretical debate is important because, from it, the core elements of *jus cogens*—those elements that are widely shared across the doctrinal perspectives—can be deciphered.

60. These more theoretical issues will, in future reports, contribute to an understanding of the judicial and State practice.

C. Core elements of *jus cogens*

61. Article 53 of the 1969 Vienna Convention contains the basic elements of *jus cogens*. Firstly, a norm of *jus cogens* is one from which no derogation is permitted. Secondly, it is a norm of general international law. Thirdly, a norm of *jus cogens* is one that is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. In addition to these, however, practice and doctrine reveal a core set of elements that give more content to the notion of *jus cogens*.

62. The element of non-derogation serves a dual function. First, it is a consequence of peremptoriness. However, it is also an important element of the nature of *jus cogens*.[214] Indeed, as the analysis below shows, non-derogation is at the heart of the idea of *jus cogens*. The requirement that, to be *jus cogens*, a norm must be a norm of general international law is also a key requirement of peremptoriness. It is not only a requirement for peremptoriness, it is also an element for its identification. This element will be considered in the second report, not only as an element for the identification of *jus cogens*, but also to clarify what sources of law give rise to peremptoriness. Similarly, the requirement that norms of *jus cogens* must be "recognized by the international community of States as a whole" will be considered in the second report as an element in the identification of *jus cogens*, or the elevation of an ordinary norm of general international law to one of *jus cogens*.

63. In addition to the elements explicitly referred to in article 53 of the 1969 Vienna Convention, however, doctrine and practice reveal that there are certain core elements that characterize *jus cogens* norms. Firstly, *jus cogens* norms are universally applicable. Secondly, *jus cogens* norms are superior to other norms of international law. Finally, *jus cogens* norms serve to protect fundamental values of the international community—what has often been described as international *ordre public* or public order. While these elements are not explicitly spelled out in article 53 of the 1969 Vienna Convention, they are generally accepted as forming important elements of *jus cogens*, as the analysis below will show.

64. Doctrine and practice reveals that *jus cogens* norms are those from which no derogation is permitted. While, as stated above, this is a consequence of peremptoriness, it is also a fundamental characteristic of *jus cogens* norms. It is useful to point out that, in international law, the idea that some rules are peremptory and cannot be derogated from through ordinary means of law-making is exceptional.[215] The majority of rules of international law fall into the category of *jus dispositivum* and can be amended, derogated from and even abrogated by consensual acts of States.[216] However, the literature has also recognized, as an exception to the general structure of international law, a set of norms which States cannot contract out of.[217] These

But a law which would make no reference to what States have consented would seem to collapse into a natural morality [but] the reference to recognition by 'the international community of States" [makes it] ascending, consensualist." See also Simma, "The contribution of Alfred Verdross to the theory of international law", p. 34 ("I consider that none of [the schools of philosophy of law] can give an all-embracing, definite explanation of, or justification for, the phenomenon of law, but I am also convinced that they do not exclude each other; that, on the contrary, each of them can unveil and illuminate aspects of international law which remain inaccessible or off-limits to the other(s)." See also Orakhelashvili, *Peremptory Norms in International Law*, p. 49 (referring to "positive law and morality as two separate but mutually complementary concepts").

[213] Koskenniemi, *From Apology to Utopia*, p. 308. Elsewhere, Koskenniemi, *The Politics of International Law*, p. 52, has stated that neither consent (positivism) nor justice (natural law) "is fully justifiable alone … Arguments about consent must explain the relevance and content of consent in terms of what seems just. Arguments about justice must demonstrate their correctness by reference to what States have consented to." See also Costelloe, *Legal Consequences of Peremptory Norms in International Law*, pp. 2–3 ("[w]hile 'elementary considerations of humanity' are not a free-standing source of obligation in international law, they may further the identification of those norms and obligations in whose integrity and enforcement the international community shares a strong interest"). See also Hameed, "Unravelling the mystery of *jus cogens* in international law", p. 54, advancing a non-consensual theory of *jus cogens* that is underpinned by morality and that nonetheless appears to be based on the acceptance of States ("[t]his essay will strive to show how we can more effectively explain *jus cogens* law-making without relying on the idea of consent. I propose that an existing rule of international law becomes *jus cogens* because it is believed by certain legal officials—principally States—to be morally paramount.").

[214] Kolb, *Peremptory International Law:* Jus cogens, p. 2 ("The key term for the classical understanding of '*jus cogens*' is therefore 'non-derogability'. In other words, *jus cogens* is defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation.").

[215] Suy, "The concept of *jus cogens* in public international law", p. 27 ("[n]orms of general international law are essentially dispositive in character").

[216] Verdross, "*Jus dispositivum* and *jus cogens* in international law", p. 58 ("[t]here was clearly a consensus in the Commission that the majority of the norms of general international law do not have the character of *jus cogens*"); Tomuschat, "The Security Council and *jus cogens*", p. 19 ("[m]ost of the rules of international law are *jus dispostivum*"); Magallona, "The concept of *jus cogens* in the Vienna Convention on the Law of the Treaties", p. 521 ("*jus dispositivum* rules [which] can be derogated by private contracts"). See also Alexidze, "The legal nature of *jus cogens* …", p. 245; Rohr, *La Responsabilidad Internacional del Estado por Violación al Jus cogens*, p. 5 ("por un lado, aquellas de naturaleza dispositiva—*jus dispositivum*—las más numerosas, creadas por acuerdo de voluntades, derogables también por acuerdos de voluntades" ["on the one hand, those [rules of international law] of a dispositive character—*jus dispostivum*—created by an agreement of wills, can also be derogated by an agreement of wills"]).

[217] See, e.g., Rohr, *La Responsabilidad Internacional del Estado por Violación al Jus cogens*, p. 5 ("por otro lado, las normas de derecho perentorio o imperativo—*jus cogens*—pertenecientes a un sistema que podría entenderse como de cuasi-subordinación normativa, que limita, en cierta manera, la voluntad estatal derivada de su propia soberanía" ["on the other hand, peremptory or imperative norms of law—*jus cogens*—belonging to a system that can be understood as normatively quasi-subordinated, which somehow limits State sovereign will"]. See also Kadelbach, "*Jus cogens*, obligations *erga omnes* and other rules …", p. 29; Thirlway, *The Sources of International Law*, p. 144 ("not all international rules belong to the domain of *jus dispositivum*, that is … rules that apply failing agreement to the contrary, but which can be set aside … by agreement"). See further Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, p. 1.

norms are, to use the words of one commentator, "potent enough to invalidate contrary rules which might otherwise be consensually established by States".[218] In short, writings of international law, irrespective of theoretical differences, converge on the idea that the majority of rules are *jus dispositivum* and "can be excluded or modified in accordance with the duly expressed will of States" while, exceptionally, some rules are *jus cogens* and cannot be so excluded or modified.[219]

65. The judicial practice also bears testimony to the fact that while, as a general rule, States are free to amend, derogate from and abrogate rules of international law, there may be some rules which are so fundamental that States cannot amend or from which States cannot derogate by consent.[220] Already in the *North Sea Continental Shelf* cases, although not willing to pronounce itself on the question of *jus cogens*, the International Court of Justice drew attention to the distinction between *jus cogens* and *jus dispositivum*.[221] *Jus cogens*, thus, has the potency to limit the freedom of States to contract.[222]

66. The distinction between *jus dispositivum*, which is subject to the agreement of States, and *jus cogens*, from which States cannot escape by agreement, has also been recognized by States themselves.[223] Certainly, this distinction was generally accepted by States in the processes leading up to the adoption of the 1969 Vienna Convention and formed the basis of the agreement of the text of article 53 of the Convention.[224] The idea that there were rules which States could not contract out of was not the subject of much disagreement at the Vienna Conference.[225] The work of the Commission, itself, on what eventually became article 53 of the Convention was based on an understanding that in international law, a distinction can be made between *jus dispositivum* and *jus cogens*.[226]

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[218] Janis, "The nature of *jus cogens*" (footnote 177 above), p. 359. See also Dubois, "The authority of peremptory norms in international law …", p. 135 ("A *jus cogens* or peremptory norm is a norm that is thought to be so fundamental that no derogation from it is allowed, whether through State behaviour or through treaty … Because of its fundamental nature, a principle that is *jus cogens* invalidates rules that are drawn from treaty … This separates *jus cogens* norms from those that are *jus dispositivum*, meaning norms that can be excluded or altered by the express will of States"). See also Alexidze, "The legal nature of *jus cogens* …", p. 246 ("[T]he will of a State regarding the existent international legal order is not unlimited. Though the majority of international law rules bind a State only under condition that the latter has expressed its will to accept a given rule, contemporary general international law contains rules whose legal force is absolute for each member of the international community of States.").

[219] See, for discussion, Orakhelashvili, *Peremptory Norms in International Law*, pp. 8–9.

[220] See *Prosecutor v. Zoran Kupreškić* et al., Case No. IT-95-16-T, Judgment, 14 January 2000, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. 2, para. 520 ("most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character"). See also Kenya, *RM and another v. Attorney General*, Judgment, 1 December 2006, High Court of Kenya, *Kenya Law Reports*, at 12. See also *Siderman v. Argentina* (footnote 198 above).

[221] See *North Sea Continental Shelf* (footnote 131 above), para. 72 ("[w]ithout attempting to enter into, still less pronounce upon[,] any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties"). For a more explicit recognition of the distinction between *jus cogens* and *jus dispositivum*, see dissenting opinion of Judge Tanaka in *South West Africa* (footnote 133 above), p. 298 ("*jus cogens*, recently examined by the International Law Commission, [is] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States"); *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, separate opinion of Judge Shahabuddeen, p. 135 ("States are entitled by agreement to derogate from rules of international law other than *jus cogens*"). See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, separate opinion of Judge *Ad Hoc* Torres Bernárdez, para. 43 ("[a]s the rules laid out in Articles 7 to 12 of the Statute of the River Uruguay are not peremptory norms (*jus cogens*), there is nothing to prevent the Parties from deciding by 'joint agreement'").

[222] *Reservations to the Genocide Convention* (footnote 190 above), p. 24 ("[t]he object and purpose of the Convention thus limit … the freedom of making reservations"). See also separate opinion of Judge Schücking in the *Oscar Chinn case* (footnote 67 above) ("[a]nd I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void"); *Right of Passage* (footnote 132 above), dissenting opinion on Judge Fernandes, para. 29 ("Several rules *cogentes* prevail over any special rules. And the general principles to which I shall refer later constitute true rules of *ius cogens*, over which no special practice can prevail."); *Military and Paramilitary Activities*, Merits (footnote 150 above), separate opinion of Judge Sette-Camara, p. 199; *Arbitral Award of 31 July 1989*, Judgment, *I.C.J. Reports 1991*, p. 53, dissenting opinion of Judge Weeramantry, p. 155 ("a treaty which offends against a rule of *jus cogens*, though complying fully with all the requirements of procedural regularity in its creation, can still be null and void owing to a factor lying outside those procedural formalities"). See also *Nuclear Tests (Australia v. France)* (footnote 191 above), dissenting opinion of Judge de Castro, p. 388, wherein the *jus cogens* status of a treaty provision is questioned because of, *inter alia*, the right to withdraw.

[223] See, for example, Mr. Elaraby (Egypt), 3505th meeting of the Security Council on 28 February 1995, S/PV.3505 ("[o]n the legal side, there is a consensus in the international community that there exist [peremptory] norms of international law better known as *jus cogens*. These norms cannot be violated … Under these comprehensive and binding rules, no party can argue that any bilateral agreement, of whatever kind, allows it to deny the right of the international community to discharge its fundamental responsibility"); Mr. Mayoral (Argentina), 5679th meeting of the Security Council of 22 May 2007, S/PV.5679 ("these are *ius cogens* norms of international law, and thus we cannot set them aside"). See, especially, Sweden, A/C.6/SR.844, para. 11.

[224] See, e.g., Mr. Jacovides (Cyprus), A/CONF.39/11, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 67 ("beside *jus dispositivum* there was a *jus cogens*"); Mr. Yasseen (Iraq), *ibid.*, 52nd meeting of the Committee of the Whole, 4 May 1968, para. 23; and Mr. Ogundere (Nigeria), *ibid.*, para. 48. See also statement by Mr. Sinclair (United Kingdom), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, 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").

[225] See Mr. Suárez (Mexico), *ibid.*, 52nd neeting of the Committee of the Whole, 4 May 1968, para. 9 ("[t]he emergence of a new rule of *jus cogens* would preclude the conclusion in the future of any treaty in conflict with it"); Mr. Evrigennis (Greece), *ibid.*, para. 18 ("and which indicated the boundaries that could not be violated by the contractual will"); Mr. Sweeney (United States), *ibid.*, para. 16 ("the very fundamental proposition of the Commission that *jus cogens* included rules from which no derogation was permitted"); Mr. Àlvarez Tabio (Cuba), *ibid.*, para. 34 (*jus cogens* "had the effect of overriding any other rules that came into conflict with them … even where the lesser rule was embodied in a treaty, as it was not permissible to contract out of a peremptory norm of general international law"). See, however, Mr. Miras (Turkey), *ibid.*, 53rd meeting of the Committee of the Whole, 6 May 1968, para. 1, and Mr. Harry (Australia), *ibid.*, 55th meeting of the Committee of the Whole, 7 May 1968, para. 13.

[226] See, e.g., *Yearbook … 1958*, vol. II, document A/CN.4/115, p. 40, para. 76 ("[t]he rules of international law in this context fall broadly into two classes—those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which

67. Norms of *jus cogens*, as distinct from *jus dispositivum*, are also generally recognized as being universally applicable.[227] As a point of departure, the majority of international law rules are binding on States that have agreed to them, in case of treaties, or at the very least, to States that have not persistently objected to them, in the case of customary international law (*jus dispositivum*).[228] *Jus cogens*, as an exception to this basic rule, presupposes the existence of rules "binding upon all members of the international community".[229] In reality, the characteristic of universal applicability flows from the notion of non-derogability, that is, it is difficult to see how a rule from which no derogation is permitted can apply to only some States. Indeed, as the Commission indicated in its commentary to draft article 50 of the 1966 draft articles, many who disputed the existence of *jus cogens* did so on the basis that rules of international law were not universally applicable.[230] But it flows also from the idea, in article 53 of the 1969 Vienna Convention, that *jus cogens* norms are norms of general international law—a characteristic that will be studied in greater detail in the next report.

68. The idea that *jus cogens* norms are universally applicable has itself two implications that will be the subject of more detailed study in future reports—what is said here is therefore provisional. First, the doctrine of the persistent objector, whatever its status with respect to customary rules of international law, is not applicable to *jus cogens*.[231] This aspect, however, deserves further study and will be addressed more fully in the report on the consequences of *jus cogens*. A second and more complicated implication of universal application is that *jus cogens* norms do not apply on a regional or bilateral basis.[232] While there are some authors that hold the view that regional *jus cogens* is possible,[233] the basis for this remains somewhat obscure. If it exists, regional *jus cogens* would be an exception to this general principle of universal application of *jus cogens* norms. The subject of whether international law permits the doctrine of regional *jus cogens* will be considered in the final report, on miscellaneous issues.

69. Closely related to non-derogability, *jus cogens* norms are hierarchically superior to other norms of international law.[234] The idea of rules capable of invalidating others and permitting no derogation implies a

merely furnish a rule for application in the absence of any other agreed régime, or, more correctly, those the variation or modification of which under an agreed régime is permissible, provided the position and rights of their States are not affected.").

[227] See, e.g., Conklin, "The peremptory norms of the international community", p. 837. See also Rozakis, *The Concept of* Jus cogens *in the Law of Treaties*, p. 78; Gaja, "*Jus cogens* beyond the law of treaties", p. 283. See further Hannikainen, *Peremptory Norms (Jus cogens) in International Law*, p. 5 ("Because the purpose of *jus cogens* is to protect certain overriding interests and values of the international community of States, and peremptory obligations are owed to this community, only the *universality* of peremptory obligations ensures the fulfilment of the purpose of *jus cogens*").

[228] See, for the persistent objector rule, draft conclusion 15 of the draft conclusions on the identification of customary international law (footnote 32 above).

[229] See, e.g., Danilenko, *Law-making in the International Community*, p. 211; Alexidze, "The legal nature of *jus cogens* …", p. 246; Dupuy and Kerbrat, *Droit International Public*, p. 322 ("la cohésion de cet ensemble normatif exige la reconnaissance par tous ses sujets d'un minimum de règles *impératives*" ["the cohesion of this set of norms requires recognition by all its subjects of a minimum of *peremptory* rules"]); Rohr, *La Responsabilidad Internacional del Estado por Violación al Jus cogens*, p. 6; Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 361 ("peremptory norms must embody general and universalizable principles"); Dubois, "The authority of peremptory norms in international law …", p. 135 ("[a] *jus cogens* … is applicable to all States regardless of their consenting to it"). See also Orakhelashvili, *Peremptory Norms in International Law*, p. 40; Saul, "Identifying *jus cogens* norms …", p. 31 ("[*j*]*us cogens* norms are supposed to be binding on all States"). See *Military and Paramilitary Activities, Merits* (footnote 150 above), para. 190 ("[t]he United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'"). See also *Reservations to the Genocide Convention* (footnote 190 above), p. 23, where the International Court of Justice refers to "the universal character … of the condemnation of genocide"; *Application of the Convention of 1902* (footnote 133 above), separate opinion of Judge Moreno Quintana, pp. 106–107 ("[t]hese principles … have a peremptory character and a universal scope"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 191 above), dissenting opinion of Judge *ad hoc* Kreća, para. 101 ("the norm prohibiting genocide as a universal norm binds States in all parts of the world"); *Questions relating to the Obligation to Prosecute or Extradite* (footnote 138 above), separate opinion of Judge Cançado Trindade, para. 102 ("*jus cogens* [is based] on the very *foundations* of a truly universal international law"). See *Jelisić* (footnote 190 above), para. 60, quoting with the approval the International Court of Justice's statement concerning the universal application of the prohibition of genocide and linking it directly to the *jus cogens* character of the prohibition. See United States, *Tel-Oren v. Libyan Arab Republic*, Judgment, 3 February 1984, United States Court of Appeals, District of Columbia, 726 F.2d 774, 233 U.S.App. D.C. 384 (there are a "handful of heinous actions—each of which violates definable, universal and obligatory norms").

[230] Para. (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, p. 177, para. 38, at p. 247 ("some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal").

[231] Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", pp. 340 *et seq.*; Rohr, *La Responsabilidad Internacional del Estado por Violación al Jus cogens*, p. 19. See also Kritsiotis, "On the possibilities of and for persistent objection", pp. 133 *et seq.* See *contra* Danilenko, "International *jus cogens:* Issues of law-making", pp. 54 *et seq.*

[232] See Orakhelashvili, *Peremptory Norms in International Law*, pp. 39 *et seq.*

[233] See, e.g., Czapliński, "*Jus cogens* and the Law of Treaties", p. 93, and Kolb, *Peremptory International Law:* Jus cogens, p. 98. See Forteau, "Regional international law", para. 24, although it should be said that the author adopts a rather restricted view of "regional international law", including *jus cogens* ("[N]owadays the fact that an international rule is regional in nature is deprived, as such, of any autonomous legal consequences. Regional international law reveals itself as being no more than a factual, not a legal, concept.").

[234] See *Furundžija* (footnote 157 above), para. 153 (a feature of the prohibition of torture "relates to the hierarchy of rules in the international normative order … this principle 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"). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993 (footnote 156 above), separate opinion of Judge Lauterpacht, para. 100 ("[t]he concept of *jus cogens* operates as a concept superior to both customary international law and treaty"); *Armed Activities on the Territory of the Congo* (footnote 155 above), separate opinion of Judge *ad hoc* Dugard, para. 10. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, *I.C.J. Reports 2002*, p. 3, dissenting opinion of Judge Al-Khasawneh, para. 7; Netherlands, A/C.6/68/SR.25, para. 101 ("[*j*]*us cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law"). See, however, Kolb, *Peremptory International Law:* Jus cogens, 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.

normative hierarchy.[235] The idea that *jus cogens* can invalidate other rules of law is both a result and reflection of normative superiority.[236]

70. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice observed that the "question whether a norm is part of the *jus cogens* relates to the legal character of the norm".[237] The legal character of *jus cogens* norms is often linked with values relating to public order. Kolb, himself suspicious of the public order/value approach to *jus cogens*, states that it "is the absolutely predominant theory" today.[238] Simply put, the content of these public order norms are aimed at protecting the fundamental values of the international community.[239] As explained earlier, while public order is often presented as a separate theory, competing with natural and positive law theories to explain the source of peremptoriness, it appears more suited to explain the quality of the norms. Indeed, public order norms can be explained in terms either of positive or natural law theories.

71. The values which are protected by *jus cogens* norms—those that constitute "the fundamental values of the international law community"—are those that have been said to be "toutes d'essence civilisatrice" ["all of civilizing essence"].[240] They are concerned with the basic considerations of humanity.[241] The description by the International Court of Justice of the values underlying the Convention on the Prevention and Punishment of the Crime of Genocide, though not expressly invoking *jus cogens*, provides an apt description of the values characterizing *jus cogens*.[242] In that case, the Court described the values underlying the Genocide Convention as follows:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose … to safeguard the very existence of certain human groups and … to confirm and endorse the most elementary principles of morality.[243]

72. While these are core characteristics, as opposed to requirements, of *jus cogens*, they do not tell us how *jus cogens* norms are to be identified in contemporary international law. Moreover, while some of these characteristics also reflect the consequences of *jus cogens*, the consequences will be the subject of a more detailed future report. The fluid interplay between the various elements of the topic—nature, requirements, consequences—was already alluded to in the earlier parts of the present report and the connections described in the present chapter are a reflection of that interconnection.

[235] See para. (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, *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251, at p. 182 ("[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 as norms from which no derogation is permitted'"). See also, e.g., Danilenko, "International *jus cogens:* Issues of law-making", p. 42; Conklin, "The peremptory norms of the international community", p. 838 ("the 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 Whiteman, "*Jus cogens* in international law, with a projected list", p. 609; Janis "The nature of *jus cogens*", (footnote 177 above), p. 360. See further "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 137 above); and Tomuschat, "Reconceptualizing the debate on *jus cogens* and obligations *erga omnes:* Concluding observations", 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 further Dupuy and Kerbrat, *Droit international public*, p. 323.

[236] Cassese, "For an enhanced role of *jus cogens*", p. 159.

[237] *Legality of the Threat or Use of Nuclear Weapons* (footnote 152 above), para. 83.

[238] Kolb, *Peremptory International Law:* Jus cogens, p. 32. Although having domestic law origins, in particular from the civil law tradition, this tradition is now firmly rooted in international law. See Orakhelashvili, *Peremptory Norms in International Law*, pp. 11 *et seq.*; Rivier, *Droit international public*, p. 567. See also, on the links between civil law *ordre public* and international law *ordre public*, *Application of the Convention of 1902* (footnote 133 above), separate opinion of Judge Moreno Quintana, p. 106.

[239] *Furundžija* (footnote 157 above), para. 153, stating that the prohibition of torture is *jus cogens* "[b]ecause of the importance of the values it protects". See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim (footnote 156 above), dissenting opinion of Judge Cançado Trindade para. 143.

[240] Kolb, "Conflits entre normes de *jus cogens*", p. 482.

[241] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 149 above), para. 147 ("[t]hat is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 149 above), p. 45, para. 85. See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 152 above), dissenting opinion of Judge Koroma, p. 573 (*jus cogens* has "humanitarian underpinnings" and is based on "values of member States"). See further *Arrest Warrant* (footnote 234 above), dissenting opinion of Judge Al-Khasawneh, para. 7. See also *Siderman v. Argentina* (footnote 198 above), p. 715.

[242] *Reservations to the Genocide Convention* (footnote 190 above), pp. 23 *et seq.* See also Bisazza, "Les crimes à la frontière du *jus cogens*", p. 168, who evokes "la conscience de l'humanité"; Boisson de Chazournes, "Commentaire", p. 76, referring to a "conscience universelle"; Schmahl, "An example of *jus cogens* …", p. 49.

[243] *Reservations to the Genocide Convention* (footnote 190 above), p. 23.

Chapter V

Form of the Commission's product

73. The Special Rapporteur is of the view that draft conclusions are the most appropriate outcome for the Commission's work on the topic. The syllabus, which formed the basis of the Commission's decision to embark on the project, proposed draft conclusions as the appropriate format. Moreover, draft articles would not be an appropriate format since, like the Commission's work on identification of customary international law and subsequent practice and subsequent agreements in relation to treaty interpretation, the essential character of the work on this topic should be to clarify the state of the law based on current practice. The Commission's draft conclusions will reflect the current law and practice on *jus cogens* and will avoid entering into the theoretical debates that often accompany discussions on *jus cogens*.

Chapter VI

Conclusions

74. In the light of the analysis above, the Special Rapporteur proposes the following draft conclusions for consideration by the Commission.

"Draft conclusion 1. Scope

"The present draft conclusions concern the way in which jus cogens rules are to be identified, and the legal consequences flowing from them.

"Draft conclusion 2. Modification, derogation and abrogation of rules of international law

"1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (jus dispositivum). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

"2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character.

"Draft conclusion 3. General nature of jus cogens norms

"1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

"2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable."

Chapter VII

Future work

75. The future work of the Commission will be determined by the membership of the Commission in the next quinquennium. The Special Rapporteur, however, would propose that the next report be dedicated to the rules on the identification of norms of *jus cogens*. This will include the question of the sources of *jus cogens*, that is, whether *jus cogens* emanates from treaty law, customary international law, general principles of law or other sources. Related to question of sources, but also more broadly concerning the identification of *jus cogens*, the second report will also consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties.

76. The third report, in 2018, might consider the consequences of *jus cogens*. The fourth report might address miscellaneous issues that arise from the debates within the Commission and comments from States. It will also offer an opportunity to assess the draft conclusions already adopted with a view to enhancing their overall coherence.

77. As stated earlier, the approach to this topic will necessarily need to be flexible and the road map described herein ought not to be cast in stone. It may change, depending on the direction in which the Commission may steer it.

PROGRAMME, PROCEDURES AND WORKING METHODS OF THE COMMISSION AND ITS DOCUMENTATION

[Agenda item 11]

DOCUMENT A/CN.4/679

Long-term programme of work: review of the list of topics established in 1996 in the light of subsequent developments

Working paper prepared by the Secretariat

[*Original: English*]
[*5 March 2015*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958)	
Convention on the High Seas	United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.
Convention on the Continental Shelf	*Ibid.*, vol. 499, No. 7302, p. 311.
Convention on the Territorial Sea and the Contiguous Zone	*Ibid.*, vol. 516, No. 7477, p. 205.
Convention on Fishing and Conservation of the Living Resources of the High Seas	*Ibid.*, vol. 559, No. 8164, p. 285.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality (Vienna, 18 April 1961)	*Ibid.*, No. 7311, p. 223.
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (Vienna, 18 April 1961)	*Ibid.*, No. 7312, p. 241.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	*Ibid.*, vol. 989, No. 14458, p. 175.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality (Vienna, 24 April 1963)	*Ibid.*, No. 8639, p. 469.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (Vienna, 24 April 1963)	*Ibid.*, No. 8640, p. 487.
Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	*Ibid.*, vol. 704, No. 10106, p. 219.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
Optional Protocol to the Convention on Special Missions concerning the compulsory settlement of disputes (New York, 8 December 1969)	*Ibid.*, p. 339.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	*Ibid.*, vol. 860, No. 12325, p. 105.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	*Ibid.*, vol. 974, No. 14118, p. 177.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York. 14 December 1973)	*Ibid.*, vol. 1035, No. 15410, p. 167.
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. See also A/CONF.67/16, p. 207.

	Source
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
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.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3
United Nations Convention on Jurisdictional Immunities of States and their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex

Introduction

1. At the sixty-sixth session of the International Law Commission, held in 2014, the Working Group on the long-term programme of work identified the need to conduct a systematic review of the work of the Commission and a survey of possible future topics. It recalled that the most recent such systematic review had been undertaken in 1996, with the development of an illustrative general scheme of topics.[1] The Commission subsequently endorsed the recommendation that the Secretariat review the 1996 list in the light of subsequent developments and prepare a list of potential topics, accompanied by brief explanatory notes, by the end of the quinquennium.[2] The request was made on the understanding that the Working Group would continue to consider any topics that members may propose.

2. In the present working paper, the Secretariat seeks to undertake the first part of the request, namely a review of the 1996 general scheme,[3] with a view to updating it in the light of subsequent developments in the work of the Commission. The relevant extracts of a revised general scheme reflecting developments up to the sixty-sixth session, in 2014, are presented under each thematic heading below. The same overall caveat to the 1996 general scheme, namely that it was presented for illustrative purposes and that neither the formulations nor the content commit the Commission in its future undertakings,[4] applies to the revised scheme.

3. The present working paper is also aimed at providing guidance for the work on preparing a list of potential topics, to be completed in 2016, which will take as a basis, *inter alia*, the list of possible future topics in the 1996 general scheme. In order not to prejudice the outcome of such work, which is currently under way, the present working paper does not include in the revised scheme the respective subsections for possible future topics. Instead, in the descriptions of developments since 1996 provided under each thematic heading, an account will also be given both of the potential topics listed in the 1996 scheme[5] and of other topics suggested (or even proposed) during the discussions in the Commission and elsewhere.

4. An attempt has been made to provide an exhaustive accounting of topics recommended over the years, including not only those made since 1996 but also those suggested in earlier years that were not reflected in the 1996 list. It was thought useful to list even those suggestions made in the past that were not pursued, not only because of the possibility that the Commission might reconsider their inclusion on the programme of work in the light of contemporary events, but also because guidance might be obtained from a consideration of both the types of topics that the Commission had taken on in the past and those that it had declined to consider. In addition to the 1996 list, the 1949[6] and 1971[7] surveys of international law and several working papers prepared by the Secretariat in 1962,[8] 1967,[9] 1968,[10] and 1970[11] were consulted in the preparation of the present working paper.

5. Reference is also made to proposals for future topics that were made in the context of the discussions in the Working Group on the long-term programme of work,[12]

[1] *Yearbook … 2014*, vol. II (Part Two), pp. 164–165, para. 271.

[2] *Ibid*., p. 165, para. 272.

[3] See *Yearbook … 1996*, vol. II (Part Two), annex II, p. 133.

[4] *Ibid*., footnote 1.

[5] Hereinafter all references to the future topics listed in the 1996 scheme are to those presented in *ibid.*, annex II.

[6] Memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission", document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)).

[7] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245.

[8] *Yearbook … 1962*, vol. II, document A/CN.4/145.

[9] *Yearbook … 1967*, vol. II, document A/CN.4/L.119.

[10] Document A/CN.4/L.128, reproduced in *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, introduction and sect. A.

[11] *Yearbook … 1970*, vol. II, document A/CN.4/230.

[12] The indication of dates of when a topic was raised in the Working Group on the long-term programme of work is to the first year in which the topic was proposed. Some topics were discussed in the Working Group over a period of several years.

including some which were never recorded in the official records of the Commission, and which are listed in the present report without attribution. Where references to the suggestions or proposals exist in the official records of the Commission, those are provided. Reference is also made to those various proposals for topics that the Commission has not taken up and that were either made by Member States in the context of the annual debate on the report of the Commission in the Sixth Committee or transmitted directly to the Commission.[13]

6. No attempt is made to provide an analysis of the reasons for the Commission's decision not to pursue the various suggestions or proposals made over the years, since in the vast majority of cases no such explanations are to be found in the records.

[13] Reference is also made to some suggestions made during the deliberations of the United Nations Colloquium on Progressive Development and Codification of International Law, held in 1997, see *Making Better International Law: The International Law Commission at 50—Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, New York, 28–29 October 1997* (United Nations publication, Sales No. E/F.98.V.5); as well as at the seminar held to commemorate the fiftieth anniversary of the International Law Commission, in 1998, see *The International Law Commission Fifty Years After: An Evaluation—Proceedings of the Seminar Held to Commemorate the Fiftieth Anniversary of the International Law Commission, Geneva, 21–22 April 1998* (United Nations publication, Sales No. E/F.00.V.3).

Subject-matter categorization of topics

7. It will be recalled that the 1996 general scheme, which contained a list of potential topics for illustrative purposes, was based on general subject-matter classifications, subdivided, as appropriate, into topics already completed, topics under consideration by the Commission and possible future topics. With the exception of the subsections on possible future topics, the updated scheme retains the basic structure of the version adopted in 1996.

A. Sources of international law

1. Topics already completed:

(*a*) Ways and means for making the evidence of customary international law more readily available:

Report on ways and means for making the evidence of customary international law more readily available, 1950;[14]

(*b*) Reservations to multilateral conventions (1951):

Report on reservations to multilateral conventions, 1951;[15]

(*c*) Extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1963):

Report on extended participation in general multilateral treaties concluded under the auspices of the League of Nations, 1963;[16]

(*d*) Law of treaties (1949–1966):

Vienna Convention on the Law of Treaties, 1969;

(*e*) Most-favoured-nation clause (1967–1978):

Draft articles on most-favoured-nation clauses, 1978;[17]

(*f*) Treaties concluded between States and international organizations or between two or more international organizations (1970–1982):

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986;

(*g*) Unilateral acts:

Guiding principles applicable to unilateral declarations of States capable of creating legal obligations, 2006;[18]

(*h*) Fragmentation of international law:

Conclusions of the work of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, 2006;[19]

(*i*) Reservations to treaties (1993–2011):

Guide to Practice on Reservations to Treaties, 2011;[20]

(*j*) Effects of armed conflicts on treaties (2004–2011):

Articles on the effects of armed conflicts on treaties, 2011.[21]

2. Topics under consideration by the Commission:

(*a*) Subsequent agreements and subsequent practice in relation to interpretation of treaties (2008–);

(*b*) Most-favoured-nation clause (2008–);

(*c*) Provisional application of treaties (2012–);

[14] *Yearbook … 1950*, vol. II, document A/1316, at p. 367, paras. 24 *et seq.*

[15] *Yearbook … 1951*, vol. II, document A/CN.4/41.

[16] Document A/CN.4/162 reproduced in *Yearbook … 1963*, vol. II, document A/5509, chap. III.

[17] *Yearbook … 1978*, vol. II (Part Two), para. 74, at pp. 16 *et seq.*

[18] *Yearbook … 2006*, vol. II (Part Two), p. 161, para. 176.

[19] *Ibid.*, pp. 177 *et seq.*, para. 251.

[20] *Yearbook … 2011*, vol. II (Part Two), pp. 26 *et seq.*, para. 75.

[21] General Assembly resolution 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

(*d*) Identification of customary international law (2012–).

3. Topics currently on the long-term programme of work:

Jus cogens (2014).

1. Work undertaken by the Commission

8. As regards the Commission's work on the sources of international law, the general scheme has been updated in two ways. First, reference has been made to work undertaken in its early years on the topics "Reservations to multilateral conventions", "Extended participation in general multilateral treaties concluded under the auspices of the League of Nations" and "Ways and means for making the evidence of customary international law more readily available", all of which were excluded from the 1996 scheme and resulted in the adoption of reports. The general scheme has also been updated to reflect developments after 1996. Accordingly, it refers to the conclusion of the consideration of the topics "Unilateral acts of States", "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", "Reservations to treaties" and "Effects of armed conflicts on treaties", which culminated in the adoption of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations (2006), 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 (2006),[22] the Guide to Practice on Reservations to Treaties (2011) and the articles on the effects of armed conflicts on treaties (2011), respectively.

9. The revised scheme also reflects the topics currently under consideration by the Commission which fall under the present category, namely "Subsequent agreements and subsequent practice in relation to interpretation of treaties", "Most-favoured-nation clause",[23] "Provisional application of treaties" and "Identification of customary international law". Furthermore, the topic "*Jus cogens*" was added to the Commission's long-term programme of work at its sixty-sixth session, in 2014.[24]

2. Possible future topics

10. While the 1996 scheme included several potential future topics under the broad categories "Law of treaties", "Law of unilateral acts", "Customary international law", "*Jus cogens* (and related concepts)" and "Non-binding instruments", no reference was made to earlier related proposals. In addition, several further proposals falling under those and other categories have been made since 1996.

(a) *Law of treaties*

11. The 1996 general scheme listed "Multilateral treaty-making process", suggested in 1979, as the only possible future topic under the category "Law of treaties". Among the other potential topics mentioned in the records of the Commission were the topics "International agreements concluded with or between subjects of international law other than States or international organizations"[25] and "Question of participation in a treaty",[26] both of which were referred to in the 1971 survey. Other proposals made in the Commission have included the topic "International agreements not in written form", which was recorded in the 1971 survey[27] as having been excluded from the scope of the Vienna Convention on the Law of Treaties, as well as "Principle of *pacta sunt servanda* (including the implementation of international law)"[28] and "Conflicts between treaty regimes".[29]

(b) *Law of unilateral acts*

12. In the list of possible future topics under this category, as conceived in 1996, the Commission identified, *inter alia*, "Law applicable to resolutions of international organizations" and "Control of validity of the resolutions of international organizations". Notwithstanding the fact that the focus of the Commission's subsequent work on unilateral acts was less on the law applicable to international organizations, it is worth recalling that a related proposal was also made in 1991 ("The legal effects of resolutions of the United Nations") in the context of the Working Group on the long-term programme of work.[30] It

[22] See also the Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)).

[23] The Commission concluded its work on the topic in 1978, which resulted in the adoption of the draft articles on most-favoured-nation clauses. See *Yearbook … 1978*, vol. II (Part Two), at pp. 16 *et seq.*, para. 74. The topic was placed on the Commission's programme of work again in 2008.

[24] *Yearbook … 2014*, vol. II (Part Two), p. 164, para. 270.

[25] See *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 57–58, paras. 262–266, albeit subject to the work on the status of other subjects of international law. See also the proposal of Marcelo Kohen at the 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), pp. 75–78.

[26] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 58–59, paras. 269–274.

[27] *Ibid.*, pp. 56 and 58, paras. 256 and 267–268. See also the proposal by Marcelo Kohen ("Treaties not in writing"), made at the 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), p. 75.

[28] Made in the Working Group on the long-term programme of work in 1997. The 1971 survey also included a discussion of the question of the "fulfilment in good faith of the obligations of international law assumed by States", *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 10–12, paras. 33–37.

[29] Made in the Working Group on the long-term programme of work in 2007. At the 1998 Seminar, Marcelo Kohen proposed the consideration of the following topics: "The consequences of the conclusion of a treaty by an international organization for its member States", "'Unequal' treaties", "The effects of a declaration of nullity, of suspension or the termination of a treaty, where States parties are in disagreement", as well as "modification or abrogation of a treaty by subsequent practice, the emergence of a contrary customary rule or by desuetude", which has since been partly covered by a topic presently on the work programme of the Commission. See 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), pp. 81–88. Proposals were also made for the topic "Importance of supervening custom as a ground of treaty termination or revision" (Ian Brownlie) and "The interrelationship between the interpretation, modification and amendment of, and the making of reservations to treaties" and "Modification of treaties *inter se*" (Vaughan Lowe). *Ibid.*, pp. 97 and 128–129, respectively.

[30] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330.

was also suggested during the discussions in the Working Group in 1998 that the Commission consider the topic "The role of international organizations in the formation of new rules of international law",[31] a topic covered in part by the ongoing work on the "identification of customary international law".

(c) *Customary international law*

13. The 1996 general scheme listed the topic "Legal effects of customary rules", proposed that year, as a possible future topic. It was subsequently suggested during the discussions in the Working Group on the long-term programme of work in 1998 that the Commission revisit its earlier work on the topic "Ways and means for making the evidence of customary international law more readily available". The previous year, the Working Group considered a proposal for a topic entitled "Development of norms of general international law", which conceivably would include the question of the formation of rules of customary international law.

(d) *Jus cogens (and related concepts)*

14. As indicated earlier, the topic "*Jus cogens*", which had been proposed in 1993,[32] was added to the long-term programme of work in 2014. The possibility of considering the somewhat related topic "*Erga omnes*" was envisaged in the discussions in the Working Group on the long-term programme of work in 2000 but never materialized. It should be noted, however, that the topic was ostensibly envisaged in the context of the law of the environment as being related to the question of legal regulation of the global commons. It was also covered in part in the work on the responsibility of States, and that of international organizations, for internationally wrongful acts.[33]

(e) *Non-binding instruments*

15. The proposal to consider the question of non-binding principles was made in 1996, during the process of preparing the general scheme. The following year, the Working Group on the long-term programme of work heard a proposal for the inclusion of the topic "Politically (not legally) binding acts".

(f) *Other proposals*

16. The records of the Commission reveal several other proposals made under the general heading "Sources of international law" but not easily categorized under the subcategories identified in 1996. These include "Acquiescence and its effects on the legal rights and obligations of States", proposed by the Secretariat in 2006,[34] and "The self-executing character of rules of international law", a proposal made in the context of the Working Group on the long-term programme of work in 2012. The Commission also received, in 2011, a written suggestion from a Member State that the topic "Hierarchy in international law" be considered.[35] More general proposals to consider the "sources of international law" (1970)[36] or to undertake a "restatement of international law" (2007)[37] were also made.

B. Subjects of international law

Topics taken up but abandoned:

(*a*) Fundamental rights and duties of States (1949);

(*b*) "Succession" of Governments (1949).

1. Work undertaken by the Commission

17. The Commission has not undertaken the consideration of any topics under the category "Subjects of international law" since 1996, and, accordingly, the general scheme as presented then remains the same.

2. Possible future topics

18. The scheme included three categories of possible future topics: "Subjects of international law" (which had been proposed in 1949); "Statehood", under which appeared the topics "Position of States in international law" (1971), "Criteria for recognition" (1949) and "Independence and sovereignty of States" (1962); and "Government", under which appeared the topics "Recognition of Governments" (1949) and "Representative Governments" (1996).

19. The 1996 scheme did not mention several related proposals made earlier; reference is made in the 1949 survey to the possibility of considering the "obligations of territorial jurisdiction"[38] and "the territorial domain of States",[39] which ostensibly concerned questions relating to the modes of acquisition of territory, as well as specific limitations on the exercise of territorial sovereignty. Another proposal, recorded in 1970, was to consider "the international personality of international

[31] In 1997 and 1999, France proposed the consideration of the topic "The scope and the legal consequences of resolutions adopted by international organizations and their role in the formation of international law". See A/C.6/52/SR.19, para. 66, and A/C.6/54/SR.26, para. 35.

[32] *Yearbook … 1993*, vol. II (Part One), document A/CN.4/454, p. 213. The topic was also included among a set of topics proposed in the Working Group on the long-term programme of work in 1997.

[33] See articles on responsibility of States for internationally wrongful acts, art. 48 (General Assembly resolution 56/83 of 12 December 2001, annex; the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77), and articles on the responsibility of international organizations, art. 48 (General Assembly resolution 66/100 of 9 December 2011, annex; the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook …2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88), respectively. See also the proposal made by Poland, in 2014, for the topic "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law", indicated in sect. I, of the present working paper.

[34] *Yearbook … 2006*, vol. II (Part Two), p. 186, para. 261.

[35] Proposal submitted by Portugal. A similar proposal was made at the 1997 Colloquium ("Interrelationships of different bodies of law and the relative weights to be attached to them when those bodies interact with each other or suggest different conclusions to a particular legal problem"). See 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 37.

[36] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 261, para. 81 (proposal by Mexico).

[37] Suggested in the Working Group on the long-term programme of work, in 2007.

[38] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 57–60.

[39] *Ibid.*, paras. 64–67.

organizations".[40] The records also indicate that that year a Member State suggested two further topics, namely "The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically, in conformity with its professed ideology and to take all necessary steps to accomplish this, e.g. decolonization, normalization, nationalization, and also steps to control all its natural resources and to ensure that those resources are utilized for the interests of the State and the people" and "The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence".[41] The 1971 survey, for its part, contained reference to the "question of recognition of … governments and belligerency"[42] and the "capacity of international organizations to espouse international claims",[43] the latter of which has since been covered, at least in part, by the Commission's work on the responsibility of international organizations.

20. Other possible topics identified under the present category, solely within the context of the Working Group on the long-term programme of work, include "Criteria for statehood" (1996), "International organizations as international subjects of law" (1997), "Recognition of States" (1998), "Non-intervention and human rights" (1998), "Subjects of international law" (2007) and "Principles on border delimitation" (2010).

C. Succession of States and other legal persons

Topics already completed:

(*a*) Succession of States with respect to treaties (1968–1974):

Vienna Convention on Succession of States in respect of Treaties, 1978;

(*b*) Succession of States in respect of matters other than treaties (1967–1981):

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983;

(*c*) Nationality in relation to the succession of States (1993–1999):

Articles on nationality of natural persons in relation to the succession of States, 1999.[44]

1. Work undertaken by the Commission

21. The 1996 general scheme has been updated to reflect the adoption in 1999 of the draft articles on nationality of natural persons in relation to the succession of States upon the conclusion of the work on the topic of the same title.

2. Possible future topics

22. As regards proposals for future topics identified by the Commission, the 1996 general scheme listed three potential topics: "Succession of States in respect of membership of, and obligations towards, international organizations", "'Acquired rights' in relation with State succession" and "Succession of international organizations".

23. It might be recalled that the question of the succession of Governments was referred to in the 1949 survey (together with that of States).[45] Since 1996, the following related topics were proposed in the Working Group on the long-term programme of work: "Treaties with international organizations in case of the succession of States" (1998); "Impacts of State succession on membership in international organizations" (2010); and "Succession of States with respect to State responsibility" (2013).

24. During the consideration by the Sixth Committee of the Commission's report at the fifty-fourth session of the General Assembly in 1999, two delegations spoke in favour of considering the topic "Nationality of legal persons in relation to the succession of States",[46] which the Commission had recommended not be pursued, following the conclusion of its work on the nationality of natural persons in relation to the succession of States.[47]

D. State jurisdiction/immunity from jurisdiction

1. Topics already completed:

Jurisdictional immunities of States and their property (1978–1991, 1999):

United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

2. Topics under consideration:

Immunity of State officials from foreign criminal jurisdiction (2007–).

3. Topics currently on the long-term programme of work:

(*a*) Jurisdictional immunity of international organizations (2006);

(*b*) Extraterritorial jurisdiction (2006).

1. Work undertaken by the Commission

25. The 1996 general scheme was updated to reflect the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004. In addition, two new sections have been established to reflect topics under consideration and those currently on the long-term programme of work. The topic "Immunity of State officials from foreign criminal jurisdiction" has

[40] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 256, para. 43.

[41] *Ibid*., p. 265, para. 113 (proposal by Indonesia).

[42] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, p. 16, para. 55.

[43] *Ibid*., p. 80, para. 354.

[44] General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

[45] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 44–47.

[46] A/C.6/54/SR.17, para. 19 (Costa Rica) and para. 30 (Slovenia).

[47] *Yearbook … 1999*, vol. II (Part Two), p. 20, para. 45.

been inserted under the first new section. The second new section includes the topics "Jurisdictional immunity of international organizations" and "Extraterritorial jurisdiction", both of which were placed in the long-term programme of work in 2006.[48]

2. Possible future topics

26. The 1996 general scheme listed proposals for the following possible future topics: "Immunities from execution" (1996); "Extraterritorial jurisdiction", under which appeared the subtopics "Recognition of acts of foreign States" (1949), "Jurisdiction over foreign States" (1949), "Jurisdiction with respect to crimes committed outside national territory" (1949) and "Extraterritorial application of national legislation" (1992); "Territorial jurisdiction", under which was listed the topic "Territorial domain of States" (1949); and "Jurisdiction relating to public services (*compétences relatives aux services publics*)" (1996). Of these proposed topics, the question of immunities from execution was covered, at least in part, by the work on the topic "Jurisdictional immunities of States and their property". Furthermore, as already indicated, the topic "Extraterritorial jurisdiction" was added to the long-term programme of work in 2006.

27. As regards the aspect of State jurisdiction, it should be recalled that the 1949 survey included a reference to the question of the "obligations of international law in relation to the law of the State", dealing with the question of the reception of international law in the domestic law of States.[49] A reference is also found in the 1970 records to a proposal by a Member State that the Commission consider the topic "Conflicts between treaties and domestic law, especially national constitutions".[50] A proposal for the consideration of the topic "Universal jurisdiction in civil matters" was made in the Working Group on the long-term programme of work in 2004.

28. On the question of immunity from jurisdiction, the 1971 survey referred briefly to the possibility of considering the topic "Jurisdictional immunities … with respect to armed forces stationed in the territory of another State".[51] In commenting on the 1971 survey, a member of the Commission proposed the consideration of the topic "Immunities of foreign States and bodies corporate".[52]

E. Law of international organizations

1. Topics already concluded:

Representation of States in their relations with international organizations (1959–1971):

Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975.

2. Topics taken up but not continued:

Status, privileges and immunities of international organizations, their officials, experts, etc. (1976–1992).

1. Work undertaken by the Commission

29. The Commission has not undertaken the consideration of any topics under the category "Law of international organizations" since 1996, and, accordingly, the scheme as presented then remains the same.

2. Possible future topics

30. As regards possible future topics, the 1996 general scheme identified "General principles of law of the international civil service", "International legal personality of international organizations" and "Jurisdiction of international organizations (implied powers, personal jurisdiction and territorial jurisdiction)". All three were proposals made in 1996. Similar proposals had been made in the past: reference is made in the 1971 survey to the question of "the legal status of international organizations, and the different types of organization".[53] The survey also included a discussion of the topic "Privileges and immunities of international organizations, and of entities and officials under their authority",[54] which was subsequently taken up by the Commission under the topic "Status, privileges and immunities of international organizations, their officials, experts, etc." but was discontinued. Furthermore, two related proposals have since been made in the context of the Working Group on the long-term programme of work, namely revisiting the question of the "representation of States in their relations with international organizations" (1998), which was the subject of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, as well as a proposal to develop "model rules of a decision-making procedure for international conferences and conferences of parties to multilateral conventions" (2011).

F. Position of the individual in international law

1. Topics already completed:

(*a*) Nationality, including statelessness (1950–1954):

Convention on the Reduction of Statelessness, 1961;

(*b*) Expulsion of aliens (2004–2014):

Draft articles on the expulsion of aliens, 2014.[55]

2. Topics taken up but not continued:

Right of asylum.

3. Topics under consideration:

Protection of persons in the event of disasters (2007–).

[48] *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257.

[49] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 34–36.

[50] *Yearbook … 1970*, vol. II, document A/CN.4/230, pp. 267–268, para. 135 (proposal by El Salvador).

[51] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 20–21, para. 77.

[52] *Yearbook … 1972*, vol. II, document A/CN.4/254, p. 207, para. 17 (Mr. Reuter).

[53] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 76–77, paras. 343–346.

[54] *Ibid*., pp. 77–79, paras. 347–352.

[55] *Yearbook … 2014*, vol. II (Part Two), pp. 22–24, para. 44.

4. Topics currently on the long-term programme of work:

Protection of personal data in transborder flow of information (2006).

1. Work undertaken by the Commission

31. Under the present heading, since 1996 the Commission has undertaken work in the areas of treatment of aliens and protection of persons. The general scheme has been updated to reflect the adoption in 2014 of the draft articles on the expulsion of aliens, considered under the topic of the same title. Likewise, the Commission is presently considering the topic "Protection of persons in the event of disasters". It is also worth noting that, while the consideration of the topic "Diplomatic protection" is recorded elsewhere in the general scheme,[56] the Commission conceived of the topic at the time of the adoption of the draft articles on diplomatic protection,[57] in 2006, as one also relating to the protection of human rights. The scheme was also amended to reflect the fact that, at its fourteenth session, in 1962, the Commission decided to include the topic "Right of asylum" in its programme[58] but did not pursue the topic. The general scheme was also updated to reflect the inclusion in 2006 of the topic "Protection of personal data in transborder flow of information" in the long-term programme of work.[59]

2. Possible future topics

32. The 1996 general scheme recorded several proposals for new topics, organized thematically. The first was "International law relating to individuals", under which appeared the general topic "The individual in international law", which had been referred to in the 1949 survey.[60] A related proposal entitled "The position of the individual in international law" was made in 2000 in the context of the Working Group on the long-term programme of work.[61]

33. The 1996 scheme also included, under the theme "Treatment of aliens", the topics "Right of asylum" and "Extradition". Both had been proposed in the initial survey of 1949.[62] As indicated previously, the topic "Right of asylum" was, in fact, briefly included in the Commission's programme but was never pursued. Since 1996, proposals to revisit the topic have been made on several occasions in the context of the long-term programme of work (as early as 1998). The Commission apparently envisaged the scope of the proposed topic "Extradition" as being limited to that of aliens (despite it conceivably being broader to include that of nationals). Furthermore, the Commission's work on the expulsion of aliens has its origins, in part, in a proposal made in 1999 entitled "The law relating to the treatment of aliens", which was only partially covered by the subsequent work on expulsion (and that on diplomatic protection).[63]

34. The 1996 scheme next included a proposal for the topic "Law concerning international migrations"[64] made in 1992, which could, in its contemporary conception, be grouped under the theme "Protection of persons". Under this theme, the Commission, in the context of the long-term programme of work, also received proposals for the consideration of the topics "The refugee problem" (1990),[65] "Principles of an international information order" (1997),[66] "Humanitarian protection" (2000)[67] and "International protection of persons in critical situations" (2003). The last two have been covered, in part, by the ongoing work on the protection of persons in the event of disasters. Two related suggestions, to consider the topics "Mass exoduses of people under threat of death" and "Human cloning and genetic manipulation", were made at the United Nations Colloquium on Progressive Development and Codification of International Law (1997).[68] In 2004 and 2005, several Member States recommended that the Commission consider the question of the "responsibility to protect".[69]

35. The 1996 scheme next included the topic "Human rights and defence of democracy", which had been proposed in 1962.[70] The records of the Commission for 1970 refer to a suggestion made by a Member State in favour of the consideration of the topic "Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights".[71] Since 1996, proposals have been made in the context of the work on the long-term programme for the topics "A new generation of human rights" (1990)[72] and "Non-dis-

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[56] See sect. I of the present working paper.

[57] *Yearbook … 2006*, vol. II (Part Two), pp. 24–26, para. 49; see also General Assembly resolution 62/67 of 6 December 2007, annex.

[58] *Yearbook … 1962*, vol. II, document A/5209, at p. 190, para. 60.

[59] *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257.

[60] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 76–89.

[61] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See also A/C.6/55/SR.24, para. 19 (Brazil).

[62] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 85–89.

[63] A similar suggestion, to consider the general topic "The rights and duties of aliens", was made at the 1997 Colloquium. See 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 36.

[64] Support for the proposal was expressed by a Member State in 2008. See A/C.6/63/SR.25, para. 11 (United Republic of Tanzania).

[65] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366.

[66] In 2008, a Member State suggested that the Commission should deal with "the question of the regulation of the Internet in international law". A/C.6/63/SR.16, para. 49 (Republic of Korea).

[67] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726.

[68] See 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 37. The latter proposal was the subject of consideration by the Sixth Committee of the General Assembly in the early 2000s, which resulted in the adoption, by the General Assembly, of the United Nations Declaration on Human Cloning. General Assembly resolution 59/280 of 8 March 2005, annex.

[69] A/C.6/59/SR.24, para. 4 (Portugal, "the question of whether and under what conditions the international community and States had a responsibility to protect in cases of massive violations of human rights"), A/C.6/60/SR.11, para. 48 (Morocco), and A/C.6/60/SR.17, para. 17 (Sierra Leone).

[70] *Yearbook … 1962*, vol. II, A/CN.4/145, pp. 97–98, paras. 177–187, which included a proposal for the creation of a special international court for the international protection of human rights (a matter dealt with separately by the Commission on Human Rights). See also the review undertaken in 1970, *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 264, para. 109 (proposal by Colombia). The 1970 review also recorded a proposal by Venezuela for the preparation of a draft Convention for the defence of democracy. *Ibid*., paras. 107–108.

[71] *Yearbook … 1970*, vol. II, documentA/CN.4/230, p. 265, para. 110 (Ceylon [Sri Lanka]).

[72] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366.

crimination in international law" (2000).[73] A reference to a suggestion that the Commission consider the topic "Rights of national minorities" can be found in the 1991 report of the Commission.[74] A suggestion that the Commission consider the topic "Human rights safeguards in the extradition process" was made during the 1997 Colloquium.[75]

36. The 1949 survey proposed a general consideration of the topic "The law of nationality".[76] Several more specific proposals for topics have been made since. The 1971 survey referred to the question of the "problems which arise owing to differences between the nationality laws applied by various countries (in particular as regards the conditions under which nationality may be accorded)",[77] as well as to that of "multiple nationality and other questions relating to nationality".[78]

37. The question of the position of the individual under international law has also arisen in the context of responsibility for internationally wrongful acts. The Working Group on the long-term programme of work has been presented with suggestions to consider the topics "The international legal consequences of violations of human rights" (2000)[79] and "The rights of individuals arising from international responsibility" (2013).

G. International criminal law

1. Topics already completed:

(*a*) Formulation of the Nürnberg Principles (1949–1950):

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950;[80]

(*b*) Draft code of crimes against the peace and security of mankind (including the draft statute for an international criminal court) (1982–1996):

(i) Draft code of crimes against the peace and security of mankind, 1996;[81]

(ii) Rome Statute of the International Criminal Court, 1998;

(*c*) Obligation to extradite or prosecute (*aut dedere aut judicare*) (2005–2014);

Final report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), 2014.[82]

2. Topics subsumed under other topics:

(*a*) Question of international criminal jurisdiction (1949–1950);

(*b*) Question of defining aggression (1951).

3. Topics under consideration:

Crimes against humanity (2014–).

1. Work undertaken by the Commission

38. In addition to amending the 1996 general scheme to reflect work undertaken by the Commission in its early years, the scheme was further updated to reflect the adoption of the draft code of crimes against the peace and security of mankind, in 1996, as well as that of the Rome Statute of the International Criminal Court, in 1998. The recent conclusion of the work on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)"[83] and the inclusion of the topic "Crimes against humanity" in the Commission's work programme[84] have also been reflected in the revised scheme; the former had featured as a potential future topic in the general scheme of 1996.

2. Possible future topics

39. The only topic remaining from the 1996 list of possible future topics is "International crimes other than those referred to in the Code of Crimes against the Peace and Security of Mankind", which had been proposed that year. It should be recalled that the 1949 survey had also included a proposal for the topic "Jurisdiction with regard to crimes committed outside national territory".[85] The 1971 survey included a discussion on the topic "Other offences of international concern",[86] including suggestions for the topics "Piracy *iure gentium*"[87] and "Attacks on diplomatic agents and others to whom the receiving State owes a duty of special protection under international law";[88] the latter was subsequently dealt with by the Commission and reflected in the 1996 general scheme as a component of diplomatic law.[89] Proposals were also made in 2000, in the Working Group on the long-term programme of work, to consider the topics "Legal aspects of corruption and related practices"[90] and "Jurisdictional aspect of transna-

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[73] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See A/C.6/55/SR.24, para. 16 (Russian Federation).

[74] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330.

[75] See, 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 36.

[76] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 76–78. See also the 1971 survey, *Yearbook … 1971*, vol. II (Part Two), A/CN.4/245, pp. 80–82, paras. 359–367.

[77] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 80–81, para. 359.

[78] *Ibid*., para. 367. The issue had been deferred in 1954. See *Yearbook … 1954*, vol. II, document A/2693, at p. 149, para. 39.

[79] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726.

[80] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 95–127.

[81] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[82] A/CN.4/L.844; available from the Commission's website, documents of the 66th session. See also *Yearbook … 2014*, vol. II (Part Two), chap. VI.

[83] *Yearbook … 2014*, vol. II (Part Two), p. 92, para. 65.

[84] *Ibid*., p. 164, para. 266.

[85] Document A/CN.4/1/Rev.1 (see footnote 6 above), paras. 61–63. See also the 1962 working paper prepared by the Secretariat, *Yearbook … 1962*, vol. II, document A/CN.4/145, p. 90, paras. 69–82.

[86] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 98–99, paras. 444–446.

[87] *Ibid*., para. 445.

[88] *Ibid*.

[89] See sect. I, of the present working paper.

[90] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See also A/C.6/55/SR.15, para. 76 (South Africa), and 1997 Colloquium,

tional organized crime".[91] In 2008, the Working Group considered a proposal for a topic entitled "Internet and international law",[92] which, in an earlier version, had been entitled "Criminal use of Internet and State jurisdiction and obligation of servers".[93]

H. Law of international spaces

1. Topics already completed:

(*a*) Law of the sea—régime of the high seas and régime of the territorial sea (1949–1956):

Four Geneva Conventions on the Law of the Seas (Convention on the Continental Shelf, Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas), 1958;

(*b*) Law of the non-navigational uses of international watercourses (1971–1994):

Convention on the Law of the Non-navigational Uses of International Watercourses, 1997;

(*c*) Shared natural resources (2002–2008):

Draft articles on the law of transboundary aquifers, 2008.[94]

2. Topics taken up and abandoned:

(*a*) Juridical regime of historical waters, including historic bays (1962);

(*b*) Shared natural resources (oil and gas) (2007–2010).

3. Topics currently on the long-term programme of work:

Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (1996).

1. Work undertaken by the Commission

40. The 1996 general scheme has been updated to reflect the adoption of the Convention on the Law of the Non-navigational Uses of International Watercourses, in 1997, as well as the adoption of the draft articles on the law of transboundary aquifers, in 2008, which were developed in the context of the Commission's work under the general rubric "Shared natural resources". To the list of topics which the Commission discontinued has been added the topic "Oil and gas", also in the context of the work on shared natural resources.[95] Furthermore, the scheme has been updated to reflect the addition of the topic "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction" to the long-term programme of work in 1996.[96]

2. Possible future topics

41. The 1996 general scheme arranged the possible future topics by thematic areas. Under the general area of "Law of the sea" appeared the topic "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction", which, as already indicated, was added to the long-term programme of work that year. The Commission's records for 1967 also make reference to a proposal to consider the topic "International bays and international straits".[97] In 2012, a proposal was made in the Working Group on the long-term programme of work for the consideration of the topic "The law of maritime delimitation".

42. The scheme further included a reference to the "law of the air", which had been raised in the 1971 survey, and which referred to a suggestion made in the debate in the Sixth Committee that the Commission consider the topic "Aerial piracy".[98]

43. The 1996 scheme also included a reference to the general topic "Law of space", which was recorded as having been proposed in 1962.[99]

44. Under the heading "Legal regime of international rivers and related topics", the scheme listed the topic "Navigation on international rivers". In 1972, a member of the Commission suggested considering the question of the "pollution of international waterways",[100] a matter dealt with, in part, by the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

45. As for the rubric "Shared natural resources",[101] the 1996 scheme referred to proposals to consider the topics "Global commons" (1992), "The common heritage of mankind" (1996), "Transboundary resources" (1996) and "Common interest of mankind" (1996).

Making Better International Law … (footnote 13 above), p. 37 ("The elimination of corruption in international commercial transactions").

[91] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. A similar proposal ("Transnational organized crime from the angle of jurisdiction and competence") was made in the Sixth Committee that year. See A/C.6/55/SR.22, para. 59 (Libyan Arab Jamahiriya).

[92] See also footnote 66 above.

[93] Proposals for topics relating to aspects of transnational crime were also made during the 1998 Seminar, including by Vaughan Lowe, who proposed the topics "Corrupt practices" and "International co-operation in criminal jurisdiction". 1998 Seminar, *The International Law Commission Fifty Years After* … (footnote 13 above), pp. 130–131 and 134, respectively.

[94] *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

[95] *Yearbook … 2010*, vol. II (Part Two), p. 200, para. 377, and p. 200, para. 384.

[96] *Yearbook … 1996*, vol. II (Part Two), pp. 97–98, para. 248.

[97] *Yearbook … 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, para. 46. See also *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, at p. 233, para. 10, and *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 269, para. 144.

[98] See *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, p. 72, footnote 399. This proposal has been superseded by work undertaken elsewhere. See Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

[99] *Yearbook … 1962*, vol. II, document A/CN.4/145, pp. 96–97, paras. 162–169.

[100] *Yearbook … 1972*, vol. II, document A/CN.4/254, para. 38 (Mr. Kearney).

[101] During the consideration of the possibility of continuing work on the general topic "Shared natural resources", following the adoption of the draft articles on the law of transboundary aquifers, a suggestion was made that the Commission could consider the transboundary movement of wildlife.

I. Law of international relations/responsibility

Topics already completed:

(*a*) Diplomatic intercourse and immunities (1954–1958):

Vienna Convention on Diplomatic Relations, and Optional Protocols, 1961;

(*b*) Consular intercourse and immunities (1955–1961):

Vienna Convention on Consular Relations, and Optional Protocols, 1963;

(*c*) Special missions (1958–1967):

Convention on Special Missions, and Optional Protocol, 1969;

(*d*) Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (1972):

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;

(*e*) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (1977–1989):

Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, 1989;[102]

(*f*) State responsibility (1954–2001):

Draft articles on responsibility of States for internationally wrongful acts, 2001;[103]

(*g*) Prevention of transboundary damage from hazardous activities (1997–2001):

Draft articles on prevention of transboundary harm from hazardous activities, 2001;[104]

(*h*) International liability in case of loss from transboundary harm arising out of hazardous activities (2002–2006):

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006;[105]

(*i*) Diplomatic protection (1997–2006):

Draft articles on diplomatic protection, 2006;[106]

(*j*) Responsibility of international organizations (2002–2011):

Draft articles on the responsibility of international organizations, 2011.[107]

1. Work undertaken by the Commission

46. Since 1996, the Commission has been particularly active in this area of public international law and has concluded its consideration of several related topics, which resulted in the adoption of five texts. Hence, the 1996 general scheme has been updated to reflect the Commission's adoption of the draft articles on responsibility of States for internationally wrongful acts (2001), the draft articles on prevention of transboundary harm from hazardous activities (2001), the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006), the draft articles on diplomatic protection (2006) and the draft articles on the responsibility of international organizations (2011).

2. Possible future topics

47. The 1996 general scheme recorded two topics for possible future consideration: "Functional protection" and "International representation of international organizations", both of which were proposed that year. It may be worth recalling that the 1949 survey had also included suggestions for the consideration of the topics "Question of whether extinctive prescription forms part of international law"[108] and "Prohibition of abuse of rights".[109] Since 1996, the possibility of considering the topics "Damages" (1998) and "Consular functions" (2010) has been raised in the Working Group on the long-term programme of work. There were also suggestions made during the seminar held to commemorate the fiftieth anniversary of the Commission, in 1998, to consider the topic "Remedies" and to undertake a revision of the Vienna Convention on Diplomatic Relations, with a view to providing, *inter alia*, for the question of insolvencies of embassies and their staff.[110] In 2014, a Member State proposed the consideration of the topic "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law".[111]

J. Law of the environment

Topics under consideration:

(*a*) Protection of the environment in relation to armed conflicts (2013–);

(*b*) Protection of the atmosphere (2013–).

[102] *Yearbook … 1989*, vol. II (Part Two), pp. 14 *et seq*., para. 72.

[103] See footnote 33 above.

[104] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq*. para. 97. See also General Assembly resolution 62/68 of 6 December 2007, annex.

[105] *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq*., para. 66; see also General Assembly resolution 61/36 of 4 December 2006, annex.

[106] See footnote 57 above.

[107] See footnote 33 above.

[108] Document A/CN.4/1/Rev.1 (see footnote 6 above), para. 98.

[109] *Ibid*.

[110] Suggestions by Vaughan Lowe, 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), p. 130, and Gerhard Hafner, *ibid*., pp. 139–140, respectively. The Commission also received, in 2013, a request by a private entity to undertake a revision of the Vienna Convention on Consular Relations, aimed at eliminating the distinction between career and honorary consuls.

[111] A/C.6/69/SR.20, para. 30 (Poland).

1. Work undertaken by the Commission

48. Prior to 1996, the Commission had not considered any topics relating to the law of the environment more generally, as opposed to those dealing with the legal regulation of specific international spaces.[112] This has changed in recent years, and the general scheme has been revised to reflect the inclusion in the current programme of work of the topics "Protection of the environment in relation to armed conflicts" and "Protection of the atmosphere", both added in 2013.[113]

2. Possible future topics

49. As for possible future topics, the 1996 scheme recorded a proposal made in 1992 for the consideration of the topic "Rights and duties of States for the protection of the human environment". The 1971 survey identified the area of the "law relating to the environment" as being one suitable for future development,[114] but without making any specific proposals. "Protection of the environment" was suggested as a possible topic for consideration in 1990, in the context of the long-term programme of work.[115] The following year, a similar suggestion for the consideration of the topic "Legal aspects of the protection of the environment of areas not subject to national jurisdiction ('global commons')" was made.[116] The report of the Working Group on the long-term programme of work for 2000 records the fact that proposals were made to undertake a "feasibility study on the law of environment: guidelines for international control for avoidance of environmental conflict"[117] and to consider the topics "The precautionary principle"[118] and "The polluter pays principle".[119]

K. Law of economic relations

Topics currently on the long-term programme of work:

The fair and equitable treatment standard in international investment law (2011).

1. Work undertaken by the Commission

50. To date, the Commission has not undertaken the consideration of any topics in this area. In 2011, the Commission placed the topic "The fair and equitable treatment standard in international investment law" on the long-term programme of work,[120] and the general scheme has been updated accordingly.

2. Possible future topics

51. In 1996, the scheme listed several related topics which had been proposed over the years, including "Economic and trade relations" (1971), "Legal conditions of capital investment and agreements pertaining thereto" (1993), "International legal problems connected with privatization of State properties" (1996) and "General legal principles applicable to assistance in development" (1996).[121] The records of the Commission also reveal proposals and suggestions made over the years for the consideration of the topics "The rules governing multilateral trade" (1970),[122] "International law of economic relations" (1990),[123] "The international legal regime of investments" (1990),[124] "Legal aspects of contracts between States and foreign corporations" (1990),[125] "Legal aspects of economic development" (1990),[126] "International legal regulation of foreign indebtedness" (1991),[127] "The legal conditions of capital investment and agreements pertaining thereto" (1991),[128] "Institutional arrangements concerning trade in commodities" (1991)[129] and "Foundations of investment law" (1997). Suggestions for topics were also made at the 1997 Colloquium and the 1998 Seminar, including "Foreign investment" (1997),[130] "Trade and investments" (1997),[131] "Parent/subsidiary relations" (1998)[132] and "State contracts" (1998).[133]

L. Law of armed conflicts/disarmament

1. Possible future topics

52. No developments have taken place since 1996 that require changes to the general scheme, which listed proposals for three possible topics only: "Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States" (1992),[134] "General legal principles applicable to demilitarized and/or neutral zones" and "General legal principles applicable to armed sanctions under Chapter VII

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[112] See sect. H, of the present working paper.

[113] *Yearbook … 2013*, vol. II (Part Two), p. 78, paras. 167–168.

[114] *Yearbook … 1971*, vol. II (Part Two), pp. 139–140, paras. 335–339.

[115] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366.

[116] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330. A similar proposal entitled "General principles of international law relating to environmental protection" was made in 1999 in the context of the Working Group on the long-term programme of work.

[117] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See A/C.6/51/SR.40, para. 40 (Japan); A/C.6/54/SR.23, para. 24 (Mexico); A/C.6/54/SR.27, paras. 3 (Japan) and 22 (Austria); and A/C.6/64/SR.16, para. 69 (Japan).

[118] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See A/C.6/54/SR.27, paras. 3 (Japan) and 22 (Austria); A/C.6/55/SR.22, para. 8 (Finland); and A/C.6/55/SR.24, para. 16 (Russian Federation).

[119] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726. See A/C.6/54/SR.23, para. 24 (Mexico), and A/C.6/54/SR.27, paras. 3 (Japan) and 22 (Austria).

[120] *Yearbook …2011*, vol. II (Part Two), p. 175, para. 365.

[121] See A/C.6/55/SR.22, para. 9 (Finland, "although much of development law derived from multilateral and bilateral treaties of assistance and cooperation, and unified codification was not advisable, it would be interesting to identify and develop new principles, for example non-reciprocity or best practices, which were found in such treaties"); and A/C.6/55/SR.24, para. 76 (Cuba).

[122] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 267, para. 130.

[123] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366. See also A/C.6/55/SR.24, para. 76 (Cuba).

[124] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366.

[125] *Ibid.*

[126] *Ibid.*

[127] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330.

[128] *Ibid.*

[129] *Ibid.*

[130] 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 36.

[131] *Ibid.*

[132] 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), p. 131 (proposal by Vaughan Lowe).

[133] *Ibid.*, pp. 133–134.

[134] See also A/C.6/63/SR.25, para. 11 (United Republic of Tanzania).

of the Charter of the United Nations". The latter two were suggested in 1996. It is recalled that the report of the Commission of 1949 included the topic "Laws of war"[135] among the list drawn from the 1949 survey as a basis for discussion, even though the survey had not included a proposal for such a topic. The records for 1962 refer to a proposal made by two Member States to consider the topic "Prohibition of war".[136] The topic "Law of war and neutrality" was also proposed that year.[137] The 1971 survey included a reference to the topic "Prohibition of the threat or use of force",[138] and the heading "The law relating to armed conflicts" included discussion of the topics "The notion of 'armed conflict' and the effects of armed conflict on the legal relations between States",[139] "Issues relating to internal armed conflicts",[140] "The status and protection of specific categories of persons in armed conflicts"[141] and "The prohibition and limitation of the use of certain methods and means of warfare".[142] Further suggestions made in the context of the Working Group on the long-term programme of work included the topics "Updating of rules relating to armed conflicts and protection of the civilian population" (1990)[143] and "The legal aspects of disarmament" (1991).[144] A further proposal was made in 2005 to consider the topic "Recourse to force by States Members of the United Nations and/or regional organizations under delegation of authority pursuant to Chapter VII of the Charter of the United Nations". Another proposal, made by a Member State the same year, was for the consideration of the topic "The pre-emptive use of force in international law".[145] In 2006 and 2007,[146] a Member State proposed the following topics: "The legal consequences arising out of the use of private armies in internal conflicts"; "The legal consequences arising out of the involvement of multilateral corporations in internal conflicts"; and "The legal consequences arising out of the involvement of security agencies in internal conflicts". In 2011, a Member State proposed the topic "The application of international humanitarian law to non-State armed groups in contemporary conflicts".[147]

53. In 1997, the topic "Law relating to international peace and security" was suggested during the discussions in the Working Group,[148] and, in 1999, the topic "The law of collective security".[149] At the 1997 Colloquium, the topic "Good-neighbourliness" was recommended,[150] and at the 1998 seminar a proposal was made for the topic "Economic sanctions".[151]

M. Settlement of disputes

Topics already completed:

Model Rules on Arbitral Procedure, 1958.[152]

1. Work undertaken by the Commission

54. Other than the work undertaken on the Model Rules on Arbitral Procedure during the 1950s, which resulted in their adoption in 1958, the Commission has not placed any other topics related to this heading on its programme of work. Accordingly, the entry in the general scheme of 1996 remains unchanged.

55. The Commission did, however, consider the question of the peaceful settlement of disputes, under the agenda item "Other matters", at its sixty-second and sixty-third sessions, in 2010 and 2011,[153] respectively, on the basis of a note by the Secretariat[154] and a working paper prepared by Sir Michael Wood,[155] respectively.

2. Possible future topics

56. As regards possible future topics, the general scheme referred to three proposals for topics: "Pacific settlement of international disputes", included in the survey of 1949; "Model clauses for the settlement of disputes relating to the application or interpretation of future codification conventions", proposed in 1996; and "Mediation and conciliation procedures through the organs of the United Nations", also suggested in 1996. Other suggestions concerning the peaceful settlement of disputes generally were made over the years. The records for 1962 reveal proposals for the topics "More frequent recourse to arbitral and judicial settlement",[156] "Obligatory jurisdiction of the International Court of Justice"[157] and "Enforcement of international law".[158] In 1968, it was suggested that the Commission consider the topics "Questions of international legal procedure, such as model rules for conciliation"[159] and "Drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of

[135] *Yearbook … 1949*, document A/925, Report to the General Assembly, pp. 280–281, paras. 15 and 18.

[136] *Yearbook … 1962*, vol. II, document A/CN.4/145, p. 94, paras. 129–130 (proposals of Afghanistan and Czechoslovakia).

[137] *Ibid*., pp. 95–96, paras. 146–156.

[138] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 25–28, paras. 104–119.

[139] *Ibid*., pp. 91–92, paras. 404–411.

[140] *Ibid*., pp. 92–93, paras. 412–417.

[141] *Ibid*., pp. 93–95, paras. 418–427.

[142] *Ibid*., pp. 95–96, paras. 428–432.

[143] *Yearbook … 1990*, vol. II (Part Two), p. 107, footnote 366.

[144] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330.

[145] A/C.6/60/SR.17, para. 17 (Sierra Leone).

[146] A/C.6/61/SR.19, para. 72, and A/C.6/62/SR.24, para. 100 (Sierra Leone).

[147] A/C.6/66/SR.27, para. 29 (Sri Lanka).

[148] See also A/C.6/55/SR.24, para. 76 (Cuba).

[149] Recorded the following year in *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 726.

[150] Proposal by the Romanian delegate at the 1997 Colloquium, see 1997 Colloquium, *Making Better International Law …* (footnote 13 above), p. 109.

[151] 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), p. 130 (proposal by Vaughan Lowe). See also A/C.6/55/SR.22, para. 59 (Libyan Arab Jamahiriya).

[152] *Yearbook … 1958*, vol. II, document A/3859, pp. 83 *et seq.*, para. 22.

[153] *Yearbook … 2010*, vol. II (Part Two), p. 202, para. 388, and *Yearbook …2011*, vol. II (Part Two), pp. 180–181 *et seq.*, paras. 416–417.

[154] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/623.

[155] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/641.

[156] *Yearbook … 1962*, vol. II, document A/CN.4/145, pp. 94–95, paras. 137–140.

[157] *Ibid*., p. 95, paras. 141–145; see also *Yearbook … 1970*, vol. II, document A/CN.4/230, para. 97.

[158] *Yearbook … 1962*, vol. II, document A/CN.4/145, p. 99, paras. 201–203; see also *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, p. 232; and *Yearbook … 1970*, vol. II, document A/CN.4/230, paras. 121–122.

[159] *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, p. 233; see also *Yearbook … 1970*, vol. II, document A/CN.4/230, paras. 92 and 143.

that question".[160] In 1970, reference was made to the proposals of two Member States for the Commission to consider the topics "Review [of] all the established machinery for the peaceful settlement of international disputes"[161] and "More frequent recourse to arbitral and judicial settlement", respectively.[162] The 1971 survey included an analysis of the general topic "Law relating to the peaceful settlement of disputes".[163] In 1991, the Commission again heard the suggestion to consider the topic "International commissions of inquiry (fact-finding)".[164] Similar proposals are to be found among the suggestions for possible topics contained in the 2011 working paper, including: "Model dispute settlement clauses for possible inclusion in drafts prepared by the Commission", "Access to and standing before different dispute settling mechanisms of various actors (States, international organizations, individuals, corporations, etc.)", "Competing jurisdictions between international courts and tribunals" and "Declarations under the optional clause, including the elaboration of model clauses for inclusion therein".[165]

57. Since 1996, the Working Group on the long-term programme of work has also been presented with suggestions for the following topics: "Means and methods for the international settlement of disputes" (1997); and "Scope and content of the obligation to settle international disputes peacefully" (2005). At the 1998 Seminar, proposals to consider the topics "Evidence" and "Multiple jurisdictions in international law" were also made.[166]

58. Proposals for new topics have also been made in connection with the specific question of the settlement of disputes involving international organizations. These include suggestions for the topic "Arrangements to enable international organizations to be parties to cases before the International Court of Justice", made in 1968,[167] which was presented in 1970 as "Status of international organizations before the International Court of Justice".[168] The 2011 working paper included a suggestion for the topic "Improving procedures for dispute settlement involving international organizations",[169] which was considered in the Working Group on the long-term programme of work during the same year.

[160] *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, p. 233.

[161] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 262, para. 85 (Israel); see also *Yearbook … 1973*, vol. II, document A/9010/Rev.1, para. 173.

[162] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 263, para. 94 (Denmark).

[163] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 29–34, paras. 120–149, in particular paras. 123 and 135 *et seq.* See also A/C.6/55/SR.24, para. 16 (Russian Federation).

[164] *Yearbook … 1991*, vol. II (Part Two), p. 130, para. 330.

[165] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/641, para. 20.

[166] 1998 Seminar, *The International Law Commission Fifty Years After …* (footnote 13 above), pp. 130 and 132–133, respectively (proposals by Vaughan Lowe).

[167] *Yearbook … 1968*, vol. II, document A/7209/Rev.1, annex, p. 233.

[168] *Yearbook … 1970*, vol. II, document A/CN.4/230, p. 268, para. 138 (Mr. Tammes).

[169] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/641, para. 20.

Annex

Topics on the long-term programme of work as at the sixty-sixth session (2014)*

Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (1996)

Jurisdictional immunity of international organizations (2006)

Protection of personal data in transborder flow of information (2006)

Extraterritorial jurisdiction (2006)

The fair and equitable treatment standard in international investment law (2011)

Jus cogens (2014)

* The year of inclusion in the long-term programme of work is indicated in parentheses.

PROGRAMME, PROCEDURES AND WORKING METHODS OF THE COMMISSION AND ITS DOCUMENTATION

[Agenda item 11]

DOCUMENT A/CN.4/679/Add.1

Long-term programme of work: possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments

Working paper prepared by the Secretariat

[*Original: English*]
[*31 March 2015*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, No. 17513, p. 609.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15

Works cited in the present document

Degan, Vladimir-Djuro

"General principles of law (A source of general international law)", *Finnish Yearbook of International Law*, vol. 3 (1992), pp. 1–102.

Gaja, Giorgio

"General principles of law", *Max Planck Encyclopedia of Public International Law* (2013). Available from www.mpepil.com.

Grant, Tom

"Who can make treaties? Other subjects of international law", *in* Duncan B. Hollis, ed., *The Oxford Guide to Treaties*, Oxford, Oxford University Press, 2012, pp. 125–149.

Jackson, John D., and Sarah J. Summers

The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions. Cambridge, Cambridge University Press, 2012.

Kohen, Marcelo G., and Mamadou Hébié, eds.

Research Handbook on Territorial Disputes in International Law. Cheltenham, Edward Elgar, 2018.

Le Bouthillier, Yves, and Jean-François Bonin

"1969 Convention: Article 3", *in* Olivier Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I. Oxford, Oxford University Press, 2011, pp. 66–76.

Marboe, Irmgard

Die Berechnung von Entschädigung und Schadenersatz in der internationalen Rechtsprechung. Frankfurt am Main, Peter Lang, 2009.

Noortmann, Math, August Reinisch and Cedric Ryngaert, eds.

Non-State Actors in International Law. Oxford, Hart, 2015.

Pellet, Alain

"Article 38", *in* Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, eds., *The Statute of the International Court of Justice: A Commentary*, Oxford, Oxford University Press, 2006, pp. 677–792.

Riddell, Anna, and Brendan Plant

Evidence before the International Court of Justice. London, British Institute of International and Comparative Law, 2009.

Sabahi, Borzu, and Thomas W. Wälde

"Compensation, damages and valuation in international investment law", *Transnational Dispute Management*, vol. 6 (2007), pp. 1–64.

Walter, Christian

"Subjects of international law", *Max Planck Encyclopedia of Public International Law* (2013). Available from www.mpepil.com.

Introduction

1. At the sixty-sixth session of the International Law Commission, the Working Group on the long-term programme of work identified a need to conduct a systematic review of the work of the Commission and a survey of possible future topics for its consideration.[1] Bearing in mind both the view of the Working Group and the fact that an illustrative general scheme of topics was last developed in 1996,[2] the Commission requested the Secretariat to: (*a*) review the list of topics established in 1996 in the light of subsequent developments and (*b*) prepare a list of potential topics, accompanied by brief explanatory notes, by the end of the present quinquennium.[3] The request was made on the understanding that the Working Group would continue to consider any topics that members may propose.[4]

2. At the sixty-seventh session of the Commission, the Secretariat prepared a working paper reviewing the 1996 general scheme, both retrospectively and prospectively, which addresses the first aspect of the Commission's request.[5]

3. The present addendum focuses on the second aspect of the Commission's request. It contains a list of six potential topics, accompanied by brief explanatory notes, consistent with the request by the Commission. The explanatory notes provide a short introduction and background, a brief survey of existing practice and a short bibliography, with footnotes being kept to a minimum for the sake of brevity. The addendum also contains an annex reflecting, in tabular form, the list of proposals and suggestions for possible future topics made over the years, based on the working paper.[6] It is from that list of proposals, including a combination thereof, that the six potential topics outlined below have been selected.

[1] *Yearbook … 2014*, vol. II (Part Two), pp. 164–165, para. 271.

[2] *Yearbook … 1996*, vol. II (Part Two), annex II.

[3] *Yearbook … 2014*, vol. II (Part Two), p. 165, para. 272.

[4] *Ibid*., pp. 164–165, para. 271.

[5] Document A/CN.4/679 (reproduced in the present volume).

[6] *Ibid*.

List of potential topics accompanied by brief explanatory notes

4. The following six topics are proposed for consideration by the Commission:

(*a*) general principles of law;

(*b*) international agreements concluded with or between subjects of international law other than States or international organizations;

(*c*) recognition of States;

(*d*) land boundary delimitation and demarcation;

(*e*) compensation under international law;

(*f*) principles of evidence in international law.

5. The topics are proposed bearing in mind the criteria of the Commission in the selection of topics for inclusion in its long-term programme of work, namely the needs of States, sufficiency and advancement of State practice, feasibility and concreteness. The Commission has also expressed a willingness not to restrict itself to traditional topics, but to consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[7] The background to the suggested topics varies. In some instances, the Commission has addressed the topic or variations thereof before, while in other instances the proposal or the suggestion has been made in the course of its work, without further elucidation. "Recognition of States" and "Land boundary delimitation and demarcation" fall in the former category, while the other four topics proposed are largely in the latter.

6. The presentation of the topics, together with the annex, follows the structure of the *Analytical Guide to the Work of the International Law Commission, 1949–1997*, as updated on the website of the Commission.[8] Two topics relate to "sources of international law" and the remaining four topics relate, respectively, to "subjects of international law", "law of international spaces", "law of international relations/responsibility" and "settlement of disputes". If any of the topics were to be selected for consideration by the Commission, it would, of course, be for the Commission to determine how it wishes to approach the topic. The suggestions made in the explanatory notes that follow are primarily intended to identify possible courses of action available to the Commission.

A. General principles of law

7. General principles of law are one of the three sources of international law identified in Article 38, paragraph 1, of the Statute of the International Court of Justice.[9] The other two sources listed in that paragraph, treaties and customary international law, are more clearly defined and developed in international practice. General principles of law, by comparison, remain less clear in scope and are more cautiously applied by international courts and tribunals, in particular the International Court of Justice.

8. The wording of Article 38, paragraph 1 (*c*), of the Statute of the Court "the general principles of law recognized by civilized nations", is the same as that of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. That provision had been the subject of some debate among the members of the Advisory Committee of Jurists who drafted it, particularly regarding the possibility of transposing principles found in national legal systems directly to international law.[10] That early uncertainty, and similar doubts and difficulties, continue to underlie the identification and application of this source of international law. In addition, general principles of law have not always been clearly distinguished from other sources of international law, and the term has sometimes been used to include general principles of international law.[11]

9. The Commission has not studied general principles of law in depth, but has made a number of references to them in the course of its work. In its 1949 survey of international law, the Commission stated that the sources of international law had been successfully codified in Article 38 of the Statute of the International Court of Justice, and acknowledged that general principles of law are one of the three principal sources to be applied by the Court.[12] The Commission has subsequently frequently considered general principles of law in the context of other topics, but has not examined them as a source of international law as such.[13] For example, it has considered general principles with regard to territorial sovereignty in the context of its consideration of possible limitations thereto in the 1971 review of its long-term programme of work,[14] and in relation to *force majeure* in the context of its work on State responsibility.[15]

10. Frequent recourse to general principles of law can be found in the practice of States and in international jurisprudence. Although the case law of the Permanent Court of International Justice and the International Court of Justice has referred to general principles of law only on limited occasions, other courts and tribunals, in particular international criminal tribunals, arbitral tribunals and regional courts, have more frequently used this source of international law in their jurisprudence. Recourse to general principles of law has been especially prominent in relation to procedural, criminal and commercial matters.

11. The reference in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice to general principles of law that are "recognized by civilized nations" anchors this source of international law in the domestic laws of States and distinguishes such principles from general principles of international law or moral principles.[16] However, this distinction has not always

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[7] *Yearbook … 1998*, vol. II (Part Two), p. 110, para. 553. The Commission has stated that (*a*) the topic should reflect the needs of the 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; (*c*) the topic is concrete and feasible for progressive development.

[8] *Analytical Guide to the Work of the International Law Commission, 1949–1997*, ST/LEG/GUIDE/1 (New York, United Nations 1998), available from http://legal.un.org/ilc/guide/gfra.shtml.

[9] A number of references to general principles of law as a source of international law can be found in arbitral decisions predating the Statutes of the Permanent Court of International Justice and the International Court of Justice. See, e.g., the arbitration between France and Venezuela in the 1905 *Antoine Fabiani* case, which defines these principles as "the rules common to most legislations or taught by doctrines", *Antoine Fabiani* Case, 31 July 1905, UNRIAA, vol. X (Sales No. 60.V.4), pp. 83–139, at p. 117.

[10] See Gaja, "General principles of law". See also Degan, "General principles of law (A source of general international law)".

[11] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, p. 162, observation 30.

[12] Memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission", document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)), para. 33.

[13] See, e.g., A/CN.4/1/Rev.1 (see previous footnote), paras. 36, 45, 49 and 71; *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 53–54, 66 and 92, paras. 244, 300 and 412, respectively. See also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, pp. 162–163, observation 30, and related footnotes 134 and 135.

[14] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, p. 15, para. 50.

[15] *Yearbook … 1978*, vol. II (Part One), document A/CN.4/315, para. 9.

[16] Pellet, "Article 38", p. 767, para. 252.

been clearly maintained in the case law and the literature. Moreover, the method of identification of general principles of law has not been developed to the same extent or with the same clarity as treaty and customary rules. International jurisprudence and scholarship suggest that identifying the substance of the general principles of law may be a very broad-ranging and far-reaching task. Accordingly, the Commission may wish to consider instead an approach similar to that being taken in relation to the topic "Identification of customary international law", that is, to seek to provide practical guidance on the way in which the existence and content of general principles of law are to be determined.

12. If the Commission wishes to pursue such an approach, it might analyse the consideration that has been given to general principles of law by international courts and tribunals and seek to identify the various issues that underlie the application of Article 38, paragraph 1 (*c*), of the Statute. While the debate surrounding the problematic reference to "civilized" nations is now largely settled, the case law and literature[17] suggest a number of remaining issues, for example: the difficulty of identifying general principles of law among the large number of States and variety of legal systems; the inherently general nature of any such principles of law; their transposability to the international level; the role often ascribed to general principles of law as "filling the gaps" in other sources of international law; how general principles of law relate to the consensual nature of international law; and how general principles of law relate to general principles of international law and the other sources of international law.

Brief bibliography

Anzilotti, D., *Corso di diritto internazionale*, 3rd ed., vol. I. Padova, Cedam, 1955, pp. 106–107.

Bassiouni, M. C., "A functional approach to 'general principles of international law' ", *Michigan Journal of International Law*, vol. 11 (1990), pp. 768–818.

Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals*. London, Stevens and Sons, 1953.

Degan, V-D., "General principles of law (A source of general international law)", *Finnish Yearbook of International Law*, vol. 3 (1992), pp. 1–102.

Fitzmaurice, G., "The general principles of international law considered from the standpoint of the rule of law", *Collected Courses of the Hague Academy of International Law* (1957-II), vol. 92, pp. 1–227.

Gaja, G., "General principles of law", *Max Planck Encyclopedia of Public International Law* (2013). Available from www.mpepil.com.

Guggenheim, P., *Traité de Droit international public*, 2nd ed. Geneva, Librairie de l'Université, 1967, pp. 291–312.

Kelsen, H., and R. W. Tucker, *Principles of International Law*, 2nd ed. New York, Holt, Rinehart and Winston, 1966, pp. 538–543.

Lauterpacht, H., *Private Law Sources and Analogies of International Law*. London, Longmans, Green and Co., 1927, pp. 60–71.

McNair A., "The general principles of law recognized by civilized nations", BYBIL, vol. 33 (1957), pp. 1–19.

Pellet, A., "Article 38", *in* A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, eds., *The Statute of the International Court of Justice: A Commentary*, Oxford, Oxford University Press, 2006, at pp. 677–792.

Rousseau, C., *Principes généraux du droit international public*, vol. I. Paris, Pedone, 1944, pp. 889–901.

Schlesinger, R. B., "Research on the general principles of law recognized by civilized nations", AJIL, vol. 51 (1957), pp. 734–753.

Thirlway, H, *The Sources of International Law*. Oxford, Oxford University Press, 2014, pp. 93–115.

Tunkin, G. I., *Theory of International Law*, transl. W.E. Butler. London, George Allen and Unwin, 1974, pp. 190–203.

Verdross, A., *Völkerrecht*, 5th ed. Vienna, Springer Verlag, 1964, pp. 22–24, 43–44, 147, 151, 160 and 164.

Weil, P., "Le droit international en quête de son identité", *Collected Courses of the Hague Academy of International Law, 1992-VI* (1992), vol. 237, at pp. 13–168.

de Wet, E., "Judicial review as an emerging general principle of law and its implications for the International Court of Justice", *Netherlands International Law Review*, vol. 47 (2000), pp. 181–210.

B. International agreements concluded with or between subjects of international law other than States or international organizations

13. The question of international agreements concluded with or between subjects of international law other than States or international organizations is a matter that the Commission left open in its treatment of the law of treaties.[18] There is increasing evidence that entities other than States and international organizations established by States may be subjects of international law.[19] However, there is no shared understanding as to which entities are subjects of international law. Furthermore, there

[17] *Ibid*., pp. 765–766.

[18] Art. 3 of the Vienna Convention on the Law of Treaties and art. 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[19] As mentioned below, the Commission itself recognized as such in its commentaries to the draft articles on the law of treaties: *Yearbook … 1962*, vol. II, document A/5209, chap. II, sect. II, p. 162, and *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 57–58, paras. 262–266. More generally, see, e.g., Walter, "Subjects of international law" and Noortmann, Reinisch and Ryngaert, *Non-State Actors in International Law*.

is disagreement as to which such entities have the legal capacity to enter into agreements that are legally binding under international law, either between themselves or with States and/or international organizations. Nonetheless, agreements concluded by non-State actors exist in contemporary international practice.[20]

14. In its commentaries to the draft articles on the law of treaties, the Commission took the position that the "other subjects of international law", mentioned in what became article 3 of the 1969 Vienna Convention on the Law of Treaties, were international organizations, the Holy See, and "other international entities, such as insurgents, which may in some circumstances enter into treaties".[21] Moreover, the Commission understood the phrase "other subjects of international law" as "primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded".[22] However, according to the Commission, the phrase did not include "individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law".[23]

15. The Commission has already addressed the law of treaties between States and international organizations or between international organizations. It may be useful for the Commission to clarify the regime applicable to international agreements concluded with or between subjects of international law other than States or international organizations.

16. The extent to which the legal capacity to enter into international agreements is now recognized for corporations and other possible subjects of international law beyond "insurgent communities", including indigenous peoples and non-governmental organizations, remains a matter of debate.

17. While foreign corporations have entered and continue to enter into a multiplicity of binding agreements with States, the extent to which these agreements are governed by international law is also a matter of doctrinal difference.

18. Furthermore, there is practice of armed groups entering into written agreements with States in the context of peace negotiations, sometimes participating in internationalized political processes involving the United Nations or third States, even without being formally recognized as insurrectional movements.[24] States have also entered into agreements with other entities, including the International Committee of the Red Cross, indigenous peoples, federal entities belonging to other States, or non-self-governing territories. The practice in this regard is varied and the legal classification of these agreements would certainly benefit from examination and clarification.

19. Article 3 of the Vienna Convention on the Law of Treaties left open the question of the legal force of such agreements and the application of any other rules of international law, independently of the Convention. A virtually identical provision is included in article 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which explicitly envisages that there could be "international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties". Moreover, it provides that the exclusion of such agreements from the scope of application of the Convention shall not affect their "legal force" and the application of "the rules set forth" in the Convention by virtue of rules independent thereof.

20. In undertaking a study of this area of the law, the Commission might wish to decide on which "other subjects of international law" to focus its work, bearing in mind that the Commission had taken the position that the reference to "subjects of international law other than States or [international] organizations" was "far narrower in scope [than the term "entity"] and the area of discussion which it opens up is very limited".[25] In any event, the Commission may wish to examine which of the rules of the two Vienna Conventions would suitably operate in relation to the agreements in question, as well as identify those aspects of the Conventions that would be inapplicable. The Commission might wish to consider such overarching rules relating to treaty law as those concerning methods of conclusion, interpretation, *pacta sunt servanda* and non-invocation of internal law. It could also identify such other rules as would apply to those agreements independent of the Vienna Conventions. Such a study may also be a useful step in any future consideration of other aspects, including the international responsibility of non-State actors for internationally wrongful acts, as well as the related question of the responsibility of States or of international organizations towards non-State actors, which was left open by articles 33, paragraph 2, of the Commission's 2001 articles on responsibility of States for internationally wrongful acts and 2011 articles on the responsibility of international organizations.[26]

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[20] For a typology, see e.g., Le Bouthillier and Bonin, "1969 Convention: Article 3", pp. 71–76, and Grant, "Who can make treaties? Other subjects of international iaw".

[21] Para. (8) of the commentary to art. 1 of the draft articles on the law of treaties, *Yearbook … 1962*, vol. II, document A/5209, p. 162; See also *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, pp. 57–58, paras. 262–266.

[22] Para. (2) of the commentary to art. 3, *Yearbook … 1962*, vol. II, document A/5209, p. 164.

[23] Para. (8) of the commentary to art. 1, *ibid*., p. 162.

[24] See art. 1, para. 1, of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II); the term "insurrectional movement" reflects the language of article 10 of the articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

[25] Para. (6) of the commentary to art. 3 of the draft articles on the law of treaties between States and international organizations or between international organizations with commentaries, *Yearbook … 1982*, vol. II (Part Two), para. 63, at. p. 22.

[26] General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook …2011*, vol. II (Part Two), pp. 40 *et seq*., paras. 87–88.

Brief bibliography

Alfredsson, G., "Indigenous peoples, Treaties with", *Max Planck Encyclopedia of Public International Law* (2013). Available from www.mpepil.com.

Arato, J. "Corporations as lawmakers", *Harvard International Law Journal*, vol. 56 (2015), pp. 229–295.

Aust, A., *Modern Treaty Law and Practice*, 3rd ed. Cambridge, Cambridge University Press, 2013, pp. 56–70.

Bell, C., *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*. Oxford, Oxford University Press, 2008, pp. 127–161.

Boyle, A., and C. Chinkin, *The Making of International Law*. Oxford, Oxford University Press, 2007, pp. 41–97.

Corten, O., and P. Klein, "Are agreements between States and non-State entities rooted in the international legal order?", *in* E. Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention*, Oxford, Oxford University Press, 2011, pp. 3–24.

Di Marzo, L., *Component Units of Federal States and International Agreements*. Alphen aan den Rijn, Sijthoff and Noordhoff, 1980.

Gazzini, T., "A unique non-State actor in international law: the International Committee of the Red Cross", *Human Rights and International Legal Discourse*, vol. 4 (2010), pp. 32–46.

Grant, T. "Who can make treaties? Other subjects of international law", *in* D. B. Hollis, ed., *The Oxford Guide to Treaties*, Oxford, Oxford University Press, 2012, pp. 125–149.

Hollis, Duncan B., "Why State consent still matters - non-State actors, treaties, and the changing sources of international law", *Berkeley Journal of International Law*, vol. 23 (2005), pp. 137–174.

Karavias, M., "Treaty law and multinational enterprises: more than internationalized contracts?", *in* C. J. Tams, A. Tzanakopoulos and A. Zimmermann, eds., *Research Handbook on the Law of Treaties*, Cheltenham, Edward Elgar, 2014, pp. 597–624.

Lachs, M., "Les traités multilatéraux et le problème des sujets de traités", *in* "Le développement et les fonctions des traités multilatéraux", *Collected Courses of the Hague Academy of International Law, 1957-II*, vol. 92 (1957), p. 229, at pp. 257–272.

Le Bouthillier, Y., and J-F. Bonin, "1969 Convention: Article 3", *in* O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Oxford, Oxford University Press, 2011, pp. 66–76, at pp. 71–76.

Lindblom, A.-K., *Non-Governmental Organisations in International Law*. Cambridge, Cambridge University Press, 2005, at pp. 487–509.

Noortmann, M., A. Reinisch and C. Ryngaert, eds., *Non-State Actors in International Law.* Oxford, Hart, 2015.

Opeskin, B. R., "Federal States in the international legal order", *Netherlands International Law Review*, vol. 43 (1996), pp. 353–386, at pp. 364–368.

Plakokefalos, I., "Treaties and individuals: of beneficiaries, duty-bearers, users, and participants", *in* C. J. Tams, A. Tzanakopoulos and A. Zimmermann, eds., *Research Handbook on the Law of Treaties*, Cheltenham, Edward Elgar, 2014, pp. 625–653.

Schusterschitz, G., "European agencies as subjects of international law", *International Organizations Law Review*, vol. 1 (2004), pp. 163–188.

Walter, C. "Subjects of international law", *Max Planck Encyclopedia of Public International Law* (2013). Available from https://opil.ouplaw.com/home/mpil.

C. Recognition of States

21. The role of recognition in the ascertainment of statehood has been a matter of some contemplation over the years. In 1949, the recognition of States was included among the topics selected by the Commission for codification,[27] on the basis of the 1949 survey. The premise for its inclusion was that the topic was "from the practical point of view, one of the most important questions of international law".[28]

22. The Commission has yet to take up the subject. A key stumbling block to its consideration has been the lingering perception that the topic is, by its nature, too political to be susceptible to codification.[29] Such concerns were evident already when the proposal was made in 1949.[30] Nonetheless, as was noted in the 1949 survey:

> [such a] view is contrary to the evidence of international practice—governmental and judicial—and that if acted upon it is probably inconsistent with the authority of international law and its effectiveness in one of the most crucial manifestations of the international relations of States. It would seem inconsistent with the authority of international law that the question of the rise of statehood and the capacity of States to participate in international intercourse should be regarded as a matter of arbitrary discretion rather than legal duty.[31]

23. Concerns as to the impact of extra-legal considerations have not prevented the Commission from dealing with, or referring to, certain aspects of the topic on

[27] *Yearbook … 1949*, document A/295, p. 284, para. 16.

[28] A/CN.4/1/Rev.1 (see footnote 12 above), para. 40.

[29] A proposal for the consideration of the topic was last made in the late 1990s. See the discussion in document A/CN.4/679 (reproduced in the present volume), paras. 19–20.

[30] A/CN.4/1/Rev.1 (see footnote 12 above), para. 42 ("[t]he main reason for the inability—or reluctance—to extend the attempts at codification to what is one of the central and most frequently recurring aspects of international law and relations has been the widely held view that questions of recognition pertain to the province of politics rather than of law.").

[31] *Ibid*.

a number of occasions. For example, the Commission contemplated including a provision on recognition in its draft declaration on rights and duties of States, adopted in 1949.[32] The recognition of States was also referred to, even if somewhat tangentially, during the consideration of the topics "Law of treaties", "Special missions" and "Relations between States and international organizations".[33] It arose again most recently in the context of the work on the topic "reservations to treaties".[34] In each case, in declining to pursue a fuller examination of the effect on the matter at hand of the rules applicable to recognition, the Commission, to varying degrees, also hinted at the possibility of an eventual study of the topic as a whole.

24. The question of recognition of States continues to be topical and a subject of contemporary relevance. With the emergence of more States in the decades since the 1949 survey, there has been a wealth of practice and developments in the law, including outside the special situation of decolonization. In the 1971 survey of international law, it was said: "that the subject has continued to be of importance, and indeed, in a society composed largely of independent States, it appears unlikely that the act of recognition could cease at any time to be of significance in international relations".[35]

25. The 1949 survey listed the following as possible legal questions to be considered:

> the requirements of statehood entitling a community to recognition; the legal effects of recognition (or of non-recognition) with regard to such matters as jurisdictional immunity, State succession, diplomatic intercourse; the admissibility and effect, if any, of conditional recognition; the question of the retroactive effect of recognition; the modes of implied recognition; the differing legal effects of recognition *de facto* and *de jure*; the legal consequences of the doctrine and practice of non-recognition; and last—but not least—the province of collective recognition.[36]

Further preliminary questions raised in the 1949 survey related to the relationship with the question of the recognition of Governments and of belligerency within the scope of the topic.

26. With the addition of the legal effect of collective "non-recognition", the list of issues remains, by and large, apposite. Furthermore, a contemporary analysis would necessarily require taking into account the legal effects of the operation of the Charter of the United Nations, as well as of major pronouncements of principles of international law, such as those contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[37] and recent case law. It might be more difficult to avoid entirely a consideration of at least some aspects of the recognition of Governments, than excluding the question of belligerency, which might best be the subject of separate consideration.

27. Moreover, the 1971 survey suggested a further refinement in approach by proposing that the Commission could adopt a basic distinction between the nature of the act of recognition and the legal consequences flowing therefrom.[38] Such an approach might be feasible, thereby restricting the consideration of the former (perhaps to possible limitations existing under international law on the freedom to recognize) while focusing primarily on the latter.

Brief bibliography

Ando N., "The recognition of Governments reconsidered", *Japanese Annual of International Law*, vol. 28 (1985), pp. 29–46.

Antonowicz, L., "On the nature of recognition of States in international law", *Polish Yearbook of International Law*, vol. 8 (1976), pp. 217–224.

Blix, H. M., "Contemporary aspects of recognition", *Collected Courses of the Hague Academy of International Law, 1970-II*, vol. 130 (1971), pp. 587–703.

Broms, B., "States", *in* M. Bedjaoui, ed., *International Law: Achievements and Prospects*, Paris, UNESCO/ Dordrecht, Nijhoff, 1991, pp. 41–66.

Brownlie, I., "Recognition in theory and practice", *in* R. St. J. Macdonald and D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, Nijhoff, 1983, pp. 627–641.

Crawford, J., *The Creation of States in International Law*, 2nd ed. Oxford, Clarendon, 2006.

———, "The criteria for statehood in international law", BYBIL, vol. 48, 1976–1977, pp. 93–182.

Devine, D. J., "Recognition, newly independent States and general international law", *South African Yearbook of International Law*, vol. 10, (1984), pp. 18–34.

Dugard, J., *Recognition and the United Nations*. Cambridge, Grotius Publications, 1987.

Grant, T. D., "States newly admitted to the United Nations: some implications", *Columbia Journal of Transnational Law*, vol. 39 (2000), pp. 177–192.

[32] See *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, para. 60.

[33] *Ibid*., paras. 61–63.

[34] Draft guideline 1.5.1 excluded from the scope of application of the draft guidelines the ancillary matter of statements of non-recognition, involving the indication by a State that its participation in a treaty did not imply recognition of an entity which it does not recognize. Such position was "guided by the fundamental consideration that the central problem here is that of non-recognition, which is peripheral to the right to enter reservations". Para. (13) of the commentary to guideline 1.5.1 of the Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), at p. 70.

[35] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, para. 65.

[36] A/CN.4/1/Rev.1 (see footnote 12 above), para. 42.

[37] General Assembly resolution 2625 (XXV) of 24 October 1970.

[38] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, para. 66 ("[a] distinction may perhaps be usefully drawn, however, between the basic act of recognition itself and elements of its application or implementation").

HALBERSTAM, M., "Recognition, use of force, and the legal effect of United Nations resolutions under the Revised Restatement of the Foreign Relations Law of the United States", *Israel Law Review*, vol. 19 (1984), pp. 495–522.

HILLGRUBER, C., "The admission of new States to the international community", EJIL, vol. 9 (1998), pp. 491–509.

KATO, L. L., "Recognition in international law: some thoughts on traditional theory, attitudes of and practice by African States", *Indian Journal of International Law*, vol. 10 (1970), pp. 299–323.

KHERAD, R., "La reconnaissance des Etats issus de la dissolution de la République socialiste fédérative de Yougoslavie par les membres de l'Union européenne", RGDIP, vol. 101 (1997), pp. 663–693.

MACCHESNEY, B., "Recognition of States and Governments", *in* R. B. Lillich and J. N. Moore, *International Law Studies: The Use of Force, Human Rights and General International Legal Issues*, vol. 62, Newport (Rhode Island), Naval War College, 1980, pp. 690–700.

MCWHINNEY, E., "New international law and international law-making: new thinking on recognition and State succession", *Chinese Yearbook of International Law and Affairs*, vol. 16 (1997–1998), pp. 33–49.

MENON, P. K., *The Law of Recognition in International Law: Basic Principles*. Lewiston, New York, Edwin Mellen Press, 1994.

MORRISON, F. L., "Recognition in international law: a functional reappraisal", *University of Chicago Law Review*, vol. 34 (1967), pp. 857–883.

MURPHY, S. D., "Democratic legitimacy and the recognition of States and Governments", *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 545–581.

PETERSON, M. J., "Recognition of Governments should not be abolished", AJIL, vol. 77 (1983), pp. 31–50.

ROSENNE, S., "Recognition of Israel by the Security Council in 1948", *Israel Yearbook on Human Rights*, vol. 13 (1983), pp. 295–330.

RUDA, J. M., "Recognition of States and Governments", *in* M. Bedjaoui, ed., *International Law: Achievements and Prospects*, Paris, UNESCO/Dordrecht, Nijhoff, 1991, pp. 449–465.

SHAW, M., "Legal acts of an unrecognised entity", *Law Quarterly Review*, vol. 94 (1978), pp. 500–505.

TALMON, S., *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*. Oxford, Oxford University Press, 2001.

VAN DER VYVER, J. D., "Statehood in international law", *Emory International Law Review*, vol. 5 (1991), pp. 9–102.

VERHOEVEN, J., *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales*. Paris, A. Pedone, 1975.

D. Land boundary delimitation and demarcation

28. Territorial delimitation concerns the definition of a land boundary between two or more States, designating the spatial limits of their sovereignty. Stable and final land boundaries are fundamental for peaceful relations between neighbouring States. Clarification of the rules, principles and methods governing territorial delimitation would assist States willing to proceed to such a delimitation of their land boundaries and, in case of a dispute, would guide them in its peaceful settlement.

29. The determination of a land boundary generally involves several phases, primarily delimitation and demarcation. As indicated by the International Court of Justice, the delimitation of a boundary consists in its "definition", whereas the demarcation of a boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground.[39] While questions of the definition of a land boundary (i.e. territorial delimitation) are formally distinct from issues relating to sovereignty of the land (i.e. title to territory), they are closely related insofar as the latter determines the former and both would eventually result in the definition of a boundary line. The effect of any delimitation is an apportionment of the areas of land lying on either side of such a line. Demarcation is the final step consisting in the technical operations marking the boundary line out on the ground, an operation which may be followed by placing physical boundary points along the border.

30. The broader topic of "the territorial domain of States" was raised in the 1949 and 1971 surveys, which have acknowledged the importance of the matter for States and the significant existing State practice. As defined in those surveys, the topic addressed a large range of questions relating to modes of acquisition of territory, as well as questions concerning specific limitations on the exercise of territorial sovereignty. On those occasions, the Commission did not take up the topic, as it was not considered suitable for immediate codification in comparison with other topics.

31. Since the 1949 and 1971 surveys, new States have emerged; this continues to raise a number of issues regarding the definition of borders. Furthermore, a number of territorial disputes have been submitted to international courts and tribunals, in particular to the International Court of Justice, resulting in the growth of case law covering the legal aspects of the matter. The practice of States and the jurisprudence of international courts and tribunals on the matter are relatively well established. Moreover, technological developments have given rise to new methods

[39] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6, at para. 56. See also Kohen and Hébié, Research Handbook on Territorial Disputes …, p. 200.

of delimitation and demarcation and it would be useful to clarify the legal implications of these novel techniques.

32. In contrast with the broad range of issues raised in previous surveys, the Commission could address a narrower subset of issues, limited to the legal principles applicable to land boundary delimitation and demarcation, to guide and assist Governments in dealing with those matters. Such an approach would be restricted to the existing legal principles applicable to the technical operations of delimitation and demarcation. A considerable amount of State practice exists, which is supplemented by a number of decisions of international courts and tribunals. The case law has addressed a large range of issues relating to territorial title, including evidence of such title, *effectivités* (the effective exercise by a State of territorial jurisdiction on a territory), as well as their relationship with title.

33. In the case law concerning land boundary disputes, a number of questions have been considered relating, *inter alia*, to the concept of territorial sovereignty, the different categories of title, including matters concerning the validity of colonial title or the principle of *uti possidetis juris*, the legal regime of boundary treaties, and issues relating to evidence of legal title, such as the evidentiary value of maps or Government publications. In addition, the case law has clarified the relevance and legal consequences of the exercise of effective authority, and qualified specific conduct by States as evidence of the establishment of sovereignty over a territory. Moreover, the role of equity, in its different forms, in territorial delimitations has been developed. Furthermore, the case law has addressed the effects of recognition, acquiescence, tacit agreements or *estoppel*. The relationship between delimitation and demarcation has also been considered and could be further clarified.

34. On the whole, the topic would set forth the principles of territorial delimitation and demarcation, as they have been defined and clarified by State practice and international courts and tribunals. The Commission could affirm the fundamental principles according to which neighbouring States are free to agree on a common boundary and that, in case of a dispute, any existing title prevails over any "*effectivités*". The Commission could also explore other relationships between titles and *effectivités* and the role of equity, in particular *infra legem*. The Commission could also address the legal questions informing the technical task of demarcation.

Brief bibliography

Abou-el-Wafa, A., "Les différends internationaux concernant les frontières terrestres dans la jurisprudence de la Cour internationale de Justice", *Collected Courses of the Hague Academy of International Law*, vol. 343 (2009), pp. 9–570.

African Union Border Programme, *Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies*. Addis Ababa, Commission of the African Union, 2013.

Alvarez-Jimenez, A., "Boundary agreements in the International Court of Justice's case law, 2000–2010", EJIL, vol. 23 (2012), pp. 495–515.

Corten, O., *et al.*, eds. *Démembrements d'États et délimitations territoriales: l'*uti possidetis *en question(s)*. Brussels, Bruylant, 1999.

Crawford, J., *The Creation of States in International Law*, 2nd ed. Oxford, Clarendon, 2006.

Cukwurah, A. O., *The Settlement of Boundary Disputes in International Law*. Manchester, Manchester University Press, 1967.

Kaikobad, K. H., *Interpretation and Revision of International Boundary Decisions*. Cambridge, Cambridge University Press, 2007.

Kohen, M. G., *Possession contestée et souveraineté territoriale*. Paris, Presses Universitaires de France, 1997.

———, "La relation titres/effectivités dans la jurisprudence récente de la Cour international de Justice (2004–2012)", *in* D. Alland *et al.*, eds., *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, pp. 599–614.

Lalonde, S., *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis. Montreal, McGill-Queen's University Press, 2002.

López Martín, A. G., *El territorio estatal en discusión: la prueba del título*. Madrid, McGraw-Hill, 1999.

Pellet A., "Remarques cursives sur les contentieux 'africains' devant la C.I.J.", *in* M. Kamga, and M. M. Mbengue, eds., *Africa and International Law: Reflections on the International Organization. Liber Amicorum Raymond Ranjeva*, Paris, Pedone, 2013, pp. 277–295.

Prescott, V., and G. D. Triggs, *International Frontiers and Boundaries: Law, Politics and Geography*. Leiden, Martinus Nijhoff, 2008.

Ratner, S. R., "Drawing a better line: *Uti possidetis* and the borders of new States", AJIL, vol. 90 (1996), pp. 590–624.

Shaw, M. N., "The International Court of Justice and the law of territory", *in* C. J. Tams and J. Sloan, eds., *The Development of International Law by the International Court of Justice*, Oxford, Oxford University Press, 2013, pp. 151–176.

Société française pour le droit international, *La frontière: Colloque de Poitiers*. Paris, Pedone, 1980.

E. Compensation under international law

35. A State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused. This fundamental principle is based on well-established case law and was codified by the Commission in article 31 of the articles on responsibility of

States for internationally wrongful acts. Article 36 singles out compensation as one form of reparation.[40]

36. While States often prefer compensation to other forms of reparation, the articles provide only limited guidance on the quantification of compensation. It is noted that the articles, and the commentaries thereto, discuss causation in a general manner. Causation is a fundamental requirement in the determination of damages in international law. A responsible State has to make reparation only for the injury caused by the internationally wrongful act. Moreover, it has been difficult to choose the appropriate method to assess the capital value of assets taken or destroyed (*damnum emergens*). The competing methods to evaluate the "fair market value" of such assets include the asset value or replacement cost, the comparable transactions approach, the alternative options approach, and the discounted cash-flow approach. It also remains challenging to establish the loss of foreseeable profits (*lucrum cessans*) without including speculative benefits.[41] In addition, recent judicial practice has seen a convergence around the award of compound interest—an issue that has been left open in the articles.[42]

37. The quantification of compensation is an important and complex topic in the law of international responsibility. The fourth Special Rapporteur on State responsibility, Gaetano Arangio-Ruiz, in his second report, discussed "reparation by equivalent" in considerable detail.[43] In 1993, the Commission decided to adopt the shorter version of the two draft articles proposed by the Special Rapporteur in the form of draft article 8, which later became draft article 44.[44] While adding draft article 38 on interest on second reading, the fifth Special Rapporteur James Crawford supported the "general and flexible" approach of the Commission.[45] He observed that little recent case law existed outside the field of diplomatic protection, and that most case law on quantification had arisen in relation to the primary obligation of compensation for expropriation. At the same time, however, he recognized that the law on compensation was "notably dynamic" and undergoing development in the practice of different international courts and tribunals.[46]

38. Since the adoption of the articles on responsibility of States, the case law of international courts and tribunals concerning the quantification of compensation has increased and diversified, making the topic sufficiently feasible and concrete for codification and progressive development. Some of this case law concerns inter-State claims, but many of the pertinent decisions address claims brought by natural persons or corporations. International courts and tribunals in fields such as human rights or the law of the sea have adopted relatively consistent approaches to quantifying compensation. This has been less so in international investment arbitration, which is generally characterized by a more varied practice. Nonetheless, arbitral tribunals have contributed considerably to the law on the quantification of compensation, for example, by innovatively applying standards of compensation for expropriation to non-expropriatory breaches of international law. Such developments illustrate both the need and the potential for a more general approach to the determination of quantum in the law of international responsibility.

39. In codifying and progressively developing pertinent rules, the Commission could rely on its earlier work on State responsibility, the responsibility of international organizations and diplomatic protection, as well as the practice of judicial and arbitral bodies in different fields of international law.

40. The rules on quantification might vary depending on the facts of the case and the primary obligation in question, possibly giving rise to *lex specialis*. Notwithstanding the existence of special rules, it may be possible to elucidate a number of applicable general rules and principles. In this regard, it is significant that the articles on responsibility of States have had considerable influence in judicial practice.[47]

41. The Commission could consider the scope and content of the study on the basis of the available practice. Relevant legal questions regarding the quantification of compensation include: the distinction between factual causation and legal causation; concurrent causation and the allocation of compensation; the determination of applicable standards of compensation; the different methods to assess fair-market value, including their interrelationships; the determination of lost profits; the choice of interest rate; and the application of simple interest and compound interest.

Brief bibliography

Buder, W., *Die Lehre vom völkerrechtlichen Schadensersatz*. Berlin, Ludwig Begach, 1932.

Crawford, J., *State Responsibility: The General Part*. Cambridge, Cambridge University Press, 2013.

Crawford, J., Pellet, A. and S. Olleson, eds., *The Law of International Responsibility*. Oxford, Oxford University Press, 2010.

D'Argent, P., *Les réparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre*. Brussels, Bruylant, 2002.

[40] The 2001 articles refer to the term "compensation", which is often used interchangeably with "damages" in practice and scholarship.

[41] Marboe, *Die Berechnung von Entschädigung und Schadenersatz in der internationalen Rechtsprechung*; and Sabahi and Wälde, "Compensation, damages and valuation in international investment law".

[42] Commentary to art. 38 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, at pp. 108–109.

[43] *Yearbook … 1989*, vol. II (Part One), document A/CN.4/425 and Add.1.

[44] See *Yearbook … 1993*, vol. II (Part Two), p. 35, para. 202, and para. 335, at p. 54, and *Yearbook … 1996*, vol. II (Part Two), chap. III, sect. D, at p. 63.

[45] *Yearbook … 2000*, vol. II (Part One), A/CN.4/507, and Add.1–4, pp. 47–51, paras. 148–160.

[46] *Ibid*., pp. 48–50, paras. 155–158.

[47] Reports of the Secretary-General on responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, A/62/62 and Corr.1 and Add.1, A/65/76 and A/68/72.

Graefrath, B., "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses of the Hague Academy of International Law, 1984-II*, vol. 185 (1985), pp. 9–149.

Gray, C., *Judicial Remedies in International Law*. Oxford, Clarendon, 1990.

Nollkaemper, A., and I. Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*. Cambridge, Cambridge University Press, 2014.

Marboe, I., *Die Berechnung von Entschädigung und Schadenersatz in der internationalen Rechtsprechung*. Frankfurt am Main, Peter Lang, 2009.

Personnaz, J., *La réparation du préjudice en droit international public*. Paris, Recueil Sirey, 1939.

Ripinsky, S., and K. Williams, *Damages in International Investment Law*. London, British Institute of International and Comparative Law, 2008.

Sabahi, B., and T. W. Wälde, "Compensation, damages and valuation in international investment law", *Transnational Dispute Management*, vol. 6 (2007), pp. 1–64.

Shelton, D., *Remedies in International Human Rights Law*. Oxford, Oxford University Press, 2005.

Stern, B., *Le préjudice dans la théorie de la responsabilité internationale*. Paris, Pédone, 1973.

Tschanz, P-Y., and J. E. Viñuales, "Compensation for non-expropriatory breaches of international investment law", *Journal of International Arbitration*, vol. 26 (2009), pp. 729–743.

Whiteman, M. M, *Damages in International Law*. Washington, D.C., U.S. Government Printing Office, 1937.

F. Principles of evidence in international law

42. International litigation has become a field of specialization in recent years. The number of international courts and tribunals has increased dramatically since the end of the Second World War, and they address an array of legal issues. In addition to the International Court of Justice, a variety of other courts and tribunals have addressed fact-finding and aspects of evidence under international law. These include international arbitral tribunals and international criminal courts and tribunals. The ascertainment of facts is also germane to commissions of inquiry. Such bodies have either adjudicated over disputes between States, between States and non-State actors, addressed situations of individual accountability, or ascertained facts and made findings in relation to a situation of interest to the international community. There now exists international legal practice on evidence in international litigation, arbitration and inquiries.

43. The purpose of evidence is to provide a court or tribunal with proof of certain facts.[48] It is axiomatic that the determination of such facts is an essential element of the judicial task,[49] as well as for any fact-finding exercise. This is so whether it is a matter before a domestic forum or an international one. Unlike the situation existing in national legal systems, however, international courts and tribunals have comparatively a greater degree of freedom in the determination of the procedure for the ascertainment of the facts underlying their decisions.[50]

44. Discussion in legal scholarship surrounding the law of evidence has been dominated by the adversarial and the inquisitorial approaches, respectively linked with the common law system and the civil law system.[51] Hitherto, the view among scholars has been that this was not a subject requiring sustained examination due to the perceived chasm that existed between the two systems.[52] However, in recent years, the subject has been studied and with respect to the international level, some work has been conducted by the Institute of International Law[53] and the British Institute of International and Comparative Law.[54]

45. The law of evidence in international law comprises a basic set of broad principles.[55] It has been said that the regime at the international level is characterized by the "generality, liberality and scarcity of its provisions".[56] A brief survey of the various practices shows that rules of procedure and evidence deal broadly with three areas which may require consideration: (*a*) the organizational aspects of evidentiary matters; (*b*) questions of proof; and (*c*) admissibility considerations.

46. The organizational aspects address such matters as the rights and responsibilities of the parties, as well as the powers of a court or tribunal, including in the production, disclosure and withdrawal of evidence, whether documentary or testimonial. In addressing questions of proof, the key considerations include the distinction between burden of proof and burden of evidence (of persuasion); the application of the basic principle *actori incumbit onus probandi*; and difficulties associated with the application of the principle. The practice also address principles surrounding the presentation of pleadings and evidence, the duty of cooperation on the parties, the presumptions and inferences associated with proof and their effect on proof. The standard of proof has been another key aspect, together with associated matters not requiring proof (judicial notice, *jura novit curia*

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[48] Riddell and Plant, *Evidence before the International Court of Justice*, p. 79.

[49] *Ibid*., p. 1.

[50] *Ibid*., p. 2.

[51] Jackson and Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, p. 11.

[52] *Ibid*.

[53] Institute of International Law, "Priniciples of evidence in international litigation", Rapporteur: C. F. Amerasinghe, *Yearbook*, vol. 70, Part I (2002–2003), Session of Bruges, 2003—First Part, pp. 139–398.

[54] See generally, Riddell and Plant, *Evidence before the International Court of Justice*, p. 2.

[55] *Ibid*.

[56] *Ibid*.

(the court knows the law)). As regards admissibility and use of evidence, implicated in the practice have been such issues as: the general rule on admissibility and limitations thereto; principles relating to the submission of evidence; certification and assessment of evidence; and specific considerations concerning the admissibility of documentary and testimonial evidence. Other ancillary matters have concerned the advisory function of international courts.

47. Since the Commission's adoption of the text of the model rules on arbitral procedure in 1958,[57] it has not addressed procedural and evidentiary matters in a comprehensive manner. The various international courts and tribunals have rules and procedures that guide their work and are unique to their operations. A court or tribunal dealing with civil proceedings has rules and procedures that are distinct from those of a court or tribunal in criminal proceedings or of an arbitral procedure. The work of the commissions of inquiry is often informed by the different sources of their mandates, as well as the terms and conditions contained in the mandates relating to their establishment. The regimes involved are thus diverse. Accordingly, the consideration of the topic by the Commission would entail an elaboration of principles based on an analysis of an authoritative set of practices, procedures and techniques employed by international processes of a judicial nature, be they civil, criminal, arbitral or related to commissions of inquiry. The study of the topic could conceivably require separate treatment of practices involving civil proceedings, criminal proceedings, arbitral proceedings and fact-finding within commissions of inquiry.

[57] *Yearbook … 1958*, vol. II, document A/3859, p. 83, para. 22.

Brief bibliography

Amerasinghe, C. F., *Evidence in International Litigation.* Boston, Martinus Nijhoff, 2005.

Higgins, R., "Respecting sovereign States and running a tight courtroom", *International Comparative Law Quarterly*, vol. 50 (2001), p. 121–132.

Institute of International Law, "Priniciples of evidence in international litigation", Rapporteur: C. F. Amerasinghe, *Yearbook*, vol. 70, Part I (2002–2003), Session of Bruges, 2003—First Part, pp. 139–398.

Jackson, J. D., and S. J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions.* Cambridge, Cambridge University Press, 2012.

Lillich, R. B., ed., *Fact-finding before International Tribunals*. Ardsley-on-Hudson, New York, Transnational Publishers, 1992.

Reisman, W. M., and C. Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law*. Cambridge, Cambridge University Press, 2014.

Riddell, A., and B. Plant, *Evidence before the International Court of Justice.* London, British Institute of International and Comparative Law, 2009.

Sandifer, D., *Evidence before International Tribunals*. Charlottesville, University Press of Virginia, 1975.

Valencia-Ospina, E., "Evidence before the International Court of Justice", *International Law FORUM du Droit international*, vol. 1 (1999), pp. 203–207.

ANNEX

Proposals and suggestions for possible future topics[1]

A. Sources of international law[2]

(*a*) Sources of international law (1970)

(*b*) International agreements concluded with or between subjects of international law other than States or international organizations (1971)

(*c*) Question of participation in a treaty (1971)

(*d*) International agreements not in written form (1971)

(*e*) Multilateral treaty-making process (1979)

(*f*) Non-binding instruments (1996)

(*g*) Law applicable to resolutions of international organizations (1996)

(*h*) Control of validity of the resolutions of international organizations (1996)

(*i*) The role of international organizations in the formation of new rules of international law (1996)

(*j*) Legal effects of customary rules (1996)

(*k*) Development of norms of general international law (1996)

(*l*) Principle of *pacta sunt servanda* (including the implementation of international law) (1997)

(*m*) *Erga omnes* (2000)

(*n*) Acquiescence and its effects on the legal rights and obligations of States (2006)

(*o*) Conflicts between treaty regimes (2007)

(*p*) Hierarchy in international law (2011)

(*q*) The self-executing character of rules of international law (2012)

(*r*) Restatement of international law (2007)

B. Subjects of international law[3]

(*a*) Subjects of international law (1949)

(*b*) Criteria for recognition (1949)

(*c*) Recognition of Governments (1949)

(*d*) Obligations of territorial jurisdiction (1949)

(*e*) The territorial domain of States (1949)

(*f*) Independence and sovereignty of States (1962)

(*g*) The international personality of international organizations (1970)

(*h*) The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically, in conformity with its professed ideology and to take all necessary steps to accomplish this, e.g. decolonization, normalization, nationalization, and also steps to control all its natural resources and to ensure that those resources are utilized for the interests of the State and the people (1970)

(*i*) The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence (1970)

(*j*) Statehood (1971)

(*k*) The question of recognition of Governments and belligerency (1971)

(*l*) The capacity of international organizations to espouse international claims (1971)

(*m*) Representative Governments (1996)

(*n*) Criteria for statehood (1996)

(*o*) International organizations as international subjects of law (1997)

(*p*) Recognition of States (1998)

(*q*) Non-intervention and human rights (1998)

(*r*) Subjects of international law (2007)

(*s*) Principles on border delimitation (2010)

C. Succession of States and other legal persons[4]

(*a*) Succession of States in respect of membership of, and obligations towards, international organizations (1996)

(*b*) "Acquired rights" in relation with State succession (1996)

(*c*) Succession of international organizations (1996)

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[1] The list should be read together with the working paper on the review of the list of topics established in 1996 in the light of subsequent developments (document A/CN.4/679; reproduced in the present volume).

[2] *Ibid*., paras. 7–16.

[3] *Ibid*., paras. 17–20.

[4] *Ibid*., paras. 21–24.

(*d*) Treaties with international organizations in case of the succession of States (1998)

(*e*) Nationality of legal persons in relation to the succession of States (1999)

(*f*) Impacts of State succession on membership in international organizations (2010)

(*g*) Succession of States with respect to State responsibility (2013)

D. State jurisdiction/immunity from jurisdiction[5]

(*a*) Recognition of acts of foreign States (1949)

(*b*) Jurisdiction over foreign States (1949)

(*c*) Jurisdiction with respect to crimes committed outside national territory (1949)

(*d*) Territorial domain of States (1949)

(*e*) The obligations of international law in relation to the law of the State (1949)

(*f*) Conflicts between treaties and domestic law, especially national constitutions (1970)

(*g*) The territory of another State (1971)

(*h*) Jurisdictional immunities with respect to armed forces stationed in the territory of another State (1971)

(*i*) Immunities of foreign States and bodies corporate (1972)

(*j*) Extraterritorial application of national legislation (1992)

(*k*) Immunities from execution (1996)

(*l*) Jurisdiction relating to public services (*compétences relatives aux services publics*) (1996)

(*m*) Universal jurisdiction in civil matters (2004)

E. Law of international organizations[6]

(*a*) The legal status of international organizations, and the different types of organization (1971)

(*b*) General principles of law of the international civil service (1996)

(*c*) International legal personality of international organizations (1996)

(*d*) Jurisdiction of international organizations (implied powers, personal jurisdiction and territorial jurisdiction) (1996)

(*e*) The representation of States in their relations with international organizations (1998)

(*f*) Model rules of a decision-making procedure for international conferences and conferences of parties to multilateral conventions (2011)

F. Position of the individual in international law[7]

(*a*) Law of nationality (1949)

(*b*) Right of asylum (1949)

(*c*) Extradition (1949)

(*d*) Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights (1970)

(*e*) Problems which arise owing to differences between the nationality laws applied by various countries (in particular as regards the conditions under which nationality may be accorded) (1971)

(*f*) Multiple nationality and other questions relating to nationality (1971)

(*g*) The refugee problem (1990)

(*h*) A new generation of human rights (1990)

(*i*) Rights of national minorities (1991)

(*j*) Law concerning international migrations (1992)

(*k*) International law relating to individuals (1996)

(*l*) Human rights and defence of democracy (1996)

(*m*) Human rights safeguards in the extradition process (1997)

(*n*) Principles of an international information order (1997)

(*o*) Mass exoduses of people under threat of death (1997)

(*p*) Human cloning and genetic manipulation (1997)

(*q*) The law relating to the treatment of aliens (1999)

(*r*) Non-discrimination in international law (2000)

(*s*) The position of the individual in international law (2000)

(*t*) Humanitarian protection (2000)

(*u*) The international legal consequences of violations of human rights (2000)

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[5] *Ibid*., paras. 25–28.

[6] *Ibid*., paras. 29–30.

[7] *Ibid*., paras. 31–37.

(*v*) International protection of persons in critical situations (2003)

(*w*) Responsibility to protect (2004, 2005)

(*x*) The rights of individuals arising from international responsibility (2013)

G. International criminal law[8]

(*a*) Jurisdiction with regard to crimes committed outside national territory (1949)

(*b*) Piracy *iure gentium* (1971)

(*c*) Attacks on diplomatic agents and others to whom the receiving State owes a duty of special protection under international law (1971)

(*d*) International crimes other than those referred to in the Code of Crimes against the Peace and Security of Mankind (1996)

(*e*) Legal aspects of corruption and related practices (2000)

(*f*) Jurisdictional aspect of transnational organized crime (2000)

(*g*) Internet and international law (2008)

H. Law of international spaces[9]

(*a*) International bays and international straits (1967)

(*b*) Air piracy (1971)

(*c*) Pollution of international waterways (1972)

(*d*) Global commons (1992)

(*e*) The common heritage of mankind (1996)

(*f*) Transboundary resources (1996)

(*g*) Common interest of mankind (1996)

(*h*) The law of maritime delimitation (2012)

I. Law of international relations/responsibility[10]

(a) Question of whether extinctive prescription forms part of international law (1949)

(b) Prohibition of abuse of rights (1949)

(c) Functional protection (1996)

(d) International representation of international organizations (1996)

(e) Damages (1998)

(f) Remedies (1998)

(g) Revision of the Vienna Convention on Diplomatic Relations, 1961, with a view to providing, *inter alia*, for the question of insolvencies of embassies and their staff (1998)

(h) Consular functions (2010)

(i) Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (2014)

J. Law of the environment[11]

(*a*) Law of the environment (1971)

(*b*) Protection of the environment (1990)

(*c*) Legal aspects of the protection of the environment of areas not subject to national jurisdiction ("global commons") (1991)

(*d*) Rights and duties of States for the protection of the human environment (1992)

(*e*) Feasibility study on the law of environment: guidelines for international control for avoidance of environmental conflict (2000)

(*f*) The precautionary principle (2000)

(*g*) The polluter pays principle (2000)

K. Law of economic relations[12]

(*a*) The rules governing multilateral trade (1970)

(*b*) Economic and trade relations (1971)

(*c*) International law of economic relations (1990)

(*d*) The international legal regime of investments (1990)

(*e*) Legal aspects of contracts between States and foreign corporations (1990)

(*f*) Legal aspects of economic development (1990)

(*g*) The international legal regulation of foreign indebtedness (1991)

(*h*) The legal conditions of capital investment and agreements pertaining thereto (1991)

(*i*) Institutional arrangements concerning trade in commodities (1991)

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[8] *Ibid*., paras. 38–39.

[9] *Ibid*., paras. 40–45.

[10] *Ibid*., paras. 46–47.

[11] *Ibid*., paras. 48–49.

[12] *Ibid*., paras. 50–51.

(*j*) Legal conditions of capital investment and agreements pertaining thereto (1993)

(*k*) International legal problems connected with privatization of State properties (1996)

(*l*) Foundations of investment law (1997)

(*m*) Foreign investment (1997)

(*n*) Trade and investments (1997)

(*o*) Parent/subsidiary relations (1998)

(*p*) State contracts (1998)

L. Law of armed conflicts/disarmament[13]

(*a*) Prohibition of war (1962)

(*b*) Law of war and neutrality (1962)

(*c*) Prohibition of the threat or use of force (1971)

(*d*) The notion of "armed conflict" (1971)

(*e*) The effects of armed conflict on the legal relations between States (1971)

(*f*) Issues relating to internal armed conflicts (1971)

(*g*) The status and protection of specific categories of persons in armed conflicts (1971)

(*h*) The prohibition and limitation of the use of certain methods and means of warfare (1971)

(*i*) Updating of rules relating to armed conflicts and protection of the civilian population (1990)

(*j*) Legal aspects of disarmament (1991)

(*k*) Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States (1992)

(*l*) General legal principles applicable to demilitarized and/or neutral zones (1996)

(*m*) General legal principles applicable to armed sanctions under Chapter VII of the Charter of the United Nations (1996)

(*n*) Good-neighbourliness (1997)

(*o*) Law relating to international peace and security (1997)

(*p*) Economic sanctions (1998)

(*q*) The law of collective security (1999)

(*r*) Recourse to force by States Members of the United Nations and/or regional organizations under delegation of authority pursuant to Chapter VII of the Charter of the United Nations (2005)

(*s*) The pre-emptive use of force in international law (2005)

(*t*) The legal consequences arising out of the use of private armies in internal conflicts (2006, 2007)

(*u*) The legal consequences arising out of the involvement of multilateral corporations in internal conflicts (2006, 2007)

(*v*) The legal consequences arising out of the involvement of security agencies in internal conflicts (2006, 2007)

(*w*) The application of international humanitarian law to non-State armed groups in contemporary conflicts (2011)

M. Settlement of disputes[14]

(*a*) Pacific settlement of international disputes (1949)

(*b*) More frequent recourse to arbitral and judicial settlement (1962)

(*c*) Obligatory jurisdiction of the International Court of Justice (1962)

(*d*) Enforcement of international law (1962)

(*e*) Questions of international legal procedure, such as model rules for conciliation (1968)

(*f*) Drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of that question (1968)

(*g*) Arrangements to enable international organizations to be parties to cases before the International Court of Justice (1968)

(*h*) Review of all the established machinery for the settlement of international disputes (1970)

(*i*) International commissions of inquiry (fact-finding) (1991)

(*j*) Mediation and conciliation procedures through the organs of the United Nations (1996)

(*k*) Model clauses for the settlement of disputes relating to the application or interpretation of future codification conventions (1996)

[13] *Ibid*., paras. 52–53.

[14] *Ibid*., paras. 54–58.

(*l*) Means and methods for the international settlement of disputes (1997)

(*m*) Evidence (1998)

(*n*) Multiple jurisdictions in international law (1998)

(*o*) Scope and content of the obligation to settle international disputes peacefully (2005)

(*p*) Model dispute settlement clauses for possible inclusion in drafts prepared by the Commission (2011)

(*q*) Access to and standing before different dispute settling mechanisms of various actors (States, international organizations, individuals, corporations, etc.) (2011)

(*r*) Competing jurisdictions between international courts and tribunals and declarations under the optional clause, including the elaboration of model clauses for inclusion therein (2011)

(*s*) Improving procedures for dispute settlement involving international organizations (2011)

CHECKLIST OF DOCUMENTS OF THE SIXTY-EIGHTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/679	Long-term programme of work: Review of the list of topics established in 1996 in the light of subsequent developments—Working paper prepared by the Secretariat	Reproduced in the present volume.
A/CN.4/679/Add.1	Long-term programme of work: Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments—Working paper prepared by the Secretariat	*Idem*.
A/CN.4/688	Provisional agenda for the sixty-eighth session	Available from the website of the Commission, documents of the sixty-eighth session. For agenda as adopted, see *Yearbook … 2016*, vol. II (Part Two).
A/CN.4/689	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session, prepared by the Secretariat	Available from the website of the Commission, documents of the sixty-eighth session.
A/CN.4/690	Second report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur	Reproduced in the present volume.
A/CN.4/691	Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law—Memorandum by the Secretariat	*Idem*.
A/CN.4/692	Third report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	*Idem*.
A/CN.4/693	First report on *jus cogens* by Mr. Dire Tladi, Special Rapporteur	*Idem*.
A/CN.4/694	Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur	*Idem*.
A/CN.4/695 and Add.1	Fourth report on identification of customary international law, by Sir Michael Wood, Special Rapporteur	*Idem*.
A/CN.4/696 and Add.1	Protection of persons in the event of disasters: Comments and observations received from Governments and international organizations	*Idem*.
A/CN.4/697	Eighth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	*Idem*.
A/CN.4/698	Crimes against humanity: Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission—Memorandum by the Secretariat	*Idem*.
A/CN.4/699 and Add.1	Fourth report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur	*Idem*.
A/CN.4/700	Third report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur	*Idem*.
A/CN.4/701	Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	*Idem*.
A/CN.4/L.870/Rev.1	Protection of the environment in relation to armed conflict: Text of the draft principles provisionally adopted in 2015 and technically revised and renumbered during the present session by the Drafting Committee	Available from the website of the Commission, documents of the sixty-eighth session.
A/CN.4/L.871	Protection of persons in the event of disasters: Titles and texts of the preamble and draft articles 1 to 18 of the draft articles on the protection of persons in the event of disasters adopted, on second reading, by the Drafting Committee	*Idem*.

Document	*Title*	*Observations and references*
A/CN.4/L.872	Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee	*Idem.*
A/CN.4/L.873 and Add.1	Crimes against humanity: Text of draft articles 5, 6, 7, 8, 9 and 10 provisionally adopted by the Drafting Committee on 25, 26, 30 and 31 May and 1 and 2 June 2016, and of draft article 5, paragraph 7, provisionally adopted on 7 July 2016	*Idem.*
A/CN.4/L.874	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading	*Idem.*
A/CN.4/L.875	Protection of the atmosphere: Titles and texts of draft guideline 3, 4, 5, 6 and 7, together with a preambular paragraph, provisionally adopted by the Drafting Committee on 7, 8 and 9 June 2016	*Idem.*
A/CN.4/L.876	Protection of the environment in relation to armed conflicts: Text of the draft principles provisionally adopted during the present session by the Drafting Committee	*Idem.*
A/CN.4/L.877	Provisional application of treaties: Text of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions	*Idem.*
A/CN.4/L.878	Report of the Planning Group	*Idem.*
A/CN.4/L.879	Draft report of the International Law Commission on the work of its sixty-eighth session: chapter I (Organization of the session)	See adopted text in *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10). The final text appears in *Yearbook … 2016*, vol. II (Part Two).
A/CN.4/L.880	*Idem:* chapter II (Summary of the work of the Commission at its sixty-eighth session)	*Idem.*
A/CN.4/L.881	*Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem.*
A/CN.4/L.882 and Add.1	*Idem*: chapter IV (Protection of persons in the event of disasters)	*Idem.*
A/CN.4/L.883 and Add.1	*Idem*: chapter V (Identification of customary international law)	*Idem.*
A/CN.4/L.884 and Add.1–2	*Idem*: chapter VI (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	*Idem.*
A/CN.4/L.885 and Add.1–2	*Idem*: chapter VII (Crimes against humanity)	*Idem.*
A/CN.4/L.886 and Add.1	*Idem*: chapter VIII (Protection of the atmosphere)	*Idem.*
A/CN.4/L.887	*Idem*: chapter IX (*Jus cogens*)	*Idem.*
A/CN.4/L.888 and Add.1	*Idem*: chapter X (Protection of the environment in relation to armed conflicts)	*Idem.*
A/CN.4/L.889 and Add.1–3	*Idem*: chapter XI (Immunity of State officials from foreign criminal jurisdiction)	*Idem.*
A/CN.4/L.890	*Idem*: chapter XII (Provisional application of treaties)	*Idem.*
A/CN.4/L.891	*Idem*: chapter XIII (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/SR.3291 – A/CN.4/SR.3347	Provisional summary records of the 3291st to 3347th meetings	Available from the website of the Commission, documents of the sixty-eighth session. The final text appears in *Yearbook … 2016*, vol. I.

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