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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2017

Volume II
Part One

Documents of the sixty-ninth 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 … 2017*).

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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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community
EU	European Union
ICAO	International Civil Aviation Organization
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
IMO	International Maritime Organization
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDP	United Nations Development Programme
UNEP`	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
UNWTO	World Tourism Organization
WHO	World Health Organization
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)
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*
GC	Grand Chamber
I.C.J. Reports	International Court of Justice, Pleadings, *Reports of Judgments, Advisory Opinions and Orders.* All judgments, advisory opinions and orders of the Court are available from the Court's website (www.icj-cij.org).
ILM	*International Legal Materials* (Washington, D.C.)
ITLOS Reports	International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders.* Case law is available from the ITLOS website (www.itlos.org).
KAV	Kavass Cases
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)
TIAS	Treaties and Other International Acts Series
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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PROVISIONAL APPLICATION OF TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/707

Memorandum by the Secretariat

[*Original: English*]
[*24 March 2017*]

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Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.
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.
Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force (Madrid, 12 May 2009)	Council of Europe, *Treaty Series*, No. 194.
Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 27 May 2009)	*Ibid.*, No. 204.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
Statutes of the World Tourism Organization (WTO) (Mexico City, 27 September 1970)	*Ibid.*, vol. 985, No. 14403, p. 339.
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International Cocoa Agreement, 1993 (Geneva, 16 July 1993)	*Ibid.*, vol.1766, No. 30692, p. 3.
International Timber Agreement, 1994 (Geneva, 26 January 1994)	*Ibid.*, vol. 1955, No. 33484, p. 81.
International Coffee Agreement, 1994 (London, 30 March 1994)	*Ibid.*, vol. 1827, No. 31252, p. 3. As extended until 30 September 2001, with modifications, by resolution No. 384 adopted by the International Coffee Council in London on 21 July 1999 (*ibid.*, vol. 2086, No. 31252, p. 147).
International Natural Rubber Agreement, 1994 (Geneva, 17 February 1995)	*Ibid.*, vol. 1964, No. 33546, p. 3.
International Grains Agreement, 1995:	*Ibid.*, vol. 1882, No. 32022, p. 195.
(*a*) Grains Trade Convention, 1995 (London, 7 December 1994)	
(*b*) Food Aid Convention, 1995 (London, 5 December 1994)	*Ibid.*
(*c*) Food Aid Convention, 1999 (London, 13 April 1999)	*Ibid.*, vol. 2073, No. 32022, p. 135; as rectified on 22 October 1999, *ibid.*, p. 234.
Treaty between the Russian Federation, Belarus, Kazakhstan and Kyrgyzstan on the Deepening of Integration in Economic and Humanitarian Fields (Moscow, 29 March 1996)	*Ibid.*, vol. 2014, No. 34547, p. 15.
Statutes of the Community of Portuguese-Speaking Countries (Lisbon, 17 July 1996)	*Ibid.*, vol. 2233, No. 39756, p. 207.
Agreement on the Establishment of the International Vaccine Institute (New York, 28 October 1996)	*Ibid., vol.* 1979, No. 33836, p. 199.

	Source
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.
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Agreement Establishing the CARICOM [Caribbean Community] Regional Organisation for Standards and Quality (CROSQ) (Belize City, 4 February 2002)	*Ibid.*, vol. 2324, No. 41658, p. 413.
Protocol on the Provisional Application of the Agreement Establishing the CARICOM Regional Organisation for Standards and Quality (CROSQ) (Belize City, 5 February 2002)	*Ibid.*, vol. 2326, No. 41658, p. 359.
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Protocol on Claims, Legal Proceedings and Indemnification to the Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (Stockholm, 21 May 2003)	*Ibid.*, p. 35.
Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (Ljubljana, 2 April 2004)	*Ibid.*, vol. 2367, No. 42662, p. 697.
International Agreement on Olive Oil and Table Olives, 2005 (Geneva, 29 April 2005)	*Ibid.*, vol. 2684, No. 47662, p. 63.
Trans-Pacific Strategic Economic Partnership Agreement (Wellington, 18 July 2005)	*Ibid.*, vol. 2592, No. 46151, p. 225.
International Tropical Timber Agreement, 2006 (Geneva, 27 January 2006)	*Ibid.*, vol. 2797. No. 49197, p. 75.
Convention on Cluster Munitions (Dublin, 30 May 2008)	*Ibid.*, vol. 2688, No. 47713, p. 39.
Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization (Moscow, 14 June 2009)	*Ibid.*, vol. 2898, No. 50541, p. 277.
International Cocoa Agreement, 2010 (Geneva, 25 June 2010)	*Ibid.*, vol. 2871, No. 50115, p. 3.
Arms Trade Treaty (New York, 2 April 2013)	*Ibid.*, vol. 3013, No. 52373, p. 269.

Introduction

1. At its sixty-eighth session, the Commission requested from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.[1] The present memorandum analyses bilateral and multilateral treaties registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations concluded since 1 January 1996 that have been subject to provisional application. In addition, it includes a number of multilateral treaties that are deposited with the Secretary-General of the United Nations but that have not yet entered into force. References to bilateral or multilateral treaties in the present memorandum only pertain to treaties reviewed within its scope.

[1] *Yearbook … 2016*, vol. II (Part Two), p. 226, para. 302.

2. The present memorandum analyses relevant treaties and related treaty actions available in the United Nations Treaty Collection (hereinafter, "Treaty Collection") for the specified time period. Relevant treaties and treaty actions containing the terms "provisional application" and "provisional entry into force" were identified.[2] The terms "temporary application" or "interim application" have also sometimes been used to indicate provisional application. Provisional application is treated differently, however, from other concepts such as "provisional treaties" and "temporary treaties". Provisional treaties are concluded to bridge the gap in time until entry into force of the permanent treaty. Temporary treaties are treaties with a determined end date. The range of terms reflects the diversity of practice among States and international organizations with regard to the provisional application of treaties.

3. The analysis in the present memorandum is based on over 400 relevant bilateral treaties. Bilateral treaties available in the Treaty Collection are limited to those registered with the Secretariat. Pursuant to article 1, paragraph 2, of the regulations to give effect to Article 102 of the Charter of the United Nations,[3] a treaty shall be registered when it enters into force. The regulations interpret "entry into force" broadly to include treaties that are provisionally applied.[4] In practice, however, bilateral treaties that are provisionally applied are frequently registered by the parties only after entry into force.[5] Moreover, it is noted that not all bilateral treaties in force have in fact been registered. Accordingly, the number of bilateral treaties provisionally applied during the time period covered by the present study is, in reality, higher than the number of those available in the Treaty Collection.

4. The present memorandum covers over 40 multilateral treaties. The Treaty Collection only contains those multilateral treaties that are registered with the Secretariat and/or deposited with the Secretary-General. Multilateral treaties are deposited with the Secretary-General only if he is the designated depository. There are many multilateral treaties for which this is not the case. Further, multilateral treaties are generally registered only after entry into force.[6] The multilateral treaties available in the Treaty Collection are therefore limited mainly to those that are in force and registered, and those deposited with the Secretary-General that are not yet in force. Similar to bilateral treaties, the number of multilateral treaties provisionally applied during the time period of this study is thus, in reality, higher than the number of such treaties included in the Treaty Collection.

5. The participation in some multilateral treaties is limited to specific parties. For purposes of the present study, such treaties with limited participation are called "treaties with limited membership". The present study also covers a number of so-called "mixed agreements", which are concluded by the European Union and its member States, on the one part, and a third party, on the other part. While mixed agreements are typically registered as bilateral treaties, they require the ratification, approval or acceptance of the European Union and each of its member States. Accordingly, mixed agreements share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership.

6. The subject area of a treaty can be important for the modalities of provisional application. In the present study, a number of mostly bilateral treaties subject to provisional application concern cross-border transport, cross-border flows of migrants and labour, and questions of nationality, immigration and residence. Several treaties concern free trade between two or more States and/or related international organizations. States also use provisional application in matters of military collaboration. Moreover, cooperation in the field of disarmament and non-proliferation has been the subject of provisional application of both bilateral and multilateral treaties. Many treaties concluded by international organizations with States or other international organizations are host or seat agreements, which establish new institutional structures and typically include provisions on the legal capacity of the organization in the national legal order.

7. A significant number of the multilateral treaties studied are commodity agreements. Despite their particularities, commodity agreements fall into a broader category of provisionally applied treaties that establish institutional arrangements. The resulting provisionally operational institutional arrangements are distinct from preparatory commissions for the establishment of an international organization such as the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization.[7] Such preparatory commissions are typically constituted by a provisional agreement that is terminated when the permanent constituent instrument of the organization enters into force.

8. Chapter I of the present memorandum analyses the practice concerning the legal basis for the provisional application of treaties. As stated in article 25, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties (hereinafter "1969 Vienna Convention"),[8] the legal basis for provisional application can either be included in the treaty itself or in a separate agreement. Chapter II considers the practice relating to the commencement of provisional application as stipulated in the treaty

[2] On the terminological shift from "provisional entry into force" to "provisional application" in article 25 of the 1969 Vienna Convention on the Law of Treaties, see *Yearbook … 2013*, vol. II (Part One), document A/CN.4/658.

[3] General Assembly resolution 97 (I) 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.

[4] *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.

[5] The exceptions are treaties registered *ex officio* by the United Nations.

[6] The exceptions are commodity agreements and some other multilateral treaties with limited membership.

[7] The Commission was established by a resolution of the States Signatories of the Comprehensive Nuclear Test-Ban Treaty on 19 November 1996 (Comprehensive Nuclear Test-Ban Treaty, Meeting of States Signatories, Resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, CTBT/MSS/RES/1, adopted on 19 November 1996).

[8] The same formulation, with the necessary modifications, is included is article 25, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force, as of 24 February 2017). For a discussion of the provision, see *Yearbook … 2015*, vol. II (Part One), document A/CN.4/676.

or dependent on the occurrence of an external event. Chapter III examines the practice on different ways to limit the scope of provisional application to part of the treaty, or by reference to the internal law of the parties and international law. Chapter IV addresses the practice relating to different ways to terminate provisional application, either by notification or by agreement of the parties. Each chapter distinguishes between bilateral and multilateral treaties. While the provisional application of bilateral and multilateral treaties share common characteristics, the practice reviewed in the present memorandum reveals that important differences exist between the two kinds of treaties. Chapter V below summarizes the observations made in the previous chapters.

Chapter I

Legal basis for provisional application

9. Article 25 of the 1969 Vienna Convention provides for two different legal bases of provisional application: "A treaty or a part of a treaty is applied provisionally pending its entry into force if: (*a*) the treaty itself so provides; or (*b*) the negotiating States have in some other manner so agreed." The majority of bilateral treaties are provisionally applied on the basis of a clause in the treaty. In contrast, multilateral treaties are frequently also provisionally applied on the basis of a separate agreement. While treaties with a clause on provisional application only state the reasons for provisional application in exceptional cases,[9] separate agreements are often more explicit in this regard, referring to the need for expediency, or unexpected difficulties in meeting the requirements for ratification at the time of the conclusion of the main treaty.

A. Provisional application by clause in the treaty

10. In both bilateral and multilateral treaties, provisional application clauses are typically contained in the final clauses of the treaty as a separate provision or as part of the provision on entry into force. Both bilateral and multilateral treaties use either the term "provisional application" or the term "provisional entry into force" to describe the application of a treaty before its entry into force. The exceptions in this regard are commodity agreements, some of which distinguish between declarations of provisional application by individual States and the provisional entry into force of the agreement. Some treaties use different descriptors for "provisional", such as "temporary" or "interim". When treaties refer to "provisional entry into force", the term "definitive entry into force" may be used to indicate that the treaty entered into force in line with the regular procedures.

1. Bilateral treaties

11. The majority of bilateral treaties contain an explicit clause allowing for provisional application. This clause is typically included in the final clauses of the treaty, either as a separate provision or under the general heading "entry into force".

12. The terminology varies both with regard to the terms "provisional" and "application". Many clauses use the terminology suggested by article 25 of the 1969 Vienna Convention, stating that the agreement "shall be provisionally applied". One bilateral treaty made explicit reference to article 25 of the Convention.[10] Other formulations are "provisional entry into force", "provisional implementation" and "provisional effect". For example, the Agreement between Argentina and Suriname on Visa Waiver for Holders of Ordinary Passports[11] "shall enter into force provisionally" (art. 8). The Treaty between Switzerland and Liechtenstein relating to Environmental Taxes in Liechtenstein[12] stipulates, in article 5, that it "shall be implemented provisionally". Similarly, the Agreement between Spain and Andorra on the Transfer and Management of Waste ,[13] in article 13, provides that "it shall be implemented and be effective in respect of all its provisions, albeit provisionally". The Agreement between the Spain and Slovakia on Cooperation to Combat Organized Crime[14] "shall take provisional effect" (art. 14, para. 2). Furthermore, the Treaty on the Formation of an Association between the Russian Federation and Belarus,[15] in article 19, states that it "shall be applicable on a provisional basis".

13. Some of the bilateral treaties do not use the descriptor "provisional", but speak instead of "temporary" or "interim" application. For example, the exchange of letters constituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia[16]

[9] By way of exception, the Agreement between Germany and Switzerland concerning the Construction and Maintenance of a Motorway Bridge across the Rhine between Rheinfelden (Baden-Württemberg) and Rheinfelden (Aargau) (Bern, 29 January 2003, United Nations, *Treaty Series*, vol. 2545, No. 45405, p. 275) states that, "[i]n order that the bridge may be opened to traffic as early as possible, the provisions of this Agreement shall be applied provisionally" (art. 16).

[10] Agreement between Spain and Kuwait on the Waiver of Visas for Diplomatic Passports (Seville, 3 October 2011), *ibid.*, vol. 2866, No. 50090, p. 211.

[11] Agreement between Argentina and Suriname on Visa Waiver for Holders of Ordinary Passports (San Salvador, 6 June 2011), *ibid*., vol. 2957, No. 51407, p. 213.

[12] Treaty between Switzerland and Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (Bern, 29 January 2010), *ibid*., vol. 2761, No. 48680, p. 23.

[13] Agreement between Spain and Andorra on the Transfer and Management of Waste (Madrid, 17 October 2006), *ibid*., vol. 2881, No. 50313, p. 165.

[14] Agreement between Spain and Slovakia on Cooperation to Combat Organized Crime (Bratislava, 3 March 1999), *ibid*., vol. 2098, No. 36475, p. 371.

[15] Treaty on the Formation of an Association between the Russian Federation and Belarus (Moscow, 2 April 1996), *ibid*., vol. 2120, No. 36926, p. 595.

[16] Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia (Geneva, 6 and 9 November 1998), *ibid*., vol. 2042, No. 35283, p. 23, letter from the Federal Republic of Yugoslavia to the Office of the United Nations High Commissioner for Human Rights, para. 33; see also the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (Minsk, 23 February 2009), *ibid*., vol. 2679, No. 47597, p. 65, at art. 15.

specifies, in paragraph 33, that "[t]he provisions of this Agreement shall apply on a temporary basis". Article 16, paragraph 2, of the Agreement between Malaysia and United Nations Development Programme concerning the establishment of the UNDP Global Shared Service Centre[17] states that the Agreement "shall apply, on an interim basis". As noted in the introduction to the present memorandum, such references to provisional application have to be distinguished from temporary treaties, which have a fixed termination date.

2. Multilateral treaties

14. Like bilateral treaties, many multilateral treaties contain a clause allowing for provisional application. The clause on provisional application is also typically included in the final clauses of the treaty either as a separate provision or within the provision on "entry into force". Compared to the practice relating to bilateral treaties, the clauses on provisional application in multilateral treaties are tailored to the characteristics of the particular multilateral treaty, as discussed in subsequent chapters.

15. With regard to terminology, multilateral treaties—like bilateral treaties—use either the term "provisional application" or "provisional entry into force". The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter, "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea"), in article 7, provides that it "shall be applied provisionally pending its entry into force". Similarly, the Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin states that it "shall be provisionally applied" (art. 3, para. 5). The Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation states, in article 18, paragraph 7, that it "shall be applied on a provisional basis from the date of its signature".[18] Furthermore, article 21, paragraph 1, of the Statutes of the Community of Portuguese-Speaking Countries and article 8 of the Agreement Establishing the "Karanta" Foundation for Support of Non-formal Education Policies and including in annex the Statutes of the Foundation (hereinafter, "Agreement Establishing the 'Karanta' Foundation")[19] provide that the respective treaty "shall enter into force provisionally".

16. A special case of treaties explicitly providing for provisional application are commodity agreements, which usually include clauses on "provisional application", "provisional entry into force" or "provisional acceptance". While some commodity agreements use any one of those terms, others distinguish between provisional application and provisional entry into force. For example, the International Agreement on Olive Oil and Table Olives, 2005, includes article 41 on notification of provisional application and article 42 on entry into force. The latter article states in paragraph 3:

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.

The Agreement was provisionally in force between 1 January 2006 and 25 May 2007. During that period, the International Olive Council, acting through a Chairperson, a Council of Members and an Executive Secretariat, functioned on a provisional basis.[20] Similar observations can be made with regard to the other commodity agreements.[21]

17. Commodity agreements belong to a broader category of provisionally applied treaties that establish institutional arrangements. Another relevant multilateral treaty in this regard is the Agreement Establishing the CARICOM [Caribbean Community] Regional Organisation for Standards and Quality (CROSQ). The Agreement provides in article 18 (provisional application) that it "may be provisionally applied by no less than eight signatories of the States mentioned in paragraph 1 of Article 3". The Agreement was provisionally applied on 5 February 2002, in accordance with article 18, and that provisional application thus established a Council, a number of Special Committees and a Secretariat.[22] It is noteworthy, however, that the parties also concluded a Protocol on the Provisional Application of the Agreement Establishing the CARICOM Regional Organisation for Standards and Quality recalling the above-mentioned article 18 and providing for the provisional application among the parties. The Protocol was concluded one day after the adoption of the Agreement.

18. A similar two-step arrangement on provisional application is included in the Agreement Establishing the "Karanta" Foundation. The Agreement provides in article 8 (entry into force) that it "shall enter into force provisionally upon signature by the founding member States and, definitively, upon ratification by these same States". Article 9 of the Agreement (transitional arrangements) adds that "[f]or the purpose of establishing the preliminary bodies of the Foundation, an ad hoc Steering Committee shall be created". The Statutes of the "Karanta" Foundation, which are annexed to the Agreement, also include a clause on provisional application, in article 49, with the same wording as the above-cited article 8. While the Agreement itself thus established an ad hoc Steering Committee to establish the preliminary bodies of the Foundation, the Statutes were also provisionally applied and brought into being the Foundation with its various organs.

19. Amendments to the constituent instruments of international organizations can also be subject to provisional application. Some constituent instruments stipulate that

[17] Agreement between Malaysia and United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (Kuala Lumpur, 24 October 2011), *ibid.*, vol. 2794, No. 49154, p. 67.

[18] The Protocol on Claims, Legal Proceedings and Indemnification thereto, in article 4, paragraph 8, contains the same formulation.

[19] See also art. 49 of the Statutes of the Foundation.

[20] See art. 3, para. 1, of the International Agreement on Olive Oil and Table Olives, 2005.

[21] See, e.g., art. 7 of the International Coffee Agreement, 1994.

[22] See art. 5 (composition of CROSQ) of the Agreement Establishing the CARICOM Regional Organisation for Standards and Quality (CROSQ).

amendments might enter into force for all member States if adopted by a certain majority in the competent organ.[23] However, most constituent instruments do not provide for such a simplified amendment procedure, but instead stipulate high qualitative or quantitative requirements for entry into force of amendments. As a result, some international organizations, through their competent organ, have decided to apply amendments provisionally. For example, the Amendment to article 14 of the Statutes of the World Tourism Organization ([UN]WTO), and the Amendment to paragraph 4 of the Financing Rules annexed to the Statutes of the World Tourism Organization ([UN]WTO) were registered as being provisionally applied. Article 33 of those Statutes on amendments does not provide for provisional application and requires the approval of two thirds of the members for entry into force of an amendment. In its resolution 365 (XII) (1997), the General Assembly of UNWTO noted "with regret that the amendment to Article 14 of the Statutes which it adopted by resolution 134 (V) … has not yet received approval from the requisite number of States" and "decide[d] that this amendment will be applied provisionally pending its ratification". Following the adoption of its resolution 365 (XII), the General Assembly of UNWTO also adopted resolution 422 (XIV) (2001) in which it directly "decide[d], exceptionally, that the new paragraph 4 of the Financing Rules shall apply immediately, on a provisional basis, pending its entry into force in accordance with paragraph 3 of Article 33 of the Statutes". While resolution 365 (XII) of the General Assembly of UNWTO would qualify as a case of provisional application by separate agreement,[24] resolution 422 (XIV) thereof did not only stipulate the amendment but also contained a clause on its provisional application.

20. A dynamic similar to that of the two UNWTO amendments can be observed with regard to Protocol No. 14 and Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[25] The parties to the Convention adopted Protocol 14 *bis* "[c]onsidering the urgent need to introduce certain additional procedures to the Convention in order to maintain and improve the efficiency of its control system for the long term". Protocol 14 *bis* was adopted in 2009 and entered into force in 2010. Article 6 of the Protocol allowed for the provisional application of Protocol 14 *bis* pending its entry into force, which was relied on by seven States. The inclusion of an explicit clause on provisional application distinguishes the 2009 Protocol No. 14 *bis* from the 2004 Protocol No. 14, which was ultimately provisionally applied on the basis of a separate agreement adopted in 2009 owing to difficulties in meeting the conditions for entry into force.[26]

21. The Rome Statute of the International Criminal Court ("Rome Statute") is an example of a constituent instrument that explicitly allows for the provisional application of amendments, namely to the Rules of Procedure and Evidence of the Court.[27] Article 51, paragraph 3, of the Rome Statute provides:

> After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

On 10 February 2016, the judges, acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence under article 51, paragraph 3, of the Rome Statute.[28] This was the first time that the procedure under article 51, paragraph 3, was used. The amendments were subsequently considered by the Study Group on Governance and the Working Group on Amendments of the Assembly of States Parties. The Assembly of States Parties did not take action on the amendments at its fifteenth session from 16 to 24 November 2016 and decided to continue to consider the matter in the Working Group on Amendments.[29] In view of the lack of a decision regarding the provisional amendments, different opinions were expressed regarding further application of the provisional rule by the International Criminal Court. On the one hand, it was stated that the Court should not apply the provisional rule while it was being considered by the Working Group on Amendments.[30] On the other hand, it was argued that a majority of delegations were in favour of the adoption of the amendments and "that it is for the Court, and the Court alone, to decide on the manner in which it should implement the provisions that concern it in the Rules of Procedure and Evidence".[31]

B. Provisional application by separate agreement

22. Separate agreements on the provisional application of both bilateral and multilateral treaties are concluded at two different points in time: (*a*) at the time of the conclusion of the main treaty that does not include a clause on provisional application; and (*b*) after the conclusion of the main treaty. This distinction is particularly evident in the case of multilateral treaties, in which it is typically more challenging to meet the requirements for entry into force. Multilateral treaties pose the additional difficulty that States that have not negotiated the treaty might accede

[23] See, e.g., art. XX of the Constitution of the International Vaccine Institute appended to the Agreement on the Establishment of the International Vaccine Institute, and art. 12 of the Agreement Establishing the International Fund for Agricultural Development.

[24] Provisional application by separate agreement will be discussed in more detail in sect. B below.

[25] Protocol 14 *bis* ceased to be in force or applied on a provisional basis as from 1 June 2010, date of the entry into force of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. For more information, see the website of the Treaty Office of the Council of Europe: www.coe.int/en/web/conventions/.

[26] See sect. B. 2, below.

[27] United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, at p. 117.

[28] See Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence (ICC-ASP/15/7) and Report of the Working Group on Amendments (ICC-ASP/15/24).

[29] International Criminal Court, Assembly of States Parties, resolution ICC-ASP/15/Res.5 of 24 November 2016 on strengthening the International Criminal Court and the Assembly of States Parties, annex I, para. 19, in *Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth Session, The Hague, 16–24 November 2016, Official Records*, vol. I (ICC-ASP/15/20 (Vol. I)), Part III.

[30] *Ibid*., annex V, Statement by Kenya concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 5.

[31] *Ibid*., annex VI, Statement by Belgium concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 3.

at a later point in time. The question then arises whether States that have not participated in the negotiations would also be considered "negotiating States" in terms of article 25, paragraph 1 (*b*), of the 1969 Vienna Convention.

1. Bilateral treaties

23. Few bilateral treaties have been provisionally applied on the basis of a separate agreement. The terminology of such separate agreements is the same as that used in bilateral treaties that contain a clause on provisional application.

24. As noted above, one can distinguish two categories of separate agreements on provisional application of bilateral treaties on the basis of when such separate agreements are concluded: (*a*) at the time of conclusion of the main treaty, the parties conclude another treaty that provides for provisional application of the main treaty (in the case of bilateral treaties, the main treaty may then be annexed to the separate treaty on provisional application); or (*b*) the parties subsequently agree in some other form to provisionally apply the treaty, which is not necessarily made explicit at the time of registration.

25. An example of the first category is the Agreement on the Taxation of Savings Income and the Provisional Application Thereof between Germany and the Netherlands.[32] In that Agreement, the two States agreed to provisionally apply the Convention between the Netherlands in respect of Aruba and Germany concerning the automatic exchange of information about savings income in the form of interest payments as contained in the appendix to the letter from Germany. The Convention itself does not include a clause on provisional application.

26. The above example contrasts with the Amendment to the Agreement on Air Services between the Netherlands and Qatar.[33] The Amendment was annexed to an Exchange of notes between the parties, which "shall be regarded as constituting an agreement between the two Governments on this matter, which shall, in accordance with Article XV, paragraph 2, of the Agreement, be provisionally applied". Article XV (modification), paragraph 2, of the Agreement provides:

> Any modifications of this Agreement decided upon during the consultation referred to in paragraph 1 above shall be agreed upon in writing between the Contracting Parties and shall take effect provisionally on the date of such agreement pending each Contracting Party informing the other in writing that the formalities constitutionally required in their respective countries have been complied with.

The parties thus applied a special clause on provisional application, contained in the Agreement, to the amendments. While the Exchange of notes constituted the agreement regarding provisional application, such agreement was ultimately based on the provisional application clause in the original treaty.

27. More generally, some amendment clauses in bilateral treaties may reference the provisions on entry into force, which in turn include a clause on provisional application. An example is the Agreement between the United Nations High Commissioner for Human Rights and Uganda concerning the Establishment of an Office in Uganda,[34] which states in article XXII, paragraph 3, that "[t]his Agreement may be amended by mutual consent of the Parties, and shall enter into force under conditions set out in paragraph 1 above". Paragraph 1 stipulates:

> The Agreement shall apply provisionally from the date of its signature by both Parties. It shall enter into force the day on which the [Office of the United Nations High Commissioner for Human Rights] shall received [*sic*] a notification from the Government confirming that it has completed the requisite legal formalities for the Agreement to enter into force.

In this context, the question is whether such *renvoi* would imply that "conditions set out in paragraph 1" also include the possibility of provisional application. Other agreements do not include such a *renvoi*. The Agreement on the Establishment of a United Nations High Commissioner for Refugees Field Office in Ukraine,[35] in article XVII, paragraph 4, states that "[a]mendments shall be made by joint written agreement". Accordingly, the Agreement was amended by the separate Protocol on amendments to article 4, paragraph 2 of the Agreement between the United Nations High Commissioner for Refugees and Ukraine,[36] which provides for the provisional application of the amendments.

28. An amendment to a treaty might also extend the provisional application of that treaty. In the Exchange of notes constituting an Agreement between Belgium and the Netherlands extending the Agreement of 13 February 1995 on the Status of Belgian Liaison Officers Attached to Europol Drugs Unit in The Hague,[37] the Parties agreed that said Agreement of 13 February 1995, "which prior to its entry into force, is being implemented on a temporary basis, be extended indefinitely as from 1 March 1996". The initial Agreement of 13 February 1995[38] was concluded for an initial duration of one year, subject to extension. A similar case is the Exchange of notes constituting an Agreement between Spain and the United States of America Extending the Agreement relating to

[32] Agreement on the Taxation of Savings Income and the Provisional Application thereof (Brussels, 26 May 2004 and The Hague, 9 November 2004), United Nations, *Treaty Series*, vol. 2821, No. 49430, p. 3. The Netherlands concluded a number of similar treaties in the period under review.

[33] Agreement between the Netherlands and Qatar for Air Services and between and beyond their Respective Territories (The Hague, 6 December 1980), *ibid.*, vol. 2265, No. 40360, p. 77, and Amendment to the Agreement on Air Services between the Netherlands and Qatar (The Hague, 11 September 1998 and London, 30 October 2000), *ibid.*, p. 507.

[34] Agreement between the United Nations High Commissioner for Human Rights and Uganda concerning the Establishment of an Office in Uganda (Gulu, 9 January 2006), *ibid.*, vol. 2517, No. 44969, p. 285.

[35] Agreement on the Establishment of a United Nations High Commissioner for Refugees Field Office in Ukraine (Kiev, 23 September 1996), *ibid.*, vol. 1935, No. 33151, p. 245.

[36] Protocol on Amendments to article 4, paragraph 2 of the Agreement between the United Nations High Commissioner for Refugees and Ukraine (Kiev, 23 September 1998), *ibid.*, vol. 2035, No. 33151, p. 288.

[37] Exchange of notes constituting an Agreement between Belgium and the Netherlands Extending the Agreement of 13 February 1995 on the Status of Belgian Liaison Officers Attached to Europol Drugs Unit in The Hague (Brussels, 28 and 29 February 1996), *ibid.*, vol. 2090, No. 36268, p. 253.

[38] Exchange of notes constituting an Agreement between Belgium and the Netherlands on the Status of Belgian Liaison Officers attached to the Europol Drug Unit in The Hague (Brussels, 9 and 13 February 1995), *ibid.*, vol. 2089, No. 36268, p. 139.

Tracking Stations,[39] which was "applied provisionally from 29 January 1997". The Agreement relating to Tracking Stations[40] did not include a clause on provisional application and was initially concluded for a period of 10 years, and has since been extended by a number of exchanges of notes.

29. Examples of the second above-mentioned category of provisional application by separate agreement at a subsequent point in time are: the Agreement between the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom;[41] the Agreement between Latvia and Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime;[42] and the Agreement between the United Nations and Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific.[43] While those treaties do not give any indication as to provisional application, they were registered as having been provisionally applied. Although States and international organizations are able to register a provisionally applied treaty under Article 102 of the Charter of the United Nations, as noted in the introduction to the present memorandum, treaties are often registered as such only when they enter into force.[44]

30. A special case of provisional application by separate agreement is the Agreement between Germany and Croatia regarding Technical Cooperation.[45] While the Agreement contains a clause on provisional application in article 7, article 5 provides for the provisional application of the "Agreement between the Republic of Croatia and the United Nations Development Programme (UNDP) of 12 March 1996 with the exception of the special provisions in article 9". The Agreement continues: "As the latter Agreement was signed for the Republic of Croatia on 12 March 1996, but never entered into force, the Parties to this Agreement understand that the said Agreement will be applied provisionally until it enters into force."[46] In other words, Germany and Croatia agreed to provisionally apply an agreement to which only Croatia was a party and which had not entered into force.

[39] Exchange of notes constituting an Agreement Extending the [Agreement between Spain and the United States of America relating to Tracking Stations] (Madrid, 17 and 24 January 1997), *ibid.*, vol. 2006, No. 7427, p. 508.

[40] Exchange of notes constituting an Agreement relating to Tracking Stations (Madrid, 29 January 1964), *ibid*., vol. 511, No. 7427, p. 61.

[41] Agreement between the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (Washington, 19 October 2012), *ibid.*, vol. No. 2967, No. 51578, p. 79.

[42] Agreement between Latvia and Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (Baku, 3 October 2005), *ibid.*, vol. 2461, No. 44230, p. 205.

[43] Agreement between the United Nations and Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific (Astana, 4 May 2011), *ibid.*, vol. 2761, No. 48688, p. 339.

[44] See introduction above.

[45] Agreement between Germany and Croatia regarding Technical Cooperation (Zagreb, 15 January 1999), United Nations, *Treaty Series*, vol. 2306, No. 41129, p. 439.

[46] Translation from the German original.

2. Multilateral treaties

31. A number of multilateral treaties are provisionally applied by separate agreement concluded by the negotiating States or entities when the treaty does not contain a clause on provisional application. As in the case of bilateral treaties, two categories of separate agreements on provisional application of multilateral treaties can be distinguished on the basis of when such separate agreements are concluded: (*a*) States or international organizations agree to provisionally apply the treaty at the time that the main agreement is concluded; or (*b*) they agree to provisionally apply the treaty by a later agreement.

32. An example of the first category is the Agreement Establishing the Caribbean Community Climate Change Centre, which was adopted on 4 February 2002. This Agreement did not provide for provisional application, but was applied on the basis of the Protocol on the Provisional Application of the Agreement Establishing the Caribbean Community Climate Change Centre, concluded on 5 February 2002 "to provide for the expeditious operationalisation of the Caribbean Community Climate Change Centre" (preamble). A comparable case is the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, which was provisionally applied by virtue of the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas.

33. Protocol No. 14 to the European Convention on Human Rights falls into the second category of provisional application by separate agreement. Protocol No. 14 was provisionally applied based on the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force (hereinafter "Madrid Agreement").[47] Protocol No. 14 was adopted in 2004, followed by the ratification by most but not all parties to the European Convention on Human Rights. To make Protocol No. 14 provisionally applicable, the member States of the Council of Europe adopted the Madrid Agreement. A number of States, all of which had previously ratified Protocol No. 14, provisionally applied the Protocol before it entered into force in 2010. The reference to article 25 of the 1969 Vienna Convention in the chapeau of the Madrid Agreement and the declaration of provisional application by the Netherlands underline that provisional application was initially not foreseen. The Netherlands stated that "the above [Madrid] agreement fully satisfies the requirement of article 25, paragraph 1 (*b*), of the Vienna Convention on the Law of Treaties, concerning the provisional application of treaties that do not expressly provide for such application".[48] Owing to delayed entry into force of Protocol No. 14, the member States also adopted Protocol No. 14 *bis* shortly after the Madrid Agreement. Protocol 14 *bis* included a clause on provisional application.[49]

[47] For the declarations of provisional application made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see United Nations, *Treaty Series*, vol. 2677, No. 2889, p. 30.

[48] *Ibid.*, p. 35.

[49] See sect. A 2 above.

34. Commodity agreements represent a special case of provisional application by separate agreement. While commodity agreements typically provide for provisional application and/or entry into force, they may also include a provision such as article 42, paragraph 3, of the International Agreement on Olive Oil and Table Olives, 2005, which states:

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.

The provision thus gives Governments the possibility to bring the Agreement provisionally into force by a collective decision. The International Tropical Timber Agreement, 1994, the International Cocoa Agreement, 1993, and the International Cocoa Agreement, 2010, were brought into force provisionally by virtue of such a decision. Such collective decisions are to be distinguished from a decision taken by the organ of an international organization to provisionally apply a treaty concluded with a third party.[50]

35. As many commodity agreements have a limited duration, they make provision for an extension of the agreement through adoption of a decision by the competent organ. According to its article 46, paragraph 1, the International Tropical Timber Agreement, 1994, "shall remain in force for a period of four years after its entry into force unless the Council, by special vote, decides to extend, renegotiate or terminate it in accordance with the provisions of this article". Unlike the other agreements mentioned above, the International Tropical Timber Agreement, 1994, entered into force only provisionally on 1 January 1997. On 30 May 2000[51] and 4 November 2002,[52] respectively, the Council decided to extend the Agreement for a period of three years with effect from 1 January 2001 and 1 January 2004, respectively. It thus extended an agreement that was in force provisionally. The extension of the International Cocoa Agreement, 1993, is a comparable example.

36. Like the International Tropical Timber Agreement, 1994, the International Agreement on Olive Oil and Table Olives, 2005, in article 47, paragraph 1, provides that it "shall remain in force until 31 December 2014 unless the International Olive Council, acting through its Council of Members, decides to prolong it, extend it, renew it or terminate it in advance in accordance with the provisions of this article". On 28 November 2014, the International Olive Council adopted a decision that entered into force as of 1 January 2015, prolonging the Agreement for a period of one year.[53] Unlike the International Tropical Timber Agreement, 1994, however, the International Agreement on Olive Oil and Table Olives, 2005, entered into force definitively on 25 May 2007, in accordance with article 42 thereof. At the time of the decision on the prolongation of the agreement, Israel had declared provisional application and never ratified the agreement. It could thus be argued that the decision of the International Olive Council constituted an agreement prolonging the provisional application of the 2005 Agreement in relation to one State.

37. The question of whether the term "negotiating States" in article 25, paragraph 1 (*b*), of the 1969 Vienna Convention would prevent acceding States from entering into an agreement on provisional application cannot be clearly answered based on the multilateral treaties considered in the present study. As noted in the previous paragraphs, some commodity agreements never enter into force definitively. When States or other entities extend an agreement that has only entered into force provisionally, such decision also applies to States that acceded to the commodity agreement. For example, several States acceded to the International Tropical Timber Agreement, 1994 (Guatemala, Mexico, Nigeria, Poland, Suriname, Trinidad and Tobago, and Vanuatu), which was extended several times. It is also noteworthy that, during the period under review, Montenegro, which became independent in 2006, succeeded to Protocol No. 14 to the European Convention on Human Rights. As a result, Montenegro had the option of provisionally applying certain provisions of Protocol No. 14 in accordance with the Madrid Agreement, although it did not do so.

[50] See the examples regarding the practice of the European Union in *Yearbook … 2016*, vol. II (Part One), document A/CN.4/699 and Add.1, annex.

[51] Decision 4 (XXVIII) of 30 May 2000 of the International Tropical Timber Council on extension of the International Tropical Timber Agreement, 1994.

[52] Decision 9 (XXXIII) of 4 November 2002 of the International Tropical Timber Council on extension of the International Tropical Timber Agreement, 1994.

[53] United Nations, *Treaty Series*, vol.3034, No. 47662, p. 303. Available from https://treaties.un.org.

Chapter II

Commencement of provisional application

A. Commencement stipulated in the treaty

38. Both bilateral and multilateral treaties provide for specific conditions under which the commencement of provisional application may take place. Commencement of provisional application may depend on certain procedures stipulated in the treaty or—less frequently—on the occurrence of an external event, such as the adoption of a law or the entry into force of another treaty. Treaties might also combine the procedural conditions stipulated in the treaty with the requirement that a certain external event must occur.

39. Provisional application typically commences in three different ways: (*a*) upon signature; (*b*) on a certain date (including retroactive effect of provisional application); or (*c*) upon notification. Unlike bilateral treaties, multilateral treaties may also foresee a fourth possibility, namely: (*d*) commencement of provisional application by means of a decision of an organ established by the treaty.

40. With regard to option (*c*), notification of the provisional application of a bilateral treaty usually takes the form of the receipt of an affirmative note or letter. In multilateral treaties, the parties notify the depository of their intention to apply the agreement provisionally. Multilateral treaties may further specify when it is possible to make such a notification. If a notification of provisional application may be made upon signature or at any subsequent time, provisional application remains possible even after entry into force of the treaty. If a notification of provisional application may only be made in conjunction with ratification, acceptance, approval or accession, the possibility of provisional application is precluded after entry into force of the agreement.

1. Bilateral treaties

41. The signature of the parties is a common condition for provisional application of bilateral treaties. Provisional application might begin on the date of signature or shortly thereafter. Examples of the formulations used are: "shall enter into force provisionally on the date of its signing", "shall apply on a temporary basis from the date of signature", "shall be implemented and be effective in respect of all its provisions, albeit provisionally, from the day it is signed", "it will be applied and it will be effective in all of its terms notwithstanding its provisional character from the day of its signature", "shall be applied temporarily from the day of its signature", and "shall apply provisionally after thirty (30) days have elapsed following the date of its signature".

42. Some bilateral treaties also refer to a date on which the treaty will be applied provisionally other than the date of signature. Common formulations are: "shall apply provisionally as of 1 April 2010", "shall be applied provisionally with effect from 1 May 2003" and "shall apply this Agreement provisionally from 1 July 1996 if this Agreement cannot enter into force by 1 July 1996".

43. The provisional application of many bilateral treaties also depends on reciprocal notifications of the parties to the treaties. Relevant formulations are: "shall be applied provisionally from the date of exchange of these notes", "provisional application shall begin 10 days after the date of exchange of these notes", "shall be provisionally applied as from the date of receipt of this affirmative note in reply", "shall be provisionally applied as from the date of the Department's reply", and "shall be provisionally applied from the date of this note".

44. As a variation of provisional application beginning on a certain date, some bilateral treaties provide for provisional application with retroactive effect. The Agreement between the Competent Authorities of Belgium and Austria Concerning the Reimbursement of Costs in Matters Relating to Social Security[54] was provisionally applied on 3 December 2001 by signature, definitively on 1 August 2003 by notification and with retroactive effect from 1 January 1994, in accordance with article 5 thereof. Article 5, paragraph 1, of the Agreement reads:

> The Contracting States shall notify each other in writing and through the diplomatic channel of the completion of the constitutional formalities required for the entry into force of this Agreement. This Agreement shall enter into force on the first day of the third month following the date of receipt of the final notification, effective as of 1 January 1994. Until its entry into force, this Agreement shall be implemented provisionally on the date of signature, effective as of 1 January 1994.

Similarly, the Exchange of notes constituting an Agreement to Renew the Status of Forces Agreement for Military Personnel and Equipment for the Forces between the Netherlands and Qatar[55] includes the following stipulation:

> If this proposal is acceptable to the State of Qatar, the Embassy proposes that this Note and the affirmative reply to it shall together constitute an Agreement between the Kingdom of the Netherlands and the State of Qatar, which will be applied provisionally pending Parliamentary approval in the Netherlands from the date of reply of the State of Qatar. If this date is later than 7 September 2005 this Agreement will have retroactive effect as from the latter date.

The Agreement was applied provisionally on 6 August 2005 and entered into force on 18 December 2005, in accordance with the provisions of the said notes.

2. Multilateral treaties

45. Multilateral treaties contain the same procedural conditions regarding commencement of provisional application as bilateral treaties: (*a*) upon signature; (*b*) a certain date; or (*c*) upon notification of the depository. While the procedural conditions might be the same, the prevalence of each of the conditions within the multilateral treaties included in the present study is different. As mentioned above, the clauses on provisional application in multilateral treaties are often more tailored to the specific treaties, and might combine different procedural conditions. Another particularity of multilateral treaties is that amendments may be provisionally applied (*d*) by means of a decision of an international organization.

46. Multilateral treaties with a limited membership often provide for provisional application by signature. The Treaty between the Russian Federation, Belarus, Kazakhstan and Kyrgyzstan on the Deepening of Integration in Economic and Humanitarian Fields, for example, includes the following article 26:

> This Treaty shall be applied provisionally from the date of its signature and shall enter into force from the date of the transmission to the depositary—which shall be the Russian Federation—of the notifications confirming the completion by the Parties of the internal formalities necessary for the entry into force of the Treaty.

Similar clauses are included in the Statutes of the Community of Portuguese-Speaking Countries, the Agreement concerning Permission for the Transit of Yugoslav Nationals who are Obliged to Leave the Country, and the Agreement establishing the "Karanta" Foundation. As noted above, some of these treaties concern institutional arrangements whose establishment proceeded on the basis of the signature of the negotiating parties. The Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization is an example of a multilateral treaty concluded and provisionally applied

[54] Agreement between the Competent Authorities of Belgium and Austria Concerning the Reimbursement of Costs in Matters Relating to Social Security (Brussels, 3 December 2001), *ibid.*, vol. 2235, No. 39769, p. 3.

[55] Exchange of notes constituting an Agreement to Renew the Status of Forces Agreement for Military Personnel and Equipment for the Forces between the Netherlands and Qatar (Kuwait, 3 and 19 March 2003), *ibid.*, vol. 2386, No. 39128, p. 343.

within the framework of an international organization. Moreover, some of the mixed agreements concluded by the European Union and its member States, on the one part, and a third party, on the other part, also allow for provisional application upon signature.[56] As noted in the introduction to the present memorandum, such mixed agreements have structural characteristics of both bilateral and multilateral treaties, particularly multilateral treaties with limited membership.[57]

47. A number of commodity agreements allow for provisional entry into force by a certain date. For example, the International Coffee Agreement, 1994, provides, in article 40 (entry into force), paragraph 2:

> This Agreement may enter into force provisionally on 1 October 1994. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1983, as extended, containing an undertaking to apply this Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 26 September 1994, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval.

The International Tropical Timber Agreement, 1994, also stipulates a date for provisional entry into force, but combines it with substantive conditions. As article 41 (entry into force), paragraph 2, states:

> If this Agreement has not entered into force definitively on 1 February 1995, it shall enter into force provisionally on that date or on any date within six months thereafter, if 10 Governments of producing countries holding at least 50 per cent of the total votes as set out in annex A to this Agreement, and 14 Governments of consuming countries holding at least 65 per cent of the total votes as set out in annex B to this Agreement have signed this Agreement definitively or have ratified, accepted or approved it pursuant to article 38, paragraph 2, or have notified the depositary under article 40 that they will apply this Agreement provisionally.

48. Notification is the most common means to commence provisional application. An example is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which provides in article 41, paragraph 1:

> This Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.

None of the current parties to the Agreement used this possibility before its entry into force on 11 December 2001.[58] In comparison, several member States of the Council of Europe notified the provisional application of the relevant provisions of Protocol No. 14 to the European Convention on Human Rights in accordance with the Madrid Agreement.[59] Subparagraph (*b*) of the Madrid Agreement states that

> any of the High Contracting Parties may at any time declare *by means of a notification addressed to the Secretary General of the Council of Europe** that it accepts, in its respect, the provisional application of the above-mentioned parts of Protocol No. 14. Such declaration of acceptance will take effect on the first day of the month following the date of its receipt by the Secretary General of the Council of Europe; the above-mentioned parts of Protocol No. 14 will not be applied in respect of Parties that have not made such a declaration of acceptance.

It is interesting that subparagraph (*b*) explicitly provides that the provisionally applied parts of Protocol No. 14 will not be applied in relation to parties that have not accepted provisional application.

49. While 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 and the Madrid Agreement allow for provisional application at any time before entry into force, a number of other multilateral treaties specify the time at which provisional application may be notified. Article 18 (provisional application) of the Convention on Cluster Munitions states that:

> 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.

Article 18 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction contains the same formulation. Accordingly, the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction were provisionally applied until entry into force by the States that had made such a declaration. After entry into force, the possibility of notifying provisional application was excluded because provisional application can only be notified at the time of ratification, acceptance, approval or accession. After entry into force, any such notification would be without effect because ratification, acceptance, approval or accession would lead to the State becoming a party to the treaty with immediate effect.

50. Some multilateral treaties are provisionally applied on the basis of a declaration at the time of signature. Article 23 (provisional application) of the Arms Trade Treaty provides:

> Any State may at the time of signature or the deposit of instrument of its 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.

Unlike the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, a State that has signed—but not yet ratified, accepted, approved or acceded to—the Arms Trade Treaty would continue to provisionally apply the Treaty even though it entered into force for States that notified ratification, acceptance, approval or accession.

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[56] See, e.g., Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, on a Framework Agreement between the European Union and Ukraine on the General Principles for the Participation of Ukraine in Union Programmes (Brussels, 22 November 2010), *ibid.*, vol. 2913, No. 35736, p. 7, art. 10.

[57] See introduction above.

[58] See also para. 4 of General Assembly resolution 50/24 of 5 December 1995.

[59] See footnote 47 above.

Accordingly, the Treaty would enter into force for some States but would continue to be provisionally applied by others. In this context, it is worth noting that almost all States that declared provisional application of the Treaty did so when depositing their instruments of ratification, acceptance, approval or accession.[60] When the Treaty entered into force on 24 December 2014, all States that had declared provisional application under article 23 had also deposited instruments of ratification, acceptance, approval or accession.

51. A characteristic of institutional arrangements such as international organizations is that provisional application may be the result of the decision of organ of that institutional arrangement. As noted above, the General Assembly of UNWTO adopted two amendments to its Statutes, which were provisionally applied.[61] Such provisional application commenced at the time of adoption of the respective resolution. The adoption of a resolution is the most straightforward way to commence provisional application.

52. The different ways in which provisional application may commence is well illustrated by the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, which includes a number of the above-discussed conditions. The relevant article 7 (provisional application), paragraph 1, reads:

> If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:
>
> (*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;
>
> (*b*) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;
>
> (*c*) States and entities which consent to its provisional application by so notifying the depositary in writing;
>
> (*d*) States which accede to this Agreement.

The chapeau of the paragraph stipulates a certain date for the commencement of provisional application. Subparagraph (*a*) is comparable to provisional application of amendments by decision of an international organization, subparagraph (*b*) provides for provisional application by signature, subparagraph (*c*) allows for provisional application by notification of the depository, and subparagraph (*d*) provides for provisional application by accession.

B. Commencement dependent on an event

53. While the commencement of provisional application is mostly determined by clauses in the treaty, it might also depend on the occurrence of external factors or events, such as the passing of a law or regulation or the entry into force of a treaty. Such conditions are mostly used in bilateral treaties and underline the flexible nature of provisional application.

1. Bilateral treaties

54. The commencement of the provisional application of a bilateral treaty might be conditioned upon the rules of an international organization of which the parties are members.[62] The Agreement in the form of an exchange of letters concerning the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and the United Kingdom[63] proposed that

> the Kingdom of the Netherlands and Guernsey apply this Agreement provisionally, within the framework of our respective domestic constitutional requirements, as from 1 January 2005, or the date of application of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, whichever is later.

The commencement of provisional application of the Agreement might thus depend on the law of the European Communities.

55. The commencement of provisional application might also be determined by another treaty in force between the parties to the treaty that is being provisionally applied. The Exchange of notes between Switzerland and Liechtenstein relating to the Distribution of the Tax Benefits on CO_2 and the Reimbursement of the Tax on CO_2 to Enterprises under Liechtenstein's Law on the Exchanges of Rights[64] provides the following:

> The Agreement shall apply provisionally from the date of the provisional implementation of the Treaty of 29 January 2010 between the Principality of Liechtenstein and the Swiss Confederation relating to environmental taxes in the Principality of Liechtenstein and of the Agreement relating to the Treaty and shall enter into force at the same time as the Treaty.

The Treaty of 29 January 2010 between Switzerland and Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein[65] provides in article 5 that it "shall be implemented provisionally as of 1 February 2010". In a similar vein, the Exchange of notes constituting an Agreement between the Netherlands and Switzerland concerning Privileges and Immunities for the Swiss Liaison Officers at Europol in The Hague[66] states that the

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[60] The only exceptions are Spain and Serbia, which notified provisional application of the Arms Trade Treaty at the time of signature on 3 June 2013 and 12 August 2013, respectively, and deposited their instruments of ratification on 2 April 2014 and 5 December 2014, respectively.

[61] See chap. I, sect. A 2, above.

[62] For a definition of the term "rules of the organization", see art. 2, para. (*b*), 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), pp. 40 *et seq.*, paras. 87–88.

[63] Agreement in the form of an exchange of letters concerning the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and the United Kingdom (Brussels, 19 November 2004, and St. Peter Port, 19 November 2004), United Nations, *Treaty Series*, vol. 2865, No. 50061, p. 73. The Netherlands has replicated this formulation in a number of other agreements.

[64] Exchange of notes between Switzerland and Liechtenstein relating to the Distribution of the Tax Benefits on CO_2 and the Reimbursement of the Tax on CO_2 to Enterprises under Liechtenstein's Law on the Exchanges of Rights (Bern, 29 January 2010), *ibid.*, vol. 2763, No. 48680, p. 274.

[65] Treaty of 29 January 2010 between Switzerland and Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (Bern, 29 January 2010), *ibid.*, vol. 2761, No. 48680, p. 23.

[66] Exchange of notes constituting an Agreement between the Netherlands and Switzerland concerning Privileges and Immunities for the Swiss Liaison Officers at Europol in The Hague (The Hague, 11 January 2006 and 19 April 2006), *ibid.*, vol. 2967, No. 51575, p. 15.

agreement "shall be applied provisionally from the day on which this affirmative note has been received by the Embassy, but not before the date the Agreement between Switzerland the European Police Office of 24 September 2004 enters into force."

2. Multilateral treaties

56. The commencement of multilateral treaties typically does not depend on the occurrence of a particular event. The exceptions are commodity agreements, which typically include multilayered conditions for provisional and/or definitive entry into force. Article 42, paragraph 3, of the International Agreement on Olive Oil and Table Olives, 2005, states:

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.

Similar clauses are contained in other commodity agreements. Such clauses may make provisional entry into force dependent on the decision of the governments concerned.

57. Some commodity agreements are conditional upon each other. Article XXIV (entry into force) of the Food Aid Convention, 1999, provides that the Food Aid Convention may enter into force provisionally or definitively when the Grains Trade Convention, 1995, is in force.

Chapter III

Scope of provisional application

58. A significant number of treaties or separate agreements on provisional application limit the scope of provisional application. The scope of provisional application may be restricted by express provisions on provisional application of part of the treaty or by references to the internal law of the parties or international law. Both bilateral treaties and multilateral treaties contain such limitations. However, clauses on provisional application of part of the treaty are more commonly found in multilateral treaties than in bilateral treaties. The scope of provisional application of bilateral treaties is more often limited by reference to internal law or international law.

A. Clauses on provisional application of part of the treaty

59. Article 25, paragraph 1, of the 1969 Vienna Convention envisages the possibility of provisional application of part of the treaty, confirming that the negotiating States or international organizations may limit the extent to which the treaty is provisionally applied. Clauses on provisional application of part of the treaty can be found in both bilateral and multilateral treaties. Provisional application of part of a treaty is prescribed in one of two ways: (*a*) by explicitly identifying the provision(s) that is/are to be provisionally applied; or (*b*) by stating which provision(s) may not be provisionally applied.

1. Bilateral treaties

60. A number of the bilateral treaties reviewed in the present study allow for provisional application of only part of the treaty. The Agreement between the Netherlands and Monaco on the Payment of Dutch Social Insurance Benefits in Monaco[67] identifies the article that is to be applied provisionally. Article 13, paragraph 2, states:

> This Agreement shall enter into force on the first day of the second month following the date of the last notification, it being understood that the Netherlands will apply article 4 on a temporary basis as of the first day of the second month following the date of signature.

61. In contrast, the Agreement between Austria and Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas[68] specifies which article is not to be applied provisionally. As article 18 provides:

> (1) This Agreement, with the exception of article 11, paragraph 1, shall be applied provisionally from the first day of the second month after the Contracting Parties have notified each other that the domestic conditions for the entry of the force of the Agreement, with the exception of article 11, paragraph 1, have been fulfilled.
>
> (2) This Agreement shall enter into force on the first day of the second month after the Contracting Parties have notified each other that the domestic conditions for the entry into force of the Agreement, including article 11, paragraph 1, have been fulfilled.

62. Among the bilateral treaties provisionally applied by separate agreement, the above-mentioned Agreement between Germany and Croatia regarding Technical Cooperation, in article 5, provides for provisional application of "the Agreement between the Republic of Croatia and the United Nations Development Programme (UNDP) of 12 March 1996 with the exception of the special provisions in article 9". As explained above (para. 30), the Agreement between Croatia and UNDP was signed for Croatia on 12 March 1996, but never entered into force. Croatia and Germany agreed to apply the Agreement provisionally pending its entry into force.

2. Multilateral treaties

63. Several multilateral treaties considered in the present study provide for the possibility of provisional application of part of the agreement. Like bilateral treaties, multilateral treaties either indicate which provisions are to be applied provisionally or provide which provisions are not to be applied provisionally.

64. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, in article 18, provides:

[67] Agreement between the Netherlands and Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (Monaco, 29 November 2001), *ibid.*, vol. 2205, No. 39160, p. 541.

[68] Agreement between Austria and Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (Vienna, 16 December 1997), *ibid.*, vol. 2170, No. 38115, p. 573.

> 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.

Article 1, paragraph 1, of the Convention contains a number of general obligations regarding the use, production, acquisition, and transfer of anti-personnel mines or to assist in such prohibited activities. Article 18 of the Convention on Cluster Munitions and article 23 of the Arms Trade Treaty include similarly worded clauses on the provisional application of article 1 and articles 6 and 7, respectively. Like article 1 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, article 1 of the Convention on Cluster Munitions pertains to the general obligations of the parties never to use, develop, produce, otherwise acquire, stockpile, retain or transfer cluster munitions, or to assist in activities prohibited under the Convention. Article 6 of the Arms Trade Treaty concerns obligations of a State party not to authorize any transfer of conventional arms covered by the Treaty and article 7 deals with the export and export assessment of arms whose export is not prohibited by the Treaty.

65. The Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe, provides in section VI, paragraph 1:

> This Document shall enter into force upon receipt of by the Depositary of notification of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this document are hereby provisionally applied as of 31 May 1996 through 15 December 1996.

In addition to this general clause on provisional application, the different parts singled out to be provisionally applied make reference to the measures to be taken "upon provisional application" of the Document.

66. The Madrid Agreement is another example of provisional application of part of the treaty. While the title of the Agreement already indicates that it concerns the provisional application of part of Protocol No. 14 to the European Convention on Human Rights, subparagraph (*a*) specifies that

> the relevant parts of Protocol No. 14 are article 4 (the second paragraph added to article 24 of the Convention), article 6 (in so far as it relates to the single-judge formation), article 7 (provisions on the competence of single judges) and article 8 (provisions on the competence of committees), to be applied jointly.

The Madrid Agreement further states that "the abovementioned parts of Protocol No. 14 will apply in respect of individual applications brought against [the High Contracting Party], including those pending before the Court at that date". The Madrid Agreement also stipulates that the parts of the Protocol will not apply in respect of any individual application brought against two or more High Contracting Parties unless Protocol No. 14 *bis* is in force or applied provisionally in respect of all of them. Protocol 14 *bis* concerned amendments to articles 25 (registry, legal, secretaries and rapporteurs), article 27 (single-judge formation, committees, chambers and Grand Chamber) and article 28 (competences of singles judges and committees).

67. The Protocol on the Provisional Application of the Revised Treaty of Chaguaramas makes explicit which provisions of the Revised Treaty are not to be applied provisionally. Article 1 states:

> The States Parties to this Protocol have agreed to apply provisionally the Revised Treaty of Chaguaramas signed at Nassau, The Bahamas, on 5 July 2001 except Articles 211 to 222 relating to the Caribbean Court of Justice pending its definitive entry into force in accordance with Article 234 thereof.

68. The Trans-Pacific Strategic Economic Partnership Agreement is an example of provisional application of part of the treaty that applies only to one party to the Agreement. As article 20.5 (Brunei Darussalam) of the Agreement states:

> 1. Subject to Paragraphs 2 to 6, this Agreement shall be provisionally applied in respect of Brunei Darussalam from 1 January 2006, or 30 days after the deposit of an instrument accepting provisional application of this Agreement, whichever is the later.
>
> 2. The provisional application referred to in Paragraph 1 shall not apply to Chapter 11 (Government Procurement) and Chapter 12 (Trade in Services).

While Brunei Darussalam notified its provisional application under article 20.5 of the Agreement on 10 July 2006, the other parties to the agreement, Chile, New Zealand and Singapore, ratified the agreement under article 20.4 on "entry into force". This situation is comparable to treaties that have entered into force for some parties but continue to be provisionally applied by others.

69. Commodity agreements do *a priori* not provide provisional application of part of the agreements. However, if the agreement has not entered into force by a certain date, some commodity agreements give Governments the option of "bring[ing] this Agreement into force definitively or provisionally among themselves, *in whole or in part*,* on such date as they may determine".[69] Such a decision might thus result in provisional entry into force of only part of the agreement.

B. Reference to internal law or rules of the organization

70. In addition to explicit clauses on provisional application of part of the treaty, the scope of provisional application may also be limited by references to the internal law of the parties or the rules of an international organization that is a party to the respective agreement. Such limitations are vaguer than clauses on provisional application of part of the treaty, which typically single out particular provisions. Such limitations are more prevalent in bilateral treaties that in multilateral treaties.

1. Bilateral treaties

71. Many bilateral treaties make the extent of provisional application conditional on the internal law of the parties to the agreement, which might lead to provisional application of only part of the agreement. This is evident in the following formulation included in the Agreement between Spain and El Salvador on Air Transport,[70] which states in article XXIV, paragraph 1:

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[69] Art. 42, para. 3, of the International Agreement on Olive Oil and Table Olives, 2005.

[70] Agreement between Spain and El Salvador on Air Transport (Madrid, 10 March 1997), United Nations, *Treaty Series*, vol. 2023, No. 34927, p. 341.

> The Contracting Parties shall provisionally apply the provisions of this Agreement from the time of its signature *to the extent that** they do not conflict with the law of either of the Contracting Parties.

Such a limitation clause can be interpreted as not requiring the parties to adopt new laws to implement the treaty pending its entry into force.

72. Bilateral treaties refer to internal law in a variety of ways. The Convention between the Netherlands and Germany on the General Conditions for the 1 (German-Netherlands) Corps and Corps-related Units and Establishments[71] refers, in article 15, paragraph 2, to provisional application "in accordance with national law of the Contracting Party concerned". The Agreement between Spain and the United States of America on Cooperation in Science and Technology for Homeland Security Matters,[72] in article 21, paragraph 1, states that provisional application shall be "consistent with each Party's domestic law". The German-Swiss Agreement on the Stay of Armed Forces[73] prescribes provisional application "in accordance with national law in effect of each State" (art. 13, para. 1). The Agreement between Denmark and Ukraine on Technical and Financial Cooperation,[74] in article X, paragraph 2, allows for provisional application "insofar as it does not contradict with existing legislation of either parties". Furthermore, the Agreement between Germany and Serbia and Montenegro regarding Technical Cooperation[75] states that provisional application shall be "in accordance with appropriate domestic law" (art. 7, para. 3). It is interesting that the Agreement between Germany and Kazakhstan on the Transit of Defence Material and Personnel through the Territory of the Republic of Kazakhstan in connection with the Contributions of the Armed Forces of the Federal Republic of Germany towards the Stabilization and Reconstruction of the Islamic Republic of Afghanistan[76] states that provisional application shall be "in accordance with the legal provisions in effect in the Republic of Kazakhstan" (art. 12, para. 2), i.e. only one of the parties.

73. Reference is most often made to internal law generally. Constitutional law is typically not expressly mentioned. This observation is important because some constitutions might prohibit provisional application. Only a number of agreements between the Netherlands and other States concerning the taxation of savings income contain such references. In its exchange of letters with the United Kingdom in respect of Jersey, for example, the Netherlands proposed that "the Kingdom of the Netherlands and Jersey apply this Agreement provisionally, within the framework of our respective domestic constitutional requirements".[77]

74. Host State agreements between international organizations and States might also contain references to the rules of the respective organization in a more general manner. After providing for provisional application in article XVII, paragraph 1, the Agreement on the Establishment of a United Nations High Commissioner for Refugees Field Office in Ukraine states in paragraph 3 of the same provision that

> [a]ny relevant matter for which no provision is made in this Agreement shall be settled by the Parties in keeping with the relevant resolutions and decisions of the appropriate organs of the United Nations.

The same provision can be found in a number of other agreements concluded between UNHCR, UNDP and the United Nations Industrial Development Organization and the respective host States. While these clauses do not specifically apply to provisional application, they may be relevant when questions regarding the applicability of the agreement arise.

2. Multilateral treaties

75. A number of multilateral treaties refer to the internal law of parties to the treaty. The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, is an example in this regard. As stated in in article 7, paragraph 2:

> All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.

Another treaty containing such a reference is the Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization, which "shall provisionally apply as of the date of signature, unless it contravenes the national laws of the Parties" (art. 17).

76. The Trans-Pacific Strategic Economic Partnership Agreement, in paragraph 3 of article 20.5 on provisional application by Brunei Darussalam, states:

> The obligations of Chapter 9 (Competition Policy) shall only be applicable to Brunei Darussalam *if it develops a competition law and establishes a competition authority*.* Notwithstanding the above, Brunei Darussalam shall adhere to the APEC Principles to Enhance Competition and Regulatory Reform.

This requirement of making the provisional application of part of the Agreement subject to the adoption of a competition policy and establishment of a competition authority

[71] Convention between the Netherlands and Germany on the General Conditions for the 1 (German-Netherlands) Corps and Corps-related Units and Establishments (Bergen, 6 October 1997), *ibid.*, vol. 2332, No. 41811, p. 213.

[72] Agreement between the United States of America and Spain on Cooperation in Science and Technology for Homeland Security Matters (Madrid, 30 June 2011), *ibid.*, vol. 2951, No. 51275, p. 3.

[73] Agreement between Switzerland and Germany concerning the Temporary Stay of Members of the Armed Forces of the Swiss Confederation and of Members of the Armed Forces of the Federal Republic of Germany on the National Territory of the Other State to Participate in Exercise and Instruction Projects and the Performance Thereof (German-Swiss Agreement on the Stay of Armed Forces) (Bern, 7 June 2010), *ibid*., vol. 2715, No. 48086, p. 247.

[74] Agreement between Denmark and Ukraine on Technical and Financial Cooperation (Copenhagen, 9 November 2006), *ibid.*, vol. 2538, No. 45251, p. 89.

[75] Agreement between Germany and Serbia and Montenegro regarding Technical Cooperation (Belgrade, 13 October 2004), *ibid.*, vol. 2424, No. 43752, p. 167.

[76] Agreement between Germany and Kazakhstan on the Transit of Defence Material and Personnel through the Territory of the Republic of Kazakhstan in connection with the Contributions of the Armed Forces of the Federal Republic of Germany towards the Stabilization and Reconstruction of the Islamic Republic of Afghanistan (Berlin, 1 February 2007), *ibid.*, vol. 2531, No. 45187, p. 83.

[77] Agreement in the form of an exchange of letters concerning the Taxation of Savings Income and the Provisional Application Thereof (Brussels and St. Helier, 19 November 2004), *ibid.*, vol. 2865, No. 50062, p. 115.

is interesting because references to internal law are usually intended to relieve the parties from adopting possible implementing legislation when the treaty enters into force.

77. References to the internal law of the parties are common in commodity agreements. Article 26 (provisional application) of the Grains Trade Convention, 1995, thus provides: "Any Government depositing such a declaration shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto." Similar formulations are contained in article XXII (*c*) (signature and ratification) and article XXIII (*c*) (accession) of the Food Aid Convention, 1999, article 40 (entry into force), paragraphs 2 and 3, of the International Coffee Agreement, 1994, article 38 (notification of provisional application) of the International Tropical Timber Agreement, 2006, and article 45 (entry into force), paragraph 2, of the International Coffee Agreement 2001.

78. Some commodity agreements also include references to constitutional procedures. The International Natural Rubber Agreement, 1994, in article 60 (notification of provisional application), paragraph 2, states that "a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations". Similar formulations are included in article 55 (notification of provisional application), paragraph 1, of the International Cocoa Agreement, 1993, article 57 (notification of provisional application), paragraph 1, of the International Cocoa Agreement, 2001, and article 56 (notification of provisional application), paragraph 1, of the International Cocoa Agreement, 2010.

Chapter IV

Termination of provisional application

79. As implied in article 25, paragraph 1, of the 1969 Vienna Convention, provisional application ends with entry into force of the treaty. In addition, article 25, paragraph 2, of the 1969 Vienna Convention provides for two ways to terminate provisional application: (*a*) termination by notification of the intention not to become a party to the treaty; and (*b*) by other agreement between the negotiating States. While option (*a*) allows for termination of the provisional application at a State's own volition (and at any time), option (*b*) presupposes some form of agreement between the negotiating States.

80. With regard to both options, it is important to distinguish between the termination of provisional application for a particular State and termination of provisional application of the treaty. While a notification under option (*a*) in a bilateral setting terminates provisional application of the treaty, such a notification in a multilateral setting terminates provisional application in relation to that State or international organization. Depending on the form of agreement between the negotiating States regarding termination of provisional application, a similar observation can be made with regard to option (*b*) as discussed below.

A. Termination by notification

81. Few treaties make reference to the possibility of terminating provisional application by notification in line with article 25, paragraph 2, of the 1969 Vienna Convention. It may thus be queried whether other pertinent termination clauses would be applicable to the termination of provisional application. Such inquiry is particularly relevant because the provisional application of both bilateral and multilateral treaties might have significant consequences for implementing measures taken during provisional application, such as the launching of cooperation projects or the establishment of institutional arrangements.

1. Bilateral treaties

82. A small number of the bilateral treaties analysed contain explicit clauses on termination of provisional application by notification. The Treaty between Germany and the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands[78] contains a clause that reflects the wording of the 1969 Vienna Convention. The relevant article (art. 16, para. 3) reads:

> This Treaty shall be applied provisionally with effect from 1 May 2003. Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party.

The Agreement between Spain and the International Oil Pollution Compensation Fund[79] stipulates:

> The provisional application of this Agreement shall terminate if Spain, through the Ambassador of Spain in London, notifies the Fund before 11 May 2001 that all the aforementioned procedures [required by Spanish law for the conclusion of the Agreement] have been completed, or if prior to that date Spain notifies the Fund, through its Ambassador in London, that those procedures will not be completed.

The Agreement between the United States of America and the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea[80] contains the following formulation in article 17:

> 2. Provisional Application. Beginning on the date of signature of this Agreement, the Parties shall apply it provisionally Either Party may discontinue provisional application at any time. Each Party shall notify

[78] Treaty between Germany and the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), *ibid.*, vol. 2389, No. 43165, p. 117.

[79] Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000), *ibid.*, vol. 2161, No. 37756, p. 45.

[80] Agreement between the United States of America and the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (Honolulu, 13 August 2004), *ibid.*, vol. 2962, No. 51490, p. 339.

the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application.

3. Termination. This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification.

Pursuant to paragraph 2, provisional application can be "discontinued" by means of notification at any time. In contrast, the termination of the agreement would only take effect one year after the requisite notification.

83. The approach taken in the Agreement between the United States of America and the Marshall Islands is in line with article 25, paragraph 2, of the 1969 Vienna Convention. However, immediate termination could prove prejudicial since the implementation of the Agreement might have already started. For the case of termination of provisional application by notification, the Agreement between the European Community and Jordan on Scientific and Technological Cooperation,[81] in article 7, provides:

2. This Agreement shall enter into force when the Parties will have notified to each other the completion of their internal procedures for its conclusion. Pending the completion by the Parties of said procedures, the Parties shall provisionally apply this Agreement upon its signature. *Should a Party notify the other that it shall not conclude the Agreement, it is hereby mutually agreed that projects and activities launched under this provisional application and that are still in progress at the time of the abovementioned notification shall continue until their completion under the conditions laid down in this Agreement.**

3. Either of the Parties may terminate this Agreement at any time upon six months' notice. Projects and activities in progress at the time of termination of this Agreement shall continue until their completion under the conditions laid down in this Agreement.

4. This Agreement shall remain in force until such time as either Party gives notice in writing to the other Party of its intention to terminate this Agreement. In such case this Agreement shall cease to have effect six months after the receipt of such notification.

A considerable number of bilateral treaties covered in this study concern scientific, technological or economic cooperation, or other subject areas related to institutional arrangements. The potentially far-reaching effects of such provisionally applied treaties raise the question of the relationship between the requirements contained in regular termination clauses and the possibility of termination of provisional application by notification under article 25 of the 1969 Vienna Convention.

84. A situation of provisional application might also be relevant in case of the application of a clause stipulating the requirements for the termination of the treaty as such. The Treaty between Spain and the North Atlantic Treaty Organization represented by the Supreme Headquarters Allied Powers Europe on the Special Conditions Applicable to the Establishment and Operation on Spanish Territory of International Military Headquarters,[82] which provides for provisional application in article 25, paragraph 1, states in paragraph 3 of that article:

The present Supplementary Agreement may be denounced by either of the contracting Parties after having been in force for two years and shall cease to be in force one year after notice of the denunciation is received by the other Party.

The question that arises is whether provisional application would count towards the two years mentioned in the clause.

2. Multilateral treaties

85. Considering termination of multilateral treaties, 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 includes a clause allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Article 41, paragraph 2, states:

Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate provisional application.

None of the parties to 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 made use of the possibility of provisional application under article 41, paragraph 1.

86. As few multilateral treaties contain clauses on termination of provisional application by notification, the question could be asked whether clauses that allow for withdrawal from multilateral agreements might be relevant. The practice with regard to commodity agreements illustrates that provisional application may be terminated by withdrawal from the agreement. Article 44 of the International Agreement on Olive Oil and Table Olives, 2005, provides:

1. Any Member may withdraw from this Agreement at any time after the entry into force of this Agreement by giving written notice of withdrawal to the depositary. The Member shall simultaneously inform the International Olive Council in writing of the action it has taken.

2. Withdrawal under this article shall become effective 90 days after the notice is received by the depositary.

The agreement entered into force provisionally on 1 January 2006 and definitively on 25 May 2007, in accordance with article 42. After entry into force of the Agreement, two States (Serbia and the Syrian Arab Republic) denounced the Agreement.[83] At the time of denunciation, those States had only been provisionally applying the Agreement.

87. Similar considerations as those outlined with regard to commodity agreements apply to amendments that are being provisionally applied by international organizations.

[81] Agreement between the European Community and Jordan on Scientific and Technological Cooperation (Brussels, 30 November 2009), *ibid.*, vol. 2907, No. 50651, p. 51.

[82] Treaty between Spain and the North Atlantic Treaty Organization represented by the Supreme Headquarters Allied Powers Europe on the Special Conditions Applicable to the Establishment and Operation on Spanish Territory of International Military Headquarters (Madrid, 28 February 2000), *ibid.*, vol. 2156, No. 37662, p. 139.

[83] *Ibid.*, vol. 2711, No. 47662, p. 328 (Serbia) and *ibid.*, vol. 3072, No. 47662, p. 269 (Syrian Arab Republic).

The provisional amendments to Rule 165 of the Rules of Procedure and Evidence of the International Criminal Court will cease to be effective in relation to a State that withdraws from the Rome Statute. A withdrawal in accordance with article 127, paragraph 1, of the Rome Statute, would take effect one year after the date of receipt of the notification, unless the notification specifies a later date, and would terminate provisional application of the respective amendments.[84]

B. Termination by agreement

88. While article 25, paragraph 2, of the 1969 Vienna Convention allows States and international organizations to terminate provisional application by their own volition, provisional application may also end by agreement of the parties. Provisional application is most frequently terminated by entry into force of the treaty as foreseen in the final clauses of the treaty (option (*a*)). The termination of provisional application might also: (*b*) depend on the entry into force of a treaty other than the one that is being provisionally applied; (*c*) take place on a certain date; (*d*) result from one treaty superseding another treaty; or (*e*) result from an agreement to terminate the treaty before it enters into force. With regard to multilateral treaties, it is also conceivable that the members of an international organization agree to expel another member while the constituent instrument is still being provisionally applied (option (*f*)). Although entry into force is ultimately based on an agreement of the negotiating States or international organizations, it can be distinguished from the other options because it will lead to the continued operation of the treaty.

1. Bilateral treaties

89. As made explicit in a number of bilateral treaties, provisional application will end when the treaty enters into force. The Agreement between Germany and Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products stored in Germany on its Behalf,[85] in article 8, thus states: "This Agreement shall be applied provisionally from the date of signature until its entry into force." Similarly, the Exchange of notes constituting an Agreement between the Spain and Colombia on Free Visas[86] provides:

> For Spain, this Agreement shall have provisional status until such time as it indicates by note that its internal requirements have been fulfilled. For Colombia, no further action is required for this Agreement to enter into force, since it concerns the continued application of the exchange of notes of 1961. This Agreement shall apply indefinitely and may be denounced at two months' notice by either Contracting Party.

90. Most bilateral treaties state that the treaty shall be applied provisionally "pending its entry into force", "pending its ratification", "pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Government[s] … informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article", or "until its entry into force".

91. While entry into force generally depends on the fulfilment of certain procedures in the internal law or rules of the parties, it might also be conditioned upon external factors. Entry into force, and thereby termination of provisional application, might thus depend on the entry into force of an agreement other than the agreement that is being provisionally applied or some other event. The Agreement between Germany and the International Tribunal for the Law of the Sea on the Occupancy and Use of the Premises of the International Tribunal for the Law of the Sea in the Free and Hanseatic City of Hamburg,[87] in article 11 provides:

> 1. This Agreement may be amended by agreement between the Government and the Tribunal, at any time, at the request of either Party.
>
> 2. After being signed by the Parties, this Agreement shall enter into force on the same day as the Headquarters Agreement. It shall be applied provisionally as from the date of signature.

The Memorandum of Understanding on the implementation of Security Council resolution 986 (1995)[88] stipulates in section 10:

> 50. The present Memorandum shall enter into force following signature, on the day when paragraphs 1 and 2 of the Resolution become operational and shall remain in force until the expiration of the 180 day period referred to in paragraph 3 of the Resolution.
>
> 51. Pending its entry into force, the Memorandum shall be given by the United Nations and the Government of Iraq provisional effect.

Paragraphs 1 and 2 of Security Council resolution 986 (1995) concerned the authorization to permit the import of petroleum and petroleum products originating in Iraq. Upon operationalization of those paragraphs, provisional application was thus terminated.

92. A number of bilateral treaties also explicitly or implicitly provide for the termination of provisional application independently of the entry into force of the agreement. For example, provisional application may be terminated if a treaty that is being provisionally applied is superseded by another treaty. The provisionally applied Agreement for Air Services between the Netherlands and Croatia[89] states, in article 20, that "[i]f a multilateral treaty

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[84] For information regarding withdrawals from the Rome Statute, see United Nations Treaty Collection, *Status of Treaties Deposited with the Secretary-General*, chap. XVIII.10, Rome Statute of the International Criminal Court, available from https://treaties.un.org, *Depositary of Treaties, Status of Treaties*.

[85] Agreement between Germany and Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products stored in Germany on its Behalf (Laibach, 18 December 2000), United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287.

[86] Exchange of notes constituting an Agreement between the Spain and Colombia on Free Visas (Bogotà, 21 and 27 December 2001), *ibid.*, vol. 2253, No. 20662, p. 328.

[87] Agreement between Germany and the International Tribunal for the Law of the Sea on the Occupancy and Use of the Premises of the International Tribunal for the Law of the Sea in the Free and Hanseatic City of Hamburg (Berlin, 18 October 2000), *ibid.*, vol. 2464, No. 44268, p. 87.

[88] Memorandum of Understanding on the implementation of Security Council resolution 986 (1995) [between the United Nations and Iraq] (New York, 20 May 1996), *ibid.*, vol. 1926, No. 32851, p. 9.

[89] Agreement for Air Services [between the Netherlands and Croatia] (Zagreb, 30 April 1996), *ibid.*, vol. 1999, No. 34244, p. 267.

concerning any matter covered by this Agreement, accepted by both Contracting Parties, enters into force, the relevant provisions of that treaty shall supersede the relevant provisions of the present Agreement". While the Agreement entered into force definitively a few months after provisional application commenced, article 20 outlines a possible scenario in which supersession could terminate provisional application. In this context, it is worthy of note that a number of air services agreements with clauses on provisional application state that supersession shall take place upon entry into force of the superseding treaty.[90] This might lead to a situation in which a superseding treaty is being provisionally applied while the preceding treaty is still in force.

93. Provisional application might be limited to the duration of a particular event. The Exchange of letters constituting an Agreement between the United Nations and Spain regarding the Hosting of the Expert Group Meeting Entitled "Making it work—Civil society participation in the implementation of the Convention on the Rights of Persons with Disabilities", to be held in Madrid, from 27 to 29 November 2007,[91] noted that:

> [The Agreement] will continue being applied provisionally, except for when it is already in force, for the duration of the Meeting and for such additional period as is necessary for the completion of its work and for the resolution of any matters arising out of the Agreement.

Without prejudice to the possible termination of provisional application by entry into force, the Agreement envisaged that provisional application would be terminated as a result of the resolution of any matters covered therein.

2. Multilateral treaties

94. A number of multilateral treaties contain provisions regarding the termination of provisional application by agreement of the parties in different ways. As in the case of bilateral treaties, such agreement most typically concerns the conditions for the entry into force of the multilateral treaty.

95. The Madrid Agreement provides in subparagraph (*d*) that "[s]uch a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the [European] Convention [on Human Rights] in respect of the High Contracting Party concerned". Protocol No. 14 *bis* states in article 6 that it shall enter into force when "three High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of article 5". In addition, subparagraph (*e*) of the Madrid Agreement states that "the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree". Article 19 of Protocol No. 14 stipulates that the Protocol shall enter into force only when "all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of article 18". As Protocol No. 14 *bis* contained a lower requirement for entry into force, the provisional application of Protocol No. 14 in accordance with the Madrid Agreement was terminated by the entry into force of Protocol No. 14 *bis*. At that point, Ukraine had declared provisional application without expressing its consent to be bound. The question is thus whether the Agreement continued to be applied provisionally in relation to Ukraine following the entry into force. Protocol 14 *bis* itself ceased to be in force or applied on a provisional basis as from 1 June 2010, the date of entry into force of Protocol No. 14 to the Convention.

96. Like the Madrid Agreement, the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea provides in article 7, paragraph 3:

> Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (*a*) of resolution II has not been fulfilled.

Under this clause, provisional application may be terminated when the Agreement enters into force under the conditions set out in article 6 of the Agreement, namely when at least 40 States have established their consent to be bound in accordance with articles 4 and 5. The Agreement entered into force definitively on 28 July 1996. At that time, several States were provisionally applying the Agreement without having expressed their consent to be bound. As in the case of the provisional application of Protocol No. 14 *bis* by Ukraine, it remains to be established whether the Agreement continued to be applied provisionally by those States until consent to be bound took place. The fact that article 7, paragraph 3, also stipulates that provisional application should terminate on 16 November 1998 would speak against such assumption. This is also confirmed by paragraph 12, subparagraph (*b*), of the Annex to the Agreement, on Costs to States Parties and Institutional Arrangements, which provides:

> Upon the entry into force of this Agreement, States and entities referred to in article 3 of this Agreement which have been applying it provisionally in accordance with article 7 and for which it is not in force may continue to be members of the Authority on a provisional basis pending its entry into force for such States and entities, in accordance with the following subparagraphs.

Subparagraph (*b*) further states that

> [i]f this Agreement enters into force after 15 November 1996, such States and entities may request the Council to grant continued membership in the Authority on a provisional basis for a period or periods *not extending beyond 16 November 1998**.

After entry into force, States and other entities could continue to be provisional members of the Authority until

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[90] See, e.g., Air Transport Agreement between the Netherlands in respect of the Netherlands Antilles and the United States of America relating to Air Transport between the Netherlands Antilles and the United States of America (Washington, 14 July 1998), *ibid.*, vol. 2066, No. 35760, p. 437.

[91] Exchange of letters constituting an Agreement between the United Nations and Spain regarding the Hosting of the Expert Group Meeting Entitled "Making it work—Civil society participation in the implementation of the Convention on the Rights of Persons with Disabilities", to be held in Madrid, from 27 to 29 November 2007 (New York, 15 and 23 November 2007), *ibid.*, vol. 2486, No. 44621, p. 5.

16 November 1998, i.e. the termination date for provisional application stipulated in article 7, paragraph 3, of the Agreement.

97. By providing for an end date for provisional application, article 7, paragraph 3, of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea provides another way in which provisional application may be terminated independently of entry into force. The Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe also specifies a date terminating provisional application, but in addition stipulates a review by the parties. Section VI, paragraph 1, provides:

> This Document shall enter into force upon receipt by the Depositary of notification of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996. If this Document does not enter into force by 15 December 1996, then it shall be reviewed by the States Parties.

A similar combination of a date for terminating provisional application and review by the parties can be found in the Trans-Pacific Strategic Economic Partnership Agreement. As explained above, the Partnership Agreement was provisionally applied in part and also by one of the parties, Brunei Darussalam. Article 20.5 states:

> …
>
> 4. The Commission shall consider whether to accept the Annexes for Brunei Darussalam under Chapter 11 (Government Procurement) and Chapter 12 (Trade in Services), no later than two years after the entry into force of this Agreement in accordance with Article 20.4(1) or (2), unless the Commission otherwise agrees to a later date.
>
> 5. Upon a decision of the Commission accepting the Annexes referred to in Paragraph 4, Brunei Darussalam shall deposit an Instrument of Ratification, Acceptance or Approval within two months of the decision by the Commission. The Agreement shall enter into force for Brunei Darussalam 30 days after the deposit of such instrument.
>
> 6. Unless the Commission decides otherwise, if the conditions in Paragraph 4 or 5 are not met, the Agreement shall no longer be provisionally applied to Brunei Darussalam.

The Partnership Agreement entered into force for Brunei Darussalam on 29 July 2009, thereby terminating provisional application.[92]

98. Treaties specifically stipulating a termination date for provisional application can be distinguished from treaties of limited duration. As noted above, such temporary treaties may be provisionally applied but generally have a fixed end date. A typical example of such temporal treaties are commodity agreements. The International Tropical Timber Agreement, 1994, provides, in article 46, paragraph 1:

> This Agreement shall remain in force for a period of four years after its entry into force unless the Council, by special vote, decides to extend, renegotiate or terminate it in accordance with the provisions of this article.

As explained above, the International Tropical Timber Agreement, 1994, did not enter into force definitively, but was extended several times by the Council, which prevented the automatic termination of provisional application.[93]

99. Article 46, paragraph 4, of the International Tropical Timber Agreement, 1994, adds that if a new agreement is negotiated and enters into force during any period of extension, the 1994 Agreement, as extended, shall terminate upon the entry into force of the new agreement. On 27 January 2006, the United Nations Conference for the Negotiation of a Successor Agreement to the International Tropical Timber Agreement, 1994, adopted the new International Tropical Timber Agreement, 2006, which entered into force definitively on 7 December 2011.[94] This amounts to a case in which one treaty supersedes another treaty, thereby terminating the provisional application of the former treaty.

100. Moreover, article 46, paragraph 5, of the 1994 Agreement states that "[t]he Council may at any time, by special vote, decide to terminate this Agreement with effect from such date as it may determine". Termination of the provisionally applied agreement as such would terminate its provisional application. In some cases, the parties to multilateral treaties may also have the option to terminate the provisional application of the amendment to a treaty. Pursuant to article 51, paragraph 3, of the Rome Statute, for instance, the Assembly of States Parties has the power to reject the above-mentioned provisional amendments to Rule 165 of the Rules of Procedure and Evidence of the International Criminal Court, which would terminate their provisional application.

101. While the termination of a provisionally applied treaty or a provisionally applied amendment becomes effective in relation to all parties, provisional application might also be terminated in relation to only one State. This would be the case if the competent organ of an international organization decided to expel or exclude a member from the organization. Most commodity agreements and constituent instruments of international organizations allow for the exclusion or expulsion of members.[95]

102. When ratifying, accepting, approving or acceding to a commodity agreement, the parties to the agreement may also do so with retroactive effect dating back to the time of provisional application. For example, out of the 29 parties that declared the provisional application of the International Cocoa Agreement, 1993, 18 subsequently ratified the agreement. The ratifications of nine States had retroactive effect dating back to the declaration of provisional application. Other ratifications with retroactive effect were made with regard to the International Tropical Timber Agreement, 2006, the International Coffee Agreement 2001, the Food Aid Convention, 1999, and the International Coffee Agreement, 1994. Such ratifications with retroactive effect arguably go beyond the mere termination of provisional application.

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[92] See New Zealand, *Treaty Series* 2006, No. 9, available from www.treaties.mfat.govt.nz/search/details/t/3599.

[93] See chap. I, sect. B.2, above.

[94] United Nations Treaty Collection, *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XIX.46, available from https://treaties.un.org, *Depositary of Treaties, Status of Treaties*.

[95] See, e.g., art. 45 of the International Agreement on Table Olives and Olive Oil, 2005.

Chapter V

Observations

103. Based on the bilateral and multilateral treaties analysed in the present memorandum, it can be observed that provisional application of treaties is a flexible tool available to States and international organizations to tailor their treaty relations. This flexibility reveals itself with regard to the terminology used and the type of agreement on and conditions for provisional application. While bilateral and multilateral treaties share many characteristics regarding provisional application, the present study illustrates that important differences exist between these two kinds of treaties. In this regard, multilateral treaties with limited membership are typically more comparable to bilateral treaties than to multilateral treaties with open membership.

104. The similarities and differences in the provisional application of bilateral and multilateral treaties are described in the more detailed observations below.

A. Legal basis of provisional application

105. Most bilateral treaties and multilateral treaties use either the term "provisional application" or "provisional entry into force" to describe the application of a treaty before its entry into force. The terminology used in bilateral treaties varies greatly. In some special cases, including in commodity agreements, a distinction is drawn between provisional application by individual States or international organizations and the provisional entry into force of the agreement as a whole.

106. The majority of bilateral treaties are applied on the basis of a clause on provisional application included in the treaty that is being provisionally applied. Provisional application by separate agreement is more prevalent in multilateral treaties, which may be partly due to the qualitative and quantitative requirements for entry into force of such treaties.

107. Separate agreements on the provisional application of multilateral treaties are either concluded: (*a*) at the time of the adoption of the original treaty; or (*b*) at a later point in time.

B. Commencement of provisional application

108. Bilateral and multilateral treaties provide for the commencement of provisional application under one or more of the following conditions: (*a*) upon signature; (*b*) at a certain date; or (*c*) upon notification. The adoption of a decision by an international organization is a fourth option (option (*d*)) for commencement of provisional application specific to multilateral treaties, which may be applied provisionally with immediate effect.

109. Multilateral treaties with limited membership are more amenable to commencement of provisional application upon signature (option (*a*)).

110. As for the commencement of provisional application by notification (option (*c*)), multilateral treaties may further specify the time of the declaration of provisional application in at least two ways: (*i*) notification of provisional application at the time of signature or at any time; or (*ii*) notification of provisional application at the time of ratification, approval, acceptance or accession. In the latter case, provisional application will only be possible in the period before the multilateral treaty enters into force.

111. Treaties, in particular multilateral treaties, may include several conditions, to be applied in combination or in the alternative, for the commencement of provisional application.

C. Scope of provisional application

112. The scope of provisional application of both bilateral and multilateral treaties may be limited by a clause on provisional application of part of the treaty or with reference to internal law or rules of the organization.

113. Few treaties provide for the provisional application of part of the treaty. Provisional application of part of the treaty is more common in multilateral treaties than in bilateral treaties.

114. Clauses on provisional application of part of the treaty may either: (*a*) identify the provisions in the treaty that are not provisionally applied; or (*b*) specify which provisions are to be provisionally applied.

115. Some treaties, such as commodity agreements, allow for provisional entry into force of part of the treaty by a decision of States and/or international organizations that have declared their consent to be bound or their provisional application of the treaty.

116. References to internal law, rules of an international organization or international law with a view to limiting the scope of provisional application are more prevalent in bilateral treaties than in multilateral treaties.

D. Termination of provisional application

117. Of the bilateral treaties and multilateral treaties that refer to termination of provisional application, few treaties explicitly allow for termination by notification of the intention not to become a party to the treaty.

118. Provisional application may be terminated by withdrawal from a multilateral treaty by a State or international organization for which the treaty is not yet in force.

119. Entry into force of the agreement is the most common way to terminate provisional application by other agreement of the parties (option (*a*)). Accordingly, the termination of provisional application frequently depends on the different conditions for entry into force of the treaty.

120. Provisional application may also be terminated by other forms of agreements unrelated to entry into force, such as: (*b*) the entry into force of a treaty other than the treaty that is being provisionally applied; (*c*) a fixed end date for provisional application; (*d*) if the parties to the treaty that is being provisionally applied conclude a new treaty that supersedes the previous treaty; (*e*) if the parties decide to terminate the treaty that is being provisionally applied; and (*f*) if the parties to a multilateral institutional arrangement agree to expel a particular State or international organization while the constituent instrument is still being provisionally applied.

PROTECTION OF THE ATMOSPHERE

[Agenda item 5]

DOCUMENT A/CN.4/705[*]

Fourth report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur[**]

[*Original: English*]
[*31 January 2017*]

CONTENTS

[*] Incorporating document A/CN.4/705/Corr.1.

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Introduction

1. At its sixty-eighth session in 2016, the International Law Commission had before it the third report[1] submitted by the Special Rapporteur on the topic of the protection of the atmosphere. The third report was considered by the Commission at its 3306th, 3307th, 3308th and 3311th meetings, on 27 and 31 May, and 1 and 7 June 2016.[2] The Commission decided to send all the draft guidelines and a preambular paragraph proposed by the Special Rapporteur to the Drafting Committee. The Commission provisionally adopted the draft guidelines and preambular paragraph, with the commentaries thereto, at its sixty-eighth session.[3]

A. Debate held in the Sixth Committee of the General Assembly at its seventy-first session

2. In October 2016, the Sixth Committee considered the Commission's work on the topic.[4] While the majority of delegations that expressed an opinion generally welcomed the work of the Commission,[5] a few delegations did express limited reservations,[6] with one delegation remaining sceptical.[7] Most delegations agreed that the participation of scientific experts was very useful.[8]

3. Some delegations supported the addition of the fourth preambular paragraph concerning the special situation and needs of developing countries.[9] However, a few delegations showed concern that the wording of that paragraph was rather weak and did not take full account of the special circumstances and real needs of developing countries.[10]

4. With regard to draft guideline 3, delegations generally supported the obligation of States to exercise due diligence when protecting the atmosphere.[11] Some delegations conveyed doubts, noting that those obligations might be difficult to apply.[12] One delegation proposed that the last sentence of paragraph (7) of the commentary to draft guideline 3 should be replaced with the following:

> In this context, it should be noted that not only is the Paris Agreement acknowledging in the Preamble that climate change is a common concern of humankind, but also that ambient air quality is a common concern of humankind, according to [World Health Organization] Ambient Air Quality Standards and Guidelines. This clearly shows the importance of ensuring the integrity of all ecosystems, including oceans and the protection of biodiversity.[13]

Regarding "environmental impact assessment" in draft guideline 4, delegations generally supported the notion that to undertake it would help to control private and public activities.[14] Some delegations suggested that the threshold of a significant adverse impact should be strictly defined,[15] and that the cumulative effect of harmful activities should be stressed.[16]

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[1] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692.

[2] There was also a dialogue with scientists on the protection of the atmosphere, which was chaired by the Special Rapporteur. The dialogue was followed by a question and answer session. The summary of the informal dialogue is available on the website of the Commission. See also Murase, "Scientific knowledge and the progressive development of international law; with reference to the ILC topic on the protection of the atmosphere".

[3] *Yearbook … 2016*, vol. II (Part Two), pp. 172 *et seq.*, paras. 95–96.

[4] The Special Rapporteur expresses his gratitude to Qi Quanmei, Law School, China Youth University of Political Studies, for her assistance in summarizing the debate in the Sixth Committee.

[5] Italy, A/C.6/71/SR.20, para. 90; Belarus, A/C.6/71/SR.23, para. 7; Algeria, *ibid.*, para. 31; Egypt, *ibid.*, para. 45; Iceland (on behalf of the Nordic countries), A/C.6/71/SR.24, para. 62; United Kingdom of Great Britain and Northern Ireland, *ibid.*, para. 74; Republic of Korea, *ibid.*, para. 84; Greece, A/C.6/71/SR.25, para. 33; El Salvador, *ibid.*, para. 57; Sudan, *ibid.*, para. 72; Portugal, *ibid.*, para. 94; Mexico, A/C.6/71/SR.26, para. 20; Singapore, *ibid.*, para. 28; Malaysia, *ibid.*, para. 67; South Africa, *ibid.*, para. 79; Viet Nam, *ibid.*, para. 100; Slovenia, *ibid.*, para. 110; Tuvalu, *ibid.*, para. 129; Tonga, *ibid.*, para. 132; Sri Lanka, A/C.6/71/SR.27, para. 2; Micronesia (Federated States of), *ibid.*, para. 23; Japan, *ibid.*, para. 31; Indonesia, *ibid.*, para. 36; India, *ibid.*, para. 41; Argentina, A/C.6/71/SR.29, para. 86; Iran (Islamic Republic of), *ibid.*, para. 91; and Peru, A/C.6/71/SR.30, para. 6.

[6] France, A/C.6/71/SR.20, para. 76; Czech Republic, A/C.6/71/SR.24, para. 70; China, *ibid.*, para. 91; Austria, A/C.6/71/SR.25, para. 84; Spain, A/C.6/71/SR.26, para. 9; and Slovakia, *ibid.*, para. 143.

[7] United States of America, A/C.6/71/SR.26, para. 127.

[8] Italy, A/C.6/71/SR.20, para. 90; Egypt, A/C.6/71/SR.23, para. 45; Portugal, A/C.6/71/SR.25, para. 94; Mexico, A/C.6/71/SR.26, para. 20; and Viet Nam, *ibid.*, para. 102.

[9] Algeria, A/C.6/71/SR.23, para. 31; Republic of Korea, A/C.6/71/SR.24, para. 84; South Africa, A/C.6/71/SR.26, para. 81; and Tuvalu, *ibid.*, para. 129.

[10] China, A/C.6/71/SR.24, para. 91. Spain believed that the reference in the new preambular paragraph to the needs of developing countries was not consistent with the more balanced focus that currently prevailed in that regard (A/C.6/71/SR.26, para. 9). See also the comments made by Brazil (*ibid.*, para. 90).

[11] Italy, A/C.6/71/SR.20, para. 90; Greece, A/C.6/71/SR.25, para. 35; Singapore, A/C.6/71/SR.26, para. 30; Viet Nam, *ibid.*, para. 101; Tonga, *ibid.*, para. 134; and Micronesia (Federated States of), A/C.6/71/SR.27, para. 24.

[12] Czech Republic, A/C.6/71/SR.24, para. 71; Romania, A/C.6/71/SR.25, para. 77; and Malaysia, which stressed that its scope might be questionable when put into practice (A/C.6/71/SR.26, para. 69).

[13] Poland, A/C.6/71/SR.26, para. 55.

[14] Italy, A/C.6/71/SR.20, para. 90; United Kingdom, A/C.6/71/SR.24, para. 76; Greece, A/C.6/71/SR.25, para. 36; Singapore, A/C.6/71/SR.26, para. 32; and Malaysia, *ibid.*, para. 70; Tonga, *ibid.*, para. 135.

[15] Czech Republic, A/C.6/71/SR.24), para. 71; Austria, A/C.6/71/SR.25, para. 84; and Slovenia, A/C.6/71/SR.26, para. 111.

[16] Czech Republic, A/C.6/71/SR.24, para. 71; Romania, A/C.6/71/SR.25, para. 77; and Tonga, A/C.6/71/SR.26, para. 135.

5. Regarding draft guidelines 5 and 6 on the sustainable, equitable and reasonable manner in which the atmosphere should be utilized, some delegations endorsed such a view.[17] One delegation was concerned that the expression "utilization of the atmosphere" was not clear enough.[18] Another suggested that draft guidelines 5 and 6 would be better placed at the beginning of the text or in the preamble.[19] One delegation proposed that for reasons of clarity, paragraph (3) of the commentary to draft guideline 5 should better define the term "utilization" or, alternatively, include examples of such utilization.[20] It was also suggested that the Commission should examine factors to be assessed in balancing the interests of current and future generations.[21]

6. With regard to draft guideline 7, delegations generally welcomed its inclusion in the draft guidelines and its emphasis on caution and prudence before undertaking any activities aimed at the intentional large-scale modification of the atmosphere.[22] One delegation suggested that draft guideline 7 should be deleted, because it was not based on any relevant existing rules or practices.[23] Another delegation believed that this guideline should not be applied to situations of armed conflict.[24] One delegation proposed that the draft guideline should use more forceful language, since such activities could have a significant impact on the quality of the atmosphere.[25] Some delegations suggested that the scope of the draft guideline should be limited.[26] With regard to draft guideline 8 concerning international cooperation, one delegation proposed that cooperation should operate in accordance with the common but differentiated responsibilities of States and their respective capabilities and social and economic conditions.[27] Another delegation suggested that the draft guideline should not refer only to international organizations, as other entities were also actively tackling the issue of atmospheric degradation and pollution.[28]

B. Purpose of the present report

7. Building on the previous three reports, the Special Rapporteur wishes to consider in the present report, the interrelationship between international law on the protection of the atmosphere and other fields of international law (chap. I), namely, international trade and investment law (chap. II), the law of the sea (chap. III) and international human rights law (chap. IV). It is considered that these fields of international law have intrinsic links with the law relating to the protection of the atmosphere itself. Therefore, to analyse their interrelationship is not in any way intended to expand the scope of the topic under draft guideline 2, as provisionally adopted by the Commission.

[17] Republic of Korea, A/C.6/71/SR.24, para. 85; and Greece, A/C.6/71/SR.25, para. 37.

[18] France, A/C.6/71/SR.20, para. 76.

[19] Belarus, A/C.6/71/SR.23, para. 7.

[20] Greece, A/C.6/71/SR.25, para. 37.

[21] Malaysia, A/C.6/71/SR.26, para. 73.

[22] Italy, A/C.6/71/SR.20, para. 90; Iceland (on behalf of the Nordic countries), A/C.6/71/SR.24, para. 62; and Republic of Korea, *ibid.*, para. 85.

[23] France, A/C.6/71/SR.20, para. 76; Mexico also suggested that "the Commission should carefully consider whether to include draft article 7 … given that the subject was controversial, practice was scarce and the debate was evolving" (A/C.6/71/SR.26, para. 23).

[24] Belarus, A/C.6/71/SR.23, para. 7; Spain also stated that draft guideline 7 should expressly state that military activities were excluded from its scope (A/C.6/71/SR.26, para. 10).

[25] Romania, A/C.6/71/SR.25, para. 78.

[26] Austria, *ibid.*, para. 85; and Slovakia, A/C.6/71/SR.26, para. 143.

[27] Algeria, A/C.6/71/SR.23, para. 31.

[28] El Salvador, A/C.6/71/SR.25, para. 58.

Chapter I

Guiding principles of interrelationship[29]

A. Fragmentation and interrelationship

8. International law related to the protection of the atmosphere (sometimes referred to as "the law of the atmosphere" in the present report) can be considered as an autonomous regime, but is in no way a "self-contained" or "sealed" regime. It exists and functions in relation to other fields of international law. Indeed, the core strength of international law as a legal system lies in such an interrelationship. Fragmentation of international law is therefore widely acknowledged as a necessary challenge that must be overcome in all phases of the international legal process, that is, formulation, interpretation/application and implementation.

9. It may be recalled that the Special Rapporteur stated the basic approach to the topic in his first report in 2014, in which he stated that it was important for the Commission to consider the legal principles and rules on the subject relating to the so-called "special regimes" within the framework of general international law. That implies that the Commission should resist the tendency towards "compartmentalization (or fragmentation)" caused by dominant "single-issue" approaches to international environmental law.[30] International law relating to the protection of the atmosphere is part of general international law and, thus, the legal principles and rules applicable to the atmosphere should, as far as possible, be considered in relation to the doctrine and jurisprudence of general international law. It also implies that the work of the Commission should extend to applying the principles and rules of general international law to various aspects of the problem of atmospheric protection. It is necessary to place each isolated compartment within the framework of general international law in order to establish coherent

[29] The Special Rapporteur is particularly grateful to Deng Hua, doctoral candidate, Renmin University, for supplying the relevant material on fragmentation of international law and for drafting the relevant parts of the report on mutual supportiveness and international trade law. He would also like to express his gratitude to Zhang Maoli, Law School, China Youth University of Political Studies, for carefully checking the relevant sources for the present report.

[30] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, para. 17. See also Murase, "Perspectives from international economic law on transnational environmental issues"; and Murase, "Conflict of international regimes: trade and the environment".

links among them. The generalist or integrative approach, which cuts across the boundaries of special regimes, is thus indispensable in today's efforts by the Commission to codify and progressively develop international law. Given that the Commission is a body composed primarily of experts of general international law, one can see here new possibilities and new opportunities for the Commission in the twenty-first century. The enormous growth in the number of treaties in these specialized fields has led to "treaty congestion" or "treaty inflation".[31] The multitude of conventions notwithstanding, they are faced with significant gaps as well as overlaps because there has been little or no coordination or harmonization and, therefore, no sufficient coherence among them. The need to enhance synergies among the existing conventions has been emphasized repeatedly and the Commission should seize upon this opportunity, as it can play an important role in that regard.[32]

10. 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 should also be noted, in their addressing the question of interrelationship of legal norms. Paragraph (1) of the conclusions states:

> International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.[33]

On this basis, paragraph (2) of the conclusions pronounces: "In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation."[34] The same conclusion continues: "For that purpose the relevant relationships fall into two general types: *[r]elationships of interpretation* [and] *[r]elationships of conflict*." The former is "the case where one norm assists in the interpretation of another". In such a case: "A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such a situation, both norms are applied in conjunction." The latter "is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them". This conclusion recalls that: "The basic rules concerning the resolution of normative conflicts are to be found in the 1969 Vienna Convention."[35] Furthermore, paragraph (4) of the conclusions stresses the principle of harmonization, affirming that: "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[36]

11. It is in the spirit of these methodological propositions that the present report discusses the question of interrelationship. Thus, any overlap or conflict arising from a plurality of conventions that may be applicable to the same issue (or subject-matter) may require coordination in the relevant context. For the present topic, such situations may arise in the form of a conflict between two multilateral conventions. As referred to later in this section, article 30 of the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention"), which provides for the situation of conflict between successive treaties, does not always give the necessary answers on how coordination should be conducted. In general, it is appropriate to follow the above conclusions on the relationships of interpretation (when norms supplement one another) and the relationships of conflict (when one prevails over another), as well as the principle of harmonization (for a single set of obligations to the extent possible), though admittedly this process presents some difficulties.[37]

12. The concept of interrelationship reflects the interdependence of environmental protection and social and economic development, and is expected to strike a proper balance in sustainable development. Therefore, the principles guiding interrelationship in the present report refer to the interlinkages between international law relating to the protection of the atmosphere and other branches of international law, such as trade and investment law, the law of the sea and human rights law. Those selected areas are highlighted because of their intrinsic linkages with the law relating to the protection of the atmosphere. Nonetheless, potential conflicts should not be ignored,[38] such as the conflicts between "principles that may often point in different directions … new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch".[39] There is a strong tendency nowadays in international law towards "compartmentalization"—evidenced by a lack of coherent links among isolated compartments of such law—which often leads to its fragmentation.[40] Thus, conflicts among the relevant treaties should be avoided or resolved through active coordination as much as possible, since not to do so would impede effective implementation of the legitimate objectives of the international community.[41]

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[31] See Brown Weiss, "International environmental law", pp. 697–702; Murase *et al.*, "Compliance with international standards: environmental case studies"; Anton, "Treaty congestion in contemporary international environmental law".

[32] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, paras. 17–18.

[33] *Yearbook … 2006*, vol. II (Part Two), pp. 177–178.

[34] *Ibid.*, p. 178.

[35] *Ibid.*, paragraph (3) of the conclusions refers to the Vienna Convention on the Law of Treaties and states: "When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with, or analogously to, the Vienna Convention, and especially the provisions in its articles 31–33 having to do with the interpretation of treaties."

[36] *Ibid.*

[37] See, in general, Boyle, "Relationship between international environmental law and other branches of international law".

[38] Concerning the phenomenon of conflict among the rules of international law, see, e.g., Pauwelyn, *Conflict of Norms in Public International Law*; Michaels and Pauwelyn, "Conflict of norms or conflict of laws"; Dagbanja, "The conflict of legal norms and interests in international investment law".

[39] *Yearbook … 2006*, vol. II (Part One), addendum 2, document A/CN.4/L.682 and Add.1, para. 15.

[40] Murase, "Perspectives from international law on transnational environmental issues", p. 10.

[41] See International Law Association, resolution 2/2014 on the declaration of legal principles relating to climate change, *Report of the Seventy-sixth Conference held in Washington, D.C., August 2014* (London, 2014), p. 21.

13. When the rules of international law are formulated, interpreted and applied, and implemented in a supplementary manner, the possibilities for avoiding or resolving conflicts among them will increase. Hence, in order to effectively protect the atmosphere from atmospheric pollution and degradation, it is crucial that consideration of the relevant rules of international law be undertaken in a mutually supportive manner, which can turn potential conflicts in coordinating treaty provisions into coherent schemes for the protection of the atmosphere.

B. Mutual supportiveness

14. The concept of "mutual supportiveness" first appeared in Agenda 21, which stressed that "[t]he international economy should provide a supportive international climate for achieving environment and development goals by … [m]aking trade and environment mutually supportive",[42] calling on States to strive to "promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive".[43] Today, the call for mutual supportiveness has become a recurrent expression in international instruments and judicial decisions, as referred to later in the present report. Generally speaking, the concept of mutual supportiveness pursues a balance between the different branches of international law in light of the concept of sustainable development. The emergence of mutual supportiveness is born of a desire to treat different branches of international law, not as potentially competing regimes, but with a view to considering coordinated efforts in achieving synergies. From such a perspective, and when considering Agenda 21 and widely acknowledged core tenets of international law, mutual supportiveness can be regarded as an indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition among regimes.[44]

15. Mutual supportiveness has developed at least two normative dimensions: first, one that requires States to negotiate in good faith with a view to preventing *ex ante* possible conflicts; and, second, to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible.[45] The concept of sustainable development, which itself is a cornerstone of international law, links long-term economic growth and livelihoods to the prevention of irreparable harm to the human environment necessary for life. This parallels the core idea of mutual supportiveness, which connects economic development and environmental protection. While the two concepts are not identical, there exists a close alliance of mutual supportiveness and sustainable development, and a certain degree of overlap. At the interpretative level, the operation of sustainable development in some cases can hardly be distinguished from what can be achieved by relying upon mutual supportiveness.[46]

16. First of all, potential conflicts may be prevented and avoided at the negotiating stage of new rules.[47] States should aim for mutual supportiveness when they are still at the stage of negotiating a given agreement, which helps to prevent possible conflicts in advance. For example, conflicts may be prevented by one rule explicitly stating that it derogates from another rule, or one rule that makes an explicit reference to another rule. In those circumstances, the two rules may simply accumulate and the conflict is prevented from arising *ex ante*.[48]

17. Also in the *ex post* process of interpretation and application of relevant rules of international law, mutual supportiveness should be the guiding principle for States and international courts and tribunals, under which the relevant rules are interpreted and applied in a harmonious way "to the extent possible … so as to give rise to a single set of compatible obligations".[49]

18. While the 1969 Vienna Convention itself does not refer directly to the interpretative principle of harmonization, it is generally guaranteed by article 31, paragraph 3 (*c*), which provides for a systemic interpretation, requiring the interpreters to take into account "[a]ny relevant rules of international law applicable in the relations between the parties".[50] In other words, article 31, paragraph 3 (*c*), emphasizes both the "unity of international law" and "the sense in which rules should not be considered in isolation of general international law".[51] Thus, for instance, since the *United States—Standards for Reformulated and Conventional Gasoline* case in 1996, the Appellate Body of the World Trade Organization (WTO) has refused to separate the rules of the General Agreement on Tariffs and Trade[52] from other rules of interpretation in public international law, by stating that "the *General Agreement* is not to be read in clinical isolation from

[42] Agenda 21: Programme of Action for Sustainable Development, *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 (Vol. I) and Corr.1; United Nations publication, Sales No. E.93.I.8), p. 9, resolution 1, annex II, para. 2.3 (*b*).

[43] *Ibid.*, para. 2.9 (*d*). See also paras. 2.19–2.22.

[44] *Ibid.*, pp. 12–20. See also Pavoni, "Mutual supportiveness as a principle of interpretation and law-making", p. 651.

[45] Pavoni, "Mutual supportiveness as a principle of interpretation and law-making", p. 651.

[46] *Ibid.*, p. 662.

[47] See Pauwelyn, *Conflict of Norms in Public International Law*, p. 237.

[48] *Ibid.* Wilfred Jenks once pointed out that, when different treaties are negotiated or coordinated by different persons, the negotiators or coordinators are likely to "secure fuller satisfaction for their own views on debatable questions of detail at the price of conflict between different instruments and incoherence in the body of related instruments" and, therefore, he called for the negotiators or coordinators to "form the habit of regarding proposed new instruments from the standpoint of their effect on the international statute book as a whole", Jenks, "Conflict of law-making treaties", p. 452.

[49] On the interpretative principle of harmonization, see conclusions on the work of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 178, para. (4).

[50] See e.g., WTO, Appellate Body report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158, and footnote 157. See also *Al-Adsani v. the United Kingdom*, application No. 35763/97, European Court of Human Rights, ECHR 2001-XI, para. 55.

[51] Sands, "Treaty, custom and the cross-fertilization of international law", p. 95, para. 25; McLachlan, "The principle of systemic integration and article 31 (3) (*c*) of the Vienna Convention", p. 279; and Corten and Klein, *The Vienna Conventions on the Law of Treaties*, pp. 828–829.

[52] The original Agreement was signed in Geneva on 30 October 1947. The General Agreement on Tariffs and Trade 1994 appears in annex 1 to the Marrakesh Agreement Establishing the World Trade Organization.

public international law".[53] It may be recalled that the Commission's Study Group on fragmentation of international law noted that article 31, paragraph (3) (*c*), of the 1969 Vienna Convention is based on the "principle of systemic integration", emphasizing the need to take into account other rules that might have a bearing on a case in interpreting the text of an international treaty.[54]

19. It should also be noted that article 30 of the 1969 Vienna Convention provides for traditional methods to resolve a conflict if the above principle of harmonization does not work effectively in a given circumstance. The article[55] provides for explicit conflict rules of *lex specialis* (para. 2), *lex posterior* (para. 3) and *pacta tertiis* (para. 4). Paragraph 2 confirms the *lex specialis* rule that: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[56] Paragraph 3 provides for the situation of successive treaties among the same parties, confirming the *lex posterior* rule that a later treaty prevails over an earlier treaty.[57] Paragraph 4 refers to the complex issues of non-identity of parties to successive treaties; that is, when the parties to the latter treaty do not include all the parties to the earlier one, which is often the case that occurs in dealing with the question of interrelationship among different multilateral treaties.[58]

20. However, these traditional methods of treaty interpretation themselves may not necessarily lead to the desired mutual supportiveness. For instance, a self-standing conflict clause (rule) in the operative text of a multilateral environmental agreement could sometimes grant priority to other agreements in case of conflict, such as article XIV, paragraphs 2 and 3, of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[59] In other instances, the conflict rule incorporated in a multilateral environmental agreement is far from being clear, as in the case of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.[60] Therefore, when States give priority to one instrument, they should also consider proper balance for the benefit of the other conflicting instrument, and avoid absoluteness so that other legitimate objectives could also be realized in an appropriate way.

21. Pursuant to the above, the following draft guideline is proposed:

"*Draft guideline 9. Guiding principles on interrelationship*

"In line with the principle of interrelationship, States should develop, interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, with a view to resolving conflict between these rules and to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation."

[53] WTO, Appellate Body report, *United States—Standards for Reformulated and Conventional Gasoline* (*US—Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, p. 17. See also Murase, "Unilateral measures and the WTO dispute settlement" (discussing the *Gasoline* case).

[54] *Yearbook … 2006*, vol. II (Part One), addendum 2, document A/CN.4/L.682 and Add.1, paras. 410–480.

[55] Corten and Klein, *The Vienna Conventions* …, pp. 764–803.

[56] *Ibid.*, pp. 785–787.

[57] *Ibid.*, pp. 789–791.

[58] *Ibid.*, pp. 791–798.

[59] See also Pavoni, "Mutual supportiveness …", p. 654.

[60] The Preamble to the Cartagena Protocol provides, with regard to its interrelationship with the WTO agreements, as follows: "Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development, [e]mphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, [u]nderstanding that the above recital is not intended to subordinate this Protocol to other international agreements", which indicates that, while the first paragraph places the Protocol and the WTO agreements on an equal footing, the second paragraph appears to give priority to the WTO agreements and the third paragraph to the Protocol. See Mckenzie *et al.*, *An Explanatory Guide to the Cartagena Protocol on Biosafety*, pp. 27–29, paras. 143–156.

Chapter II

Interrelationship with international trade and investment law

22. Free trade and foreign investment are prerequisites for the welfare of humankind in the contemporary world; however, they may come into conflict with the protection of the environment and the atmosphere. As a general example, a State may take domestic environmental measures to maintain air quality by restricting foreign imports of gasoline or foreign investments in a power plant, which may in turn be considered as conflicting with the State's international obligations to respect free trade or to protect foreign investment. How to reconcile such conflicts has been an issue of serious debate in international law. In considering questions of trade versus environment, it is important to distinguish between two situations: one is the case in which the measures in question have been taken by a State in accordance with the applicable multilateral environmental agreements, and another the case in which the measures have been taken merely on the basis of the State's domestic law. In the former case, coordination between two treaties should be settled in accordance with articles 30 and 31 of the 1969 Vienna Convention as mentioned above, while in the latter case these are basically the State's unilateral measures that can be deemed either as "opposable" or "non-opposable" in international law.[61]

A. International trade law

1. World Trade Organization/General Agreement on Tariffs and Trade

23. The protection of the environment was not a primary issue of concern when the General Agreement on Tariffs and Trade was drafted in 1947. Article XX of the General

[61] See Murase, "Unilateral measures and the concept of opposability in international law".

Agreement on Tariffs and Trade on general exceptions has subsequently become recognized as relevant in part to the environment; it reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (*b*) necessary to protect human, animal or plant life or health; … (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[62]

24. It was reported that, during the negotiation of the Montreal Protocol on Substances that Deplete the Ozone Layer in 1987, the compatibility of its article 4 ("Control of trade with non-parties") with the General Agreement on Tariffs and Trade rules on free trade was questioned. However, that does not seem to have raised any serious controversy,[63] unlike the heated discussions that took place worldwide on trade and environment that were sparked by the reports of the Dispute Settlement Panel of the General Agreement on Tariffs and Tradeon the *Tuna-Dolphin* dispute (*Restrictions on Tuna and Tuna Products, Mexico v. United States and Restrictions on Imports of Tuna, European Economic Community and the Netherlands v. United States*).[64] In both cases, interpretation of article XX, paragraphs I (*b*) and (*g*), of the General Agreement on Tariffs and Tradewas the central issue.

25. In 1995, WTO came into being under the Marrakesh Agreement Establishing the World Trade Organization, into which the General Agreement on Tariffs and Trade has been incorporated without substantial change as an annex. The first paragraph of the preamble of the Marrakesh Agreement provides that the aim of WTO is to reconcile trade and development goals with environmental needs "in accordance with the objective of sustainable development". As such, it has added a new dimension to the trade and environment issue. The WTO Committee on Trade and Environment began pursuing its activities "with the aim of making international trade and environmental policies mutually supportive",[65] and in its 1996 report to the Singapore Ministerial Conference, the Committee reiterated its position stating that the WTO system and environmental protection are "two areas of policy-making [that] are both important and … should be mutually supportive in order to promote sustainable development",[66] adding that they are both "representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both".[67] As the concept of mutual supportiveness has become gradually regarded as "a legal standard *internal* to the WTO",[68] the Doha Ministerial Declaration[69] expresses the conviction of States that "the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".[70]

2. Free trade agreements

26. Free trade agreements also incorporate mutual supportiveness for dealing with the interrelationship between trade and the environment. For instance, article 17.12 of the Dominican Republic–Central America–United States Free Trade Agreement stipulates that "the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party".[71] Some other recent free trade agreements, such as the one between Canada and the European Free Trade Association, recognize "the need for mutually supportive trade and environmental policies in order to achieve the objective of sustainable development".[72] More recently, the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part,[73] provides, in Chapter 24 ("Trade and environment"), article 24.4, paragraph 1, that:

> The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and stress the need to enhance the mutual supportiveness between trade and environment policies, rules, and measures.

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[62] See, in general, on the issue of trade and environment, Murase, "Perspectives from international economic law …" and "Conflict of international regimes …".

[63] Lawrence, "International legal regulations for the protection of the ozone layer: some problems of implementation".

[64] General Agreement on Tariffs and Trade, Panel report, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155, 3 September 1991, (Tuna–Dolphin I, not adopted); General Agreement on Tariffs and Trade, Panel report, *United States—Restrictions on Imports of Tuna*, DS29/R, 16 June 1994 (Tuna–Dolphin II, not adopted). See also Schoenbaum, "Free international trade and protection of the environment".

[65] Trade Negotiations Committee, decision of 14 April 1994, MTN. TNC/45(MIN), annex II, p. 17.

[66] WTO, Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 November 1996), para. 167.

[67] *Ibid.*, para. 171.

[68] Pavoni, "Mutual supportiveness …" , p. 652.

[69] Adopted on 14 November 2001 at the fourth session of the WTO Ministerial Conference in Doha, WT/MIN(01)/DEC/1.

[70] *Ibid.*, para. 6. The Hong Kong Ministerial Declaration of 2005 reaffirmed "the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of trade and environment" (adopted on 18 December 2005 at the sixth session of the Ministerial Conference in Hong Kong, China, WT/MIN(05)/DEC, para. 30).

[71] Dominican Republic–Central America–United States Free Trade Agreement (Washington, D.C., 5 August 2004), available from the website of the Office of the United States Trade Representative, at https://ustr.gov, *Trade agreements*.

[72] Free Trade Agreement Between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) (Davos, Switzerland, 26 January 2008), available from the website of the European Free Trade Association at www.efta.int, *Global trade relations*.

[73] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (Brussels, 30 October 2016), *Official Journal of the European Union*, L11, 14 January 2017, p. 23. See also the TransPacific Partnership Agreement (Auckland, 4 February 2016; the legally verified text of which was released on 26 January 2016), article 20.2, paragraph 1, which states that the objectives of the Environment Chapter are "to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation". The Agreement has not yet come into force. The text is available from the website of New Zealand Foreign Affairs and Trade, www.mfat.govt.nz, *About us, Who we are, Treaties*.

3. Multilateral environmental agreements

27. The concept of mutual supportiveness is integrated into multilateral environmental agreements that relate to the protection of the atmosphere. Article 3, paragraph 5, of the United Nations Framework Convention on Climate Change reflects this concept, providing that:

> The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.

Furthermore, the Stockholm Convention on Persistent Organic Pollutants recognizes in its preamble that "[the] Convention and other international agreements in the field of trade and the environment are mutually supportive". The Minamata Convention on Mercury also recognizes mutual supportiveness in similar language.

4. Dispute settlement

28. The first case that the WTO Dispute Settlement Body and its Appellate Body dealt with was the 1996 *Gasoline* case,[74] which addressed the linkage between trade and the atmospheric environment in the context of WTO law. The Appellate Body recognized, in connection with the interpretation of article XX (*g*) of the General Agreement on Tariffs and Trade, that clean air was an "exhaustible natural resource" that could be "depleted".[75] This decision was significant in its weighty reference to the principles and rules of international law. Criticizing the Panel report, the Appellate Body stated that:

> A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX (*g*) … is that the Panel there overlooked a fundamental rule of treaty interpretation. This rule has received its most authoritative and succinct expression in the [1969 Vienna Convention] …. The "general rule of interpretation" set out [in article 31 of the 1969 Vienna Convention] has been relied upon by all of the participants and third participants, although not always in relation to the same issue. The general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the [Dispute Settlement Understanding], to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" …. That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.[76]

As mentioned earlier (paragraph 18 above), the Appellate Body emphasized the importance of adopting systemic interpretation in a spirit of mutual supportiveness and sustainable development. The *Gasoline* case was both a strong example of the principle of mutual supportiveness as well as an instance in which law related to the protection of the atmosphere itself contributed to the broader development of international law.

29. The *United States/Shrimp* case[77] was another example of WTO law as it related to environmental protection; and while not directly addressing atmospheric pollution, its broader environmental principles are pertinent here. Mutual supportiveness between trade and environmental regimes was a central principle in that case.[78] The Appellate Body reversed the Panel's finding that, while qualifying for provisional justification under article XX (*g*), the measures in question by the United States failed to meet the requirements of that *chapeau* of article XX. The Appellate Body referred to mutual supportiveness explicitly and acknowledged its close link with the goal of sustainable development that had been proclaimed by the preamble to the Marrakesh Agreement Establishing the World Trade Organization. Guided by this principle, the Appellate Body sought a proper balance when interpreting the *chapeau* of article XX that the exceptions in that article must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". The Appellate Body regards the *chapeau* as "one expression of the principle of good faith";[79] hence, its fundamental purpose is to prevent the abuse of the exceptions set out in article XX and to maintain the balance of rights and obligations within the WTO legal system. Since the United States had failed to engage in meaningful multilateral negotiations with the States concerned to conclude agreements for the protection of sea turtles, the Appellate Body held that the measure of the United States at issue was not within the scope of measures permitted under the *chapeau* of article XX. In short, in this landmark case, mutual supportiveness was acknowledged by the Appellate Body as a standard internal to the WTO legal system, not one borrowed from outside sources, affirming that: "The need for, and the appropriateness of, such concerted and cooperative efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations."[80]

30. The judgment of the European Court of Justice on 21 December 2011, in *Air Transport Association of America and Others v. Secretary of State for Energy and Climate*,[81] affirmed the validity of the inclusion of aviation activities in the European Union Emissions Trading

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[74] See footnote 53 above. In this case, Brazil and the Bolivarian Republic of Venezuela requested the WTO Dispute Settlement Body to examine the compatibility of the United States Clean Air Act and the "baseline establishment methods" of the United States Environmental Protection Agency with the relevant WTO/General Agreement on Tariffs and Trade provisions. The Clean Air Act and its regulations (amended in 1990) are intended to prevent and control air pollution in the United States by setting standards for gasoline quality and motor vehicles emissions. See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, para. 49.

[75] See the WTO Appellate Body report, *US—Gasoline* (footnote 53 above), p. 14, quoting the Panel's report.

[76] *Ibid.*, pp. 16–17. See also McRae, "GATT article XX and the WTO Appellate Body"; and Gomula, "Environmental disputes in the WTO".

[77] See footnote 50 above. See Gomula, "Environmental disputes …", pp. 408–411.

[78] See Ruiz Fabri, "Jeux dans la fragmentation", p. 79; Nathalie Bernasconi-Osterwalder, "Interpreting WTO law and the relevance of multilateral environmental agreements in *EC–Biotech*", background note to the presentation at the British Institute of International and Comparative Law, Seventh Annual WTO Conference (22–23 May 2007), pp. 9 and 11.

[79] *United States/Shrimp* case (see footnote 50 above), para. 158.

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

[81] Case C-366/10, Judgment of the Court (Grand Chamber), 21 December 2011, ECR 2011, p. I-13755; Meltzer, "Climate change and trade—The EU Aviation Directive and the WTO"; Bartels, "The WTO legality of the application of the EU's Emission Trading System to aviation"; Piera Valdés, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges.*

Scheme within Directive 2008/101/EC.[82] The entry into force on 1 January 2012 of certain parts of the European Union Aviation Directive concerning both European Union and non-European Union airlines entering and leaving European Union airspace had an impact on international trade and has therefore given rise to international tensions. Although the European Court of Justice considers the European Union Emissions Trading Scheme as compatible with international law and aviation agreements, the Aviation Directive might still be challenged as violating WTO law. Developing climate change measures consistently with WTO rules requires striking an appropriate balance between giving WTO members the policy space to take action to reduce greenhouse gas emissions, while maintaining an open and non-discriminatory trading system that supports economic growth and global welfare. Faced with heated criticisms from non-European Union countries, the European Union has since temporarily suspended the application of the Emissions Trading Scheme to flights originating from or to non-European countries,[83] pending the implementation of global market-based measures adopted by the Assembly of the International Civil Aviation Organization (ICAO) in the form of a new Carbon Offsetting and Reduction Scheme for International Aviation, which is scheduled to enter into force on a voluntary basis in 2021 and in a mandatory second phase from 2027 onwards (ICAO Assembly resolution A39-3). The measures in question, however, could potentially be challenged by non-European countries in other forums, illustrating the trade versus environment conflict, which should be settled in a conciliatory and mutually supportive manner.[84]

B. International investment law

31. As in the field of international trade law, there is a growing awareness in international investment law regarding the importance of sustainable development and mutual supportiveness in the protection of investment and the protection of the environment.[85] Trade is basically a one-time transaction between the parties (a seller and a buyer), whose contractual relation ceases to exist when the transaction is completed. In contrast, investment normally requires a long-term commitment between the parties (an investor and an investee), and therefore the significance of environmental protection in international investment agreements can be far more important in investment than in trade. The multilateral agreement on investment sponsored by the Organization for Economic Cooperation and Development would have established global investment rules, but negotiations failed in 1998.[86] There are now two main sources of international investment law: free trade agreements and bilateral investment treaties. It is said that there are now more than 358 of the former and 2,946 of the latter in force that contain provisions governing foreign direct investment.[87] This body of international investment law defines the rights of foreign investors in host countries. Those investor rights typically specify the terms of "national" and "most-favoured-nation" treatment and guarantee "fair and equitable treatment" against expropriation.[88] Here, protection of foreign investment (or investors) may come into conflict with the protection of the environment, which can and should be reconciled in a spirit of mutual supportiveness.[89]

1. Treaty practice

32. Among the free trade agreements, the North American Free Trade Agreement (NAFTA), concluded by Canada, Mexico and the United States, may be most notable in that it has incorporated a number of important provisions and institutions for the protection of the environment. While chapter 11 on "Investment" provides for various aspects of protecting foreign investments and investors (articles 1101–1105), it also has certain provisions pertinent to the protection of the environment, such as article 1106, paragraph 6, on the exception to the restriction on "performance requirements"[90] and article 1110 on "expropriation and compensation".[91] Most notably, article 1114 on "environmental measures" provides, in paragraph 1, that:

[82] Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *Official Journal of the European Union*, L 8 (13 January 2009).

[83] Decision No. 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, *Official Journal of the European Union*, L 113 (25 April 2013); and Regulation (EU) No. 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, *Official Journal of the European Union*, L 129 (30 April 2014).

[84] With regard to potential disputes regarding the European Union Emissions Trading Scheme before the ICAO Council, see Bae, "Review of the dispute settlement mechanism under the International Civil Aviation Organization". Regarding the activities of ICAO to combat climate change in the field of aviation, see ICAO Assembly resolution A39-3 on consolidated statement of continuing ICAO policies and practices related to environmental protection—Climate Market-based Measure (MBM) scheme, adopted by the Assembly at its thirty-ninth session, Montreal, 27 September–6 October 2016; and Ahmad, "Environmental law: emissions", pp. 243–248.

[85] The Special Rapporteur is particularly grateful to Yuka Fukunaga, Professor, Waseda University, for supplying the relevant material and drafting parts of the present report on international investment law.

[86] Available from www.oecd.org, *Topics*, *Investment*.

[87] United Nations Conference on Trade and Development, *World Investment Report 2016*, p. 20.

[88] Schoenbaum and Young, *International Environmental Law*, p. 645, also pp. 644–655.

[89] Dupuy and Viñuales, eds., *Harnessing Foreign Investment to Promote Environmental Protection*; Viñuales, *Foreign Investment and the Environment in International Law*; Slater, "Investor–State arbitration and domestic environmental protection"; Beharry and Kuritzky, "Going green: managing the environment through international investment arbitration"; Condon, "The integration of environmental law into international investment treaties and trade agreements: negotiation process and the legalization of commitments"; Gordon and Pohl, "Environmental concerns in international investment agreements: a survey"; Baughen, "Expropriation and environmental regulation: the lessons of NAFTA chapter eleven"; Fauchald, "International investment law and environmental protection".

[90] Art. 1106, para. 6, of NAFTA provides: "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(*b*) or (*c*) or 3(*a*) or (*b*) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(*a*) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(*b*) necessary to protect human, animal or plant life or health; or

(*c*) necessary for the conservation of living or non-living exhaustible natural resources."

[91] Art. 1110, para. 1 (*a*), of NAFTA provides for "a public purpose" (which includes cases of environmental protection) as an exception to the rule prohibiting expropriation of foreign investment.

> Nothing in this Chapter [on investment] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

While this paragraph stops short of justifying measures otherwise inconsistent with the chapter, it confirms that the parties are not prevented from taking appropriate environmental measures as long as they abide by the obligations under the chapter. Paragraph 2 of article 1114 directs the parties not to relax their environmental rules to attract foreign investment, providing that:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

This paragraph seeks to ensure that the parties do not engage in a so-called "race to the bottom" to attract foreign investment. In addition to article 1114, NAFTA provides for the primacy of certain environmental and conservation agreements.

33. According to article 104, paragraph 1, of NAFTA:

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
>
> (*a*) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979,
>
> (*b*) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,
>
> (*c*) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
>
> (*d*) the agreements set out in Annex 104.1,
>
> such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.[92]

34. One of the most recent free trade agreements is the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, signed at the EU-Canada Summit on 30 October 2016.[93] In view of the recent concern that investment agreements and investment arbitration adversely affect the regulatory autonomy of States,[94] the Agreement explicitly acknowledges the importance of the right to regulate environmental issues. For example, article 8.4, paragraph 2 (*d*), confirms that "a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban" is consistent with paragraph 1 of the provision, which provides that a party shall not adopt or maintain limitations and restrictions "with respect to market access through establishment by an investor of the other Party". In addition, article 8.9, paragraph 1, provides that:

> the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

35. More specifically, paragraph 4 of article 8.9 provides that: "nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties". It is presumed that this paragraph is a response to the accumulation of investor-State arbitration claims against Spain in the wake of the reduction of feed-in tariffs there. The importance of the right to regulate is also recognized in paragraphs 2 and 9 of the Joint Interpretative Instrument on the Agreement. In particular, paragraph 9 of the Instrument directly addresses climate change as follows:

> 9. Environmental Protection
>
> (*a*) [the Agreement] commits the European Union and its Member States and Canada to provide for and encourage high levels of environmental protection, as well as to strive to continue to improve such laws and policies and their underlying levels of protection.
>
> (*b*) [the Agreement] explicitly recognises the right of Canada and of the European Union and its Member States, to set their own environmental priorities, to establish their own levels of environmental protection and to adopt or modify their relevant laws and policies accordingly, mindful of their international obligations, including those set by multilateral environmental agreements. At the same time in [the Agreement] the European Union and its Member States and Canada have agreed not to lower levels of environmental protection in order to encourage trade or investment and, in case of any violation of this commitment, governments can remedy such violations regardless of whether these negatively affect an investment or investor's expectations of profit.
>
> (*c*) [the Agreement] includes commitments towards the sustainable management of forests, fisheries and aquaculture. It also includes commitments to cooperate on trade-related environmental issues of common interest such as climate change where the implementation of the [2015] Paris Agreement will be an important shared responsibility for the European Union and its Member States and Canada.

36. The Agreement has other provisions that, although not referring explicitly to environmental issues, ensure that certain measures are not taken as these would violate the obligations of the parties on account that they are arbitrary or unjustifiable. For example, article 8.10, paragraph 2, provides that: "A Party breaches the obligation of fair and equitable treatment … if a measure or series of measures constitutes", among others, "manifest arbitrariness", "targeted discrimination on manifestly wrongful grounds" or "abusive treatment of investors". With respect to indirect expropriation, paragraph 3 of annex 8-A states that: "except in the rare circumstance when the impact of a measure or series of measures is so

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[92] Annex 104.1 specifies the Agreement between the Government of the United States of America and the Government of Canada concerning the Transboundary Movement of Hazardous Waste (Ottawa, 28 October 1986), United Nations, *Treaty Series*, vol. 2120, No. 36880, p. 97, and the Agreement between the United Mexican States and the United States of America on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Pax [Mexico], 14 August 1983), *ibid*., vol. 1352, No. 22805, p. 67.

[93] See footnote 73 above.

[94] See, e.g., Henckels, *Proportionality and Deference in Investor–State Arbitration*, pp. 1–4; and Bonnitcha, *Substantive Protection under Investment Treaties*, pp. 113–133.

severe in light of its purpose that it appears manifestly excessive, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations." Moreover, the Agreement follows the emerging trend of recently agreed free trade agreements and bilateral investment treaties to incorporate the general exception under article XX of the General Agreement on Tariffs and Trade, or its equivalent, into the chapter on investment.[95]

37. NAFTA and the Comprehensive Economic and Trade Agreement are not isolated examples of recognition of the need for mutual supportiveness and sustainable development. Most of the free trade agreements and bilateral investment treaties in force today contain provisions that, in one way or another, protect the environment. For example, a number of free trade agreements and bilateral investment treaties concluded by Canada, Colombia and the United States include a provision similar to article 1114, paragraph 1, of NAFTA and article 8.9 of the Comprehensive Economic and Trade Agreement, which confirm the parties' right to regulate environmental issues.[96] These agreements also often stipulate that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures, in a similar way to article 1114, paragraph 2, of NAFTA.[97] In addition, some free trade agreements and bilateral investment treaties concluded by Canada explicitly recognize the importance of sustainable development. For example, the Free Trade Agreement between Canada and the Republic of Korea states in the preamble that the parties are resolved to "promote sustainable development" and recognizes, in article 17.1, paragraph 2, that "economic development and environmental protection are interdependent and mutually reinforcing components of sustainable development". Another noticeable practice that can be seen particularly in free trade agreements agreed to by Canada is to provide interpretative guidance for arbitrators with respect to indirect expropriation in order to clarify that environmental measures constitute indirect expropriation only in rare circumstances.[98] Similarly, bilateral investment treaties concluded by Colombia often provide that measures taken in good faith for reasons of public good or social interest, such as environmental protection, shall not constitute indirect expropriation as long as they are nondiscriminatory, non-arbitrary and not disproportionate in light of their purpose.[99]

38. A few free trade agreements also include a provision equivalent to article 104, paragraph 1, of NAFTA, which provides for its relationship with environmental agreements. For example, article 1.3 of the Free Trade Agreement between Canada and the Republic of Korea provides that:

> In the event of an inconsistency between a Party's obligations under this Agreement and the Party's obligations under an agreement listed in Annex 1A, a Party is not precluded from taking a particular measure necessary to comply with its obligations under an agreement listed in Annex 1A, provided that the measure is not applied in a manner that would constitute, where the same conditions prevail, arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.[100]

Article 11, paragraph 3, of the Agreement between the Belgium-Luxembourg Economic Union and Barbados for the Reciprocal Promotion and Protection of Investments provides that: "The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation."[101]

39. Moreover, some free trade agreements and bilateral investment treaties take a step further by providing an exception that justifies environmental measures otherwise inconsistent with treaty obligations. For example, the Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments,[102] which came into effect in September 2016, provides for general exceptions

[95] Art. 28.3, para. 1. It explicitly confirms that: "Article XX (*g*) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources." See also art. 28.3, para. 2.

[96] See, e.g., the Dominican Republic–Central America–United States Free Trade Agreement (see footnote 71 above), art. 10.11; Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (Mar del Plata, 4 November 2005), TIAS 06-1101, art. 12, para. 2; Free Trade Agreement between Canada and the Republic of Korea (Ottawa, 22 September 2014), *Canada Treaty Series*, 2015/3, art. 8.10, para. 1; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (Bogota, 17 March 2010), United Kingdom, *Treaty Series*, No. 24 (2014), art. VIII; Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (Tokyo, 12 September 2011), United Nations, *Treaty Series*, vol. 3136, No. 53785, art. 21, para. 2.

[97] See, e.g., Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, art. 12, para. 1; Free Trade Agreement between Canada and the Republic of Korea, art. 8.10, para. 2; Agreement Between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments (Dakar, 30 November 2014), *Canada Treaty Series*, 2015/19, art. 15, para. 1; Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, art. 21, para. 1.

[98] See, e.g., the Free Trade Agreement between Canada and the Republic of Korea, annex 8-B, para. (*d*); Agreement between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments, annex B.10.

[99] See, e.g., Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, art. VI, para. 2 (*c*).

[100] Annex 1-A lists the following agreements: "(*a*) The *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington on 3 March 1973, as amended on 22 June 1979; (*b*) The *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal on 16 September 1987, as amended 29 June 1990, 25 November 1992, 17 September 1997 and 3 December 1999; (*c*) The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, done at Basel on 22 March 1989; (*d*) The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, done at Rotterdam on 10 September 1998; (*e*) The *Stockholm Convention on Persistent Organic Pollutants*, done at Stockholm on 22 May 2001".

[101] Agreement between the Belgium–Luxembourg Economic Union and Barbados for the Reciprocal Promotion and Protection of Investments (Brussels, 29 May 2009), *Official Journal of Belgium*, 6 June 2011.

[102] Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Toronto, 10 February 2016), *Canada Treaty Series*, 2016/8.

under article 17, paragraph 1 of which states that "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures, including environmental measures", for example "necessary to protect human, animal or plant life or health". Similarly, article 15, paragraph 1, of the Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment provides that:

> Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of that other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement … shall be construed to prevent that former Contracting Party from adopting or enforcing measures, including those to protect the environment … necessary to protect human, animal or plant life or health.

The free trade agreements and bilateral investment treaties mentioned above are generally in line with the model treaties adopted by Canada (2004),[103] Colombia (2007)[104] and the United States (2012).[105] Furthermore, the Model International Agreement on Investment for Sustainable Development (revised in 2006)[106] of the International Institute for Sustainable Development serves as a model example, recognizing in its preamble that: "the promotion of sustainable investments is critical for the further development of national and global economies, as well as for the pursuit of national and global objectives for sustainable development". In a similar vein, the United Nations Conference on Trade and Development has proposed policy options for free trade agreements and bilateral investment treaties to incorporate sustainable development.[107]

2. Arbitral cases

40. In several investment arbitral cases, environmental measures were claimed to violate the obligations of free trade agreements and bilateral investment treaties, in particular, the obligation of fair and equitable treatment. Jurisprudence has been developed particularly under NAFTA to ensure that a State's right to regulate environmental issues be respected, at least to a certain extent, in an examination of fair and equitable treatment. For example, in the case *S.D. Myers, Inc. v. Government of Canada*,[108] a United States investor challenged a Canadian legislative order banning exports of polychlorinated biphenyls and associated waste on the grounds of violation of, *inter alia*, article 1105 of NAFTA, which provides for fair and equitable treatment. The Canadian ban had been adopted purportedly on the grounds of significant danger to the environment and to human life and health. The arbitral tribunal found that the ban was intended primarily to protect the Canadian polychlorinated biphenyl disposal industry from competition from the United States and that there was no legitimate reason for introducing the ban. In interpreting the rules of NAFTA, the arbitral tribunal referred to a range of environmental agreements, including the Agreement between the United States and Canada concerning the Transboundary Movement of Hazardous Waste,[109] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the North American Agreement on Environmental Cooperation, stating that:

> NAFTA should be interpreted in the light of the following general principles:
>
> – Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
>
> – Parties should avoid creating distortions to trade;
>
> – Environmental protection and economic development can and should be mutually supportive.[110]

The tribunal went on to state that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an *unjust or arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective", and that the examination of article 1105 "must be made in the light of the *high measure of deference** that international law generally extends to the right of domestic authorities to regulate matters within their own borders" and "must also take into account any specific rules of international law that are applicable to the case".[111]

41. Other NAFTA investment cases broadly follow the general framework of mutual supportiveness between the protection of foreign investment and the protection of the environment as well as the interpretation of the fair and equitable treatment standard affirmed by *S.D. Myers*, though the jurisprudence is not necessarily consistent.[112]

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[103] Available from www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[104] Available from www.italaw.com/documents/inv_model_bit_colombia.pdf.

[105] Available from www.italaw.com/sites/default/files/archive/ita1028.pdf.

[106] Mann *et al.*, *IISD Model International Agreement on Investment for Sustainable Development*. The Institute is an independent, non-governmental and non-profit organization that occasionally submits *amicus curiae* to international investment dispute tribunals.

[107] United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, pp. 91–121. See also Muchlinski, "Negotiating new generation international investment agreements".

[108] United Nations Commission on International Trade Law (UNCITRAL), first partial award and separate opinion of Mr. Bryan Schwartz (13 November 2000). See, Sands and Peel, *Principles of International Environmental Law*, pp. 876–885.

[109] Agreement between the United States and Canada concerning the Transboundary Movement of Hazardous Waste (Ottawa, 28 October 1986), *Canada Treaty Series*, 1986/39.

[110] *S. D. Myers, Inc. v. Government of Canada* (see footnote 108 above), first partial award, para. 220. The second partial award of 21 October 2002 awarded the claimant 6.05 million Canadian dollars in damage, with interest.

[111] *Ibid.*, first partial award, para. 263.

[112] See, e.g., *Waste Management, Inc. v. United Mexican States*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB(AF)/98/2, NAFTA, award, 2 June 2000; *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, award, 30 August 2000; *Técnicas Medioambientales Tecmed, S. A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, award, 29 May 2003; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, award, 7 February 2005; *Methanex Corporation v. United States of America*, UNCITRAL, NAFTA, final award on jurisdiction and merits, 3 August 2005; *Saluka Investments B. V. v. Czech Republic*, UNCITRAL, partial award, 17 March 2006; *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, NAFTA, award, 19 June 2007; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, concurring and dissenting opinion, 18 July 2008;

In the 2015 award of *Bilcon of Delaware and others v. Canada*,[113] the tribunal agreed with other NAFTA tribunals, including the *S.D. Myers* tribunal, stating that "there is indeed a high threshold for article 1105 to apply",[114] and decided to apply the formulation applied by the *Waste Management* tribunal.[115]

42. The formulation of article 1105 developed by the *S.D. Myers*, *Waste Management* and other NAFTA tribunals was also adopted in recent NAFTA cases involving renewable energy.[116]

43. Non-NAFTA cases generally follow the same pattern of analysis as the NAFTA precedents, citing the leading cases such as *S.D. Myers* as if it were its own relevant precedent, although textual differences of free trade agreements and bilateral investment treaties occasionally result in different interpretations of fair and equitable treatment. For instance, in the 2015 *Al Tamimi v. Oman* case,[117] the tribunal followed the formulation of the *S.D. Myers* tribunal in interpreting article 10.5 ("Minimum standard of treatment") of the free trade agreement between the United States and Oman, together with its annex 10-A,[118] and confirmed that "the minimum standard of treatment under customary international law imposes a relatively high bar for breach", and that "[b]reach of the minimum standard of treatment thus requires more than a minor derogation from the ideal standard of perfectly fair and equitable treatment".[119] Moreover, the tribunal noted that: "the US–Oman FTA places a high premium on environmental protection", given that "[t]he wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is '*undertaken in a manner sensitive to environmental concerns*'",[120] and that "[t]he very existence of Chapter 17 [entitled "Environment"] exemplifies the importance attached by the [contracting parties] to the enforcement of their respective environmental laws" and their intention "to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws".[121] Thus, the tribunal found that "to establish a breach of the minimum standard of treatment under article 10.5, the Claimant must show that [the respondent] has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. … a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations".[122] Having reviewed the facts of the case, the tribunal dismissed the claimant's claim that the respondent breached the obligation for fair and equitable treatment.[123]

44. Beyond free trade agreements, there are cases of bilateral investment treaties in which jurisprudence on the relationship between investment and environment varies and is often unclear.[124] Nonetheless, as a general propo-

Chemtura Corporation v. Government of Canada, UNCITRAL, NAFTA, award, 2 August 2010; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, NAFTA, award, 8 June 2009; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, NAFTA, award, 12 January 2011; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, award, 11 March 2011; *Commerce Group Corp and San Sebastian Gold Mines, Inc. v Republic of El Salvador*, ICSID Case No ARB/09/17, award, 14 March 2011; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, award, 31 October 2011; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, award, 22 September 2014; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, interim decision on the environmental counterclaim, 11 August 2015; *Charanne B. V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, Stockholm Chamber of Commerce, Case No. 062/2012, Energy Charter Treaty, final award, 21 January 2016; *Quiborax S.A. and Non Metallic Minerals S. A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, award, 16 September 2015; and *Mesa Power Group, LLC v. Government of Canada*, Permanent Court of Arbitration Case (PCA) No. 2012-17, UNCITRAL, NAFTA, award, 24 March 2016. See Schoenbaum and Young, *International Environmental Law*, pp. 644–655; Sands and Peel, *Principles of International Environmental Law*, pp. 876–883; and Reinisch, "Expropriation".

[113] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No 2009-04, UNCITRAL, NAFTA, award on jurisdiction and liability and dissenting opinion of Professor Donald McRae, 17 March and 10 March 2015, respectively.

[114] PCA Case No. 2009-04 (see previous footnote), award on jurisdiction, para. 441.

[115] *Waste Management, Inc. v. United Mexican States*, No. 2, ICSID Case No. ARB(AF)/00/3, NAFTA, award, 30 April 2004, para. 98, quoted in PCA Case No 2009-04 (see footnote 113 above), award on jurisdiction, para. 442.

[116] *Mesa Power Group, LLC v. Government of Canada* (see footnote 112 above), para. 502; and *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, UNCITRAL, NAFTA, award, 27 September 2016, para. 361, quoting *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, award, 11 October 2002, para. 118.

[117] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, award, 3 November 2015.

[118] Annex 10-A of the Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area states that: "The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect economic rights and interests of aliens."

[119] *Al Tamimi* (see footnote 117 above), paras. 382 and 384.

[120] *Ibid*., para. 387. Art. 10.10 states that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

[121] *Al Tamimi* (see footnote 117 above), para. 389. For example, art. 17.2, para. 1, provides that: "(*a*) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (*b*) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (*a*) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources."

[122] *Al Tamimi* (see footnote 117 above), para. 390.

[123] *Ibid*., paras. 394–453.

[124] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, award, 13 November 2000; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, final award, 17 February 2000, basing jurisdiction on ICSID; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, award, 11 September 2007, applying the bilateral investment treaty between Lithuania and Norway; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, award, 27 August 2008, applying the Energy Charter Treaty.

sition, it appears that tribunals echo, either explicitly or implicitly, the necessity of reconciling the protection of foreign investment with the protection of the environment. Finally, it is worth mentioning the first arbitral award on the merits in the cases involving Spain's regulatory framework regarding generation systems based on photovoltaic solar energy. The tribunal in *Charanne*, brought under the Energy Charter Treaty, started its examination by noting that "the obligation to provide fair and equitable treatment is included in the more general obligation to create stable, equitable, favourable and transparent conditions" under article 10, paragraph 1, of the Energy Charter Treaty, and that to analyse whether the relevant measures violate the said article, "the existence of legitimate expectations of the investor is a relevant factor".[125] It further stated that "an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest".[126] In other words, according to the tribunal, the respondent would be found to have violated article 10, paragraph 1, if it acted "unreasonably, against the public interest, or in a disproportionate fashion".[127] The tribunal concluded that the respondent did not violate the legitimate expectations under the Energy Charter Treaty by being "unreasonable, arbitrary, contrary to public interest, or disproportionate".[128]

45. Based on the analysis of the foregoing, the following draft guideline is proposed:

"*Draft guideline 10. Interrelationship between the law on the protection of the atmosphere and international trade and investment law*

"States should take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere from atmospheric pollution and atmospheric degradation, provided that they shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment, respectively. In order to avoid any conflict, States should ensure that interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness."

[125] *Charanne B. V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, paras. 477 and 486.

[126] *Ibid*., para. 514.

[127] *Ibid*., para. 515.

[128] *Ibid*., para. 539.

Chapter III

Interrelationship with the law of the sea

A. Linkages between the sea and the atmosphere

46. In physical terms, the sea (oceans) and the atmosphere are closely linked in specific processes that determine the character of ocean-atmosphere interaction.[129] These include the role of ambient water vapour and clouds, the selective absorption of radiation by the ocean and the distribution of total heating in the ocean-atmosphere system.[130] Energy, momentum and matter (water, carbon, nitrogen, etc.) are exchanged between the ocean and the atmosphere.[131] A significant proportion of pollution of the marine environment from or through the atmosphere generally originates from land-based sources, that is, from anthropogenic activities on land. The atmosphere is a significant pathway for the transport of many natural and pollutant materials from the continents to the oceans.[132] Pollution emanates from either direct discharges or diffuse sources, including those released into the atmosphere by fossil-fuel and waste combustion. According to scientific findings, "[a]lthough chemical contaminants—released as a result of human activities—can now be found throughout the world's oceans, most demonstrable effects on living resources occur in coastal waters and are the result of pollution from land".[133] Human activities are also responsible for global warming, which causes the temperature of the oceans to rise, which in turn results in extreme atmospheric conditions of flood and drought[134] as well as mega typhoons (hurricanes/ cyclones).[135] El Niño phenomena,

[129] Duce, Galloway and Liss, "The impacts of atmospheric deposition to the ocean on marine ecosystems and climate"; Brévière *et al.*, "Surface ocean-lower atmosphere study: scientific synthesis and contribution to Earth system science"; World Meteorological Organization/ Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, *The Atmospheric Input of Chemicals to the Ocean, Reports and Studies No. 84*. The Special Rapporteur is grateful to Ms. Oksana Tarasova, Chief, and Ms. Silvina Carou, Scientific Officer, Atmospheric Environment Research Division, WMO, for the supply of the relevant scientific information.

[130] Webster, "The role of hydrological processes in ocean-atmosphere interactions". See also Kraus and Businger, *Atmosphere–Ocean Interaction*; and Lau and Waliser, *Intraseasonal Variability in the Atmosphere–Ocean Climate System*. The Special Rapporteur is grateful to Zhou You, Juris Master, Peking University (graduate of its Science Department), for supplying the relevant scientific information on the linkages between the sea and the atmosphere.

[131] See Stocker, *Introduction to Climate Modelling*, pp. 137–150, stating that "[m]ost of the movements in the ocean, particularly the large-scale flow, are caused by these exchange fluxes" (*ibid*., p. 137).

[132] Duce *et al.*, "The atmospheric input of trace species to the world ocean"; Jickells and Moore, "The importance of atmospheric deposition for ocean productivity".

[133] Boesch *et al.*, *Marine Pollution in the United States*, p. 1; Prospero, "The atmospheric transport of particles to the ocean"; Cornell, Randell and Jickells, "Atmospheric inputs of dissolved organic nitrogen to the oceans"; Duce *et al.*, "Impacts of atmospheric anthropogenic nitrogen on the open ocean".

[134] According to a scientific study, "human-induced increases in greenhouse gases have contributed to the observed intensification of heavy precipitation events found over approximately two-thirds of data-covered parts of Northern Hemisphere land areas" (Min *et al.*, "Human contribution to more-intense precipitation extremes"). Many scientific analyses suggest there is a risk of drought in the twenty-first century and severe and widespread droughts during the next 30 to 90 years over many land areas, resulting from either decreased precipitation and/or increased evaporation (see Dai, "Increasing drought under global warming in observations and models"; and Sheffield, Wood, and Roderick, "Little change in global drought over the past 60 years").

[135] "A large increase was seen in the number and proportion of hurricanes reaching categories 4 and 5. The largest increase occurred in the North Pacific, Indian, and Southwest Pacific Oceans, and the

resulting from unstable interactions between the tropical Pacific Ocean and the atmosphere,[136] are among the prominent features of climate variability with a global climatic impact. It has been suggested that: "Such a massive reorganization of atmospheric convection … [has] severely disrupted global weather patterns, affecting ecosystems, agriculture, tropical cyclones, drought, bushfires, floods and other extreme weather events worldwide."[137]

47. Of various human activities, greenhouse gas emissions from ships have been increasing in recent years at a high rate, and have contributed to global warming and climate change. The 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions classified such emissions from ships into four categories, namely: emissions of exhaust gases; emissions of refrigerants; cargo emissions; and other emissions from firefighting and other equipment.[138] Not only carbon dioxide (CO_2) emissions but also sulphur oxides (SOx) and nitrogen oxides (NOx) from shipping are noted.[139] Research indicates that excessive greenhouse gas emissions from ships change the composition of the atmosphere and climate, and cause a negative impact on the marine environment and human health.[140]

48. One of the most profound impacts of atmospheric degradation on the sea is the rise in sea level caused by global warming. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100.[141] While exact absolute figures and rates of change still remain uncertain, the report states that it is virtually certain that the sea level will continue to rise during the 21st century, and for centuries beyond—even if the concentrations of greenhouse gas emissions are stabilized. Moreover, the rise in sea level is likely to exhibit "a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change".[142] That degree of change in sea level may pose a potentially serious, maybe even disastrous, threat to many coastal States, especially those with large, heavily populated and low-lying coastal areas, as well as to small, low-lying island States, which will be discussed later in the present report.

49. The General Assembly has continued to emphasize the urgency of addressing the effects of atmospheric degradation, such as increases in global temperatures, sea-level rise, ocean acidification and the impact of other climate changes that are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States, and threatening the survival of many societies.[143] In 2015, the first Global Integrated Marine Assessment (first World Ocean Assessment) was completed as a comprehensive, indepth study of the substances polluting the oceans from land-based sources through the atmosphere.[144] The summary of the report was approved by the General Assembly in its resolution 70/235 of 23 December 2015. General Assembly resolution 71/257 of 23 December 2016 has confirmed the effect of climate change on oceans.[145]

B. Legal relationship between the law of the sea and the law on the protection of the atmosphere[146]

1. United Nations Convention on the Law of the Sea and other instruments

50. When the United Nations Convention on the Law of the Sea was adopted in 1982, it aimed to address all issues relating to the law of the sea, including the protection of the marine environment from atmospheric pollution and atmospheric degradation. To that end, the Convention defines the "pollution of the marine environment" in article 1, paragraph 1 (4), and regulates all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels, through articles 192, 194, 207, 211 and 212 of Part XII of the Convention. Although climate change was not on the international environmental agenda when the Convention was negotiated,[147] the relevant obligations of States can be inferred from it, and these obligations interact with the international climate change regime and the IMO regime in a mutually supportive manner.

smallest percentage increase occurred in the North Atlantic Ocean. These increases have taken place while the number of cyclones and cyclone days has decreased in all basins except the North Atlantic during the past decade" (see Webster *et al.*, "Changes in tropical cyclone number, duration, and intensity in a warming environment"). "[F]or some types of extreme—notably heatwaves, but also precipitation extremes—there is now strong evidence linking specific events or an increase in their numbers to the human influence on climate. For other types of extreme, such as storms, the available evidence is less conclusive, but based on observed trends and basic physical concepts it is nevertheless plausible to expect an increase" (see Coumou and Rahmstorf, "A decade of weather extremes").

[136] Fedorov and Philander, "Is El Niño changing?".

[137] Cai *et al.*, "Increasing frequency of extreme El Niño events due to greenhouse warming".

[138] Buhaug *et al.*, *Second IMO GHG Study 2009*, p. 23. See also Smith *et al.*, *Third IMO GHG Study 2014*, table 1.

[139] Righi, Hendricks and Sausen, "The global impact of the transport sectors on atmospheric aerosol in 2030—Part 1: land transport and shipping".

[140] Most of the greenhouse gas emissions from ships are emitted in or transported to the marine boundary layer where they affect atmospheric composition. See, e.g., Eyring *et al.*, "Transport impacts on atmosphere and climate: shipping", pp. 4735, 4744–4745 and 4752–4753. Greenhouse gas emissions from ships have a negative impact on the marine environment. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change asserted that greenhouse gas emissions have led to global ocean warming, the rise of ocean temperatures and ocean acidification: Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report: summary for policymakers"; Currie and Wowk, "Climate change and CO_2 in the oceans and global oceans governance", pp. 387 and 389; Schofield, "Shifting limits?"; Cooley and Mathis, "Addressing ocean acidification as part of sustainable ocean development", pp. 29–47.

[141] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis.*, p. 1180.

[142] *Ibid.*, p. 1140.

[143] See Oceans and the law of the sea, Report of the Secretary-General: Addendum (A/71/74/Add.1), chap. VIII ("Oceans and climate change and ocean acidification"), paras. 115–122.

[144] Division for Ocean Affairs and the Law of the Sea, "First Global Integrated Marine Assessment (first World Ocean Assessment)", available from www.un.org/depts/los/global_reporting/WOA_RegProcess.htm (see, in particular, chap. 20 on "Coastal, riverine and atmospheric inputs from land").

[145] See paras. 185–196.

[146] The Special Rapporteur is particularly grateful to Yubing Shi, Professor, Xiamen University, for drafting the relevant parts of the present report concerning the law of the sea and related judicial decisions.

[147] Boyle, "Law of the sea perspectives on climate change". See, in general, Abate, *Climate Change Impacts on Ocean and Coastal Law*.

51. Article 1, paragraph 1 (4), of the Convention provides that: "'pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities." Based on this definition, the release of toxic, harmful or noxious substances (including atmospheric pollutants) from land-based sources cause marine pollution and harm the marine environment, and this has been confirmed by articles 194, paragraph 3, and 207 of the Convention. Similarly, atmospheric pollution from vessels also harms the marine environment, and this has been regulated by articles 194, paragraph 3, 211 and 212 of the Convention. While SOx and NOx have been generally accepted as air pollutants,[148] there are debates and differences in national legislation on whether greenhouse gas emissions from ships, in particular CO_2 emissions from ships, are a type of pollution.[149] Nonetheless, it is well known that greenhouse gas emissions from ships, as a main factor contributing to climate change, cause marine pollution and harm the marine environment. The definition provided in article 1, paragraph 1 (4), of the Convention is significant in that it provides the criteria for judging whether a type of "substance or energy" is marine pollution and this may trigger the application of many pollution-related treaties under the auspices of the IMO and other international fora to the issue of that particular "substance or energy".[150]

52. Part XII of the Convention covers atmospheric pollution from land-based sources. While article 192 provides a general obligation for States to protect and preserve the marine environment, articles 194, paragraph 3 (*a*), and 207 specify requirements on pollution of land-based sources. Article 194, paragraph 3 (*a*), reads that:

> The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:
>
> (*a*) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping.

Through the above provisions, the Convention requires States to take all necessary measures to prevent, reduce and control land-based atmospheric pollution. The source of this atmospheric pollution also covers greenhouse gas emissions due to their deleterious effects on the marine environment.[151] In this way, the Convention imposes an obligation of due diligence on States,[152] and serves as a framework treaty for States to reduce land-based atmospheric pollution and greenhouse gas emissions. This regulation underpins the subsequent global and regional regulatory initiatives including the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities,[153] the United Nations Framework Convention on Climate Change and its Kyoto Protocol and the Paris Agreement.

53. Article 207, paragraph 4, of the United Nations Convention on the Law of the Sea highlights that global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution from land-based sources should be established through competent organizations or diplomatic conference. The plural term "competent international organizations" in this provision indicates that IMO is not the sole organization exclusively dealing with land-based sources of marine pollution.[154] In this way, relevant treaties adopted under the auspices of IMO and other international forums have thus been incorporated into the Convention by reference. Meanwhile, this provision underscores that the establishment of global and regional rules, standards and recommended practices and procedures should take into account characteristic regional features, the economic capacity of developing States and their need for economic development. This provision reflects article 194, paragraph 1, that requires States to take measures "in accordance with their capabilities",[155] and underpins the eventual formation of the "common but differentiated responsibilities and respective capabilities principle" in 1992.

54. The regulation on atmospheric pollution from vessels under the Convention incorporates "mutual supportiveness" for dealing with the interrelationship between the Convention and IMO. This has been achieved by two approaches, namely the so-called rules of reference, and general obligations being supplemented by IMO instruments.

55. Regarding the rules of reference, parties to the Convention are required to comply with rules and standards that

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[148] For example, at the fifty-eighth session of the Marine Environment Protection Committee in 2008, IMO adopted annex VI, as amended, to the International Convention for the Prevention of Pollution from Ships, which regulates, *inter alia*, emissions of SOx and NOx. The Convention now has six annexes, namely, annex I on regulations for the prevention of pollution by oil (entry into force on 2 October 1983); annex II on regulations for the control of pollution by noxious liquid substances in bulk (entry into force on 6 April 1987); annex III on regulations for the prevention of pollution by harmful substances carried by sea in packaged form (entry into force on 1 July 1992); annex IV on regulations for the prevention of pollution by sewage from ships (entry into force on 27 September 2003); annex V on regulations for the prevention of pollution by garbage from ships (entry into force 31 December 1988); and annex VI on regulations for the prevention of air pollution from ships (entry into force 19 May 2005).

[149] Shi, "Are greenhouse gas emissions from international shipping a type of marine pollution?".

[150] *Ibid*., p. 187.

[151] Boyle, "Law of the sea perspectives on climate change", p. 158; See also Intergovernmental Panel on Climate Change, *Climate Change 2013* …, pp. 4–5; Currie and Wowk, "Climate change and CO_2 in the oceans and global oceans governance", pp. 387 and 389.

[152] Boyle, "Law of the sea perspectives on climate change", p. 159.

[153] The Global Programme of Action is administered by a Coordinating Unit hosted by the United Nations Environment Programme. The Global Programme of Action was designed around the relevant provisions of chaps. 17, 33 and 34 of Agenda 21, the Rio Declaration on Environment and Development, and the Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources. The Global Programme of Action recommends actions at the international, regional and national levels to address the issue of marine pollution from land-based activities.

[154] Nordquist *et al., United Nations Convention on the Law of the Sea 1982*, p. 133, para. 207.7 (*d*).

[155] The origin of this expression can be traced back to principle 7 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), which incorporated the words "all possible steps". See Nordquist *et al., United Nations Convention on the Law of the Sea* … , p. 64, para. 194.10 (*b*).

are stipulated in other international instruments adopted under the auspices of IMO, even when these parties to the Convention are not parties to the IMO instruments.[156] Two rules of reference under the Convention may be relevant for the regulations on atmospheric pollution from vessels. Article 211 ("Pollution from vessels"), paragraph 2, of the Convention reads: "States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference." The "competent international organization" in this provision refers to IMO. Indeed, this provision imposes an obligation on all flag States that their national laws and regulations for the prevention, reduction and control of vessel-sourced atmospheric pollution should be consistent with or stricter than generally accepted international rules and standards established by IMO.[157] In this way, this provision is linked to relevant IMO instruments on vessel-sourced atmospheric pollution in which relevant rules and standards are qualified as "generally accepted" for the purpose of article 211, paragraph 2.[158] An example of such an instrument is annex VI ("Regulations for the prevention of air pollution from ships") to the International Convention for the Prevention of Pollution from Ships. Article 212, paragraph 1, of the United Nations Convention on the Law of the Sea ("Pollution from or through the atmosphere") provides that:

> States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.

This provision encourages flag States to enforce internationally agreed IMO rules, standards and recommended practices and procedures so as to satisfy their obligations under the Convention. Compared with the expression "generally accepted", "generally agreed" is a weaker term. However, the United Nations Division for Ocean Affairs and the Law of the Sea has treated annex VI of the International Convention for the Prevention of Pollution from Ships as a complementary instrument that needs to be implemented by States to fulfil their obligations under article 212.[159]

56. Some general obligations of States on vessel-sourced atmospheric pollution provided by the United Nations Convention on the Law of the Sea are supplemented by concrete regulations under the auspices of IMO. For instance, article 194, paragraph 3 (*b*), of the Convention mentions atmospheric pollution from vessels in a general manner. It reads as follows:

> The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:
>
> …
>
> (*b*) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.

The standard of conduct set out in this provision is very general. It covers various sources of air pollution from vessels, including those resulting from the normal operation of vessels and also from marine casualties following collisions and groundings. The concrete obligations can be found in relevant IMO instruments such as the International Convention for the Prevention of Pollution from Ships, the Convention on the International Regulations for Preventing Collisions at Sea, 1972 and the International Convention for the Safety of Life at Sea, 1974. Similarly, for the purpose of preventing, reducing and controlling vessel-sourced marine pollution, article 211, paragraph 6, of the United Nations Convention on the Law of the Sea allows coastal States to establish special areas in their exclusive economic zone after appropriate consultations through the competent international organization. To facilitate the enforcement of this provision, in 2005 IMO adopted resolution A.982(24) on revised guidelines for the identification and designation of particularly sensitive sea areas, which provide guidelines on designating such areas.

57. A commentary to article 194 is illuminating in describing the (limited) interrelationship between the law of the sea and the law relating to the atmosphere:

> The word "atmosphere" appears for the first time in this Convention in paragraph 3 (*a*), and the question arises of the extent to which the atmosphere can be considered as part of the marine environment. Several provisions of the Convention refer to the atmosphere in terms of the superjacent airspace or some cognate expression … This is sufficient to indicate that the atmosphere itself can be regarded as a component of the marine environment, at least to the extent that there is a direct link between the atmosphere in superjacent airspace and the natural qualities of the subjacent ocean space. Article 194, paragraph 3 (*a*), together with articles 212 and 222, thus also constitutes a link with between the law relating to the marine environment and the law relating to the atmosphere as such, whether or not over the oceans. At the same time, the provisions of this Convention, and especially those found in Part XII, do not themselves prejudge the question whether any part of the atmosphere is itself part of the marine environment.[160]

The scope of application of article 212 is the territorial airspace "under the sovereignty" of a given State, and it does not relate to airspace above an exclusive economic zone, not to mention common airspace above the high seas. Article 212 does not address directly the problem of pollution of the atmosphere itself, or any form of pollution other than that defined in article 1, paragraph 4, namely pollution of the marine environment.[161] Article 222 ("Enforcement with respect to pollution from or through the atmosphere") is the enforcement counterpart of article 212, the standard-setting article for the prevention, reduction and control of pollution of the marine environment from or through the atmosphere. Article 222 may to some extent overlap article 223 on enforcement

[156] See, e.g., Harrison, "Recent developments and continuing challenges in the regulation of greenhouse gas emissions from international shipping", p. 20.

[157] Nordquist *et al.*, *United Nations Convention on the Law of the Sea* … , p. 203, para. 211.15 (*f*).

[158] See, e.g., Boyle, "Marine pollution under the law of the sea convention", p. 357; and Van Reenen, "Rules of reference in the new Convention on the Law of the Sea …".

[159] Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea*, p. 52.

[160] Nordquist *et al.*, *United Nations Convention on the Law of the Sea*…, p. 67, para. 194.10 (*k*).

[161] *Ibid.*, pp. 212–213, para. 212.9 (*d*).

with regard to the pollution of the marine environment from land-based sources, since in fact most of the pollution in the atmosphere derives from sources on land.[162]

58. Other relevant instruments include the Convention for the Protection of the Marine Environment of the North-East Atlantic (art. 1 (*e*)), the Convention on the Protection of the Marine Environment of the Baltic Sea Area (art. 2, para. 2), the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (art. 4, para. 1 (*b*)),[163] the Protocol for the Protection of South-East Pacific against Pollution from Land-based Sources (art. II (*c*)) and the Protocol for the Protection of the Marine Environment Against Pollution from Land-Based Sources (art. III) to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, dealing with pollution through the atmosphere as a land-based source. The revised Protocol on the Protection of the Marine Environment of the Black Sea from Land-based Sources and Activities[164] regulates pollution transported through the atmosphere in its annex III. In 1991, the parties to the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources adopted a new annex (IV) to the Protocol on land-based sources of pollution transported through the atmosphere.[165] Prior to the United Nations Convention on the Law of the Sea, the only international instrument of significance was the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Wwater.

59. Through the rules of reference under the United Nations Convention on the Law of the Sea, annex VI of the International Convention for the Prevention of Pollution from Ships can be treated as the "internationally agreed rules [and] standards" for the purpose of reducing vessel-sourced air pollution such as SOx and NOx.[166] Regarding greenhouse gas emissions from ships, the interaction between IMO and the United Nations Convention on the Law of the Sea becomes more complicated due to their interrelationship with the international climate change regime. It seems that the interrelationship among IMO, the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change is somehow conflicted due to the controversial application of the principle of common but differentiated responsibilities and respective capabilities to the IMO regulation of greenhouse gas emissions from international shipping. However, in essence this relationship is still "mutually supportive", as the so-called conflict can be addressed through interpretation in good faith.

60. The entire negotiation process regarding greenhouse gas emissions reduction within IMO has been shaped and bedevilled by tension between developed and developing States. The conflict centres on the question of whether the principle of common but differentiated responsibilities and respective capabilities or the principle of no more favourable treatment should be applied to the regulation of greenhouse gas emissions from international shipping.[167] While the former principle runs through the United Nations Framework Convention on Climate Change, its Kyoto Protocol and the Paris Agreement, the latter principle is incorporated into all IMO regulations, including the International Convention for the Prevention of Pollution from Ships. Thus, there are strongly held different views regarding which principle should be applied to the regulatory regime to reduce greenhouse gas emissions from international shipping. Nonetheless, it is possible that this tension can be addressed provided that an interpretation based on the 1969 Vienna Convention is made in a mutually supportive manner. Generally speaking, the mandate of IMO as regards greenhouse gas emissions comes from both the United Nations Convention on the Law of the Sea and the International Convention for the Prevention of Pollution from Shipsas well as the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[168] which indicates that both principles mentioned above can be applied to the issue under discussion and their incorporation into the regulation can be achieved through a broader and flexible interpretation of the principle of common but differentiated responsibilities and respective capabilities.[169] To some extent, this approach has been reflected in the adoption of the 2011 amendments to annex VI of the International Convention for the Prevention of Pollution from Ships and the ongoing discussion on market-based measures within IMO.[170]

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[162] *Ibid*., pp. 315–319.

[163] The original Protocol was modified by amendments adopted on 7 March 1996 by the Conference of Plenipotentiaries on the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources, held in Syracuse on 6 and 7 March 1996 (UNEP, *Final Act of the Conference of the Plenipotentiaries on the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources* [UNEP(OCA)/MED IG.7/4]). The amended Protocol, recorded as "Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities", entered into force on 11 May 2008.

[164] The Protocol is not yet in force.

[165] Bodansky *et al.*, "Oceans", pp. 128 and 136.

[166] United Nations Convention on the Law of the Sea, art. 212, para. 1. Based on the current literature on the criteria of "generally accepted", it is less likely, however, that annex VI can be regarded as constituting generally accepted international rules and standards as stipulated in art. 211, para. 2, of the Convention. See, e.g., Harrison, "Recent developments and continuing challenges …", pp. 21–22.

[167] The principle of common but differentiated responsibilities and respective capabilities requires developed and developing States to address environmental issues but underscores that the former should take primary responsibility. The premise for this arrangement is the different levels of responsibility developing and developed States have for the causation of environmental problems. The no more favourable treatment principle refers to "port States enforcing applicable standards in a uniform manner to all ships in their ports, regardless of flag"; see Shi, "The challenge of reducing greenhouse gas emissions from international shipping", pp. 136–137.

[168] Art. 2, para. 2, of the Kyoto Protocol authorizes IMO to regulate greenhouse gas emissions from international shipping. Meanwhile, IMO receives its competence on greenhouse gas emissions from arts. 1 (*a*) and 64 of the Convention on the International Maritime Organization and arts. 211, para. 1, and 212, para. 3, of the United Nations Convention on the Law of the Sea. Shi, "Greenhouse gas emissions from international shipping: the response from China's shipping industry to the regulatory initiatives of the International Maritime Organization", pp. 82–84.

[169] *Ibid*., pp. 86–89.

[170] The amendments adopted in 2011 to annex VI of the International Convention for the Prevention of Pollution from Ships (see IMO resolution MEPC.203(62) of 15 July 2011, document MEPC 62/24/Add.1, annex 19) introduced a mandatory energy efficiency design index for new ships and a ship energy efficiency management plan for all ships. Furthermore, market-based measures, as a third type of measure in addition to the technical and operational measures, had also been discussed and negotiated from 2000 to 2013 within IMO. See IMO, "Main events in IMO's work on limitation and reduction of greenhouse

61. As a package deal, the United Nations Convention on the Law of the Sea does not provide definitions on various types of marine pollution, and the absence of certain types of marine pollution has been supplemented by other regional treaties. For instance, the United Nations Convention on the Law of the Sea regulates pollution from land-based sources, and a definition of "land-based sources" was later provided by the Convention for the protection of the marine environment of the North-East Atlantic. Article 1 (*e*) of that Convention provides that:

> "Land-based sources" means point and diffuse sources on land from which substances or energy reach the maritime area by water, through the air, or directly from the coast. It includes sources associated with any deliberate disposal under the sea-bed made accessible from land by tunnel, pipeline or other means and sources associated with man-made structures placed, in the maritime area under the jurisdiction of a Contracting Party, other than for the purpose of offshore activities.

62. Thus, the relevant provisions of the United Nations Convention on the Law of the Sea and other related instruments address the atmosphere as long as it is within territorial airspace, and as long as it affects the marine environment. They do not address the atmosphere itself, nor situations where the oceans may affect the atmosphere. The interrelationship between the sea and the atmosphere covered by the United Nations Convention on the Law of the Sea is limited and unilateral (one way from the atmosphere to the oceans, but not the other way around), requiring further efforts by the international community to overcome such negative conflicts within the relevant international law. As recalled, the preamble of the Paris Agreement notes the importance of ensuring the integrity of all ecosystems, including oceans. It is therefore considered important that the law of the sea and the law relating to the atmosphere are interpreted and applied in a mutually supportive manner.

2 Judicial decisions

63. As was referred to in the second report by the Special Rapporteur,[171] Australia had asked the International Court of Justice, in its application in the *Nuclear Tests* case, "to adjudge and declare that the carrying out of atmospheric nuclear weapon tests in the South Pacific area is not consistent with obligations imposed on France by applicable rules of international law".[172] While the Court had previously indicated provisional measures on 22 June 1973, it rendered a final judgment on 20 December 1974, holding that the objective pursued by the applicants, namely the cessation of the nuclear tests, had been achieved by French declarations not to continue atmospheric tests, and therefore that the Court was not called upon to give a decision on the claims put forward by the applicants.[173] It may be noted that Australia filed this case on the grounds of protecting, not only its own legal interests, but also the interests of other States, since it considered French nuclear tests a violation of the freedom of the high seas. Its memorial stated, *inter alia*, that: "The sea is not static; its life systems are complex and closely interrelated. It is evident, therefore, that no one can say that pollution—especially pollution involving radioactivity—in one place cannot eventually have consequences in another. It would, indeed, be quite out of keeping with the function of the Court to protect by judicial means the interests of the international community, if it were to disregard considerations of this character."[174]

64. The 2001 decision by the International Tribunal for the Law of the Sea in the *MOX Plant* case[175] exemplifies the interrelationship between the United Nations Convention on the Law of the Sea and the relevant international law regime regarding the prevention, reduction and control of land-based atmospheric pollution. Mutual supportiveness between the Convention and the atmospheric pollution regime was one of the factors being considered by the Tribunal. In this case, Ireland requested that an arbitral tribunal be constituted under annex VII to adjudge and declare that the United Kingdom, through its MOX plant, had breached its obligations under articles 192, 193 and/or article 194 and/or article 207 and/or articles 211 and 213 of the Convention. Ireland asserted that the United Kingdom failed to take the necessary measures to prevent, reduce and control marine pollution in the Irish Sea by means of the intended discharge and/or accidental release of radioactive materials or wastes from the MOX plant.[176] The reasoning behind the submission of Ireland was that compliance with agreed standards of pollution control under relevant international law was not enough to satisfy the more general duty of due diligence, which was

gas emissions from international shipping" (2011), para. 18, available from www.imo.org; Shi, "Reducing greenhouse gas emissions from international shipping: is it time to consider market-based measures?", p. 125; and Zhang, "Towards global green shipping: the development of international regulations on reduction of GHG emissions from ships". At its seventieth session from 24 to 28 October 2016, the IMO Marine Environment Protection Committee agreed to cut SOx emissions from ships, starting in 2020 (with an implementation scheme to be discussed in 2017), but postponed a decision on greenhouse gas emissions until after a further review in 2017.

[171] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681, para. 44.

[172] Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, *I.C.J. Pleadings 1973*, para. 430.

[173] *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, p. 99; *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, p. 135; *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p. 457. See, Thierry, "Les arrêts du 20 décembre 1974 et les relations de la France avec la Cour internationale de justice"; Franck, "Word made law: the decision of the ICJ in the *Nuclear Test* cases"; Lellouche, "The International Court of Justice: the *Nuclear Tests* cases: judicial silence v. atomic blasts"; McWhinney, "International law-making and the judicial process, the world court and the French *Nuclear Tests* case"; Sur, "Les affaires des essais nucléaires (*Australie c. France; Nouvelle-Zélande c. France: C.I.J.—arrêts du 20 décembre 1974*)"; MacDonald and Hough, "The *Nuclear Tests* case revisited". The Court stated that "the unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*", implying that France became bound towards all States (*Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, at p. 269, para. 50).

[174] Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, *I.C.J. Pleadings 1973*, para. 459.

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

[176] Request for provisional measures and statement of case submitted on behalf of Ireland, 9 November 2001, available from www.itlos.org/en/main/, *Cases*, *List of cases*). In its request for provisional measures, Ireland stated that "the consequences for human health and environment of an accidental atmospheric release of the high-level radioactive waste tanks at Sellafield would be far greater than the Chernobyl accident in April 1986" (para. 11).

established under the Convention.[177] Based on this consideration, Ireland requested the Tribunal to impose certain provisional measures, such as the United Kingdom immediately suspending its authorization to the MOX plant. The Tribunal decided not to impose provisional measures as requested by Ireland but requested that the two parties cooperate forthwith. This case can also be seen as a balancing exercise by the Tribunal between continued economic development and environmental protection.[178]

C. Sea-level rise and its impact

65. As described in paragraph 48 above, sea-level rise as a result of global warming was predicted by the Intergovernmental Panel on Climate Change as the most likely scenario. One of the well-known consequences of sea-level rise is the significant global regression of coastlines, leading to changes of baselines to measure territorial waters and other maritime zones including archipelagic lines, as the baselines are intended to be "ambulatory".[179] As sea levels rise, the low water line along the coast, which marks the "normal baseline" for the purposes of article 5 of the Convention, will usually move inland and some key geographical features used as base points may be inundated and lost. Some authors, however, hold the view that "a substantial rise in sea level, whatever the cause, should not entail the loss of States' ocean space and their rights over maritime resources, already recognized by the 1982 Convention".[180] The International Law Association Committee on Baselines under the International Law of the Sea has suggested that there may be two options: first, a new rule freezing the existing baselines in their current positions, using the "large-scale charts officially recognised by the coastal State"; or, second, a new rule freezing the existing defined outer limits of maritime zones measured from the baselines established in accordance with the Convention.[181] These options do appear to be contrary to the established rule of international law, since the fundamental change of circumstances cannot be applied to boundaries.[182] Nonetheless, there is a strong need for the international community to consider the problem *de lege ferenda* to overcome the difficulty facing the States concerned with baseline issues.[183]

66. Another set of problems caused by sea-level rise, which is of direct relevance to the protection of the atmosphere, relates to the issues of forced migration and human rights. Sea-level rise is threatening partial or complete inundation of State territory, or depopulation thereof, in particular of small island and low-lying States, and the relevant implications under international law are enormous, requiring serious, in-depth study of the issues. The combined and cumulative impacts of relative sea-level rise and other effects of climate change present a range of direct and indirect negative consequences for human lives and living conditions in coastal and low-lying areas.[184] These questions of human rights and migration should, however, be better considered in the context of human rights law rather than the law of the sea, and will therefore be discussed in chapter IV.

67. In view of the above, the following draft guideline is proposed:

"*Draft guideline 11. Interrelationship of law on the protection of the atmosphere with the law of the sea*

"1. States should take appropriate measures in the field of the law of the sea, taking into account the relevant provisions of the United Nations Convention on the Law of the Sea and related international instruments, to protect the atmosphere from atmospheric pollution and atmospheric degradation and to deal with questions of maritime pollution from or through the atmosphere. In order to avoid any conflict, States should ensure that development, interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness.

"2. States and competent international organizations should consider the situations of small island States and low-lying States with regard to the baselines for the delimitation of their maritime zones under the law of the sea.

[177] Boyle, "Law of the sea perspectives on climate change", p. 162.

[178] *Ibid*.

[179] Soons, "The effects of a rising sea level on maritime limits and boundaries"; Hayashi, "Sea level rise and the law of the sea: future options". The 1969 Vienna Convention provides in article 62, paragraph 2, that: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary."

[180] Jesus, "Rocks, new-born islands, sea level rise and maritime space", pp. 599 and 602.

[181] See International Law Association, *Report of the Seventy-Fifth Conference held in Sofia, August 2012* (London, 2012), pp. 385–428.

[182] The International Court of Justice also confirmed this exclusion of a boundary from the application of fundamental change of circumstances in *Aegean Sea Continental*, Judgment, *I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 85.

[183] International Law Association, *Johannesburg Conference (2016): International Law and Sea Level Rise* (interim report), pp. 13–18.

[184] *Ibid*., pp. 18–28. See also Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report …".

Chapter IV

Interrelationship with international human rights law

68. International law related to the protection of the atmosphere can only coordinate appropriately with international human rights law to the extent that elements of the law of protection of the atmosphere are considered "anthropocentric" (human-centric) rather than eco-centric in character,[185] that is, that environmental protection is primarily considered as a means of protecting humans rather

[185] See Stone, "Ethics and international environmental law". The Special Rapporteur is particularly grateful to Masayuki Hiromi, Sophia

than an end in itself.[186] Thus, for instance, the European Court of Human Rights, in a case concerning the protection of marshland, stated that: "Neither article 8 nor any of the other Articles of the Convention [for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)] are specifically designed to provide general protection of the environment as such; other international instruments … are more pertinent in dealing with this particular aspect."[187]

69. In order for human rights instruments to contribute to the protection of the environment in general and to the protection of the atmosphere in particular, the direct link between atmospheric pollution or degradation and an impairment of a protected human right must be established.[188] In this sense, international human rights law can be pertinent only in the context of atmospheric pollution and atmospheric degradation affecting the human and natural environments, since they are protected ultimately for humans. Thus, international human rights law does not necessarily overlap with international environmental law, but may do so to some extent.[189]

A. Treaties and other instruments

70. With regard to human rights references in environmental texts, the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[190] recognized for the first time the interrelationship between international environmental law and international human rights law: its principle 1 focused on the rights granted to individuals rather than the obligations imposed on States, providing that: "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being."[191] The Rio Declaration on Environment and Development[192] of 1992 also outlined in its principle 1 that "[h]uman beings are at the centre of concerns for sustainable development", and that "[t]hey are entitled to a healthy and productive life in harmony with nature". Although the second clause did not refer specifically to the term "human right",[193] principle 1 has helped the development of international human rights law to incorporate concerns for sustainability and environmental protection. While these declarations are not legally binding instruments, they provided the basis for subsequent development of a human right to a healthy environment.[194]

71. It is important to note that international law relating to the protection of the atmosphere does significantly reflect an anthropocentric approach so that human rights law does have a great potential to contribute to this field, since, after all, clean air is indispensable for human survival. In the context of atmospheric pollution, the Convention on Long-range Transboundary Air Pollution recognizes that air pollution has "deleterious effects of such a nature as to endanger human health" (article 1) and obliges the parties "to protect man and his environment against air pollution" (article 2). Likewise, for atmospheric degradation, the Vienna Convention for the Protection of the Ozone Layer contains a provision whereby the parties are required to take appropriate measures "to protect human health" (article 2), and the United Nations Framework Convention on Climate Change deals with the adverse effects of climate change including significant deleterious effects "on human health and welfare" (article 1). As noted in a recent analytical study on the relationship between human rights and the environment undertaken by the Office of the High Commissioner for Human Rights,[195] environmental degradation including air pollution, climate change and ozone layer depletion "has the potential to affect the realization of human rights".[196]

72. As regards environmental considerations in human rights instruments, it is after the 1972 United Nations Conference on the Human Environment that human rights treaties have included the specific right to the environment. So far, there are two instruments that expressly provide such a right: the African Charter on Human and Peoples' Rights of 1981, which provides in its article 24 that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development" and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which stipulates in its article 11, paragraph 1, that "[e]veryone shall have the right to live in a healthy environment". In contrast, treaties and other instruments concluded before the Stockholm Conference in 1972 did not explicitly refer to any specific right to the environment, among these the Universal Declaration of Human Rights,[197] the European Convention on Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the American Convention on Human Rights. However, human rights courts and bodies established under those

University, for supplying relevant material and drafting parts of the present report on human rights law.

[186] Boyle, "Relationship between international environmental law …", p. 141.

[187] *Kyrtatos v. Greece*, No. 41666/98, ECHR 2003-VI, para. 52. The Court went on to say that "even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention" (*ibid*., para. 53).

[188] Dupuy and Viñuales, *International Environmental Law*, pp. 308–309 and 319.

[189] Certain environmental norms, such as conventions concerning the protection of biodiversity, "reflect a greater environmental consciousness and suggest that the protection of the environment is often recognised on its own terms, and not simply a means of protecting humans" (Sands and Peel, *Principles of International Environmental Law*, p. 776). In such an area, there is no room for international human rights norms to be taken into consideration.

[190] See *Report of the United Nations Conference of the Human Environment, Stockholm 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. I.

[191] Sohn, "The Stockholm Declaration on the Human Environment", pp. 451–452.

[192] *Report of the United Nations Conference on Environment and Development* … (see footnote 42 above), resolution 1, annex I.

[193] Shelton, "What happened in Rio to human rights?", p. 75.

[194] Francioni, "Principle 1: human beings and the environment", pp. 97–98.

[195] Human Rights Council resolution 19/10 of 22 March 2012 on human rights and the environment.

[196] Analytical study on the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights" (A/HRC/19/34 and Corr.1), paras. 15–16.

[197] Universal Declaration on Human Rights, General Assembly resolution 217 (III) A, of 10 December 1948.

conventions have subsequently incorporated environmental considerations into the existing provisions on certain general rights through an evolutionary interpretation of respective treaties in order to afford human protection from environmental pollution or degradation.[198] Thus, the European Court of Human Rights, for instance, stated that: "There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."[199] The Inter-American Commission on Human Rights also expressly recognized the link between the protection of the environment and the enjoyment of human rights guaranteed under the American Convention on Human Rights, stating that:

> although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The IACHR [Inter-American Commission on Human Rights] has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights of life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm.[200]

B. Jurisprudence of international courts and treaty bodies

73. There may be a difficulty, however, in analysing the protection of the atmosphere through application of human rights norms within the framework of general international law, because the specific circumstances and priorities in respective societies lead regional courts and human rights treaty bodies to interpret such norms differently.[201] Indeed, their focus and interpretation of the rights relating to environmental protection are slightly different. Generally speaking, the environmental jurisprudence of the European Court of Human Rights has been mainly concerned with individual rights relating to human health and private and family life, while it appears that the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights have focused more on the collective rights of indigenous or tribal peoples,[202] though admittedly, based on the commonality of environmental jurisprudence, the relevant treaty provisions may in the long run come to be interpreted and applied in a harmonious manner.[203]

1. Human Rights Committee

74. At the global level, it was after 1990 that certain complaints relevant to environmental concerns were communicated to the Human Rights Committee, though such complaints had limited success on the merits.[204] In the context of the protection of the atmosphere, the *Bordes and Temeharo v. France*[205] case is of particular relevance, although the Committee found the case inadmissible. The case concerned underground nuclear tests in the South Pacific carried out by France in 1995 and 1996, which led New Zealand to bring the *Nuclear Tests II* case to the International Court of Justice.[206] In the *Bordes and Temeharo* case, French citizens residing in the islands of the South Pacific contended that the French tests violated their rights to life (art. 6) and to privacy and family life (art.17) guaranteed under the International Covenant on Civil and Political Rights. According to them, the nuclear tests fractured the geological structure of the atolls, and radioactive particles that leaked from fissures contaminated the atmosphere and exposed the population surrounding the testing area to an increased risk of radiation. The Committee stated that "for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such right, or that there is a real threat of such result",[207] finding that the applicants did not qualify as "victims" of violation due to the remoteness of the harm, and that the case was inadmissible. It should be noted, however, that the Committee did not deny the possibility that atmospheric pollution by a State infringes the right to life and the right to family life guaranteed under the Covenant, if the direct link between such pollution and the impairment of their rights is established.

2. European Court of Human Rights

75. It was in the 1994 *López Ostra v. Spain* case that the European Court of Human Rights for the first time clearly recognized environmental issues within the European Convention on Human Rights, even in the absence of an explicit environmental right.[208] In this case, the applicant, a Spanish national and resident of the city of Lorca, in Spain, claimed that fumes from a waste treatment plant, which was built by a private company in the vicinity of the applicant's residence, polluted the atmosphere in that city and caused health problems and nuisance to the applicant and her family, which resulted in a violation of article 8 ("Right to private and family life") of the Convention. The Court endorsed the preceding findings of the European Commission of Human Rights that "there could

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[198] Desgagné, "Integrating environmental values into the European Convention on Human Rights". See draft conclusion 8 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted by the Commission on first reading (*Yearbook … 2016*, volume II (Part Two), para. 75).

[199] *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR, 2003-VIII, para. 96.

[200] *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members v. Panama*, merits of 13 November 2012, Report No. 125/12, Case 12.354, para. 233.

[201] Higgins, "Human rights: some questions of integrity"; and Simma, "International human rights and general international law".

[202] Dupuy and Viñuales, *International Environmental Law*, pp. 307–311.

[203] That does not mean the jurisprudence of the European Court of Human Rights on the matter has to be followed by other courts and bodies of human rights. See Higgins, "Human rights: some questions of integrity", p. 7. Cf. Lixinski, "Treaty interpretation by the Inter-American Court of Human Rights", pp. 594–596.

[204] Dupuy and Viñuales, *International Environmental Law*, p. 306.

[205] *Bordes and Temeharo v. France*, Communication No. 645/1995, Decision adopted on 22 July 1996, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. II, annex IX, sect. G.

[206] *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.

[207] *Bordes and Temeharo v. France* (see footnote 205 above), para. 5.4.

[208] Fitzmaurice, *Contemporary Issues in International Environmental Law*, p. 186. *López Ostra v. Spain*, 9 December 1994, Series A, No. 303-C.

be a causal link between … emissions and the applicant's daughter's ailments".[209] The Court went on to say that "[a]dmittedly, the Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question",[210] because the plant concerned was owned, controlled and operated by a private company. According to the Court, however, the Spanish authorities incurred "a positive duty … to take reasonable and appropriate measures to secure the applicant's rights" guaranteed under the Convention,[211] because the town allowed the plant to be built on its land and subsidized the plant's construction.[212] The Court finally concluded that Spain was responsible for violating article 8 due to its failure to take steps to that end.

76. The subject matter of the 1995 case *Noel Narvii Tauira and 18 others v. France*[213] before the then European Commission on Human Rights was the same as that of the *Bordes and Temeharo v. France* case before the Human Rights Committee above (see paragraph 74 above). In that case, the applicants claimed that the decision of France to resume nuclear tests in the South Pacific would result in a violation of, among other rights, articles 2 ("Right to life") and 8 ("Right to respect for private and family life") of the European Convention on Human Rights and article 1 ("Protection of property") of its Protocol No. 1. As the Committee concluded, the Commission stated that: "[i]n order for an applicant to claim to be a victim of a violation of the Convention, there must be a sufficiently direct link between the applicant and the loss which he considers he has suffered as a result of the alleged violation",[214] and that "[m]erely invoking risks inherent in the use of nuclear power … is insufficient to enable the applicants to claim to be victims of a violation of the Convention, as many human activities generate risks".[215] Eventually, the Commission reached the same conclusion as the Committee, namely that the application was inadmissible due to the applicants' failure to substantiate their allegations. But, unlike the Committee, the Commission clearly recognized the admissibility of the application against the risk of a future violation, stating that "[i]t is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation", since the applicants alleged the potential risk to their lives, health and family lives of a leakage of radioactivity from ruptured atolls.[216] The Commission went on to say that: "In order for an applicant to claim to be a victim in such a situation, he must … produce reasonable and *convincing evidence** of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect."[217]

77. The jurisprudence of the European Court of Human Rights relevant to the protection of atmosphere developed further in the case of *Fadeyeva v. Russia*[218] in 2005. This case concerned intra-boundary air pollution from the Severstal steel plant in the town of Cherepovets in the Russian Federation, privatized in 1993, which was argued by the applicants who lived in a flat near the plant to have infringed their right to health and well-being, as guaranteed under article 8 of the European Convention on Human Rights. The Court pointed out that, for the applicant to raise an issue under article 8 ("Right to respect for private and family life"), he or she has to establish (*a*) the causal link between environmental pollution or degradation and an impairment of a protected human right and (*b*) a certain minimum level of the adverse effect sufficient to bring it within the scope of article 8 of the Convention.[219] After the Court found that those two requirements were fulfilled, it noted that in the instant case the Severstal steel plant was not owned, controlled or operated by the Russian Federation at the material time.[220] The Court pointed out, however, that "the State's responsibility in environmental cases may arise from a failure to regulate private industry" and considered whether the State incurred a positive duty to take reasonable and appropriate measures to secure the applicant's right under article 8, paragraph 1, of the Convention.[221] The Court finally concluded that there exists "a sufficient nexus between the pollutant emissions and the State", because the authorities were in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them,[222] thus affirming that there had been a violation of article 8 of the Convention by the Russian Federation.

3. African Commission on Human and Peoples' Rights

78. The 2001 *Ogoni* case[223] concerned environmental degradation and health problems among the Ogoni people in Nigeria resulting from the contamination of water, soil and air from resource exploitation by an oil consortium in which the Government of Nigeria was involved. The complainants invoked, among other rights, articles 4 ("Right to life"), 16 ("Right to health"), and 24 ("Right to a general satisfactory environment") of the African Charter on Human and Peoples' Rights as substantial rights infringed by the acts and omissions of Nigeria. In that case, the African Commission on Human and Peoples' Rights first of all mentioned the necessary condition for the complaint to be admissible, that is, the link between environmental

[209] *López Ostra v. Spain* (see previous footnote), para. 49.

[210] *Ibid*., para. 52.

[211] *Ibid*., para. 51.

[212] *Ibid*., para. 52.

[213] *Noel Narvii Tauira and 18 others v. France*, No. 28204/95, Commission decision of 4 December 1995, *Decisions and Reports* No. 83-B, p. 112.

[214] *Ibid*., p. 130.

[215] *Ibid*., p. 131.

[216] *Ibid*., p. 130.

[217] *Ibid*., p. 131.

[218] *Fadeyeva v. Russia*, No. 55723/00, ECHR 2005-IV.

[219] *Ibid*., paras. 68–69.

[220] *Ibid*., para. 89. Although the plant had released toxic substances into the air of the town before its privatization in 1993, the Court took into consideration only the period after 5 May 1998 when the European Convention on Human Rights came into force with respect to the Russian Federation.

[221] *Ibid*., para. 89.

[222] *Ibid*., para. 92.

[223] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria*, decision of 27 October 2001, African Commission on Human and Peoples' Rights, Communication No. 155/96. The case was also concerned with the direct conduct of the Nigerian military and security forces against the Ogoni people, such as attacks, and burning and destruction of several Ogoni villages and homes. The present report, however, focuses only on environmental questions. See, Coomans, "The *Ogoni* case before the African Commission on Human and Peoples' Rights".

pollution or degradation and the infringement of human rights, stating that: "These rights recognise the importance of a clean and safe environment … in so far as the environment affects the quality of life and safety of the individual."[224] Then, the Commission suggested that violation of the human rights that the applicant had invoked entailed both negative and positive obligations.[225] In concluding its opinion, the Commission referred to certain precedents of the European Court of Human Rights and the Inter-American Court of Human Rights,[226] and emphasized that: "As a human rights instrument, the African Charter is not alien to these concepts".[227] According to the Commission, the right to health (article 16) imposes on States a negative obligation "to desist from directly threatening the health and environment of their citizens"[228] and the right to a general satisfactory environment (article 24) imposes on States a positive obligation "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources",[229] including environmental impact assessments, appropriate monitoring and provision of information. Finally, the African Commission, after examining the conduct of the Government of Nigeria, found a violation of articles 16 and 24 of the Charter. As for the right to life, the Commission found a violation of article 4, since "[t]he pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare".[230]

4. Inter-American Commission on Human Rights

79. The *Community of La Oroya v. Peru* petition concerned air, soil and water pollution from the metallurgical complex operated by the United States firm Doe Run in the community of La Oroya, Peru.[231] The petitioners alleged that Peru had been liable by act and omission, especially in its failure to control the complex, its lack of supervision, and its failure to adopt measures to mitigate ill effects. In its preliminary remarks, the Inter-American Commission found that: "the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 ["Right to life"] and 5 ["Right to humane treatment"] of the American Convention [on Human Rights]".[232] Since the environmental contamination was caused by a complex operated by a private enterprise, the Commission asserted the positive obligation of a State to take measures to avert risks to life and health by third parties.

80. Climate change has specific identifiable effects on polar regions and populations living in the area. Two indigenous groups independently presented petitions to the Inter-American Commission on issues related to such climate change.[233] In 2005, a Chair of the Inuit Circumpolar Conference, on behalf of the Inuit of the Arctic regions of the United States and Canada, filed a petition against the United States with the Commission, alleging that the impact of climate change in the Arctic, caused by the greenhouse gas emissions of the United States, violated the Inuit's fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments.[234] These included their rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home. In 2006, the Commission, however, dismissed the petition, concluding that the petitioners failed to establish "whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration".[235] In 2013, the Arctic Athabaskan Council, on behalf of all the Athabaskan Peoples of the Arctic regions of Canada and the United States, in turn, filed a petition against Canada with the Commission, claiming that Arctic warming, caused by Canada's inaction and a lack of effective regulations for black carbon emissions, violated the human rights of Arctic Athabaskan peoples, including the right to the benefits of their culture, the right to property and the right to health enshrined in the American Declaration of the Rights and Duties of Man.[236] A review of the admissibility of the Athabaskan petition is still pending.

C. Substantive rights

81. A comparative analysis of environmental jurisprudence and the decisions of human rights courts and bodies suggests that the most commonly used "general" substantive rights in environmental claims are "the right to life" (art. 6 of the International Covenant on Civil and Political Rights; art. 6 of the Convention on the Rights of the Child; art. 10 of the Convention on the Rights of Persons with Disabilities; art. 2 of the European Convention on Human Rights; art. 4 of the American Convention on Human Rights; and art. 4 of the African Charter on Human and Peoples' Rights), "the right to private and family life" (art. 17 of the International Covenant on Civil and Political Rights; art. 8 of the European Convention on Human Rights; and art. 11, para. 2, of the American Convention on Human Rights), and "the right to property" (art. 1 of Protocol No. 1 to the European Convention

[224] African Commission on Human and Peoples' Rights, Communication No. 155/96, para. 51.

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

[226] *Ibid*., para. 57.

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

[228] *Ibid*., para. 52.

[229] *Ibid*.

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

[231] *Community of Law Oroya v. Peru*, decision on admissibility of 5 August 2009, Report No. 76/09, Petition 1473-06. The complex was nationalized in 1974 and then purchased by the United States firm in 1997.

[232] *Ibid*., para. 74.

[233] De la Rosa Jaimes, "Climate change and human rights litigation in Europe and the Americas", pp. 191–195.

[234] Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States*, 7 December 2005.

[235] See letter from Ariel E. Dulitzky, Assistance Executive Secretary, Organization of American States, to Paul Crowley, ref. Sheila Watt-Cloutier, *et al.*, Petition No. P-1413-05, United States, 16 November 2006.

[236] Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, 23 April 2013.

on Human Rights; art. 21 of the American Convention on Human Rights; and art.14 of the African Charter on Human and Peoples' Rights).[237] Where a "specific" right to environment is not explicitly provided for under human rights instruments, human rights courts and treaty bodies interpret those general rights to cover the content of the right to environment and the right to health.[238] In addition, even where there exist specific rights to environment in human rights conventions such as the African Charter on Human and Peoples' Rights, relevant courts and treaty bodies apply general rights, such as the right to life, as well as the specific right to environment and the right to health, as indicated in the *Ogoni* and the *Inuit* cases above. Those general rights are common to all human rights instruments, whether global or regional, and thus may be universally applicable, if jurisprudence continues in such a direction in this field.

82. In order for international human rights law to contribute to the protection of the atmosphere, however, certain core requirements must be fulfilled.[239] First, international human rights law remains "a personal-injury-based legal system"[240] and, as a result, the direct link between atmospheric pollution or degradation and an impairment of a protected right must be established. Second, the adverse effects of atmospheric pollution or degradation must attain a certain minimum level if they are to fall within the scope of international human rights law. The assessment of that minimum standard is relative and depends on the content of the right to be invoked and all the relevant circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. Third, and most importantly, it is necessary to establish a causal link between the action or omission of a State, on the one hand, and atmospheric pollution or degradation, on the other hand.

83. The obligations of States engendered from relevant rights are of two dimensions. In principle, States incur the negative obligation—or obligation to respect—to refrain from any interference directly or indirectly with the enjoyment of fundamental rights. However, as the above jurisprudence and decisions of human rights courts and bodies have suggested, this duty of abstention is accompanied by the positive obligation—or obligation to protect—to take all appropriate measures to protect human rights.[241] It requires States to take positive measures to protect one's rights against any interference by third parties, such as individuals or private industries. The latter obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to prevent third parties from infringing upon guaranteed rights. As the Human Rights Committee rightly stated, the obligations under international human rights law "do not … have direct horizontal effect as a matter of international law", but there may be circumstances in which State responsibility arises as a result of States' "permitting or failing to take appropriate measures or to exercise due diligence to prevent … the harm caused by such acts by private persons or entities".[242]

D. Vulnerable people

84. Certain groups of people deserve special attention under international law because of their vulnerability to the impact of atmospheric pollution and degradation. These include indigenous people, those living in small island and lowlying developing countries, women, children and the elderly as well as persons with disabilities. According to the most recent data published by the World Health Organization (WHO) in September 2016, an estimated 6.5 million deaths annually (11.6 per cent of all global deaths) are attributable to air pollution, with the highest increases recorded in urban areas of low-income countries.[243] In response therefore, the Sustainable Development Goals adopted by the General Assembly in its 2030 Agenda for Sustainable Development address atmospheric pollution in Goals 3.9 and 11.6, calling, in particular, for a substantial reduction of the number of deaths and illnesses from air pollution, and for special attention to ambient air quality in cities.[244]

85. WHO has also noted that: "All populations will be affected by a changing climate, but the initial health risks vary greatly, depending on where and how people live. People living in small island developing states and other coastal regions, megacities, and mountainous and polar regions are all particularly vulnerable in different ways. Health effects are expected to be more severe for elderly people and people with infirmities or pre-existing medical conditions."[245] Persons with disabilities should also be included here. WHO further noted that: "The groups who are likely to bear most of significant cost of the resulting disease burden are children and the poor, especially women."[246] "The major diseases that are most sensitive to climate change—diarrhoea, vector-borne diseases like malaria, and infections associated with undernutrition—are most serious in children living in poverty."[247] Thus, for

[237] Shelton, "Human rights and the environment: substantive rights", pp. 267 and 269–278.

[238] Churchill, "Environmental rights in existing human rights treaties", pp. 89–98.

[239] Dupuy and Viñuales, *International Environmental Law*, pp. 320–329.

[240] *Ibid*., pp. 308–309.

[241] Cançado Trindade, "The contribution of international human rights law to environmental protection …", pp. 272 and 280.

[242] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III.

[243] WHO, *Ambient Air Pollution: A Global Assessment of Exposure and Burden of Disease*. See also WHO, "Burden of disease from the joint effects of household and ambient air pollution for 2012"; United Nations Environment Assembly resolution 1/7 (2014) on strengthening the role of the United Nations Environment Programme in promoting air quality, UNEP/EA.1/10, annex I; World Health Assembly resolution WHA68.8 of 26 May 2015 on health and the environment: addressing the health impact of air pollution; and Lelieveld *et al.*, "The contribution of outdoor air pollution sources to premature mortality on a global scale".

[244] General Assembly resolution 70/1 of 25 September 2015; see Lode, Schönberger and Toussaint, "Clean air for all by 2030? ". See also the indicators for these targets specified in 2016 (3.9.1: mortality rate attributed to household and ambient air pollution; and 11.6.2: annual mean levels of fine particulate matter in cities).

[245] WHO, *Protecting Health from Climate Change*, p. 2.

[246] *Ibid.* The Committee on the Elimination of Discrimination against Women has an agenda on "gender-related dimensions of disaster risk reduction and climate change"; see www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx.

[247] WHO, *Protecting Health from Climate Change*, p. 2.

instance, the World Bank Group has in recent years focused on policy development to support the people most vulnerable to climate change. According to its Climate Change Action Plan, extremely vulnerable groups include the very poor—those without access to basic infrastructure services and social protection—children, women and the elderly, persons with disabilities, indigenous populations, refugees and migrants, and people living in extremely vulnerable areas such as small islands and deltas.[248]

86. Apart from limited treaty practice and soft-law instruments, the legal status of indigenous people is not yet sufficiently settled in international law.[249] Nonetheless, as was declared in the Report of the Indigenous Peoples' Global Summit on Climate Change, "[i]ndigenous people are the most vulnerable to the impacts of climate change because they live in the areas most affected by climate change and are usually the most socio-economically disadvantaged",[250] and therefore they should certainly be included in those categories of people to be especially protected against the effects of atmospheric degradation.

E. Future generations

87. As previously emphasized in draft guideline 6 provisionally adopted in 2016, and in the Special Rapporteur's third report,[251] equitable and reasonable utilization of the atmosphere should also take into account the interests of future generations of humankind. It is considered necessary to emphasize the interests of future generations in the context of human rights protection. This intergenerational obligation was already expressed in principle 1 of the Stockholm Declaration ("solemn responsibility to protect and improve the environment for present and future generations"), and in the very concept of sustainable development as formulated in the 1987 Brundtland Report ("development that meets the needs of the present without compromising the ability of future generations")[252] as well as in the Preamble to the 2030 Agenda for Sustainable Development ("to support the needs of present and future generations"). It is also reflected in article 4 of the Convention for the Protection of the World Cultural and Natural Heritage (recognizing the "duty of ensuring the identification, protection, conservation, presentation and transmission to future generations" of cultural and natural heritage); in article 3, paragraph 1, of the United Nations Framework Convention on Climate Change ("Parties should protect the climate system for the benefit of present and future generations of humankind"), in the preamble to the Convention on Biological Diversity, and in other subsequent treaties, such as article 4 (vi) of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (parties shall "strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation"). The International Court of Justice, in its 1996 advisory opinion on *Nuclear Weapons*, noted that "it is imperative … to take account of the unique characteristics of nuclear weapons, and in particular their … ability to cause damage to generations to come";[253] and Judge Weeramantry, in his dissenting opinion, considered that "the rights of future generations have passed the stage when they are merely an embryonic right struggling for recognition. They have woven themselves into international law".[254]

88. While there are no rights-holders present with legal standing to invoke the obligations so incurred, it has been suggested in the literature that the rights involved could be enforced by a "guardian" or representative of future generations.[255] Regarding protection of the atmosphere in particular, there have indeed been recent domestic court decisions in a number of countries upholding the human rights of minors, represented by guardians, to challenge governmental action (or inaction) in this field.[256] Standing to sue in some of those proceedings was granted on the basis of what is referred to as the "public trust doctrine",[257] holding Governments accountable as trustees for the management of common environmental resources.[258] Given, however, that there are as yet no decisions by international tribunals conferring customary intergenerational rights of this kind,[259] the Drafting Committee, at the sixty-eighth session of the Commission, opted for the term "interests" rather than "benefit" in draft guideline 6.[260] Accordingly, paragraph 4 of the proposed new draft guideline 12 below uses similar language.

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[248] World Bank Group, *Climate Change Action Plan 2016–2020*, p. 49.

[249] General Assembly resolution 61/295 of 13 September 2007 entitled "United Nations Declaration on the Rights of Indigenous Peoples" does not define "indigenous people", leaving the matter to future development. The group's self-identification is considered as an essential element in determining its status and scope. See Barsh, "Indigenous peoples"; Kingsbury, "Indigenous peoples"; Strydom, "Environment and indigenous peoples".

[250] Report of the Indigenous Peoples' Global Summit on Climate Change, 20–24 April 2009, Anchorage, Alaska, p. 11.

[251] *Yearbook … 2016*, volume II (Part One), A/CN.4/692, paras. 69–78. See also the suggestion by Malaysia, during the debate on the topic in the Sixth Committee in October 2016, for further examination of factors to be assessed in balancing the interests of current and future generations (A/C.6/71/SR.26, para. 73).

[252] Report of the World Commission on Environment and Development, note by the Secretary-General (A/42/427), annex, chap. 2, para. 1.

[253] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 244, para. 36.

[254] *Ibid*., at p. 455.

[255] Brown Weiss, *In Fairness to Future Generations*, p. 96; Bruce, "Institutional aspects of a charter of the rights of future generations"; Allen, "The Philippine children's case", referring to the judgment of the Philippine Supreme Court in *Minors Oposa et al. v. Factoran* (30 July 1993), ILM, vol. 33 (1994), pp. 173–206.

[256] On the "children's atmospheric trust" cases decided or currently pending in several United States state and federal courts, see Wood and Woodward, "Atmospheric trust litigation and the constitutional right to a healthy climate system". For a similar case now pending in the Pakistan Supreme Court, see *Rabab Ali v. Federation of Pakistan*, summary available from www.ourchildrenstrust.org/pakistan.

[257] See Redgwell, *Intergenerational Trusts and Environmental Protection*; Coghill, Sampford and Smith, *Fiduciary Duty and the Atmospheric Trust*; Blumm and Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*; Bosselmann, *Earth Governance: Trusteeship of the Global Commons*.

[258] In a landmark judgment on 13 December 1996, the Indian Supreme Court declared the public trust doctrine "the law of the land"; *M. C. Mehta v. Kamal Nath and others*, (1997) 1 Supreme Court Cases 388, reprinted in UNEP, *Compendium of Judicial Decisions in Matters Related to Environment: National Decisions*, vol. I, p. 259. See Razzaque, "Application of public trust doctrine in Indian environmental cases".

[259] Redgwell, "Intra- and inter-generational equity", p. 198.

[260] Para. (3) of the commentary on draft guideline 6, *Yearbook … 2016*, volume II (Part Two), p. 177.

F. Procedural problems: extra-jurisdictional application[261]

89. The most intriguing problem in the interrelationship between the law relating to the atmosphere and human rights law is the disconnect in their application. While the law on the atmosphere is to be applied not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction (art. 2 of the International Covenant on Civil and Political Rights; art.1 of the European Convention on Human Rights; and art.1 of the American Convention on Human Rights).[262] Since most jurisprudence and decisions examined above concerned intra-boundary air pollution cases in which applicants lodged their complaints against their own States, there was no problem of recognizing the States' positive obligations to deal with atmospheric pollution and atmospheric degradation in the context of the relevant human rights treaties. However, where an environmentally harmful activity in one State infringes a right of persons in another State, the case becomes a matter of extra-jurisdictional application, and thus a situation that human rights treaties cannot normally cope with. In other words, human rights treaties cannot be applied extra-jurisdictionally to the State of origin of the alleged environmental harm. This is the most fundamental difficulty in dealing with environmental problems via human rights treaties.

90. How would it be possible to overcome this difficulty? One way may be to resort to the object and purpose of human rights treaties. It should be noted that the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* pronounced: "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions".[263] If the fundamental object and purpose of human rights treaties is to protect human rights on the basis of the principle of non-discrimination, it is unreasonable to conclude that international human rights law has no application to transboundary atmospheric pollution or global degradation and that the law can extend protection only to the victims of intra-boundary pollution. The non-discrimination principle requires the responsible State to treat such pollution or degradation no differently from domestic pollution.[264] In the same vein, another possible way to address the challenge would be to resort to the test of "necessary and foreseeable consequence". The Human Rights Committee considered the jurisdictional scope of application of respective human rights instruments in cases concerning extradition by one State to another jurisdiction where a fugitive faced the death penalty (*Joseph Kindler v. Canada* case). The Human Rights Committee stated, however, that: "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".[265] This could be conceived of as a form of non-discrimination in human rights law. The same principle has been confirmed by the European Court of Human Rights in an effort to overcome the difficulty of the extra-jurisdictional application of human rights treaties.[266]

91. Another avenue to overcome the jurisdictional difficulty of human rights treaties may be to recognize that those substantive human rights norms relevant to the protection of the atmosphere, such as the rights to life and to property, are now crystallized as customary international law. Since customary international law can be applied without jurisdictional limitation, the relevant human rights norms can be equally applied to any State, including the author and victim States. Indeed, many human rights norms are today recognized as established or emergent rules of customary international law.[267] If the relevant human rights norms are recognized as such, they will be considered as overlapping with environmental norms, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5) and equitable and reasonable utilization (draft guideline 6), among others, which would enable interpretation and application of both norms in a harmonious manner.

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[261] The term "extra-jurisdictional" application of a treaty is employed here in order to differentiate it from "extra-territorial" application of a domestic law.

[262] Boyle, "Human rights and the environment", pp. 633–641.

[263] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[264] Boyle, "Human rights and the environment", pp. 639–640.

[265] *Kindler v. Canada*, Communication No. 470/1991, Views adopted on 30 July 1993, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII, sect. U, para. 6.2. The author was a fugitive who was convicted of murder and kidnapping and sentenced to the death penalty in the United States in 1983. He escaped to Canada in 1984. Canada arrested and detained him in 1985 and extradited him to the United States, by which he alleged a violation by Canada of certain rights guaranteed under the Covenant. Canada contented that the author could not be considered a victim within the jurisdiction of Canada, since he had already been extradited to the United States, falling therefore outside the former's jurisdiction. The tests of "necessary and foreseeable" or "real risk" or "reasonably anticipate" have been employed in turns by the Human Rights Committee when extra-jurisdictionally applying the Covenant facing extradition: *Kindler v. Canada*, *ibid*., paras. 6.2 and 13.2; *Chitat Ng v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993, *ibid., Forty-ninth Session, Supplement No. 40* (A/49/40), annex IX, sect. CC, para. 7; *Cox v. Canada*, Communication No. 539/1993, Views adopted on 31 October 1994, *ibid., Fiftieth Session, Supplement No. 40* (A/50/40), annex X, sect. M, para. 16.1; *A. R. J. v. Australia*, Communication No. 692/1996, Views adopted on 28 July 1997, *ibid., Fifty-second Session, Supplement No. 40* (A/52/40), annex VI, sect. T, para. 4.1; *Judge v. Canada*, Communication No. 829/1998, Views adopted on 5 August 2003, *ibid., Fifty-eighth Session, Supplement No. 40* (A/58/40), annex VI, sect. G, para. 10.4; *Esposito v. Spain*, Communication No. 1359/2005, Decision adopted on 20 March 2007, *ibid., Sixty-second Session, Supplement No. 40* (A/62/40), annex VIII, sect. P, para. 7.5; *Munaf v. Romania*, Communication No. 1539/2006, Views adopted on 30 July 2009, *ibid., Sixty-fourth Session, Supplement No. 40* (A/64/40), annex VII, sect. LL, para. 4.14.

[266] The test of "real risk" is used by the European Court of Human Rights in its extra-jurisdictional application of the Convention facing extradition. See *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161, para. 4; *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V, para. 68; *Saadi v. Italy* [GC], No. 37201/06, ECHR 2008.

[267] Simma and Alston, "Sources of human rights law"; Dimitrijevic, "Customary law as an instrument for the protection of human rights"; Simma, "Human rights in the International Court of Justice"; Thirlway, "International law and practice".

92. Based on the foregoing considerations, draft guideline 12 is proposed as follows:

Draft guideline 12. Interrelationship of law on the protection of the atmosphere with human rights law

"1. States should make best efforts to develop, interpret and apply international human rights norms in a mutually supportive manner with rules of international law relating to the protection of the atmosphere, with a view to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation."

"2. States should make best efforts to comply with international human rights norms in developing, interpreting and applying the rules and recommendations relevant to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, particularly with regard to the human rights of vulnerable groups of people, including indigenous people, people of the least developed developing countries, and women, children and the elderly as well as persons with disabilities."

"3. States should consider, in developing and interpreting and applying the relevant rules of international law, the impact of sea-level rise on small island and low-lying States, particularly in matters relating to human rights and migration."

"4. States should also take into account the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere."

Chapter V

Conclusion

93. The present report has attempted to demonstrate that the law relating to the protection of the atmosphere exists and functions in the interrelationship with other relevant fields of international law, most notably, international trade and investment law, the law of the sea and human rights law. These are the fields that have intrinsic links with the law on the atmosphere and, as such, it is clear that they need to be treated in an integrated manner within the scope of the present topic.

94. The next report, in 2018, will deal with: (*a*) implementation (on the level of domestic law); (*b*) compliance (on the level of international law); and (*c*) specific features of dispute settlement relating to the law on the protection of the atmosphere, which will hopefully conclude the first reading of the topic.

CRIMES AGAINST HUMANITY

[Agenda item 6]

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Third report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur*

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CONTENTS

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Introduction

A. Work to date on this topic

1. At its sixty-sixth session in 2014, the International Law Commission decided to include the topic "Crimes against humanity" in its current programme of work and appointed a Special Rapporteur.[1] At its sixty-seventh session in 2015, the Commission held a general debate concerning the Special Rapporteur's first report and provisionally adopted four draft articles and commentaries thereto.[2]

2. At its sixty-eighth session in 2016, the Commission held a general debate on the Special Rapporteur's second report and provisionally adopted six additional draft articles and commentaries thereto.[3]

B. Debate in 2016 in the Sixth Committee

3. During the debate in the Sixth Committee in 2016, 39 States (including one on behalf of the Nordic States) commented on the topic of "Crimes against humanity",[4] with views that generally favoured the Commission's work to date, stressing the overall importance of the topic[5] and welcoming the draft articles adopted during the sixty-eighth session.[6] Numerous States again expressed appreciation of the steps taken to ensure that the Commission's work does not conflict with existing instruments, in particular the 1998 Rome Statute of the International Criminal Court.[7] Along these lines, several States expressed support for the Commission's use in certain instances of language similar to that of the Rome Statute of the International Criminal Court,[8] such as in draft article 5, paragraphs 2 and 3.

4. Several States welcomed the inclusion of an obligation to adopt national laws on crimes against humanity,[9] noting the importance of the harmonization of national laws[10] so as to allow for robust inter-State cooperation.[11] States also expressed their support for the approach taken by the Commission on command responsibility,[12] the inapplicability of a superior orders defence[13] and the inapplicability of statutes of limitations.[14] At the same time, some States felt that draft article 7 on the obligation to investigate was unclear[15] and that additional analysis might be given to the concept of "universal jurisdiction"[16] and liability for legal persons.[17] Additionally, some States pressed for the consideration of additional issues, such as extradition,[18] mutual legal assistance,[19] reparations for victims[20] and amnesty,[21] while other States expressed a view that certain issues should not be included, such as civil jurisdiction[22] or monitoring mechanisms.[23]

5. Several States indicated that they support the possibility of the present draft articles becoming a new convention,[24] though one State proposed that the project focus on creating guidelines instead of a binding instrument.[25] One State also expressed concern that the current topic risked duplicating efforts being undertaken in existing regimes.[26] Some States noted the existence of a separate initiative by several States to develop a convention focused on mutual legal assistance and extradition for

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[1] See *Yearbook … 2014*, vol. II (Part Two), para. 266.

[2] See *Yearbook … 2015*, vol. II (Part Two), paras. 110–114.

[3] See *Yearbook … 2016*, vol. II (Part Two), paragraphs 79–83.

[4] Presentations to the Sixth Committee on this topic were made by: Argentina (A/C.6/71/SR.29, para. 85), Australia (A/C.6/71/SR.25, paras. 89–91), Austria (*ibid.*, paras. 81–83), Belarus (A/C.6/71/SR.23, para. 6), Brazil (A/C.6/71/SR.26, para. 89), Chile (A/C.6/71/SR.25, paras. 98–100), China (A/C.6/71/SR.24, paras. 87–88), Croatia (A/C.6/71/SR.25, paras. 47–49), Cuba (A/C.6/71/SR.24, para. 65), Czech Republic (*ibid.*, para. 69), Egypt (A/C.6/71/SR.23, para. 42), El Salvador (A/C.6/71/SR.25, paras. 50–55), France (A/C.6/71/SR.20, paras. 74–75), Germany (A/C.6/71/SR.26, paras. 34–36), Greece (A/C.6/71/SR.25, paras. 26–32), Hungary (A/C.6/71/SR.24, paras. 78–82), Iceland (on behalf of the Nordic countries) (*ibid.*, paras. 58–61), India (A/C.6/71/SR.27, para. 40), Indonesia (*ibid.*, para. 35), Ireland (*ibid.*, paras. 13–16), Israel (A/C.6/71/SR.25, paras. 42–44), Japan (A/C.6/71/SR.27, para. 30), Malaysia (A/C.6/71/SR.26, paras. 64–66), Mexico (*ibid.*, paras. 14–19), the Netherlands (*ibid.*, paras. 37–41), Peru (A/C.6/71/SR.30, para. 5), Poland (A/C.6/71/SR.26, paras. 53–54), Portugal (A/C.6/71/SR.25, paras. 92–93), Romania (*ibid.*, paras. 74–76), the Russian Federation (*ibid.*, paras. 65–66), Singapore (statement made to the Sixth Committee on 28 October 2016), Slovakia (A/C.6/71/SR.26, paras. 139–142), Slovenia (*ibid.*, paras. 105–108), Spain (*ibid.*, paras. 2–8), Switzerland (A/C.6/71/SR.24, paras. 66–67), the Sudan (A/C.6/71/SR.25, paras. 69–71), the United Kingdom of Great Britain and Northern Ireland (A/C.6/71/SR.24, para. 73), the United States of America (A/C.6/71/SR.26, para. 124) and Viet Nam (*ibid.*, paras. 97–99).

[5] See, for example, Croatia, A/C.6/71/SR.25, para. 47; and El Salvador, *ibid.*, para. 50.

[6] See, for example, Czech Republic, A/C.6/71/SR.24, para. 69; and Slovakia, A/C.6/71/SR.26, para. 141.

[7] See, for example, Argentina, A/C.6/71/SR.29, para. 85; Australia, A/C.6/71/SR.25, para. 90; Germany, A/C.6/71/SR.26, para. 35; Iceland, on behalf of the Nordic countries, A/C.6/71/SR.24, para. 58; Mexico, A/C.6/71/SR.26, para. 14; Peru, A/C.6/71/SR.30, para. 5; Portugal, A/C.6/71/SR.25, para. 92; Switzerland, A/C.6/71/SR.24, para. 67; and the United Kingdom, *ibid.*, para. 73.

[8] See, for example, Argentina, A/C.6/71/SR.29, para. 85; Ireland, A/C.6/71/SR.27, para. 14; Romania, A/C.6/71/SR.25, para. 74; and Slovenia, A/C.6/71/SR.26, para. 106.

[9] See, for example, Australia, A/C.6/71/SR.25, para. 90; Brazil, A/C.6/71/SR.26, para. 89; Hungary, A/C.6/71/SR.24, para. 78; and Iceland, on behalf of the Nordic countries, *ibid.*, para. 58.

[10] See, for example, Brazil, A/C.6/71/SR.26, para. 89.

[11] See, for example, Australia, A/C.6/71/SR.25, para. 90; and Iceland, on behalf of the Nordic countries, A/C.6/71/SR.24 para. 58.

[12] See, for example, Chile, A/C.6/71/SR.25, para. 98; Croatia, *ibid.*, para. 48; and Switzerland, A/C.6/71/SR.24, para. 66.

[13] See, for example, Chile, A/C.6/71/SR.25, para. 98; and Switzerland, A/C.6/71/SR.24, para. 66.

[14] See, for example, Chile, A/C.6/71/SR.25, para. 99; Romania, *ibid.*, para. 74; and Spain, A/C.6/71/SR.26, para. 4.

[15] See, for example, Spain, A/C.6/71/SR.26, para. 7.

[16] See, for example, Hungary, A/C.6/71/SR.24, para. 82.

[17] See, for example, Czech Republic, A/C.6/71/SR.24, para. 69; Hungary, *ibid.*, para. 81; and Mexico, A/C.6/71/SR.26, para. 18.

[18] See, for example, Spain, A/C.6/71/SR.26, para. 3; and Switzerland, A/C.6/71/SR.24, para. 67.

[19] See, for example, Mexico, A/C.6/71/SR.26, para. 19; the Netherlands, *ibid.*, para. 40; and Portugal, A/C.6/71/SR.25, para. 93.

[20] See, for example, Poland, A/C.6/71/SR.26, para. 54.

[21] See, for example, Spain, *ibid.*, para. 3.

[22] See, for example, United Kingdom, A/C.6/71/SR.24, para. 73.

[23] See, for example, Israel, A/C.6/71/SR.25, para. 43; and Mexico, A/C.6/71/SR.26, para. 15.

[24] See, for example, Croatia, A/C.6/71/SR.25, para. 47; Egypt, A/C.6/71/SR.23, para. 42; Hungary, A/C.6/71/SR.24, para. 78; and Germany, A/C.6/71/SR.26, para. 34.

[25] See Malaysia, A/C.6/71/SR.26, para. 66.

[26] See India, A/C.6/71/SR.27, para. 40.

all serious international crimes, and encouraged the Commission to engage in a dialogue with those involved in this separate initiative.[27] One State urged the Commission to complete its work on this topic "as swiftly as possible".[28]

C. Purpose and structure of the present report

6. The purpose of the present report is to address a series of additional issues relating to this topic, to propose what might be an appropriate preamble in the event that the present draft articles are transformed into a convention, and to consider the possibility of final clauses to such a convention. The issues addressed herein are: the rights, obligations and procedures applicable to the extradition of an alleged offender; *non-refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to a crime against humanity; the rights, obligations and procedures applicable to mutual legal assistance; the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the present draft articles; reparation for victims; the relationship to competent international criminal courts; obligations upon federal States; monitoring mechanisms and dispute settlement; a draft preamble; and further issues for which proposals are not being advanced.

7. Chapter I of this report addresses rights, obligations and procedures applicable to the extradition of an alleged offender, based upon the different types of extradition provisions included in various treaties addressing crimes. Less detailed extradition provisions include a general obligation to consider the offences in the treaty to be extraditable offences in a State's existing extradition treaties and any future extradition treaty the State completes. More detailed extradition provisions, however, allow for the treaty itself to be used as a basis for extradition, and address a wide range of issues that can arise in the context of extradition, including: the inapplicability of the political offence exception; satisfaction of the requirements of national law in the extradition process; extradition of a State's own nationals; the prohibition on extradition when an individual will face persecution after extradition; and requirements of consultation and cooperation. Chapter I concludes by proposing a draft article addressing these points in the context of crimes against humanity.

8. Chapter II addresses the principle of *non-refoulement*. This principle, or the prohibition on returning an individual to a territory when there are substantial grounds for believing that he or she will be in danger of a specified harm, is found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. In such treaties, *non-refoulement* is triggered when there are substantial grounds for believing that the person will be in danger of persecution or other specified harm upon return, with the harm in question varying depending on the subject matter of the treaty. Though there are limited exceptions to the *non-refoulement* principle in conventions on refugees, including on grounds of national security, such exceptions are not included in more recent human rights treaties. Chapter II concludes by proposing a draft article providing for an obligation of *non-refoulement* in the context of crimes against humanity.

9. Chapter III addresses the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings, based upon the different types of mutual legal assistance provisions included in various treaties. Less detailed treaties include general obligations to afford the greatest possible measure of assistance. Treaties with more detailed provisions place some general obligations on all States parties, but also include "mini mutual legal assistance treaty" provisions. Such provisions essentially create a detailed, bilateral mutual legal assistance treaty relationship between States parties in circumstances where they do not otherwise have such a relationship (or when those States elect to use the mini mutual legal assistance treaty to facilitate cooperation). Mini mutual legal assistance treaty provisions address topics such as: transferring detained persons to another State to provide evidence; designating a central authority to handle mutual legal assistance requests; using videoconferencing for witnesses to provide testimony; and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III concludes by proposing a draft article on mutual legal assistance most suited to issues related to crimes against humanity.

10. Chapter IV addresses the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the present draft articles, as well as reparation for victims. Although prior treaties addressing crimes under national law often have not contained provisions concerning victims and witnesses, the most recent treaties do contain such provisions. Those treaties typically address the protection of victims and witnesses, as well as reparation for victims; they also sometimes address the participation of victims in legal proceedings undertaken against the alleged offender. Chapter IV concludes by proposing a draft article addressing these points.

11. Chapter V addresses the relationship of the present draft articles with the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court. As a general matter, the present draft articles have been drafted so as to avoid any such conflicts. Even so, to avoid any unanticipated conflict, there is value in a provision that makes clear that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevail over the rights and obligations of the State identified in the present draft articles. Chapter V concludes by proposing a draft article addressing this issue.

12. Chapter VI addresses obligations upon federal States. It reviews the practice by some States of making a unilateral declaration when signing or ratifying a treaty so as to exclude its application to part of their territories. In recent years, such declarations have been viewed with sufficient disfavour that some treaties have included articles precluding the ability of States to make such declarations. Chapter VI concludes by proposing a draft article addressing this issue.

[27] See, for example, Argentina, A/C.6/71/SR.29, para. 85; Chile, A/C.6/71/SR.25, para. 100; Ireland, A/C.6/71/SR.27, para. 16; and the Netherlands, A/C.6/71/SR.26, para. 41.

[28] See United Kingdom, A/C.6/71/SR.24, para. 73.

13. Chapter VII addresses monitoring mechanisms and dispute settlement. Various monitoring mechanisms already exist that are capable of scrutinizing situations of crimes against humanity, either as such or in the context of the types of violations (such as torture) that may occur when such crimes are committed. If States wish to establish a new monitoring mechanism, numerous treaties, especially human rights treaties, provide for a monitoring mechanism body. This body can take the form of a committee, commission, court or meeting of States parties. In addition to monitoring mechanisms, many treaties also have dispute settlement clauses. These clauses will typically obligate States parties to negotiate in the case of a dispute. Should negotiations not succeed, such clauses provide for further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII concludes by proposing a draft article addressing dispute settlement.

14. Chapter VIII addresses other issues that have arisen in the course of discussions within the Commission relating to this topic, specifically concealment of crimes against humanity, immunity and amnesty.

15. Chapter IX proposes a preamble which highlights several core elements that motivate and justify the present draft articles.

16. Chapter X addresses the issue of final clauses, in the event that the present draft articles are transformed into a convention. The Commission typically does not include final clauses as a part of its draft articles and consequently no proposal is made in that regard. Even so, this chapter discusses possible choices available to States with respect to a final clause on reservations.

17. Chapter XI addresses a future programme of work on this topic, proposing that a first reading be completed in 2017 and a second reading in 2019.

18. As a matter of convenience, annex I to this report contains the 10 draft articles provisionally adopted by the Commission to date. Annex II contains the seven draft articles and draft preamble proposed in this report.

Chapter I

Extradition

A. Extradition and crimes against humanity

19. In 1973, the General Assembly of the United Nations in its resolution 3074 (XXVIII) of 3 December 1973 highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment. In that regard, the General Assembly indicated that "States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them" (para. 4). Further, "[p]ersons against whom there is evidence that they have committed … crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that [connection], States shall co-operate on questions of extraditing such persons" (para. 5). Moreover, "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of … crimes against humanity" (para. 8). In 2001, the Sub-Commission on the Promotion and Protection of Human Rights reaffirmed the principles set forth in General Assembly resolution 3074[29] and urged "all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity".[30]

20. Draft article 6, paragraph 2, of the present draft articles provides that each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where an alleged offender is present in any territory under its jurisdiction, and the State does not extradite or surrender the person. When an alleged offender is present and has been taken into custody, the State is obligated under draft article 8, paragraph 3, to notify other States that have jurisdiction to prosecute the alleged offender, which may result in those States seeking the alleged offender's extradition. Further, draft article 9 obligates the State to submit the case to its competent authorities for the purpose of prosecution, unless the State extradites or surrenders the person to another State or competent international criminal tribunal.

21. Thus, when an alleged offender is in the jurisdiction of a State, there is a possibility of that offender being extradited to another State for the purpose of prosecution.[31] When this occurs, it is useful to have in place clearly stated rights, obligations and procedures with respect to the extradition process. At present, there is no global or regional convention devoted exclusively to extradition of alleged offenders for crimes against humanity. Rather, extradition of such offenders may occur pursuant to the rights, obligations and procedures set forth in multilateral[32] or bilateral extradition agreements[33]

[29] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, para. 3, contained in the Report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session, Geneva, 30 July–17 August 2001 (E/CN.4/2002/2-E/CN.4/Sub.2/2001/40). The Sub-Commission largely replicated in its resolution the General Assembly's principles, but with some modifications.

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

[31] This chapter does not address procedures for surrender to a competent international criminal tribunal, which would be regulated by the relevant instruments associated with that tribunal.

[32] See, for example, the 1957 European Convention on Extradition. See also Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, No. L 190, 18 July 2002, p. 1.

[33] See, generally, Bassiouni, *International Criminal Law, Multilateral and Bilateral Enforcement Mechanisms*; and Sadoff, *Bringing International Fugitives to Justice*.

addressing crimes more generally, where they exist between a requesting State and requested State, or pursuant to national laws or policies when those are regarded as sufficient by the requested State.

22. Multilateral or bilateral extradition agreements addressing crimes generally have not led to comprehensive global coverage. The 1990 Model Treaty on Extradition is one effort to help States in developing bilateral extradition agreements capable of addressing a wide range of crimes,[34] but any given State does not have such agreements in place with all other States. Rather, most States typically will have in place such an extradition agreement with only some other States, leaving no treaty-based extradition relationship with many other States. At the same time, many States will not extradite in the absence of an extradition agreement.

23. Consequently, the approach taken for many treaties that address a particular crime, such as torture, corruption or enforced disappearance, is to include within the treaty an article providing in some detail the rights, obligations and procedures that will govern extradition between States with respect to that particular crime, in the absence of any other applicable extradition treaty. A survey of treaties that address a particular crime suggests two broad models for provisions addressing extradition. The first and less detailed approach is reflected in article 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which contains just four paragraphs, and article 13 of the International Convention for the Protection of All Persons from Enforced Disappearance, which contains seven paragraphs.

24. The second and more detailed approach may be seen in article 16 of the United Nations Convention against Transnational Organized Crime and the substantially similar article 44 of the United Nations Convention against Corruption, which contain 17 and 18 paragraphs respectively. Article 44 of the United Nations Convention against Corruption, for example, reads as follows:

Article 44. Extradition

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(*a*) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(*b*) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

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.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall

[34] General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997).

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.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

25. The core elements addressed in both the "less detailed" and "more detailed" approaches to extradition are analysed in the next section. Thereafter, this chapter concludes with a proposed draft article consisting of 13 paragraphs entitled "Extradition". The proposed draft article is largely modelled after article 44 of the United Nations Convention against Corruption. At present 181 States have adhered to the text of that Convention. It provides ample guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity, and its provisions are well understood by States, especially through detailed guides and other resources developed by the United Nations Office on Drugs and Crime (UNODC).[35] Further, the draft article proposed in this report on mutual legal assistance (see chapter III below) is based on the United Nations Convention against Corruption, and certain institutional structures called for in that regard—such as national contact points—could be harnessed for implementing extradition in the context of crimes against humanity. At the same time, some substantive and stylistic modifications to the text of article 44 are warranted in the context of the present draft articles.

26. It is noted that extradition treaties typically do not seek to regulate which requesting State (if any) should have priority in the event that there are multiple requests for extradition. For example, the Model Treaty on Extradition, in article 16, simply provides: "If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited."[36] Some instruments identify elements to be taken into account, but still leave the ultimate decision to the requested State.[37] A variety of factors in any given situation may suggest that one or the other requesting State is best situated to prosecute, and it is always the case that the State where the alleged offender is present may elect to submit the case to its own competent authorities for the purpose of prosecution instead of extraditing. The present report makes no proposal for inclusion of a provision addressing multiple requests for extradition.

B. Extradition provisions in treaties addressing specific crimes

27. As noted in the prior section, treaties that address a particular crime, such as torture, corruption or enforced disappearance, typically include provisions addressing the rights, obligations and procedures that will govern extradition between the States parties with respect to that particular crime. While there is some variety among these agreements, the more detailed articles tend to have particular elements in common, as discussed below.

1. Dual criminality

28. One element sometimes contained in such treaties is a "dual criminality" requirement, meaning that obligations with respect to extradition only arise in circumstances where, for a specific request, the conduct at issue is criminal in both the requesting State and the requested State.[38] Such a treaty provision is typically included in two situations.

29. First, a dual criminality requirement is usually included in general extradition treaties, which are potentially capable of covering a wide array of conduct. In such circumstances, a requested State may not wish to be subject to extradition obligations with respect to conduct that it does not regard as criminal. Consequently, the dual criminality requirement is included to ensure that obligations with respect to extradition only arise if both States have criminalized the conduct at issue.

30. Second, a dual criminality requirement is usually included where the treaty is focused on a particular type of crime, but has established a combination of mandatory and non-mandatory offences, with the result that the offences existing in any two States parties may differ. For

[35] See, for example, UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*; UNODC, *Technical Guide to the United Nations Convention against Corruption*; and UNODC, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption*. For additional resources, visit www.unodc.org/unodc/en/corruption/publications.html. UNODC has developed similar resources for the United Nations Convention against Transnational Organized Crime, which contains many of the same provisions as the United Nations Convention against Corruption in its article on extradition. See, for example, UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*; and the Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

[36] Model Treaty on Extradition (see footnote 34 above), art. 16.

[37] See, for example, Council Framework Decision of 13 June 2002 (footnote 32 above), p. 7, art. 16.

[38] See, for example, Bassiouni, *International Extradition: United States Law and Practice*, p. 500 ("Dual criminality (also referred to as double criminality and double incrimination) refers to the characterization of the relator's conduct as criminal under the laws of both the requesting and requested States. It is a reciprocal characterization of criminality that is considered a substantive requirement for granting extradition"); and UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part One: Revised Manual on the Model Treaty on Extradition, p. 10, para. 20 ("The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law").

example, the United Nations Convention against Corruption establishes both mandatory (arts. 15, 16, para. 1, and arts. 17, 23, and 25) and non-mandatory (art. 16, para. 2, and arts. 18–22 and 24) offences relating to corruption. The Convention's provisions on dual criminality, contained in the first three paragraphs of article 44,[39] essentially allow a State party that has not adopted a non-mandatory offence to decline an extradition request relating to such an offence.[40] At the same time, the dual criminality requirement should be fulfilled among States parties with respect to all mandatory offences established under the Convention.[41]

31. By contrast, treaties addressing a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement. Thus, treaties such as 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, which define specific offences and obligate States parties to take the necessary measures to ensure that they constitute offences under national criminal law, contain no dual criminality requirement in their respective extradition provisions. The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to satisfy a dual criminality requirement. A further rationale is that such treaties typically do not contain an absolute obligation to extradite; rather, they contain an *aut dedere aut judicare* obligation, whereby the requested State may always choose not to extradite, so long as it submits the case to its competent authorities for the purpose of prosecution.

32. The present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 5, paragraphs 1 to 3, that the "offences" of "crimes against humanity" exist under national criminal laws of each State.[42] As such, when an extradition request from one State is sent to another State for an offence referred to in draft article 5, the offence is criminal in both States; dual criminality is automatically satisfied.

33. Draft article 3, paragraph 4, does acknowledge that the definition of the offence "is without prejudice to any broader definition provided for in any international instrument or national law" but, for purposes of the present draft articles, the "offence" of "crimes against humanity" is as defined in draft article 5, paragraphs 1 to 3. Any broader definition of "crimes against humanity" provided for in any international instrument or national law is not an "offence" referred to in draft article 5.

34. Draft article 5, paragraph 7, addresses the liability of legal persons for the "offences" referred to in draft article 5 (hence referring to paragraphs 1–3), and indicates that such liability "may be criminal, civil or administrative". Thus, there may be divergences among the national laws of States when addressing the liability of legal persons. Yet such divergences are not with respect to the "offences" of "crimes against humanity" but, rather, with respect to the liability of legal persons for such offences. In any event, extradition procedures concern the transfer of natural persons.

35. Draft article 6, paragraph 1, allows for some differential treatment as among States in the establishment of jurisdiction over offenders. At the same time, in the context of an extradition request, the requested State is the State in which the alleged offender is present, which falls within the scope of draft article 6, paragraph 2, for which there is no differential treatment. Even if the requesting State seeks to exercise a type of national jurisdiction that has not been established by the requested State (for example, jurisdiction based on the nationality of the victim), the salient point is that the *offence* at issue is criminal in both the requesting and requested States. The requested State can chose not to extradite if it does not approve of the type of national jurisdiction that the requesting State seeks to exercise, but the requested State must then submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 9.

36. In light of the above, there appears to be no need to include in a draft article on extradition a dual criminality requirement such as appears in the first three paragraphs of article 44 of the United Nations Convention against Corruption.

2. Inclusion as an extraditable offence in existing and future treaties

37. A second element typically contained in such treaties is an obligation on States parties to regard the offence identified in the treaty as an extraditable offence both in existing treaties that address extradition generally and in any future such treaties concluded between State parties.[43]

[39] See also United Nations Convention against Transnational Organized Crime, art. 16, paras. 1–2 ("1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (*a*) or (*b*), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party. 2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences").

[40] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 152, para. 556 ("With respect to those offences whose establishment is optional and that some parties may have established while others have not, the dual criminality requirement may constitute an obstacle to extradition. In this context, article 44, paragraph 2, can be considered as an encouragement for parties to extradite in the absence of dual criminality, if their domestic law allows it").

[41] *Ibid.*

[42] Draft article 3, paragraph 4, provides that the draft article is without prejudice to any broader definition of crimes against humanity provided for in any national law. An extradition request based on an alleged offence arising outside the scope of draft article 3, paragraphs 1–3, however, is not based on an offence arising under draft article 5.

[43] See draft art. 7 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/8719/Rev.1, chap. III, sect. B, at pp. 319–320; and art. 10 of the draft code of crimes against the peace and security of mankind, *Yearbook…1996*, vol. II (Part Two), para. 50, at p. 32. See also Lambert, *Terrorism and Hostages in International Law: Commentary on the Hostages Convention 1979*, p. 229; and Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, pp. 138–139 and 238.

38. For example, article 8, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[t]he offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them".

39. Likewise, article 13, paragraphs 2 and 3, of the International Convention for the Protection of All Persons from Enforced Disappearance provides:

> 2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.
>
> 3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.[44]

40. Similar provisions appear in: the Convention for the Suppression of Unlawful Seizure of Aircraft;[45] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[46] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[47] the International Convention against the Taking of Hostages;[48] the Convention on the Safety of United Nations and Associated Personnel;[49] the International Convention for the Suppression of Terrorist Bombings;[50] the United Nations Convention against Transnational Organized Crime;[51] and regional treaties.[52] It is also noted that the Commission's 1996 draft code of crimes against the peace and security of mankind provides in article 10, paragraph 1, that, "[t]o the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them".[53]

41. Article 44, paragraph 4, of the United Nations Convention against Corruption contains such language, and provides a suitable basis for a paragraph within a draft article on extradition (see draft article 11, paragraph 1, below). At the same time, paragraph 4 adds a further element barring use of the "political offence" exception, which is addressed in the next section.

3. Exclusion of the "political offence" exception to extradition

42. A third element typically contained in such treaties excludes the "political offence" exception from being applied to certain crimes, meaning that it requires that the extradition proceed even if the offence for which extradition is requested might be regarded by the requested State as an offence of a political nature.

43. Under some extradition treaties addressing crimes, the requested State may decline to extradite if it regards the offence for which extradition is requested as political in nature, such as criminalizing as "treason" conduct that is in the nature of activism seeking political change.[54] Yet "the rise of terrorism and other forms of international and

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[44] There was some concern during drafting that, as then written, it might not be "possible to require States parties to include enforced disappearance among the extraditable offences in every extradition treaty they concluded (art. 13, para. 3), since a contracting party or contracting parties that did not accede to the instrument might not agree" (Commission on Human Rights, Report of the inter-sessional 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. 110). Various wording changes were suggested, along with using the language in article 8, paragraphs 1 and 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid*., paras. 110–114). The final text of article 13, paragraph 3, reflects the language used in article 8, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("State Parties undertake to include").

[45] Art. 8, para. 1 ("The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them").

[46] Art. 8, para. 1 ("The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them").

[47] Art. 8, para. 1 ("To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them"). For the Commission's analysis of this provision, see *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap.III, sect. B, at p. 319, paras. (1)–(3) of the commentary to draft art. 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.

[48] Art. 10, para. 1 ("The offences set forth in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them").

[49] Art. 15, para. 1 ("To the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them").

[50] Art. 9, para. 1 ("The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them").

[51] Art. 16, para. 3 ("Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them").

[52] See article 13 of the Inter-American Convention to Prevent and Punish Torture, which reads, in relevant part: "The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them"; article V of the Inter-American Convention on Forced Disappearance of Persons, which reads, in relevant part: "The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties"; and article XIII, paragraph 2, of the 2007 ASEAN [Association of Southeast Asian Nations] Convention on Counter Terrorism, which reads, in relevant part: "The offences covered in Article II of this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Convention."

[53] *Yearbook …1996*, vol. II (Part Two), para. 50, at p. 32.

[54] For a general discussion of political offences and the political offence exception, see Gilbert, *Aspects of Extradition Law*, pp. 113 *et seq.*

transnational criminality is causing some governments to make an about-face and to seek to exclude the exception for international crimes and for serious crimes of violence".[55]

44. In particular, there is support for the proposition that crimes such as genocide, crimes against humanity and war crimes should not be regarded as "political offences". For example, article VII of the Convention on the Prevention and Punishment of the Crime of Genocide states that its enumerated offences are not subject to any exception founded on political offence grounds: "Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition".[56] Commentators have noted that, given that the aim of the Convention was "to prevent impunity in the case of genocide", article VII "was not a controversial issue in the drafting history"[57] and was "accepted, without much controversy, by a majority of countries as a central provision in the Genocide Convention".[58]

45. There are similar reasons not to regard alleged crimes against humanity as a "political offence" so as to preclude extradition.[59] Indeed, the Revised Manual on the Model Treaty on Extradition states that "certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition".[60] The Sub-Commission on the Promotion and Protection of Human Rights has also declared that persons "charged with war crimes and crimes against humanity shall not be allowed to claim that the actions fall within the 'political offence' exception to extradition".[61]

46. Several other multilateral treaties addressing specific crimes contain provisions barring the "political offence" exception, including: the International Convention for the Suppression of Terrorist Bombings;[62] the International Convention for the Suppression of the Financing of Terrorism;[63] and the International Convention for the Protection of All Persons from Enforced Disappearance.[64] Contemporary bilateral extradition treaties also often specify particular offences that should not be regarded as a "political offence" so as to preclude extradition.[65] Neither the International Convention against the Taking of Hostages[66] nor the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[67] however, contain a provision barring the political offence exception to extradition.

47. Article 44, paragraph 4, of the United Nations Convention against Corruption contains a final sentence that

[55] Bassiouni, *International Extradition*, pp. 669–739, at p. 671. There has also been movement towards not including the political offence exception in its entirety. See Council Framework Decision of 13 June 2002 (footnote 32 above); and the United Kingdom, Extradition Act, 2003 c. 41, available from www.legislation.gov.uk/ukpga/2003/41/contents.

[56] See, generally, Roth, "The extradition of *génocidaires*", p. 283.

[57] *Ibid*., p. 279. See also Schiffbauer, "Article VII", pp. 262–263. For the negotiating history of the Convention, see Abtahi and Webb, *The Genocide Convention: the Travaux Préparatoires*.

[58] Roth, "The extradition of *génocidaires*", pp. 289 and 284. See also Economic and Social Council, Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee (E/794), p. 37; and A/C.6/31/SR.55, pp. 8–9, especially para. 30 (statement of Australia referencing war crimes, genocide and violations of human rights as crimes for which "any such political character should not prevent extradition").

[59] See, for example, United States, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook*, United States District Court, S. D. New York, 924 F. Supp. 565 (1996), p. 577 ("if the act complained of is of such heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception"); United States, *Ordinola v. Hackman*, United States Court of Appeals, Fourth Circuit, 478 F.3d 588 (2007) (providing an overview of the political offence doctrine in U.S. law); and United States, *Nezirovic v. Holt*, United States Court of Appeals, Fourth Circuit, 779 F.3d 233 (2015) (holding that the political offence exception is not applicable to acts of torture committed during the conflict in Bosnia).

[60] UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part One: Revised Manual on the Model Treaty on Extradition, p. 17, para. 45.

[61] Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22 (see footnote 29 above), para. 3.

[62] Art. 11 ("None of the offences set forth in article 2 shall be regarded, for purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives").

[63] Art. 14 ("None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives").

[64] Art. 13, para. 1 ("For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone").

[65] See, for example, Extradition Treaty Between the United States of America and South Africa (Washington, D.C., 16 September 1999, available from www.state.gov/wp-content/uploads/2019/02/13060-South-Africa-Extradition-September-16-1999.pdf), art. 4, para. 2 ("For the purposes of this Treaty, the following offences shall not be considered political offences: … (*b*) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; (*c*) murder; (*d*) an offence involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage"); Treaty on Extradition Between the Republic of Korea and Australia (Seoul, 5 September 1990, available from www.austlii.edu.au/au/other/dfat/treaties/ATS/1991/3.html), art. 4, para. 1 (*a*) ("Reference to a political offence shall not include … (ii) an offence in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties; and (iii) an offence against the law relating to genocide"); and Treaty of Extradition Between the Government of Canada and the Government of the United Mexican States (Mexico City, 16 March 1990, available from https://web.oas.org/mla/en/Treaties_B/can_ext_bil_mex_en.pdf), art. IV, subpara. *a*) ("For the purpose of this paragraph, political offence shall not include an offence for which each Party has the obligation, pursuant to a multilateral international agreement, to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution"). See also Bassiouni, *International Extradition*, p. 670.

[66] See also Saul, "International Convention against the Taking of Hostages".

[67] See also Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, p. 373 (noting that "Switzerland feared that the motives for acts of torture might be such as to permit torturers to invoke the political nature of their actions as an argument against their extradition" and suggesting that a statement be added that the acts defined in the Convention "shall not be deemed to be offences of a political nature").

reads: "A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence." This language limits the exclusion of the political offence exception only to extraditions occurring under the Convention itself. A broader exclusion of the political offence exception to all extraditions occurring between two States parties is found in article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, which reads: "For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone."

48. Broader language of this kind would be preferable for a draft article on extradition (see draft article 11, paragraph 2, below).

49. It is noted that the key aspect of such language is to clarify that the *conduct* of committing a crime against humanity can never be regarded as a "political offence" (in other words, that such conduct itself cannot be regarded as some form of political activism). This issue differs, however, from whether a requesting State is *pursuing the extradition* on account of the individual's political opinions; in other words, it differs from whether the State is alleging a crime against humanity and making its request for extradition as a means of persecuting an individual for his or her political views. The latter issue of persecution is addressed separately below.

4. States requiring a treaty to extradite can use the present draft articles

50. A fourth element establishes the treaty itself as a possible legal basis for extradition, for the benefit of States that condition extradition upon the existence of a treaty.[68] Article 44, paragraph 5, of the United Nations Convention against Corruption contains an example of such a provision. It reads: "If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies."

51. The same or a similar provision may be found in the Convention for the Suppression of Unlawful Seizure of Aircraft;[69] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[70] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[71] the International Convention against the Taking of Hostages;[72] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[73] the International Convention for the Suppression of Terrorist Bombings;[74] the International Convention for the Suppression of the Financing of Terrorism;[75] the United Nations Convention against Transnational Organized Crime;[76] and the International Convention for the Protection of All Persons from Enforced Disappearance.[77] The Commission's 1996 draft code of crimes against the peace and security of mankind also contained such a provision.[78]

52. In addition to this provision, and unlike other treaties, both the United Nations Convention against Transnational Organized Crime,[79] in its article 16, paragraph 5, and the

[68] See Lambert, *Terrorism and Hostages in International Law*, pp. 238–239; and Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity: inter-State cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation", p. 330.

[69] Art. 8, para. 2 ("If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence").

[70] Art. 8, para. 2 (same language as the Convention for the Suppression of Unlawful Seizure of Aircraft).

[71] Art. 8, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State"). For the Commission's analysis, see *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap. III, sect. B, at pp. 319–320, commentary to draft article 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.

[72] Art. 10, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in article 1. Extradition shall be subject to the other conditions provided by the law of the requested State").

[73] Art. 8, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State").

[74] Art. 9, para. 2 ("When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State").

[75] Art. 11, para. 2 (same text as the International Convention for the Suppression of Terrorist Bombings).

[76] Art. 16, para. 4 ("If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies").

[77] Art. 13, para. 4 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance").

[78] *Yearbook … 1996*, vol. II (Part Two), para. 50, at p. 32, art. 10, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State").

[79] Art. 16, para. 5 (*a*) ("States Parties that make extradition conditional on the existence of a treaty shall … [a]t the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention").

United Nations Convention against Corruption,[80] in its article 44, paragraph 6, include a requirement in their subparagraph (*a*) that any State party that makes extradition conditional on the existence of a treaty notify the depositary whether it intends to treat the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty. Further, in subparagraph (*b*), these Conventions both provide that if the State party does not regard the Convention as the legal basis for extradition, it shall "seek, where appropriate, to conclude treaties on extradition with other States Parties".

53. One commentator asserts that subparagraph (*a*) "seeks to make transparent the process envisaged in [using the Convention as a legal basis for extradition] by requiring States Parties to make it clear whether they are exercising the optional power to take the Convention as the legal basis for cooperation".[81] Yet whether the provision has been effective in providing for transparency is unclear. For example, as of 2016 only about 50 out of 181 States parties to the United Nations Convention against Corruption had provided notification to the Secretary-General as to whether they intended to treat the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty.[82] Thus, for more than two thirds of the States parties, it is not clear whether they regard the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty.

54. Subparagraph (*b*) obliges a State party that does not use the Convention as the legal basis for extradition to conclude extradition treaties, "as appropriate", with other States parties. Despite the "as appropriate" clause, a report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime asserts that "those States which require a treaty basis and do not take the Convention as the legal basis for extradition have an obligation under paragraph 5 to seek to conclude with other parties treaties on extradition in order to strengthen international cooperation in criminal matters as a stated purpose of the Convention".[83]

55. In light of the above, article 44, paragraph 6, of the United Nations Convention against Corruption provides a suitable basis for a paragraph within a draft article on extradition. Yet the text of subparagraph (*a*) could be altered to establish a default in favour of using the draft articles as a basis for extradition, unless the State notifies the depositary otherwise (see draft article 11, paragraph 4, below). Doing so would provide a strong incentive for States to be transparent as to whether they intend to treat the draft articles as a legal basis for extradition.

[80] Art. 44, para. 6 (substantively the same text as the United Nations Convention against Transnational Organized Crime).

[81] McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, p. 180.

[82] A list of notifications made under article 6 (3), 44 (6) (*a*) and 46 (13) and (14) of the 2003 United Nations Convention against Corruption may be found in the United Nations Treaty Collection database, at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_en#top.

[83] Conference of the Parties to the 2000 United Nations Convention against Transnational Organized Crime, Analytical report of the Secretariat on the Implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle (CTOC/COP/2005/2/Rev.1), para. 69.

5. States not requiring a treaty to extradite shall use the present draft articles

56. A fifth element provides that a State party that does *not* make extradition conditional on the existence of a treaty shall recognize the offences identified in the treaty as extraditable offences between itself and other States parties. Such a provision appears at article 44, paragraph 7, of the United Nations Convention against Corruption. It reads: "States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves."

57. Similar provisions may be found in many other treaties addressing crimes, including the Convention for the Suppression of Unlawful Seizure of Aircraft;[84] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[85] the International Convention against the Taking of Hostages;[86] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[87] and the International Convention for the Protection of All Persons from Enforced Disappearance.[88] The Commission's 1996 draft code of crimes against the peace and security of mankind also contains such a provision.[89]

58. In light of the above, article 44, paragraph 7, of the United Nations Convention against Corruption provides a suitable basis for a paragraph within a draft article on extradition (see draft article 11, paragraph 5, below).

6. Satisfying other requirements of the requested State's national law

59. A sixth element provides that the extradition is otherwise subject to the conditions or requirements set forth in the law of the requested State. Such a provision appears at article 44, paragraph 8, of the United Nations Convention against Corruption. It reads: "Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition."

[84] Art. 8, para. 3 ("Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State").

[85] Art. 8, para. 3 (same text as the Convention for the Suppression of Unlawful Seizure of Aircraft).

[86] Art. 10, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State").

[87] Art. 8, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State").

[88] Art. 13, para. 5 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves").

[89] *Yearbook … 1996*, vol. II (Part Two), para. 50, p. 32, art. 10, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State").

60. Similar provisions may be found in the Convention for the Suppression of Unlawful Seizure of Aircraft;[90] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[91] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[92] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[93] the Convention on the Safety of United Nations and Associated Personnel;[94] the International Convention for the Suppression of Terrorist Bombings;[95] the International Convention for the Suppression of the Financing of Terrorism;[96] the United Nations Convention against Transnational Organized Crime;[97] and the International Convention for the Protection of All Persons from Enforced Disappearance.[98] Regional conventions also contain similar language.[99]

61. Such provisions have not been controversial. For example, the negotiating history of the United Nations Convention against Corruption reveals that article 44, paragraph 8, was maintained in identical form throughout the negotiations and that there were no notable objections to the text or suggestions for change.[100]

62. The wording of the provision allows the rules on extradition commonly included in a requested State's national laws to continue to operate. Such laws might: include a requirement that an extradition only proceed if the offence at issue is punishable by a certain minimum penalty, such as imprisonment of one year;[101] prohibit the extradition of the requested State's nationals; prohibit extradition if the request is related to a trial that was conducted *in absentia*; or require that an extradited person only can be extradited to face the charge for which extradition was requested (the principle of specialty or speciality).[102] Whatever the reason, in the context of the present draft articles, it should be kept in mind that the requested State in which the offender is present is obligated to submit the matter to prosecution under draft article 9 unless it extradites or surrenders the alleged offender. Thus, while the requested State's national law may preclude extradition to a requesting State in certain circumstances, the requested State remains obliged to submit the matter to its prosecuting authorities.[103]

63. The United Nations Convention against Transnational Organized Crime[104] and the United Nations Convention against Corruption contain an additional provision relating to the national law of the requested State, which essentially encourages the requested State to streamline its extradition procedures to the extent permissible under national law. Thus, article 44, paragraph 9, of the United Nations Convention against Corruption reads: "States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies."

64. In light of the above, article 44, paragraphs 8 and 9, of the United Nations Convention against Corruption provides a suitable basis for paragraphs within a draft article on extradition (see draft article 11, paragraphs 6 and 7, below).

7. Deeming the offence to have occurred in the requesting State

65. A seventh element allows for the situation in which the offence has not occurred in the requesting State. Some treaties and national laws provide that the requested State is only required to grant a request for extradition if it was made by the State in which the crime occurred.[105] To counter such a rule, many treaties have included a provision stating that the offence at issue should be deemed to have occurred not only in the State where it physically

[90] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[91] Article 8, paragraph 2, reads in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[92] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State."

[93] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[94] Article 15, paragraph 2, reads, in relevant part: "Extradition shall be subject to the conditions provided in the law of the requested State."

[95] Article 9, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[96] Article 11, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[97] Article 16, paragraph 7, reads: "Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition."

[98] Art. 13, para. 6 ("Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions").

[99] See, for example, article 13 of the Inter-American Convention to Prevent and Punish Torture, which reads, in relevant part: "Extradition shall be subject to the other conditions that may be required by the law of the requested State"; article V of the Inter-American Convention on Forced Disappearance of Persons, which reads, in relevant part: "Extradition shall be subject to the provisions set forth in the constitution and other laws of the request[ed] State"; and the 1999 Council of Europe Criminal Law Convention on Corruption, article 27, paragraph 4 ("Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition").

[100] See UNODC, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption*, pp. 345–361.

[101] See, for example, Bassiouni, *International Extradition*, p. 511.

[102] See, for example, the United Kingdom Extradition Act (footnote 55 above), section 17.

[103] See Saul, "International Convention against the Taking of Hostages", p. 6 ("National law continues to govern the preconditions of extradition to the extent not modified by the Convention. Thus, for instance, States which refuse to extradite their nationals may continue not to do so; or States could still insist on satisfaction of the 'specialty' rule (namely, that an extradited person can only be extradited to face the charge for which extradition was requested). The State must then submit the case for prosecution").

[104] Art. 16, para. 8 ("States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies").

[105] *Yearbook … 1996*, vol. II (Part Two), para. 50, at p. 33, para. (3) of the commentary to draft art. 10 of draft code of crimes against the peace and security of mankind ("Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred").

occurred, but also in any State that is required to establish jurisdiction over the offence under the treaty, if such an approach is necessary for the extradition to proceed. Thus, article 8, paragraph 4, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, provides that "[e]ach of the crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 3".

66. Notably, the above provision was not included in the Commission's draft articles that served as the basis of the Convention,[106] but was inserted by the Sixth Committee in the final text.[107] Provisions with substantially similar language may be found in the Convention for the Suppression of Unlawful Seizure of Aircraft;[108] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[109] the International Convention against the Taking of Hostages;[110] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[111] the Convention on the Safety of United Nations and Associated Personnel;[112] and the International Convention for the Suppression of Terrorist Bombings.[113] A recent formulation may be found in article 11, paragraph 4, the International Convention for the Suppression of the Financing of Terrorism: "If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2."

67. Provisions of this kind refer to States that have established jurisdiction on the basis of a territorial, nationality or passive personality connection (art. 7, paras. 1 and 2, of the International Convention for the Suppression of the Financing of Terrorism); they do not refer to a State that has established jurisdiction on the basis of the presence of the offender (art. 7, para. 4, of the Convention). The reason for not referring to the latter State is that the State requesting extradition is never the State in which the alleged offender is present, and therefore there is no need for the requested State to deem that the offence at issue has occurred in a State that has established jurisdiction on the basis of the presence of the offender.

68. In its commentary to the 1996 draft code of crimes against the peace and security of mankind, which contains a similar provision in article 10, paragraph 4,[114] the Commission stated that "[p]aragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party … with respect to the crimes" established in the draft code, and that "[t]his broader approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes".[115] Such an approach also "finds further justification in the fact that the Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests".[116]

69. Such a provision, however, has not been included in some recent conventions, notably the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the International Convention for the Protection of All Persons from Enforced Disappearance. Even so, it appears that the provision may still have value in situations where extradition is problematic for a requested State because the crime against humanity did not physically occur in the requesting State, but where the requesting State has established jurisdiction in accordance with draft article 6, paragraph 1 or 2.[117] As such, inclusion of such a provision in the draft article on extradition, based on the International Convention for the Suppression of the Financing of Terrorism and with a cross reference to draft article 6 of the present draft articles, appears warranted (see draft article 11, paragraph 8, below).

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[106] See *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap. III, sect. B, at pp. 319–320, draft art. 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons and commentary thereto; A/C.6/SR.1437, paras. 27–28 (considering that the Commission's proposed article 7, paragraph 4, dealing with conflicting extradition requests "established too rigid a system of priorities", and noting that it had been replaced by text suggested by Japan in document A/C.6/L.934). See also A/C.6/SR.1419, paras. 15–16 (Japan introduced its amendment to bring article 7, paragraph 4 "into line with the corresponding provision of the Conventions of The Hague and Montreal" because the "delegation felt that the text of the Conventions of The Hague and Montreal in that particular paragraph was essential to enable certain States to put their extradition mechanism in motion when they received requests for extradition from States other than the State where offences were committed").

[107] See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 4.

[108] Art. 8, para. 4 ("The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occur[r]ed but also in the territories of the States required to establish their jurisdiction in accordance with article 4, paragraph 1").

[109] Art. 8 para. 4 (similar language as the Convention for the Suppression of Unlawful Seizure of Aircraft).

[110] Art. 10, para. 4 ("The offences set forth in article 1 shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 5").

[111] Art. 8, para. 4 ("Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1").

[112] Art. 15, para. 4 ("Each of those crimes shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of article 10").

[113] Art. 9, para. 4 ("If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2").

[114] *Yearbook … 1996*, vol. II (Part Two), para. 50, at p. 32 ("Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party").

[115] *Ibid.*, p. 33, para. (3) of the commentary to art. 10.

[116] *Ibid.*

[117] Thus, this provision would apply to circumstances where the requesting State has established national jurisdiction under draft article 6 other than on the basis that the crime against humanity occurred in its territory.

8. Extradition of a requested State's own nationals

70. An eighth element, found in article 16, paragraphs 10 to 12, of the United Nations Convention against Transnational Organized Crime and in article 44, paragraphs 11 to 13, of the United Nations Convention against Corruption, concerns situations where a requested State is limited in its ability to extradite its own nationals.

71. These paragraphs address three issues. First, if a State cannot extradite one of its nationals under its national law, it is obligated to submit the case without undue delay to its own authorities for the purpose of prosecution. Such a provision appears in article 44, paragraph 11, of the United Nations Convention against Corruption. Given draft article 9 of the present draft articles, a paragraph of this kind in a draft article on extradition appears unnecessary.

72. Second, these paragraphs deal with the situation where the requested State can extradite one of its nationals, but only if the alleged offender will be returned to the requested State for the purpose of serving out any sentence imposed by the requesting State. In such a situation, the provision makes clear that an extradition subject to such a condition is a permissible way of satisfying the requested State's *aut dedere aut judicare* obligation. Such a provision appears in article 44, paragraph 12, of the United Nations Convention against Corruption, and would appear appropriate for a draft article on extradition (see draft article 11, paragraph 9, below).

73. Third, these paragraphs address the situation where extradition of the requested State's national is being sought for the purpose of enforcing a sentence, such as in a situation where the offender was tried but has not yet served or fully served his or her sentence, and is found in his or her State of nationality. The two above-mentioned Conventions provide that the requested State shall, if its national law so permits, consider itself enforcing the sentence or the remainder thereof. Such a provision appears in article 44, paragraph 13, of the United Nations Convention against Corruption, and would appear appropriate for a draft article on extradition (see draft article 11, paragraph 10, below).

9. Refusal to extradite due to possible persecution

74. A ninth element, found in many conventions, is based on the principle "that an individual should not be extradited to a State in which he [or she] might be persecuted or prejudiced for reasons extraneous to his [or her] guilt of the charged offence".[118] Such a provision appears in article 16, paragraph 14, of the United Nations Convention against Transnational Organized Crime,[119] and in article 44, paragraph 15, of the United Nations Convention against Corruption, which reads as follows:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.[120]

75. Strictly speaking, this provision does not appear necessary in a treaty containing provisions obligating a State to establish jurisdiction when an alleged offender is present and to submit the matter to prosecution, unless the individual is extradited. Such a treaty does not create any obligation to extradite, let alone an obligation where the individual might be at risk of harm. Rather, the State can refuse to extradite for whatever reasons it choses, so long as it submits the matter to its own competent authorities for the purpose of prosecution.

76. Nevertheless, various multilateral instruments similar in nature to the present draft articles contain such a provision, such as: the International Convention against the Taking of Hostages;[121] the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;[122] the International Convention for the Suppression of Terrorist Bombings;[123] the International Convention for the Suppression of the Financing of Terrorism;[124] and the International Convention for the Protection of All Persons from Enforced Disappearance.[125] The provision also commonly appears in bilateral extradition agreements[126]

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[118] Lambert, *Terrorism and Hostages in International Law*, p. 211.

[119] Article 16, paragraph 14, reads: "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons."

[120] For a discussion of what is meant by "substantial grounds" in *non-refoulement* provisions, which cover more than just extradition, see chapter II above.

[121] Article 9 reads, in relevant part: "A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (*a*) That the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion."

[122] Art. 6, para. 6 ("In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request").

[123] Art. 12 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite … if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 … has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion").

[124] Art. 15 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite … if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 … has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons").

[125] Art. 13, para. 7 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons").

[126] See, for example, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic (Paris, 24 January 2003), available from www.mea.gov.in/Images/CPV/leta/France.pdf, art. 3, para. 3 ("Extradition shall also not be granted if the Requested State has substantial grounds for believing that a request for extradition has been made for the purpose of

and in national laws[127] and is included in the Model Treaty on Extradition.[128]

77. The inclusion of such a provision highlights, in particular, the ability of States to refuse extradition in cases where there are substantial grounds for believing that the individual sought is being or will be persecuted for the reasons outlined. In doing so, the provision appears to serve three purposes. First and foremost, it helps ensure that individuals will not be extradited when there is a danger that their rights will be violated. Second, States which already insert a similar provision into their extradition treaties or national laws are assured that substantial grounds for believing that a person will be subjected to persecution will remain a basis of refusal for extradition. Third, States which do not have such a provision explicitly in their bilateral arrangements will have a textual basis for refusal if such a case arises.

78. As such, the inclusion of such a provision in a draft article on extradition appears warranted (see draft article 11, paragraph 11, below). Consideration might be given to adding the "or membership of a particular social group" at the end of the list of factors, as is done in the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 7). In any event, it is stressed that, in the context of the present draft articles, draft article 9 still requires the requested State, if it does not extradite, to submit the matter to its own prosecutorial authorities.

10. Consultation and cooperation

79. A tenth element seeks to promote consultation between States when a request for extradition is made and encourage general cooperation among States to carry out or enhance the effectiveness of extradition.

80. With respect to consultation, article 44, paragraph 17, of the United Nations Convention against Corruption provides that, "[b]efore refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation". An identical provision is found in the United Nations Convention against Transnational Organized Crime.[129]

81. With respect to cooperation, article 44, paragraph 18, of the United Nations Convention against Corruption, provides that "States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition". Similar provisions are included in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[130] and the United Nations Convention against Transnational Organized Crime.[131]

82. The inclusion of provisions based on article 44, paragraphs 17 and 18, of the United Nations Convention against Corruption in a draft article on extradition appears warranted (see draft article 11, paragraphs 12 and 13, below).

C. Draft article 11. Extradition

83. In light of the sources indicated above, the Special Rapporteur is of the view that a draft article on extradition for crimes against humanity should be largely modelled on the text used in article 44 of the United Nations Convention against Corruption. At present, 181 States have adhered to the text of that Convention. Its provisions would provide useful guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity and are well understood by

prosecuting or punishing a person on account of his or her race, religion, nationality or political opinion, or that the position of that person sought may be prejudiced for any of these reasons"); Extradition Treaty Between the United States of America and South Africa (footnote 65 above), art. 4, para. 3 ("extradition shall not be granted if the executive authority of the Requested State determines that there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, or political opinion"); Treaty on Extradition Between the Republic of Korea and Australia (footnote 65 above), art. 4, para. 1 (*b*) ("Extradition shall not be granted under this Treaty … if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person for any reason which would be grounds for refusing extradition under the law of the Requested Party [or] that that person's position may be prejudiced for any of those reasons"); and Treaty of Extradition Between the Government of Canada and the Government of the United Mexican States (footnote 65 above), art. IV, subpara. (*b*) ("Extradition shall not be granted … if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality or political beliefs or, that in the circumstances of the case, extradition would be inconsistent with the principles of fundamental justice").

[127] See, for example, the China, Extradition Law of the People's Republic of China: Order of the President of the People's Republic of China, No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000, available from www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf, art. 8, para. 4 ("The request for extradition made by a foreign State to the People's Republic of China shall be rejected if … the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings"); and the United Kingdom Extradition Act (footnote 55 above), section 13 ("A person's extradition … is barred by reason of extraneous considerations if (and only if) it appears that (*a*) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (*b*) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions").

[128] Model Treaty on Extradition (see footnote 34 above), art. 3, para. (*b*) ("If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons"). See also UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part One: Revised Manual on the Model Treaty on Extradition, p. 17, para. 47 ("Subparagraph (*b*) … is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world").

[129] Art. 16, para. 16 ("Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation").

[130] Art. 6, para. 11 ("The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition").

[131] Art. 16, para. 17 ("States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition").

States, including through the legislative guides and other resources developed by UNODC.[132] Further, although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the crime. Finally, the provision proposed in this report on mutual legal assistance (see chapter III below) is based on the United Nations Convention against Corruption, and certain institutional structures called for in that regard—such as national contact points—could be harnessed for implementing extradition in the context of crimes against humanity.

84. At the same time, some modifications to the text of article 44 of the United Nations Convention against Corruption are warranted in the context of crimes against humanity. Certain stylistic changes are necessary for consistency with the draft articles already provisionally adopted, such as changing: "article" to "draft article"; "this Convention" to "the present draft articles"; "domestic law" to "national law"; and "State Party" to "State". Likewise, in various places, additional changes are appropriate so as to clarify that the offences in question are those referred to in draft article 5.

85. A few substantive changes are also necessary. First, as explained above, the first three paragraphs of article 44 of the United Nations Convention against Corruption on dual criminality are unnecessary and therefore need not be included in the proposed draft article 11.

86. Second, the political offence exception contained in article 44, paragraph 4, of the Convention should be broadened along the lines of article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, and should be placed in its own subparagraph in draft article 11 (see proposed draft article 11, paragraph 2, below).

87. Third, article 44, paragraph 6 (*a*), of the United Nations Convention against Corruption should be reformulated so that the default rule, if a State does not act, is that the State shall use the present draft articles as the legal basis for cooperation on extradition with other States. The State may avoid such an outcome if it so informs the Secretary-General of the United Nations at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles (see proposed draft article 11, paragraph 4 (*a*), below).

88. Fourth, article 44 of the Convention does not contain a paragraph providing that, if necessary, the offences shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred, but also in the territory of the States that have established jurisdiction under proposed draft article 6. For reasons previously explained, such a paragraph should be added to draft article 11 (see proposed draft article 11, paragraph 8, below).

89. Fifth, article 44, paragraph 10, of the United Nations Convention against Corruption overlaps with current draft article 8, paragraph 1, and therefore should not be included in draft article 11.

90. Sixth, article 44, paragraph 11, of the Convention is subsumed within current draft article 9, and therefore should not be included in draft article 11.

91. Seventh, article 44, paragraph 14, of the Convention overlaps with current draft article 10, and therefore should not be included in draft article 11.

92. Finally, article 44, paragraph 16, of the United Nations Convention against Corruption contains a provision that precludes a State party from refusing to extradite on the sole ground that the offence is also considered to involve fiscal matters, which is appropriate in the context of corruption (as well as transnational organized crime), where the offence may include issues such as evasion of taxes, customs or duties. However, such matters are not part of the offence of crimes against humanity, and therefore inclusion of such a provision does not appear warranted for a draft article on extradition.

93. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 11. Extradition*

"1. Each of the offences referred to in draft article 5 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

"2. For the purposes of extradition between States, an offence referred to in draft article 5 shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

"3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence referred to in draft article 5.

"4. A State that makes extradition conditional on the existence of a treaty shall:

(*a*) use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles; and

(*b*) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States to the present draft articles in order to implement this draft article.

[132] See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*.

"5. States that do not make extradition conditional on the existence of a treaty shall recognize offences to which this draft article applies as extraditable offences between themselves.

"6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition.

"7. States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article 5.

"8. If necessary, the offences set forth in draft article 5 shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 6, paragraph 1.

"9. Whenever a State is permitted under its national law to extradite or otherwise surrender one of its nationals only upon condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State and the State seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in draft article 9.

"10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

"11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

"12. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

"13. States shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition."

Chapter II

Non-refoulement

A. Principle of *non-refoulement*

94. The principle of *non-refoulement* obligates a State not to return an individual to another State when there are substantial grounds for believing that he or she will be in danger of persecution or other specified harm, such as torture or other cruel, inhuman or degrading treatment.[133] The principle was incorporated into treaties in the twentieth century, including the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV),[134] but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees, which reads:

Article 33. Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[135]

95. Other conventions addressing refugees have incorporated the principle in similar terms to the Convention

[133] See, generally, de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture*.

[134] Article 45 reads, in relevant part: "In no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear prosecution for his or her political opinions or religious beliefs." Recent International Committee of the Red Cross (ICRC) commentary on article 3 common to the four Geneva Conventions for the protection of war victims maintains that "[c]ommon Article 3 does not contain an explicit prohibition of *refoulement*. However, in the ICRC's view, the categorical prohibitions in common Article 3 would also prohibit a transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of ill-treatment" (ICRC, Commentary of 2016, Article 3: Conflicts not of an international character, available from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC, § 710).

[135] The same obligation applies under the Protocol relating to the Status of Refugees by virtue of article I, paragraph 1, of that Protocol. Unlike various other provisions in the Convention relating to the Status of Refugees, application of article 33 is not dependent on the lawful residence of a refugee in the territory of a contracting State. On whether article 33 governs a State Party's conduct even outside its territory, see Office of the United Nations High Commissioner for Refugees, *Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Advisory opinion of 26 January 2007, available from www.refworld.org/pdfid/45f17a1a4.pdf.

relating to the Status of Refugees, including the OAU [Organization of African Union] Convention governing the Specific Aspects of Refugee Problems in Africa,[136] as have some non-binding instruments.[137] The principle, as elucidated in the Convention relating to the Status of Refugees, has also been applied more broadly with respect to aliens (whether or not they are refugees),[138] such as in the American Convention on Human Rights: "Pact of San José, Costa Rica"[139] and the African Charter on Human and People's Rights,[140] and was addressed in the Commission's 2014 draft articles on the expulsion of aliens.[141]

96. The principle of *non-refoulement* is often reflected in general extradition treaties, by stating that nothing in the convention shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing that the request has been made for the purpose of persecuting the alleged offender on specified grounds. The proposed draft article 11, paragraph 11, discussed in the preceding chapter is a provision of this type.

97. The principle of *non-refoulement* is also incorporated in treaties addressing particular crimes, such as torture or enforced disappearance, which may be seen as an aspect of prevention of the crime. When this occurs, such treaties prohibit the return of *any* person—whether the person is an alleged offender or not, and whether or not the return is in the context of extradition—to another State when there are substantial grounds for believing that he or she will be in danger of being subjected to the crime that is the subject matter of the treaty. For example, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

98. Paragraph 1 captures the principle of *non-refoulement* in the context of the subject of the Convention (torture). This Convention modelled its language on the Convention relating to the Status of Refugees, but added the additional element of extradition so as to "cover all possible measures by which a person is physically transferred to another State".[142] A similar article is included in the Charter of Fundamental Rights of the European Union.[143]

99. The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in the 1966 International Covenant on Civil and Political Rights[144] and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), respectively,[145] as implicitly imposing an obligation of *non-refoulement* even though these conventions contain no such express obligation.

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[136] Art. II, para. 3 ("No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2").

[137] See, for example, the 1984 Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984, available from www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf, conclusion 5 ("To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees …").

[138] See, for example, General Assembly resolution 2312 (XXII) of 14 December 1967; art. III, para. 1, of the Final Text of the 1966 Bangkok Principles on Status and Treatment of Refugees, adopted at the Asian–African Legal Consultative Organization's 40th session held in New Delhi on 24 June 2001, available from www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf ("No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion"); and Council of Europe, Committee of Ministers, Recommendation No. R(84)1 on the Protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees, adopted on 25 January 1984 ("the principle of *non-refoulement* has been recognised as a general principle applicable to all persons").

[139] Art. 22, para. 8 ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions").

[140] Art. 12, para. 3 ("Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions").

[141] *Yearbook … 2014*, vol. II (Part Two), art. 23, para. 1 ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law").

[142] Weissbrodt and Hörtreiter, "The principle of *non-refoulement*: article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in comparison with the *non-refoulement* provisions of other international human rights treaties", pp. 7–8.

[143] Art. 19, para. 2 ("No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"). See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *Official Journal of the European Union*, No. L 337, 20 December 2011, p. 9, article 2, para. (*f*), and article 15 (indicating that a person is entitled to protection from return when "substantial grounds have been shown for believing that the person concerned … would face a real risk of suffering serious harm", and "[s]erious harm consists of: (*a*) the death penalty or execution; or (*b*) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (*c*) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict").

[144] See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement").

[145] *Chahal v. the United Kingdom*, 15 November 1996, ECHR 1996-V, para. 80 ("whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 [the prohibition against torture and inhuman or degrading treatment] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion").

100. The standard to be applied when implementing such an obligation has been addressed by relevant committees and courts. The Committee Against Torture, in considering communications alleging that a State violated article 3, has stated that in determining whether there are "substantial grounds" for believing that a person would be in danger of being subjected to torture, it has to determine whether the return "would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured".[146] The Human Rights Committee similarly concluded that States must refrain from exposing individuals to a "real risk" of violations of their rights under the Covenant.[147] More recently, the Human Rights Committee has held that a State has an obligation "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant".[148] The European Court of Human Rights has also found that a State's responsibility exists where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to article 3.[149]

101. There is no precise definition of what constitutes a "real risk". The Committee Against Torture has stated that the risk must be assessed on grounds that "go beyond mere theory or suspicion", though "the risk does not have to meet the test of being highly probable".[150] The European Court of Human Rights has also confirmed that a real risk is something more than a mere possibility but something less than more likely than not.[151]

102. The European Court of Human Rights has stressed that the examination of evidence of a real risk must be "rigorous".[152] In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to article 3 exists, the evidence of the risk "must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion",[153] though regard can be had to information that comes to light subsequently.[154] Adopting the same approach, the Human Rights Committee has further affirmed that there does not need to be "proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk".[155] In determining the risk of such treatment, all relevant factors should be considered and "[t]he existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed".[156] The Committee against Torture has a non-exhaustive list of seven elements to be considered by a State when determining if return is permissible.[157]

103. Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance uses virtually the same language as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but replaces "torture" with "enforced disappearance", adds the terms "or she" and "surrender", and adds at the end "or of serious violations of international humanitarian law". It reads:

> 1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.[158]

104. During the drafting of the International Convention for the Protection of All Persons from Enforced Disappearance, some delegations considered that paragraph 1 could be written more broadly to address return when there was a danger of any serious human rights violation. Yet most "delegations considered that the obligation not to return a person … should apply only in cases where a risk of enforced disappearance existed rather than a risk

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[146] *Aemei v. Switzerland*, Communication No. 34/1995, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44* (A/52/44), annex V, sect. B, 2, para. 9.5. See also *A. R. J. v. Australia*, Communication No. 692/1996, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), annex VI.T, para. 6.14 (finding that the risk of torture must be "the necessary and foreseeable consequence of deportation").

[147] *Chitat Ng v. Canada*, Communication No. 469/1991, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), annex IX, sect. CC, para. 14.1.

[148] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, Report of the Human Rights Committee, vol. I, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), annex III, para. 12.

[149] See *Soering v. the United Kingdom*, 7 July 1989, European Court of Human Rights, *Series A*, No. 161, para. 88; and *Chahal v. the United Kingdom* (footnote 145 above), para. 74.

[150] General comment No. 1 (1997) on the implementation of article 3, Report of the Committee Against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex IX, para. 6.

[151] *Saadi v. Italy [GC]*, No. 37201/06, ECHR 2008, paras. 131 and 140.

[152] *Ibid.*, para. 128.

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

[154] *El-Masri v. the former Yugoslav Republic of Macedonia [GC]*, No. 39630/09, ECHR 2012, para. 214.

[155] *Maksudov and others v. Kyrgyzstan*, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), annex V, sect. W, para. 12.4.

[156] *Ibid.*

[157] General comment No. 1 (see footnote 150 above), para. 8. The list contains the following elements: (*a*) where the State concerned is one for which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights; (*b*) whether the individual has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past; (*c*) whether there is medical or other independent evidence to support a claim that the individual has been tortured or maltreated in the past; (*d*) whether the internal situation with respect to human rights in the State concerned has changed; (*e*) whether the individual has engaged in political or other activity within or outside the State concerned which would make him particularly vulnerable to the risk of being placed in danger of torture; (*f*) whether there is any evidence as to the credibility of the individual; and (*g*) whether there are any factual inconsistencies in the individual's claim.

[158] For an analysis, see McCrory, "The International Convention for the Protection of All Persons from Enforced Disappearance", pp. 554–555.

of serious human rights violations, which was too broad a formula".[159] Consequently, the Convention only seeks to address *non-refoulement* of persons when they face the risk of enforced disappearance; the risk that they will face other human rights violations is left to be regulated by other treaties and customary international law.

105. The Convention relating to the Status of Refugees contains exceptions to the *non-refoulement* obligation so as to allow return where the person had committed a crime or presented a serious security risk. Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.[160] Indeed, the *non-refoulement* obligation is viewed as non-derogable.[161]

[159] Commission on Human Rights, Report of the inter-sessional 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. 49.

[160] See, for example, *Maksudov and others v. Kyrgyzstan* (footnote 155 above), para. 12.4 (finding that the prohibition on return in the International Covenant on Civil and Political Rights "should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of"). See also *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012, para. 185; and *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996, Report of the Committee Against Torture, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44* (A/52/44), Annex V, sect. B.4, para. 14.5.

[161] Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-seventh session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 12 A* (A/51/12/Add.1 and Corr.1), para. 21 (i) ("recalls that the principle of *non-refoulement* is not subject to derogation"); and General Assembly resolution 51/75 of 12 December 1996, para. 3 ("calls upon all States … to respect scrupulously the fundamental principle of *non-refoulement*, which is not subject to derogation").

B. Draft article 12. *Non-refoulement*

106. In light of the above, a draft article on *non-refoulement* appears warranted for the present draft articles, which could be based on the text contained in the International Convention for the Protection of All Persons from Enforced Disappearance quoted in paragraph 103 above. Paragraph 1 would focus on stating the principle of *non-refoulement* in the context of a danger of being subjected to a crime against humanity. Notably, use of the phrase "to another State" would not limit the provision to situations where an official of a foreign Government may commit the crime against humanity; rather, the danger may alternatively exist with respect to non-State actors in the other State. Paragraph 2 would instruct States parties to look at all relevant considerations, while indicating, on a non-exclusive basis, particular considerations of relevance.

107. The following draft article is proposed:

"Draft article 12. Non-refoulement

"1. No State shall expel, return (refouler), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

"2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law."

Chapter III

Mutual legal assistance

108. Following the occurrence of a crime against humanity, a State conducting an investigation or prosecution in relation to the offences referred to in draft article 5 may wish to seek assistance from another State in gathering information and evidence, including through documents, sworn declarations and oral testimony by victims or witnesses. Cooperation on such matters, which is typically undertaken on a basis of reciprocity, is referred to as "mutual legal assistance".[162]

109. At present, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of this kind occurs with respect to crimes against humanity, it takes place through voluntary cooperation by States as a matter of comity or, if they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties). Having a legal obligation to provide such assistance is considered preferable, as it provides a more predictable framework for cooperation and a structure for clarifying the mode of cooperation.[163]

110. While there are examples of multilateral mutual legal assistance treaties at the regional level,[164] there is no global mutual legal assistance treaty, and most cooperation takes place pursuant to agreements concluded by States on a bilateral basis.[165] It is common for multilateral

[162] See generally Bassiouni, *Introduction to International Criminal Law*, pp. 504–506; Salomon, "Mutual legal assistance in criminal matters"; and van der Sanden and van der Wolf, *Mutual Legal Assistance in International Criminal Matters*.

[163] Bassiouni, *Introduction to International Criminal Law*, pp. 504–506.

[164] See, for example, the 1959 European Convention on Mutual Assistance in Criminal Matters; the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters; the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (supplement to the 1959 European Convention on Mutual Assistance in Criminal Matters and the 1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters); and the [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters.

[165] For a map displaying existing bilateral mutual legal assistance treaties between States, see Access Now, "Mutual legal assistance treaties", available from https://mlat.info.

mutual legal assistance treaties to give deference to any existing bilateral agreement between the two States concerned, because such an agreement is likely to be more detailed and calibrated to take account of any peculiarities of the States' national legal systems.[166]

111. Provisions contained in bilateral mutual legal assistance treaties tend to be similar, in part due to the approach by States of using the formula contained in previously concluded bilateral agreements and in part due to the influence of "model" treaties or national laws.[167] Notably, in 1990, the General Assembly adopted a Model Treaty on Mutual Assistance in Criminal Matters and Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime,[168] characterizing it "as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice".[169] In 2007, the UNODC also established a Model Law on Mutual Assistance in Criminal Matters, which could be adopted by States at the national level.[170]

112. While mutual legal assistance relating to crimes against humanity can occur through existing multilateral and bilateral mutual legal assistance treaties, in many instances there is no such treaty between the requesting and requested States.[171] As is the case for extradition (discussed above in chapter I), a State often has no treaty relationship with a large number of other States on mutual legal assistance, so that when cooperation is needed with respect to a crime against humanity there is no international legal instrument in place to address the matter.

113. The absence of multilateral legal obligations for mutual legal assistance with respect to crimes against humanity has resulted in calls for a provision on mutual legal assistance to be added to a new global convention on crimes against humanity.[172] During the Sixth Committee debates in 2015 and 2016, States expressed the view that provisions on mutual legal assistance for crimes against humanity at the international level were lacking and should be included in the present topic.[173]

114. In developing such a draft article, guidance may be found in existing treaties that address a specific type of crime, such as torture or corruption. Generally speaking, such treaties either contain a less detailed "short-form" article or a more detailed "long-form" article on mutual legal assistance. Both forms establish the core obligation to cooperate, but the latter provides much greater detail as to how such cooperation is to operate. Indeed, the long-form article contains what might be referred to as a "mini mutual legal assistance treaty", setting forth the key provisions for mutual legal assistance which are to be used if the two States concerned have no other multilateral or bilateral mutual legal assistance treaty in force between them.

A. Short-form mutual legal assistance article

115. The short-form mutual legal assistance article contained in some treaties addressing crimes at the national level is brief. Such an article focuses on requiring the greatest measure of cooperation between States, while not providing any details as to how such cooperation should operate, and calls for the application of any existing mutual legal assistance treaties between the States concerned. For example, article 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
>
> 2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

116. Similarly, article 10 of the International Convention for the Suppression of Terrorist Bombings provides:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.
>
> 2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

117. The most recent example of this type of provision is found in article 14 of the International Convention for the Protection of All Persons from Enforced Disappearance, which states:

> 1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.
>
> 2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular,

[166] See Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity", p. 338.

[167] Bassiouni, *Introduction to International Criminal Law*, p. 506.

[168] Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex.

[169] *Ibid.*, para. 1. See also UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part Two: Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters, p. 65.

[170] See UNODC, Model Law on Mutual Assistance in Criminal Matters, available from www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

[171] See Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, done at Vienna on 20 December 1988 (E/CN.7/590), pp. 184–185, para. 7.22 (finding that "[t]here are still … many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter"). See also Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity", p. 336.

[172] Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity", p. 336.

[173] See, for example, Switzerland, A/C.6/70/SR.22, para. 20 ("Key elements that future draft articles should address included provisions on mutual legal assistance requiring States to cooperate while respecting existing constraints in national systems"); and the Netherlands, A/C.6/71/SR.26, para. 40 ("Another matter of concern to her delegation was that a convention on the prohibition of crimes against humanity should include provisions on mutual legal cooperation and assistance between States").

the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.[174]

118. Treaties with similar short-form articles include: the Convention for the Suppression of Unlawful Seizure of Aircraft (art. 10); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 10);[175] the 1996 Inter-American Convention against Corruption (art. XIV); the 2002 Inter-American Convention against Terrorism (art. 9); and the 2003 African Union Convention on Preventing and Combating Corruption (art. 18).

B. Long-form mutual legal assistance article

119. While a short-form article for mutual legal assistance appears in several conventions, States have also been attracted to a long-form article for mutual legal assistance, which contains much more detail as to how such assistance should operate.

120. Several global treaties contain such a long-form article, including: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 7); the International Convention for the Suppression of the Financing of Terrorism;[176] the United Nations Convention against Transnational Organized Crime (art. 18); and the United Nations Convention against Corruption (art. 46).

121. The move towards use of the long-form article is apparent from the drafting history of the United Nations Convention against Transnational Organized Crime. Initially, the article on mutual legal assistance was a two-paragraph provision similar to a short-form article.[177] States decided early on, however, that this short-form article should be replaced with a much more detailed article based on article 7 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[178] The drafters of the United Nations Convention against Corruption similarly opted to use a detailed provision and reproduced, nearly in its entirety, article 18 of the United Nations Convention against Transnational Organized Crime. Article 46 of the United Nations Convention against Corruption, on mutual legal assistance, consists of 30 paragraphs and reads as follows:

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(*a*) Taking evidence or statements from persons;

(*b*) Effecting service of judicial documents;

(*c*) Executing searches and seizures, and freezing;

(*d*) Examining objects and sites;

(*e*) Providing information, evidentiary items and expert evaluations;

(*f*) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(*g*) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(*h*) Facilitating the voluntary appearance of persons in the requesting State Party;

(*i*) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(*j*) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

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[174] The first version of this article appeared in the 1998 draft article 8, and read as follows: "1. States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including the supply of all the evidence at their disposal that is necessary for the proceedings. 2. States Parties shall cooperate with each other, and shall afford one another the greatest measure of legal assistance in the search for, location, release and rescue of disappeared persons or, in the event of death, in the return of their remains. 3. States Parties shall carry out their obligations under paragraphs 1 and 2 of this article, without prejudice to the obligations arising from any treaties on mutual legal assistance that may exist between them" (Commission on Human Rights, Report of the sessional working group on the administration of justice, (E/CN.4/Sub.2/1998/19, annex), p. 25). A number of delegations supported the deletion of paragraph 3 of draft article 8, which was considered vague and duplicative of language in paragraph 2 (see Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (footnote 44 above), p. 19 (paragraph 3 dealt with "refusal to provide legal assistance on grounds related to sovereignty, security, public order or other essential interests of the requested State")). The phrase "judicial assistance" was replaced with "legal assistance" to accord with evolving usage (Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66), para. 69; see also UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part Two: Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters, p. 67, paras. 6–7 (discussing the use of "mutual assistance" instead of "judicial assistance" to avoid problems resulting from differences in legal systems)).

[175] Article 10 of this convention was substantially based, with some modification, on article 10 of the Convention for the Suppression of Unlawful Seizure of Aircraft. See *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap. III, sect. B, at p. 321, para. (2) of the commentary to draft article 10 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons ("Article 10 substantially reproduces the provisions of article 10 of The Hague Convention … the phrase 'including the supply of all evidence at their disposal necessary for the proceedings' has been added in order to ensure that the article is not given a limited construction on the basis of the narrow technical meaning sometimes attributed to the expression 'mutual judicial assistance'").

[176] Art. 7, para. 5, and arts. 12–16. The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered among several articles and mutual legal assistance is addressed in several provisions which concern both mutual assistance and extradition. The trend in more recent conventions, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, is to consolidate mutual legal assistance provisions into a single article (see articles 18 and 46, respectively).

[177] See Commission on Crime Prevention and Criminal Justice, Question of the elaboration of an international convention against transnational organized crime (E/CN.15/1997/7/Add.1), p. 15; and McClean, *Transnational Organized Crime*, p. 201.

[178] See Question of the elaboration of an international convention against transnational organized crime (previous footnote), p. 15 (suggestions of Australia and Austria).

(*k*) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (*a*) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(*b*) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(*c*) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(*a*) The person freely gives his or her informed consent;

(*b*) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(*a*) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(*b*) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(*c*) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(*d*) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(*a*) The identity of the authority making the request;

(*b*) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(*c*) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(*d*) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(*e*) Where possible, the identity, location and nationality of any person concerned; and

(*f*) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(*a*) If the request is not made in conformity with the provisions of this article;

(*b*) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(*c*) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(*d*) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(*a*) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(*b*) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

122. Such a long-form article would appear best suited for draft articles on crimes against humanity, for several reasons. First, it provides much more guidance to States with respect to mutual legal assistance and allows them to rely upon the provisions of the article in the absence of any mutual legal assistance treaty between the States concerned. Second, long-form articles have been viewed by States as necessary in the context of crime prevention and punishment in important areas of transnational criminal law.[179] Third, long-form articles have been accepted in practice by States. For example, the United Nations Convention against Transnational Organized Crime has 187 States parties and the United Nations Convention against Corruption has 181 States parties. No State party has filed a reservation objecting to the language or content of the mutual legal assistance article in either convention.[180] Additionally, the provisions of long-form mutual legal assistance treaty articles are well understood by States with the aid of numerous guides and other resources, such as those by UNODC, that have been

[179] The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was negotiated within the Commission on Narcotic Drugs at the request of the General Assembly and the Economic and Social Council. The International Convention for the Suppression of the Financing of Terrorism was developed by an *ad hoc* committee established by the General Assembly pursuant to its resolutions 53/108 of 8 December 1998 and 51/210 of 17 December 1996. The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption were negotiated within the Commission on Crime Prevention and Criminal Justice, which was established by the Economic and Social Council in its resolution 1992/1 of 6 February 1992 according to the request of the General Assembly in its resolution 46/152 of 18 December 1991, as one of its functional commissions. This Commission acts as the principal policymaking body of the United Nations in the field of crime prevention and criminal justice.

[180] States parties to the United Nations Convention against Transnational Organized Crime made declarations to article 18, paragraphs 13 and 14, to notify the Secretary-General of the designated central authority and the preferred language of requests. States similarly made declarations to the United Nations Convention against Corruption, as required under article 46, paragraphs 13 and 14.

developed to aid in the implementation of the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.[181]

123. To that end, the draft article proposed at the conclusion of this chapter is largely modelled on article 46 of the United Nations Convention against Corruption, with some changes as noted below. The following subsections discuss the provisions of article 46 of that Convention, grouped into three categories: (1) the general obligation to afford mutual legal assistance; (2) cooperation when a mutual legal assistance treaty exists between the two States concerned; and (3) cooperation when a mutual legal assistance treaty does not exist between the two States concerned.

1. General obligation to afford mutual legal assistance

124. Article 46, paragraph 1, of the United Nations Convention against Corruption establishes a general obligation for States parties to "afford one another the widest measure of mutual legal assistance"[182] with respect to offences arising under that Convention. States parties are obligated to afford each other such assistance not just in "investigations" but also in "prosecutions" and "judicial proceedings". Such an obligation is intended to ensure that the broader enforcement goal of the treaty is furthered by comprehensive cooperation among all States parties that might possess relevant information and evidence with respect to the offence.[183] Paragraph 1 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 1, below).

125. Article 46, paragraph 2, of the United Nations Convention against Corruption establishes a general obligation upon States parties also to afford such cooperation with respect to offences for which a "legal person" may be held liable, but only "to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party".[184] This qualification is a recognition that national legal systems differ considerably in their treatment of legal persons in relation to crimes, and therefore mutual legal assistance in this context must be contingent on the extent to which such cooperation is possible under the requested State party's national law in a criminal case.[185] Paragraph 2 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 2, below).

126. Article 46, paragraph 3, of the United Nations Convention against Corruption lists several broad types of assistance that may be requested by a State party.[186] These types of assistance are drafted in broad terms and, in most respects, replicate types of assistance listed in other multilateral[187]

[181] See, for example, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*; *Technical Guide to the United Nations Convention against Corruption*; *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption*; and the Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

[182] See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9, para. 1 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings"); the International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 1 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings"); and the United Nations Convention against Transnational Organized Crime, art. 18, para. 1 ("States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention").

[183] *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap. III, sect. B, at p. 321, para. (2) of the commentary to draft art. 10 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons ("Clearly if the alleged offender is to be tried in a State other than that in which the crime was committed it will be necessary to make testimony available to the court hearing the case and in such form as the law of that State requires. In addition, part of the required evidence may be located in third States. Consequently the obligation is imposed upon all States party").

[184] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 2 (identical language). During the drafting of that Convention, there was general support for the inclusion of a provision on mutual legal assistance concerning legal persons, even though some delegations considered that the matter was already covered under paragraph 1. See McClean, *Transnational Organized Crime*, pp. 207–208. By contrast, the International Convention for the Suppression of the Financing of Terrorism does not obligate States to afford assistance in cases involving legal persons, but does provide in article 12, paragraph 4, that "[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5 [on liability of legal persons]".

[185] In this regard, reference might be made to the differences in national legal systems identified with respect to draft article 5, paragraph 7.

[186] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, paras. 2–3 (containing language substantially similar to that of the United Nations Convention against Corruption); United Nations Convention against Transnational Organized Crime, art. 18, para. 3 (identical language); and Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 1, para. 2 (language substantially similar to that of the United Nations Convention against Corruption). For discussion, see McClean, *Transnational Organized Crime*, pp. 208–212; and UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 475 ("Generally, mutual legal assistance treaties provide for such forms of cooperation [as are included in article 18, paragraph 3]").

[187] See, for example, Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7 ("The assistance envisaged under this convention shall include the following Procedures among others: *a*. notification of rulings and judgments; *b*. taking of testimony or statements from persons; *c*. summoning of witnesses and expert witnesses to provide testimony; *d*. immobilization and sequestration of property, freezing of assets, and assistance in procedures related to seizures; *e*. searches or seizures; *f*. examination of objects and places; *g*. service of judicial documents; *h*. transmittal of documents, reports, information, and evidence; *i*. transfer of detained persons for the purpose of this convention; and *j*. any other procedure provided there is an agreement between the requesting [S]tate and the requested [S]tate"); and [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, art. 1, para. 2 ("Mutual assistance to be rendered in accordance with this Treaty may include: (*a*) taking of evidence or obtaining voluntary statements from persons; (*b*) making arrangements for persons to give evidence or to assist in criminal matters; (*c*) effecting service of judicial documents; (*d*) executing searches and seizures; (*e*) examining objects and sites; (*f*) providing original or certified copies of relevant documents, records and items of evidence; (*g*) identifying or tracing property derived from the commission of an offence and instrumentalities of crime; (*h*) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; (*i*) the recovery, forfeiture or confiscation of property derived from the commission of an offence; (*j*) locating and identifying witnesses and suspects; and (*k*) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party").

and many bilateral[188] extradition treaties. Indeed, such terms are broad enough to encompass the range of assistance that might be relevant for the investigation and prosecution of a crime against humanity, including the seeking of police and security agency records; court files; citizenship, immigration, birth, marriage, and death records; health records; forensic material; and biometric data. Further, the list is not exhaustive, as it provides in subparagraph (i) a catch-all provision relating to "[a]ny other type of assistance that is not contrary to the domestic law of the requested State Party". Any existing bilateral mutual legal assistance treaty between States parties that lack the forms of cooperation listed in article 46, paragraph 3, are generally considered "as being automatically supplemented by those forms of cooperation".[189] In light of the above, paragraph 3 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 3, below).

127. Article 46, paragraph 4, of the United Nations Convention against Corruption encourages each State party to transmit information to another State party, even in the absence of a request, if doing so could assist the latter in undertaking or successfully concluding inquiries and criminal proceedings, or could result in a request from the latter for mutual legal assistance.[190] Such a provision was viewed as innovative when first used in the United Nations Convention against Transnational Organized Crime, though it "declares what must always have been the case, that the authorities of one State may take the initiative in providing information to another".[191] At the same time, this provision is stated in discretionary terms, providing that a State party "may" transmit information, and is further conditioned by the clause "[w]ithout prejudice to domestic law", making clear that States parties are not obliged to transmit information. Paragraph 4 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 6, below).

128. Article 46, paragraph 5, of the United Nations Convention against Corruption relates to paragraph 4 by addressing a situation where the State party providing the information requires that the information be kept confidential or otherwise restricts its use. Such restrictions are to be honoured, unless disclosure to the alleged offender is necessary because the information is exculpatory.[192] The drafters of the United Nations Convention against Transnational Organized Crime decided to include an "interpretative note" in the *travaux préparatoires* on this issue so as to provide further guidance:

> The *travaux préparatoires* should indicate that (*a*) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (*b*) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State.[193]

Paragraph 5 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 7, below).

129. Article 46, paragraph 8, of the United Nations Convention against Corruption provides that "States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy". The *Legislative Guide* to the Convention states:

> It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties. … Thus, where a State party's laws currently permit such ground for refusal, amending legislation will be required. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that State becoming party to the Convention against Corruption should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.[194]

Similar language appears in other multilateral and bilateral treaties on mutual legal assistance.[195] Arguably such

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[188] See, for example, the Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 1, para. 2 ("Mutual assistance to be afforded in accordance with the present Treaty may include: (*a*) Taking evidence or statements from persons; (*b*) Assisting in the availability of detained persons or others to give evidence or assist in investigations; (*c*) Effecting service of judicial documents; (*d*) Executing searches and seizures; (*e*) Examining objects and sites; (*f*) Providing information and evidentiary items; (*g*) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records"); the Treaty on Mutual Legal Assistance between the United States of America and the Russian Federation (Moscow, 17 June 1999), available from https://www.state.gov/wp-content/uploads/2019/02/13046-Russian-Federation-Judicial-Assistance-June-17-1999.pdf, art. 2 ("Legal assistance under this Treaty shall include: (1) obtaining testimony and statements; (2) providing documents, records, and other items; (3) serving documents; (4) locating and identifying persons and items; (5) executing requests for searches and seizures; (6) transferring persons in custody for testimony or other purposes under this Treaty; (7) locating and immobilizing assets for purposes of forfeiture, restitution, or collection of fines; and (8) providing any other legal assistance not prohibited by the laws of the Requested Party").

[189] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

[190] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 4 (identical language); and UNODC, *Technical Guide to the United Nations Convention against Corruption*, p. 165 ("The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively").

[191] McClean, *Transnational Organized Crime*, p. 212.

[192] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 5 (identical language); and McClean, *Transnational Organized Crime*, p. 213.

[193] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 37.

[194] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 171, paras. 611–612.

[195] See United Nations Convention against Transnational Organized Crime, art. 18, para. 8 ("States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy"); the International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 2 ("States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy"); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 4, para. 2 ("Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions"); and the [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, art. 3, para. 5 ("Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters"). For discussion, see McClean, *Transnational Organized Crime*, pp. 215–216.

a provision, however, is not needed for the present draft articles, given that the offences at issue are not financial in nature. Yet given that a crime against humanity might entail a situation where assets have been stolen in the course of the crime, and where mutual legal assistance regarding those assets might be valuable for proving the crime, such a provision may have some value even in this context. As such, paragraph 8 appears to provide a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 4, below).

130. Finally, article 46, paragraph 30, of the United Nations Convention against Corruption calls upon States parties to consider "the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article".[196] Paragraph 30 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 5, below).

2. Cooperation when a mutual legal assistance treaty exists between the States concerned

131. Article 46, paragraph 6, of the United Nations Convention against Corruption makes clear that "[t]he provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance". In other words, any other mutual legal assistance treaty in place between the two States parties, whether concluded before or after entry into force of the Convention for those parties, continues to apply.[197] Identical wording is found in article 18, paragraph 6, of the United Nations Convention against Transnational Organized Crime and substantially identical wording is found in article 7, paragraph 6, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[198]

132. While this provision preserves obligations under existing mutual legal assistance treaties, it does not automatically give those treaties priority over the provisions contained in the United Nations Convention against Corruption.[199] Rather, the provision is interpreted as requiring States parties to satisfy the highest level of assistance to which they have agreed, whether found in the Convention or in another bilateral or multilateral mutual legal assistance treaty.[200] The commentary to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances makes this clear:

> Paragraph 6 embodies an important provision dealing with potential conflict with existing or future mutual legal assistance treaties. It does not give those treaties a general priority over the provisions of the 1988 Convention. Its effect, instead, is to preserve the obligations incurred under general mutual legal assistance treaties from any diminution as a result of the specific provisions of the Convention. This means that where the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual lega l assistance treaty, the provisions of the Convention will prevail. In the converse case, where the treaty provides for a higher level of assistance, this paragraph comes into play and the treaty provisions will prevail with respect to the extent of the requested party's obligations.[201]

133. At the same time, article 46, paragraph 7, of the United Nations Convention against Corruption provides that paragraphs 9 to 29 of article 46 do *not* apply in the event that there exists a mutual legal assistance treaty between the States parties concerned.[202] Rather, the corresponding provisions of that treaty alone apply, leaving only paragraphs 1 to 8 and 30 of the Convention to apply as between the States parties concerned.

134. Even so, paragraph 7 indicates that, in such a situation, States parties "are strongly encouraged to apply" paragraphs 9 to 29 "if they facilitate cooperation". The United Nations Convention against Transnational Organized Crime uses substantially identical language in article 18, paragraph 7, and similar language is used in article 7, paragraph 7, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[203] The Commentary to the latter Convention states:

> Where there is no applicable mutual legal assistance treaty, the Convention supplies the necessary provisions in paragraphs 8-19. Where there is an applicable treaty, its provisions will be followed in

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[196] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 20 (identical language); and United Nations Convention against Transnational Organized Crime, art. 18, para. 30 (identical language). For discussion, see Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 171 above), p. 199, para. 7.59.

[197] *Yearbook … 1972*, vol. II, document A/8719/Rev.1, chap. III, sect. B, at p. 321, para. (1) of the commentary to draft art. 10 (regarding a similar provision in draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons: "Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article").

[198] Art. 7, para. 6 ("The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters").

[199] See McClean, *Transnational Organized Crime*, p. 214.

[200] *Ibid.*

[201] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 171 above), p. 184, para. 7.20.

[202] Whether the other instrument must be a treaty or can be some other form of arrangement is disputed. Compare the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*), p. 185, para. 7.24 ("There are a number of parties whose general mutual legal assistance practice is governed by some instrument, such as the Commonwealth Scheme, which lacks the formality of a full treaty. The text of paragraph 7 uses the term 'a treaty of mutual legal assistance', and that has become a term of art. It does not appear to include the less formal agreements or arrangements, where the provisions of paragraphs 8–19 will apply for all cases falling within the scope of the Convention, unless the parties agree otherwise"), with McClean, *Transnational Organized Crime*, p. 215 (maintaining that it has been assumed the reference to "a treaty of mutual legal assistance" in article 18, paragraph 7, of the United Nations Convention against Transnational Organized Crime encompasses multilateral conventions and "it would be unfortunate if it did not also cover certain arrangements such as the Commonwealth Scheme which are not technically 'treaties'" in addition to bilateral mutual legal assistance treaties).

[203] Art. 7, para. 7 ("Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof").

place of those set out in paragraphs 8–19; this enables pairs of States to follow the procedures with which they have become familiar in the general context of mutual legal assistance … . Parties to a general mutual legal assistance treaty concerned in a particular matter may, however, choose to agree that the provisions of the Convention should apply in that context.[204]

135. The result of article 46, paragraphs 6 and 7, of the United Nations Convention against Corruption is that there are some provisions applicable to all States parties (paragraphs 1 to 8 and 30) and there are some provisions (the "mini mutual legal assistance treaty" provisions in paragraphs 9 to 29) that apply among States parties unless there is a bilateral or multilateral mutual legal assistance treaty between the States parties concerned[205] (even then, those States parties are encouraged to use some or all of the "mini mutual legal assistance treaty" provisions to better facilitate cooperation). Paragraphs 6 and 7 provide a suitable basis for two paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 8 and 9, below).

3. Cooperation when a mutual legal assistance treaty does not exist between the States concerned

136. As set out above, article 46, paragraph 7, of the United Nations Convention against Corruption provides that when there is no mutual legal assistance treaty in place between the States parties concerned, the "mini mutual legal assistance treaty" provisions of paragraphs 9 to 29 apply.

137. Article 46, paragraph 9, of the Convention addresses the issue of a request for mutual legal assistance in the absence of dual criminality.[206] As noted above in the section on dual criminality, the present draft articles on crimes against humanity are designed to ensure the existence of dual criminality in the requesting and requested States, such that paragraph 9 does not appear necessary or indeed appropriate for the present draft articles.

138. Article 46, paragraphs 10 to 12, of the United Nations Convention against Corruption addresses the situation where a person being detained or serving a sentence in one State party is needed in another State party for purposes of identification, testimony or other assistance. As a general matter, these provisions set forth the basic conditions under which such a person might be transferred to the other State party for these purposes and then returned.[207] Paragraphs 10 to 12 provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 25 to 27, below).

139. Article 46, paragraphs 13 to 17, of the Convention addresses in some detail the procedures for sending a request from one State to another. Among other things, paragraphs 13 and 14 require States parties to: designate a central authority responsible for handling incoming and outgoing requests for assistance;[208] stipulate that requests must generally be written; call upon each State party to designate the language(s) the State party finds acceptable for incoming requests; and require States parties to notify the depositary of the United Nations Convention against Corruption (the Secretary-General of the United Nations) of the chosen central authority and acceptable languages.[209] Paragraph 15 designates what must be included in any request for mutual legal assistance, such as an indication of the subject matter and nature of the inquiry, and a statement of the relevant facts.[210] Paragraph 16 essentially allows the requested

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[204] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 171 above), p. 185, para. 7.23. See also UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 171, para. 608 ("If a treaty is in force between the States parties concerned, the rules of the treaty will apply instead, unless the States agree to apply paragraphs 9 to 29 of article 46 of the Convention"); and McClean, *Transnational Organized Crime,* p. 215 (discussing article 18, paragraph 7, of the United Nations Convention against Transnational Organized Crime, and noting that "where there is an applicable multilateral convention or a bilateral [mutual legal assistance treaty], its provisions will be followed in place of those set out in paragraphs 9 to 29" and that supplanting provisions "negotiated with close regard to the principles of the national legal systems of the two States involved … would have created serious difficulties in determining, in particular cases, which set of rules was to be followed").

[205] McClean, *Transnational Organized Crime,* p. 215 (discussing article 18, paragraph 7, of the United Nations Convention against Transnational Organized Crime: "Particularly in the case of bilateral treaties, the provisions will have been negotiated with close regard to the principles of the national legal systems of the two States involved. There was no wish to supplant those provisions, and to have done so would have created serious difficulties in determining, in particular cases, which set of rules was to be followed").

[206] For a discussion of this issue, see McClean, *Transnational Organized Crime*, pp. 216–217.

[207] *Ibid.*; see also International Convention for the Suppression of the Financing of Terrorism, art. 16 (language substantially similar to that of the United Nations Convention against Corruption); and United Nations Convention against Transnational Organized Crime, art. 18, paras. 10–12 (language identical to that of the United Nations Convention against Corruption). McClean notes that "[i]t is one of the oddities of the text that the topic of the transfer of persons in custody appears so early in the mini-[mutual legal assistance treaty], before provisions dealing with the content for the request or the procedure for dealing with it" (McClean, *Transnational Organized Crime,* p. 218).

[208] Designation of a central authority "is a feature of many mutual legal assistance treaties and agreements" and thus is an obligation with which States are accustomed to complying (Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 171 above), p. 186, para. 7.25).

[209] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, paragraphs 8–9 ("8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible. 9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith"); and the United Nations Convention against Transnational Organized Crime, art. 18, paras. 13–14 (language identical to that of the United Nations Convention against Corruption).

[210] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 10 (identical language); the United Nations Convention against Transnational Organized Crime, art. 18, para. 15 (identical language); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 5, para. 1 (language substantially similar to that of the United Nations Convention against Corruption, but with the additional requirement that

State to request additional information when that is either necessary to carry out the request under its national law, or when additional information would prove helpful in doing so.[211] Paragraph 17 provides that the request is to be executed in accordance with the law of the requested State, and in line with the procedures specified by the requesting State so far as they do not conflict with the requested State's law.[212] The first clause of paragraph 17 helps preserve the integrity of the requested State's legal system, as the requested acts will occur in its territory, while the second clause emphasizes the desirability of complying with specific requests of the requesting State so that, for example, evidence collected is admissible under the procedural rules of its courts.[213]

140. Paragraphs 13 to 17 provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 10 to 14, below).

141. Article 46, paragraph 18, of the United Nations Convention against Corruption addresses testimony by witnesses through videoconferencing, a cost-effective technology that is becoming increasingly common. While testimony by videoconference is not mandatory, States are expected "to make provision wherever possible and consistent with the fundamental principles of domestic law for the use of videoconferencing as a means of providing viva voce evidence in cases where it is impossible or undesirable for a witness to travel".[214] Inclusion of this novel provision in article 18 of the United Nations Convention against Transnational Organized Crime[215] led to the adoption by the diplomatic conference of an interpretative note, which reads as follows:

> The *travaux préparatoires* should indicate that the delegation of Italy made a proposal on the matter covered by this paragraph (see A/AC.254/5/Add.23). During the debate on the proposal, it was pointed out that the following part of it, not reflected in the text of the Convention, could be used by States Parties as guidelines for the implementation of article 18, paragraph 18:
>
> "(*a*) The judicial authority of the requested State Party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;
>
> (*b*) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;
>
> (*c*) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;
>
> (*d*) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;
>
> (*e*) All the costs of the video conference shall be borne by the requesting State Party, which may also provide as necessary for technical equipment."[216]

Paragraph 18 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 24, below).

142. Article 46, paragraph 19, of the United Nations Convention against Corruption provides that the requesting State party is generally restricted in its ability to use or transmit information provided to it by the requested State party for purposes other than those set forth in its request, without prior consent of the requested State party.[217] There is an exception to this general obligation, however, when the information is exculpatory (in which case, the information can be disclosed to the alleged offender, but advance notice must be given to the requested State whenever possible). Paragraph 19 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 21, below).

143. Article 46, paragraph 20, of the United Nations Convention against Corruption allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent

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requests include: "(*f*) Specification of any time-limit within which compliance with the request is desired"); and UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, Part Two: Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters, p. 93, para. 106 ("Most instruments and schemes including the [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], the [United Nations Convention against Transnational Organized Crime], the [United Nations Convention against Corruption] and the Commonwealth Scheme [relating to Mutual Assistance in Criminal Matters] contain a list of contents of requests. While there are some differences in terms of detail and language, in general terms the lists in all of these instruments are very similar").

[211] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 11 (identical language); United Nations Convention against Transnational Organized Crime, art. 18, para. 16 (identical language); and Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 5, para. 3.

[212] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 12 (identical language); and United Nations Convention against Transnational Organized Crime, art. 18, para. 17 (identical language).

[213] See Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 171 above), p. 190, paragraphs 7.35–7.36.

[214] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 174, paras. 628–629.

[215] The United Nations Convention against Transnational Organized Crime, article 18, paragraph 18, reads: "Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party."

[216] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 41. See also McClean, *Transnational Organized Crime*, pp. 226–227.

[217] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 13 ("The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party"); International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 3 (language identical to that of the United Nations Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances); and the United Nations Convention against Transnational Organized Crime, art. 18, para. 19 (language identical to that of the United Nations Convention against Corruption).

necessary to execute the request.[218] Paragraph 20 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 22, below).

144. Article 46, paragraphs 21 to 23, of the Convention address the circumstances under which a request for mutual legal assistance may or may not be refused. Paragraph 21 lists a series of grounds for which refusal is permitted: (*a*) when the request does not conform to requirements of the article; (*b*) if the requested State considers that the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests; (*c*) when the authorities of the requested State party would be prohibited by its national law from carrying out the action requested with regard to any similar offence; and (*d*) when granting the request would be contrary to the requested State's legal system.[219] With respect to this last ground, an interpretative note was agreed upon during the drafting of the comparable paragraph of the United Nations Convention against Transnational Organized Crime, which reads as follows:

> The *travaux préparatoires* should indicate that the provision of paragraph 21 (*d*) of this article is not intended to encourage refusal of mutual assistance for any reason, but is understood as raising the threshold to more essential principles of domestic law of the requested State. The *travaux préparatoires* should also indicate that the proposed clauses on grounds for refusal relating to the prosecution or punishment of a person on account of that person's sex, race, religion, nationality or political opinions, as well as the political offence exception, were deleted because it was understood that they were sufficiently covered by the words "essential interests" in paragraph 21 (*b*).[220]

Paragraph 23 requires the requested State to give reasons for any refusal of mutual legal assistance.[221] Paragraphs 21 and 23 provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 16 and 17, below).

145. By contrast, article 46, paragraph 22, of the United Nations Convention against Corruption indicates a ground upon which a request may *not* be refused, stating that "States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters".[222] Such a provision is appropriate in the context of corruption (as well as transnational organized crime), where the offence may include issues such as evasion of taxes, customs or duties. Yet such matters are not part of the offence of crimes against humanity and therefore inclusion of such a provision does not appear warranted for a draft article on mutual legal assistance.

146. Article 46, paragraph 24, of the United Nations Convention against Corruption provides that the request shall be expeditiously addressed, stating, *inter alia*, that the requested State party "shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party".[223] Paragraph 24 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 15, below).

147. At the same time, paragraph 25 provides that mutual legal assistance "may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding".[224] Para-

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[218] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 20 (identical language); and Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 9 ("Upon request: (*a*) The requested State shall use its best endeavours to keep confidential the request for assistance, its contents and its supporting documents as well as the fact of granting of such assistance. If the request cannot be executed without breaching confidentiality, the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed; (*b*) The requesting State shall keep confidential evidence and information provided by the requested State, except to the extent that the evidence and information is needed for the investigation and proceedings described in the request").

[219] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 15 (identical language); United Nations Convention against Transnational Organized Crime, art. 18, para. 21 (identical language); Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 4, para. 1 ("Assistance may be refused if: (*a*) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest; (*b*) The offence is regarded by the requested State as being of a political nature; (*c*) There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons; (*d*) The request relates to an offence that is subject to investigation or prosecution in the requested State or the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (*ne bis in idem*); (*e*) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction; (*f*) The act is an offence under military law, which is not also an offence under ordinary criminal law"); and the European Convention on Mutual Assistance in Criminal Matters, art. 2 ("Assistance may be refused: (*a*) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; (*b*) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country").

[220] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 42.

[221] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 16 ("Reasons shall be given for any refusal of mutual legal assistance"); United Nations Convention against Transnational Organized Crime, art. 18, para. 23 (language identical to that of the United Nations Convention against Corruption); and Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 4, para. 5 ("Reasons shall be given for any refusal or postponement of mutual assistance").

[222] See also International Convention for the Suppression of the Financing of Terrorism, art. 13 ("None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence"); and United Nations Convention against Transnational Organized Crime, art. 18, para. 22 (language identical to that of the United Nations Convention against Corruption).

[223] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 24 (identical language). For discussion, see McClean, *Transnational Organized Crime*, pp. 231–232.

[224] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 25 (identical language); Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 4, para. 3 ("The requested State may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested State"); and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17 ("Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing

graph 25 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 18, below).

148. Article 46, paragraph 26, of the United Nations Convention against Corruption attempts to help avoid situations of complete refusal or extended delay of response to a request for mutual legal assistance by calling upon the requested State party first to "consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions".[225] Paragraph 26 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 19, below).

149. Article 46, paragraph 27, of the Convention is essentially a "safe conduct" provision, which gives individuals traveling to the requesting State's territory a measure of protection from prosecution, detention or punishment while they are in the territory for the purpose of testifying.[226] Paragraph 27 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 23, below).

150. Article 46, paragraph 28, of the United Nations Convention against Corruption addresses the issue of costs, stating, *inter alia*, that "[t]he ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned".[227] An interpretative note for the identical provision in the United Nations Convention against Transnational Organized Crime provides some guidance:

> The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests under article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.[228]

Paragraph 28 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 28, below).

151. Article 46, paragraph 29, of the United Nations Convention against Corruption addresses the provision of government records, documents and information from the requested State to the requesting State and indicates that such information "shall" be provided, while non-public information "may" be provided.[229] Paragraph 29 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 20, below).

C. Draft article 13. Mutual legal assistance

152. In light of the sources indicated above, the Special Rapporteur is of the view that a draft article on mutual legal assistance for crimes against humanity should be modelled largely on the text used in article 46 of the United Nations Convention against Corruption. At present, 181 States have adhered to the text of the Convention, its provisions provide ample guidance as to all relevant rights, obligations and procedures for mutual legal assistance that may arise in the context of crimes against humanity (including in situations where there is no mutual legal assistance treaty between the States concerned), and its provisions are well understood by States, especially through detailed

investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary").

[225] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 26 (identical language). For discussion, see McClean, *Transnational Organized Crime*, pp. 232–233.

[226] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 18 (identical language); United Nations Convention against Transnational Organized Crime, art. 18, para. 27 (identical language); the Scheme Relating to Mutual Assistance in Criminal Matters (the Harare Scheme), art. 25 ("(1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country. (2) The immunity provided for in that paragraph shall cease: (*a*) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it; (*b*) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country"); European Convention on Mutual Assistance in Criminal Matters, art. 12, paragraph 1 ("A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party"); and Model Treaty on Mutual Assistance in Criminal Matters (footnote 168 above), art. 15 ("1. Subject to paragraph 2 of the present article, where a person is in the requesting State pursuant to a request made under article 13 or 14 of the present Treaty: (*a*) That person shall not be detained, prosecuted, punished or subjected to any other restrictions of personal liberty in the requesting State in respect of any acts or omissions or convictions that preceded the person's departure from the requested State; (*b*) That person shall not, without that person's consent, be required to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation to which the request relates. 2. Paragraph 1 of the present article shall cease to apply if that person, being free to leave, has not left the requesting State within a period of [15] consecutive days, or any longer period otherwise agreed on by the Parties, after that person has been officially told or notified that his or her presence is no longer required or, having left, has voluntarily returned. 3. A person who does not consent to a request pursuant to article 13 or accept an invitation pursuant to article 14 shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure, notwithstanding any contrary statement in the request or summons"). For discussion, see Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 171 above), pp. 197–198, para. 7.55; and McClean, *Transnational Organized Crime*, pp. 233–234.

[227] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 19 (identical language); and United Nations Convention against Transnational Organized Crime, art. 18, para. 28 (identical language).

[228] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 43. See also McClean, *Transnational Organized Crime*, pp. 234–236.

[229] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 29 (identical language).

guides and resources developed by UNODC.[230] Further, although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of mutual legal assistance are largely the same regardless of the nature of the crime.

153. At the same time, some modifications are warranted. Certain stylistic changes are necessary for consistency with the draft articles already provisionally adopted, such as changing: "article" to "draft article"; "this Convention" to "the present draft articles"; "in the territory" of the State to "in territory under the jurisdiction" of the State; "domestic law" to "national law"; and "State Party" to "State". Likewise, in various places, additional changes are appropriate so as to clarify that the offences at issue are "crimes against humanity" rather than "criminal matters" generally. The clarity of article 46, paragraph 7, might be improved by replacing "the corresponding provisions of that treaty shall apply" with "the provisions of that treaty shall apply instead", for purposes of draft article 13, paragraph 9. Further, article 46, paragraphs 4 and 5, refer to "inquiries and criminal proceedings", whereas most other paragraphs (for example, paragraphs 1, 2, 10, 19) refer to "investigations, prosecutions and judicial proceedings". For purposes of harmonization, the latter phrase is used for draft article 13, paragraphs 6 and 7.

154. A few structural or substantive changes are also desirable. First, with respect to structural changes, several of the paragraphs are reordered so as to group paragraphs that address comparable issues together. Subheadings are added to assist the reader in identifying these groupings.

155. Second, with respect to substantive changes, in article 46, paragraph 3, the list of types of assistance might be altered given its application in relation to crimes against humanity, rather than corruption. To that end, the illustrative listing in subparagraph (*f*) ("including government, bank, financial, corporate or business records") is deleted as it unduly stresses financial records. The last two types of assistance listed—in subparagraphs (*j*) and (*k*)[231]—are uniquely tied to the United Nations Convention against Corruption, as they expressly refer to the detailed provisions of chapter V of that Convention on asset recovery. As such, they are not appropriate for the purposes of the present draft articles and have been deleted. Yet, given that a crime against humanity might entail situations where assets have been stolen in the course of the crime, and where mutual legal assistance regarding those assets might be valuable for proving the crime, subparagraph (*g*) is retained. To improve the drafting, the word "freezing" is moved from subparagraph (*c*) to subparagraph (*g*), so as to reformulate subparagraph (*g*) to read: "identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes".

156. Article 46, paragraph 9, addresses the issue of a request for mutual legal assistance in the absence of dual criminality. Since the present draft articles are designed to ensure the existence of dual criminality for the offence of crimes against humanity, paragraph 9 is deleted as unnecessary.

157. Finally, article 46, paragraph 22, contains a provision that precludes a State party from refusing to provide mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters. As previously noted, such matters are not part of the offence of crimes against humanity, and therefore inclusion of such a provision does not appear warranted for a draft article on mutual legal assistance.

158. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"Draft article 13. Mutual legal assistance

"General cooperation

"1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article.

"2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 5, paragraph 7, in the requesting State.

"3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(*a*) taking evidence or statements from persons;

(*b*) effecting service of judicial documents;

(*c*) executing searches and seizures;

(*d*) examining objects and sites;

(*e*) providing information, evidentiary items and expert evaluations;

(*f*) providing originals or certified copies of relevant documents and records;

(*g*) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(*h*) facilitating the voluntary appearance of persons in the requesting State; or

(*i*) any other type of assistance that is not contrary to the national law of the requested State.

"4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

[230] See footnote 35 above.

[231] Art. 46, para. 3 (*j*)–(*k*) ("(*j*) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (*k*) The recovery of assets, in accordance with the provisions of chapter V of this Convention").

"5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this draft article.

"Transmission of information without a prior request

"6. Without prejudice to national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

"7. The transmission of information pursuant to paragraph 6 of this draft article shall be without prejudice to investigations, prosecutions and judicial proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State shall notify the transmitting State prior to the disclosure and, if so requested, consult with the transmitting State. If, in an exceptional case, advance notice is not possible, the receiving State shall inform the transmitting State of the disclosure without delay.

"Relationship to treaties on mutual legal assistance between the States concerned

"8. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

"9. Paragraphs 10 to 28 of this draft article shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the provisions of that treaty shall apply instead, unless the States agree to apply paragraphs 10 to 28 of this draft article in lieu thereof. States are strongly encouraged to apply those paragraphs if they facilitate cooperation.

"Designation of a central authority

"10. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

"Procedures for making a request

"11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

"12. A request for mutual legal assistance shall contain:

(*a*) the identity of the authority making the request;

(*b*) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(*c*) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(*d*) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(*e*) where possible, the identity, location and nationality of any person concerned; and

(*f*) the purpose for which the evidence, information or action is sought.

"13. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

"Response to the request by the requested State

"14. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

"15. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

"16. Mutual legal assistance may be refused:

(*a*) if the request is not made in conformity with the provisions of this draft article;

(*b*) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(*c*) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(*d*) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

"17. Reasons shall be given for any refusal of mutual legal assistance.

"18. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

"19. Before refusing a request pursuant to paragraph 16 of this draft article or postponing its execution pursuant to paragraph 18 of this draft article, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

"20. The requested State:

(*a*) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(*b*) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

"Use of information by the requesting State

"21. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

"22. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

"Testimony of person from the requested State

"23. Without prejudice to the application of paragraph 27 of this draft article, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

"24. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

"Transfer for testimony of person detained in requested State

"25. A person who is being detained or is serving a sentence in territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences referred to in draft article 5, may be transferred if the following conditions are met:

(*a*) the person freely gives his or her informed consent; and

(*b*) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

"26. For the purposes of paragraph 25 of this draft article:

(*a*) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(*b*) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(*c*) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(*d*) The person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

"27. Unless the State from which a person is to be transferred in accordance with paragraphs 25 and 26 of this draft article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

"Costs

"28. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne."

Chapter IV

Victims, witnesses and other affected persons

A. Overview

159. In the aftermath of the commission of a crime against humanity, issues relating to victims, witnesses and other affected persons invariably arise. Yet, at present, there is no global treaty addressing the rights of such persons under national law in the context of crimes against humanity.

160. First, victims, witnesses and others may wish to come forward with information pertaining to the commission of a crime, which may be of assistance in preventing further crimes, apprehending alleged offenders and prosecuting or extraditing those offenders. When this occurs, however, the person coming forward may be exposed to threats or intimidation by those who do not wish such information to be made available.

161. Second, victims may wish to participate in the proceedings brought against the alleged offender for a variety of reasons, including the ability to express their views and concerns, to verify facts and to secure recognition as victims.[232]

162. Third, victims may be interested in reparation from those responsible for the crime, which may take the form of restitution, compensation, satisfaction or some other form of reparation.[233]

163. International norms relating to the rights of victims have developed relatively recently, most notably since the 1980s.[234] As a result, many treaties addressing crimes under national law prior to this period contain no provisions with respect to victims or witnesses, such as: the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention for the Suppression of Unlawful Seizure of Aircraft; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; and the International Convention against the Taking of Hostages.

164. Further, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims or witnesses,[235] including: the International Con-

[232] See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victims' participation, 18 January 2008, Trial Chamber I, International Criminal Court, para. 39.

[233] Some commentators have noted the interrelationship between the "purpose of participation" and reparation. See, for example, Cassese, *et al.*, *Cassese's International Criminal Law*, p. 387.

[234] Fernández de Casadevante Romani observes that "[t]hese international norms related to victims are also recent. The most ancient were born in the 1980s. The most recent belong to 2006", and further states that "[p]reviously, both international and domestic law had ignored the victim. Domestic law[,] because the [S]tate's *ius puniendi* embodied in criminal law has traditionally had the criminal as the exclusive reference without considering the victim. International law, because its approaches on the matter of responsibility have always been focused upon the author of the wrongful act: the [S]tate (in international law of human rights), the individual or States (in international humanitarian law) or the individual (in international criminal law), but always ignoring the victim" (Fernández de Casadevante Romani, *International Law of Victims*, pp. 5–6).

[235] See Fernández de Casadevante Romani, "International law of victims". There are, however, exceptions. See International Convention

(*Continued on next page.*)

vention for the Suppression of Terrorist Bombings; the OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism; the International Convention for the Suppression of Acts of Nuclear Terrorism; and the ASEAN Convention on Counter Terrorism.

165. On the other hand, there are treaties adopted since the 1980s concerning particular crimes that do address issues relating to victims and witnesses in national law, including some concerning crimes that might apply when crimes against humanity occur, such as torture or enforced disappearance. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment addresses the rights of victims and witnesses to protection, as well as the right of victims to redress and compensation (arts. 13–14). More recent treaties on corruption and transnational organized crime similarly include provisions on the rights of victims and witnesses.[236] Further, the statutes of international courts and tribunals that have jurisdiction over crimes against humanity have included provisions addressing victims and witnesses in the context of the operation of those courts and tribunals.[237]

166. The General Assembly has also provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power addressed issues such as access to justice, fair treatment, restitution, compensation and assistance.[238] The 2005 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, while not entailing "new international or domestic legal obligations", nevertheless identified "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms".[239]

167. Most treaties that address "victims", such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[240] do not provide a definition of that term, and instead allow States parties latitude for addressing its scope under their national laws. There are, however, some exceptions, such as the International Convention for the Protection of All Persons from Enforced Disappearance (article 24, paragraph 1, provides that " 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance")[241] or the 2008 Convention on Cluster Munitions, which provides an even more expansive definition.[242] Under some treaties, only natural persons are covered, whereas under other treaties legal persons may be "victims" as well.[243] Rule 85, sub-rule (*a*), of the International Criminal Court's Rules of Procedure and Evidence defines "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[244] Rule 85, sub-rule (*b*), extends the definition of victims to legal

(*Footnote 235 continued.*)

for the Suppression of the Financing of Terrorism, art. 8, para. 4 ("Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (*a*) or (*b*), or their families"); and Council of Europe Convention on the Prevention of Terrorism, art. 13 ("Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members"). See also Council of Europe, Directorate General of Human Rights, Guidelines on the protection of victims of terrorist acts, adopted by the Committee of Ministers on 2 March 2005, in *Human Rights and the Fight against Terrorism: The Council of Europe Guidelines*, 2005.

[236] See United Nations Convention against Transnational Organized Crime, arts. 24 and 25; and United Nations Convention against Corruption, arts. 32 and 33.

[237] See, for example, Rome Statute of the International Criminal Court. See also Rules of Procedure and Evidence of the International Criminal Court, rule 86 ("A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence"). Rules of Procedure and Evidence of the International Criminal Court, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1, United Nations publication, Sales No. E.03.V.2).

[238] General Assembly resolution 40/34 of 29 November 1985, annex.

[239] General Assembly resolution 60/147 of 16 December 2005, annex, preamble.

[240] While the Convention itself provides no definition, the Committee against Torture observed: "Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. …The term 'victim' also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization" (Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X, para. 3). Further, the Committee stated: "A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim" (*ibid*). The Committee's approach builds upon the 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 (see previous footnote above), para. 8. See also draft declaration of international law principles on reparation for victims of armed conflict, International Law Association, The Hague Conference (2010), art. 4, available from www.ila-hq.org/en_GB/documents/conference-report-the-hague-2010-10.

[241] See also Shelton, *Remedies in International Human Rights Law*, pp. 241–242.

[242] Art. 2, para. 1 (" 'Cluster munition victims' means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities").

[243] Compare article 1 of the American Convention on Human Rights: "Pact of San José, Costa Rica" (which only ensures the human rights of natural persons) with article 34 of the European Convention on Human Rights (which includes both natural and legal persons as the "victim of a violation").

[244] Rules of Procedure and Evidence of the International Criminal Court (see footnote 237 above), Rule 85, sub-rule (*a*). Pre-Trial Chamber I held that "[r]ule 85, sub-rule (*a*), "establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered" (*Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, Pre-Trial Chamber I, International Criminal Court, para. 79).

persons suffering direct harm, providing that "[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".[245]

168. Though the term "victim" is generally understood as including, at a minimum, the person who directly experienced the harm and immediate family members in the event that the victim has lost his or her life, most treaties have not sought to develop a definition, and instead have left the matter to specification within national legal systems, which already address the concept of "victim" in various contexts. Indeed, some participants in the intersessional open-ended working group that elaborated the International Convention for the Protection of All Persons from Enforced Disappearance noted that national courts should be given a certain amount of latitude in the designation of beneficiaries of reparations.[246] For the purposes of the present draft articles, it is appropriate to give States latitude in determining exactly which persons qualify as "victims" of a crime against humanity.

169. The remainder of this chapter discusses the three principal issues that arise with respect to victims, witnesses and others: protection of victims, witnesses and others; participation of victims in legal proceedings; and reparation for victims.

B. Complaints by and protection of victims and others

170. As noted above, many treaties addressing crimes under national law contain no provision with respect to victims or witnesses. Treaties that do contain such provisions typically address: (*a*) the right of individuals to complain to relevant authorities; and (*b*) protection by the State party of the complainant and witnesses, thereby allowing them to come forward without fear of ill-treatment or intimidation.

171. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 13:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.[247]

172. With respect to the action of State authorities once a complaint has been filed, it should be noted that draft article 7 of the present draft articles currently provides that "[e]ach State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction".

173. With respect to protection, later treaties have expanded the category of persons beyond complainants and witnesses to other persons. For example, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption provide for the protection of witnesses "who give testimony concerning offences" covered by the Conventions and, "as appropriate, for their relatives and other persons close to them".[248] Article 12, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance provides that:

> Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.[249]

174. By contrast, statutes of international criminal tribunals have been less expansive with respect to the types of persons to be protected. The Rome Statute of the International Criminal Court,[250] the updated Statute of the International Tribunal for the Former Yugoslavia,[251] the Statute of the International Tribunal for Rwanda[252] and the Law on

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[245] Rules of Procedure and Evidence of the International Criminal Court (see footnote 237 above), Rule 85, sub-rule (*b*). Pursuant to Rule 85, sub-rule (*b*), of the Rules of Procedure and Evidence of the International Criminal Court, a legal person must have suffered "direct harm". There is no such limitation for natural persons under Rule 85, sub-rule (*a*). The Appeals Chamber held, however, that only persons who have suffered personal harm would be considered victims for the purposes of Rule 85, sub-rule (*a*). See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, Appeals Chamber, International Criminal Court, paras. 32–39.

[246] See Commission on Human Rights, Report of the inter-sessional open-ended working group (footnote 159 above), para. 83.

[247] See also Nowak and McArthur, *The United Nations Convention against Torture*, p. 450.

[248] United Nations Convention against Transnational Organized Crime, art. 24, and United Nations Convention against Corruption, art. 32. The phrase "and other persons close to them" is intended to cover persons who may be subject to danger by virtue of a particularly close relationship with the witness, but who are not relatives, such as a cohabiting partner or business partner (see McClean, *Transnational Organized Crime*, pp. 260–261).

[249] See also Basic Principles and Guidelines (footnote 239 above), para. 12 (*b*) (States should "[t]ake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims").

[250] Art. 68, para. 1 ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses … particularly during the investigation and prosecution of such crimes").

[251] See updated Statute of the International Tribunal for the Former Yugoslavia, adopted by Security Council resolution 827 (1993) of 25 May 1993, updated in report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1), annex, art. 22 ("The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses"). See also Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (IT/32/Rev.50), rules 69 and 75, available from www.icty.org/en/documents/rules-procedure-evidence.

[252] Article 21 reads: "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses". See also International Tribunal for Rwanda, Rules of Procedure and Evidence (13 May 2015) (ITR/3/REV.1), Rules 69 and 75.

the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea[253] provide only for the protection of "victims" and "witnesses".[254]

175. Most treaties do not differentiate between the type of witness or victim for whom protective measures should be adopted. The Rome Statute of the International Criminal Court also emphasizes the position of children and victims of sexual or gender violence (art. 68, para. 2),[255] though one commentator has asserted that "[t]hese statements, which generally begin with the words 'in particular', are not much more than admonishments".[256]

176. Some treaties provide a list of specific measures that "may" be taken or that the State "shall consider" taking with respect to the protection of victims, witnesses and others.[257] For example, article 32, paragraph 2, of the United Nations Convention against Corruption provides:

> 2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process:
>
> (*a*) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
>
> (*b*) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

177. Other detailed measures[258] mentioned in some treaties include: presenting evidence by electronic or other special means;[259] protecting the privacy and identity of witnesses and victims;[260] *in camera* proceedings;[261] withholding of evidence or information if disclosure may lead to the grave endangerment of the security of a witness or his or her family;[262] and relocating victims or witnesses.[263]

178. While suggesting or listing measures that might be taken has some benefits, ultimately the central obligation remains simply that the State must protect victims and witnesses, and the particular measures for doing so will inevitably vary according to the circumstances at issue, the capabilities of the relevant State and the preferences of the victims, witnesses and complainants. As such, the core provision as set forth in the International Convention for the Protection of All Persons from Enforced Disappearance (quoted above at paragraph 173) would appear suitable in the context of crimes against humanity.[264]

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[253] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 33 ("The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses"). See also Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.9), Rule 12 *bis*.

[254] By contrast, article 16 of the Statute of the Special Court of Sierra Leone (available from https://rscsl.org/the-rscsl/documents/), refers to protective measures for "witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses". Article 12, paragraph 4, of the Statute of the Special Tribunal for Lebanon (Security Council resolution 1757 (2007) of 30 May 2007, attachment) provides for "measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses".

[255] See also International Criminal Court, Office of the Prosecutor, Policy on children, available from www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF, and Policy paper on sexual and gender-based crimes, available from www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

[256] Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, p. 1059.

[257] See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, paragraphs 1 (*f*) and 5; United Nations Convention against Transnational Organized Crime, art. 24, para. 2; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 3.

[258] For detailed measures outlined in the Rules of Procedures of international criminal courts and tribunals, see the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (footnote 251 above), Rule 75; the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (footnote 252 above), Rule 69; the Rules of Procedure and Evidence of the International Criminal Court (footnote 237 above), Rules 87 and 88; and the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (footnote 253 above), Rule 29.

[259] See Rome Statute of the International Criminal Court, art. 68, para. 2 ("the Court may … allow the presentation of evidence by electronic or other special means"); United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (*b*) ("Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means"); and the United Nations Convention against Corruption, art. 32, para. 2 (*b*) (language almost identical to that of the United Nations Convention against Transnational Organized Crime).

[260] See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 1 (*e*) ("Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims"); and 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 (footnote 253 above), art. 33 ("Such protection measures shall include, but not be limited to … the protection of the victim's identity") .

[261] See Rome Statute of the International Criminal Court, art. 68, para. 2 ("the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera*"); and 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, art. 33 (footnote 253 above)("Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings").

[262] See Rome Statute of the International Criminal Court, art. 68, para. 5 ("Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

[263] See United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (*a*) ("Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons"); and the United Nations Convention against Corruption, art. 32, para. 2 (*a*) (identical language).

[264] Article 12, paragraph 1, reads, in relevant part: "Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given."

179. At the same time, measures of protection taken by the State may affect the rights of a defendant, such as limiting disclosure of the identity of the witnesses. Consequently, some treaties, such as the Rome Statute of the International Criminal Court,[265] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,[266] the United Nations Convention against Transnational Organized Crime[267] and the United Nations Convention against Corruption,[268] also provide that any measures taken shall be without prejudice to the rights of the accused.[269]

180. In light of the above, there would appear to be merit in including in a draft article on victims, witnesses and others a provision addressing the right of individuals to complain to relevant authorities, and protection by the State of the complainant and others, drawing upon the text from the International Convention for the Protection of All Persons from Enforced Disappearance, taking into account draft article 7 and that any protective measures taken shall be without prejudice to the rights of the accused (see proposed draft article 14, paragraph 1, below).

C. Participation of victims in criminal proceedings

181. The right of victims to participate in criminal proceedings against an alleged offender usually is not included in treaties addressing crimes under national law, even in those (discussed in the previous subsection) containing provisions on the complaints by, and protection of, victims and witnesses.[270]

182. Some treaties addressing crimes under national law, however, do contain a provision on the participation of victims in the proceedings against the alleged offender. When this occurs, the relevant provision accords to States considerable flexibility as to the implementation of the obligation. For example, article 32, paragraph 5, of the United Nations Convention against Corruption provides that the right is subject to the State party's national law: "Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence." As suggested by the clause "subject to its domestic law", when the right to participate is included, States are given considerable flexibility as to the implementation of the obligation. Similar examples to this provision may be found in: the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[271] the United Nations Convention against Transnational Organized Crime;[272] and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[273] Providing such flexibility allows States to tailor the requirement for the participation of victims in a manner most suitable to their national systems.

183. The issue of participation by victims in legal proceedings was not addressed in the updated Statute of the International Tribunal for the Former Yugoslavia or the Statute of the International Tribunal for Rwanda. The 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, however, allows for extensive participation of victims, who can even participate in legal proceedings as civil parties,[274] though it requires participants to meet

[265] Art. 68, para. 1 ("These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

[266] Art. 8, para. 6 ("Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial").

[267] Art. 24, para. 2 ("The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant").

[268] Art. 32, para. 2 (language almost identical to that of the United Nations Convention against Transnational Organized Crime).

[269] See also Basic Principles and Guidelines (footnote 239 above), para. 27 ("Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process").

[270] For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no such provision. The Committee against Torture, however, has emphasized the importance of victim participation in processes for remedy and reparation. See general comment No. 3 (footnote 240 above), para. 4. The International Convention for the Protection of All Persons from Enforced Disappearance, while not providing expressly for the participation of victims in legal proceedings, has provisions relating to a victim's right to have access to information (art. 18) and right to know the truth regarding the circumstances of the enforced disappearance (art. 24). For an overview of national practices on victim participation, see Redress and Institute for Security Studies, "Victim participation in criminal law proceedings: survey of domestic practice for application to international crimes prosecutions", September 2015, available from https://redress.org/wp-content/uploads/2017/12/September-Victim-Participation-in-criminal-law-proceedings.pdf.

[271] Art. 8, para. 1 ("States parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: … (*c*) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law"). See also Convention on the Rights of the Child, art. 12, para. 2.

[272] Art. 25, para. 3 ("Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence").

[273] Art. 6, para. 2 ("Each State Party shall ensure that its domestic legal or administrative system contains measures to provide victims or trafficking in persons, in appropriate cases: … (*b*) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence"). The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime provides extensive obligations to protect migrants subject to conduct covered by the Convention but does not provide separately for participation.

[274] See Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (footnote 253 above), Rule 23 ("1. The purpose of Civil Party action before the [Extraordinary Chambers in the Courts of Cambodia] is to: *a*) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the [Extraordinary Chambers in the Courts of Cambodia] by supporting the prosecution; and *b*) Seek collective and moral reparations, as provided in Rule 23 *quinquies*. 2. The right to take civil action may be exercised without any distinction based on criteria such as current residence or nationality. 3. At the pre-trial stage, Civil Parties participate individually. Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as described in IR 12 *ter*. The Civil Party Lead Co-Lawyers are supported by the Civil Party Lawyers described in IR 12 *ter* (3). Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations. 4. The Civil Party cannot be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused").

relatively strict criteria.[275] Further, this approach reflects Cambodian national law, influenced by the French civil law system, which allows for victims to participate as civil parties in criminal proceedings.[276] The issue of participation was also addressed in article 68, paragraph 3, of the Rome Statute of the International Criminal Court, which provides:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[277]

184. One commentator notes that "[w]hen the *Rome Statute* was being drafted, few could have imagined the importance that this short and rather obscure provision would have upon proceedings at the Court"[278] as a result of the growth in participation. In August 2015, the Registry reported that in the years 2014 to 2015, 4,002 victims were admitted to participate in proceedings before the Court. During the same period, the Court also received 1,669 new applications for the participation of victims.[279]

185. In light of the above, there would appear to be merit in including in a draft article on victims, witnesses and others a provision addressing the right of victims to participate in criminal proceedings against an alleged offender, modelled on the text from the United Nations Convention against Corruption (see proposed draft article 14, paragraph 2, below).

[275] *Ibid.*, Rule 23 *bis* ("1. In order for Civil Party action to be admissible, the Civil Party applicant shall: (*a*) be clearly identified; and (*b*) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based. When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true").

[276] See *Co-Prosecutors' submission on civil party participation in provisional detention appeals*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 22 February 2008, Pre-Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, available from www.eccc.gov.kh/en/documents/court/co-prosecutors-submission-civil-party-participation.

[277] See also Rules of Procedure and Evidence of the International Criminal Court (footnote 237 above), Rules 89–93 and 131, sub-rule 2; and *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation (footnote 232 above), para. 85 ("the Trial Chamber has borne in mind that proceedings before the Court are *sui generis* and the Court must develop trial procedures that meet the particular exigencies of the international case that it will have to decide").

[278] Schabas, *The International Criminal Court*, p. 1062. Professor Schabas notes that the language for article 68, paragraph 3, of the Rome Statute of the International Criminal Court is drawn from the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see footnote 238 above), which provide at paragraph 6 (*b*) that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by "[a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system". By contrast, the 2005 Basic Principles and Guidelines (see footnote 239 above) do not contain a principle or guideline on the right to participation.

[279] Report of the International Criminal Court on its activities in 2014/15 (A/70/350), para. 27.

D. Reparation for victims

186. Treaties that address crimes under national law and that contain a provision with respect to victims and witnesses typically also address the issue of reparation for victims. Such provisions appear inspired by provisions on the right to an "effective remedy" found in the Universal Declaration of Human Rights,[280] the International Covenant on Civil and Political Rights[281] and regional human rights treaties.[282]

187. The term "remedy", however, has not generally been used in treaties addressing crimes under national law. Instead emphasis has been placed on a right to pursue reparation, using either the term "reparation" itself or terms such as "compensation", "rehabilitation" or "restitution". For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 14:

[280] See Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"). For an overview of the institutions and regimes on remedies for victims, see McCarthy, *Reparations and Victim Support in the International Criminal Court*, chap. 2, and Shelton, *Remedies in International Human Rights Law*, chap. 3.

[281] Art. 2, para. 3 ("Each State Party to the present Covenant undertakes: (*a*) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (*b*) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (*c*) To ensure that the competent authorities shall enforce such remedies when granted"). See also Human Rights Committee, general comment No. 31 (footnote 148 above), paras. 16–17 ("16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. 17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices").

[282] See European Convention on Human Rights, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"); and American Convention on Human Rights: "Pact of San José, Costa Rica", art. 25 ("1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: *a*. To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; *b*. To develop the possibilities of judicial remedy; and *c*. To ensure that the competent authorities shall enforce such remedies when granted").

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

188. While article 14, paragraph 1, refers to "redress", "compensation" and "rehabilitation", the Committee against Torture considers that paragraph 1 embodies a "comprehensive reparative concept".[283] According to the Committee:

> The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[284]

189. In particular, it should be noted that article 14, paragraph 1, provides that each "State Party shall ensure *in its legal system**". Such a phrase stresses that the obligation of the State party is to have necessary effective laws, regulations, procedures or mechanisms enabling victims to pursue adequate and appropriate redress for the harm they have suffered against those who are responsible. In implementing such an obligation, States parties may be guided by the provisions on access to justice set forth in the 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.[285]

190. Many treaties concerned with crimes under national law focus solely on "compensation" as the relevant form of reparation. Examples of such treaties include: the International Convention for the Suppression of the Financing of Terrorism;[286] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[287] the United Nations Convention against Transnational Organized Crime;[288] the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[289] and the United Nations Convention against Corruption.[290] While the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment emphasizes "fair and adequate compensation" (see the text quoted at paragraph 187 above), the Committee against Torture has emphasized that compensation alone may not be sufficient redress for a victim of torture or ill-treatment.[291]

191. The updated Statute of the International Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda contained provisions exclusively addressing the possibility of restitution of property,[292] not compensation or other forms of reparation. Yet, in the establishment of other international criminal courts and tribunals, there appears to be recognition that focusing solely on restitution is inadequate (instead, the more general term "reparation" is used) and that establishing an individual right to reparation for each victim may be problematic in the context of a mass atrocity. Consequently, allowance is made for the possibility of reparation for individual victims or for reparation on a collective basis.[293] For example, the International Criminal Court's Rules of Procedure and Evidence provide that in awarding reparation to victims pursuant to article 75 of the Rome Statute of the International Criminal Court,[294] "the Court may award

[283] See Committee against Torture, general comment No. 3 (footnote 240 above), para. 2.

[284] *Ibid*., para. 5.

[285] Basic Principles and Guidelines (see footnote 239 above), paras. 12–14.

[286] Art. 8, para. 4 ("Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims … or their families").

[287] Art. 9, para. 4 ("States parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible").

[288] Art. 25, para. 2 ("Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention") and also art. 14, para. 2 ("When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners").

[289] Art. 6, para. 6 ("Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered").

[290] Art. 35 ("Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation").

[291] See general comment No. 3 (footnote 240 above), para. 9; see also *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, Report of the Committee against Torture, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44* (A/60/44), annex VIII, sect. A, para. 6.8 ("article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case").

[292] See updated Statute of the International Tribunal for the Former Yugoslavia, art. 24, para. 3 ("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") (footnote 251 above); and the Statute of the International Criminal Tribunal for Rwanda (footnote 252 above), art. 23, para. 3 (identical language).

[293] See Basic Principles and Guidelines (footnote 239 above), para. 13 ("In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate"); and International Law Association, "Reparation for victims of armed conflict", pp. 319–320, para. (2) *o* and *s* of the commentary to article 6 ("The concept of collective reparation has been even less explored than the right to individual reparation. Still, there are some developments that indicate that international law endorses collective reparation. … Collective reparations also receive support from the Rules of Procedure and Evidence of the International Criminal Court").

[294] Art. 75 ("1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in

(*Continued on next page.*)

reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both", taking into account the scope and extent of any damage, loss or injury.[295] In the context of the atrocities in Cambodia under the Khmer Rouge, only "collective and moral reparations" are envisaged under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.[296]

192. Perhaps under the influence of both the Commission's 2001 articles on responsibility of States for internationally wrongful acts[297] and the General Assembly's 2005 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,[298] the International Convention for the Protection of All Persons from Enforced Disappearance uses the broad term "reparation" but also provides a list of forms of reparation. Article 24, paragraphs 4 and 5, provides that:

> 4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
>
> 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
>
> (*a*) Restitution;
>
> (*b*) Rehabilitation;
>
> (*c*) Satisfaction, including restoration of dignity and reputation;
>
> (*d*) Guarantees of non-repetition.

193. All the traditional types of reparation would appear potentially relevant in the aftermath of the commission of crimes against humanity.[299] Restitution, or the return to the status quo *ex ante*, may be an appropriate form of reparation, including the ability for a victim to return to his or her home, the return of moveable property or the reconstruction of infrastructure. Compensation may be appropriate with respect to both material and moral damages. Rehabilitation programs for large numbers of persons in certain circumstances may be required, such as programmes for medical treatment, provision of prosthetic limbs, trauma-focused therapy or reconstruction of public or private buildings, including schools, hospitals and places of religious worship. Satisfaction may also be a desirable form of reparation, such as issuance of a statement of apology or regret. Likewise, reparation for a crime against humanity might consist of assurances or guarantees of non-repetition.

194. Moreover, while reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation,[300] in some situations only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. In still other situations, a combination of individual and collective reparations may be appropriate.

195. As such, there would appear to be value in a draft article that addresses reparation for victims, which builds upon the text used in the International Convention for the Protection of All Persons from Enforced Disappearance, while allowing for flexibility as to the exact nature and form that such reparation should take (see proposed draft article 14, paragraph 3, below).

E. Draft article 14. Victims, witnesses and others

196. Based on the aforementioned considerations, the following draft article is proposed:

> *"Draft article 14. Victims, witnesses and others*
>
> "1. Each State shall take the necessary measures to ensure that:
>
> (*a*) any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities; and
>
> (*b*) complainants, witnesses, and their relatives and representatives, as well as other persons

(*Footnote 294 continued.*)

respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79"). The Appeals Chamber considered the principles and procedures to be applied to reparations in *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3129, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, 3 March 2015, Appeals Chamber, International Criminal Court.

[295] Rules of Procedure and Evidence of the International Criminal Court (see footnote 237 above), Rule 97, sub-rule 1. See, generally, McCarthy, *Reparations and Victim Support in the International Criminal Court*.

[296] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (see footnote 253 above), rules 23 and 23 *quinquies*.

[297] 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.

[298] Basic Principles and Guidelines (see footnote 239 above), paras. 15 and 18–23.

[299] The Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence has stressed the importance of adopting a "broad array of coherently organized measures" for victims of massive violations, distinguishing between reparation programmes with material and symbolic measures and those that distribute benefits to individuals or collectivities (report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/69/518), para. 84).

[300] See, for example, Frigessi di Rattalma and Treves, *The United Nations Compensation Commission: A Handbook*; Van Houtte, "Mass property claim resolution in a post-war society: the Commission for Real Property Claims in Bosnia and Herzegovina"; Permanent Court of Arbitration, International Bureau, *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*; Holtzmann and Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*; Van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights under International Law*, vol. I: *Institutional Features and Substantive Law*; Das and Van Houtte, *Post-War Restoration of Property Rights under International Law*, vol. II: *Procedural Aspects*; Payne and Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*; Alford, "The Claims Resolution Tribunal"; and Murphy, Kidane and Snider, *Litigating War: Mass Civil Injury and the Eritrea–Ethiopia Claims Commission*.

participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. These measures shall be without prejudice to the rights of the alleged offender referred to in draft article 10.

"2. Each State shall, subject to its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 10.

"3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation, on an individual or collective basis, consisting of one or more of the following forms: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition."

Chapter V

Relationship to competent international criminal tribunals

A. Potential for conflicts

197. In considering the Commission's work on this topic, several States in the Sixth Committee have stressed that the draft articles on crimes against humanity should avoid any conflict with the rights or obligations of States with respect to competent international criminal tribunals,[301] with many States specifically mentioning the need to avoid any conflict with the Rome Statute of the International Criminal Court.[302]

198. With that in mind, the draft articles have been written to avoid any such conflicts.[303] For example, draft article 9 allows a State to fulfil its *aut dedere aut judicare* obligation through surrender to a "competent international criminal tribunal". Thus, where a State has an obligation to surrender, it can do so without encountering any conflict with draft article 9. Moreover, the draft articles generally have been designed to promote harmony with the constituent instruments of competent international criminal tribunals, such as by using in draft article 3 the definition of "crimes against humanity" found in the Rome Statute of the International Criminal Court.

199. As such, there do not appear to be any conflicts between the rights or obligations of States set forth in the draft articles and their rights and obligations with respect to competent international criminal tribunals. Even so, there would appear to be value in expressly addressing an unforeseen situation where a conflict might arise. Otherwise, in the event that a convention is adopted based on the draft articles, a conflict between a State's rights or obligations under that convention and its rights or obligations under a treaty establishing an international criminal tribunal might depend on which instrument is more recent.[304]

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[301] See, for example, Austria, A/C.6/70/SR.20, para. 30 ("it would be useful if the legal relationship [between the draft articles and the constituent instruments of international or hybrid criminal courts] was explicitly reflected in the final draft articles, otherwise, the *lex posterior* regime of the Vienna Convention on the Law of Treaties could generate different results"); Germany, A/C.6/70/SR.22, para. 15 ("To ensure its success, this project must be compatible with existing rules and institutions of international criminal law"); Hungary, A/C.6/70/SR.21, para. 83 ("recognizing the need to avoid conflict with other existing legal regimes in the field"); India, *ibid.*, para. 65 ("in view of the existing legal regimes and mechanisms, it would require in-depth study and thorough discussion in the Commission. The proposed obligations should not conflict with existing treaty obligations and should not duplicate existing regimes"); Italy, A/C.6/70/SR.17, para. 58 ("[Italy] endorsed the Commission's view that the draft articles would avoid any conflicts with obligations of States arising under the constituent instruments of international or 'hybrid' criminal courts or tribunals"); Japan, A/C.6/70/SR.22, para. 130 ("The current work should avoid any legal conflicts with the obligations of States arising under the constituent instruments of international courts or tribunals"); Malaysia, A/C.6/70/SR.23, para. 47 ("the draft convention on crimes against humanity should be drafted in such a way as to ensure that any further work complemented, and did not overlap with, existing regimes"); Mexico, A/C.6/70/SR.21, para. 51 ("The Commission's work on the topic should complement the relevant existing instruments"); Portugal, A/C.6/70/SR.22, para. 61 ("the topic should be addressed with caution, taking into account the existing legal framework concerning crimes against humanity. It was important to avoid entering into conflict with regimes already in place"); and the Republic of Korea, A/C.6/70/SR.23) para. 56 ("In drafting a convention on crimes against humanity, the relevant provisions in existing treaties and the interrelationship of those provisions should be examined in detail to avoid conflicts with other treaty regimes").

[302] See, for example, the Netherlands, A/C.6/70/SR.21) para. 42 ("It would also be pertinent to address the relation between the draft articles on crimes against humanity and the Rome Statute [of the International Criminal Court]. States parties to the … Statute were obliged to implement its provisions, including those on crimes against humanity, in their respective national legal systems. Any subsequent instrument on the same topic should build on that existing practice"); Slovenia, A/C.6/70/SR.23, para. 4 ("any new convention on crimes against humanity should be consistent with, and complement, the provisions [of the Rome Statute of the International Criminal Court]"); the United Kingdom, *ibid.*, para. 36 ("Any additional regime would need to complement rather than compete with the Rome Statute [of the International Criminal Court]"); Spain, A/C.6/69/SR.21, para. 42 ("it would be necessary to consider carefully … [the draft convention's] precise relationship with the [Rome Statute of the International Criminal Court] and the International Criminal Court"); Trinidad and Tobago, A/C.6/69/SR.26, para. 118 ("The project should not detract from, but rather complement the Rome Statute of the International Criminal Court"); and the United Kingdom, A/C.6/69/SR.19, para. 160 ("It was important that the work of the International Criminal Court in that area should not be affected").

[303] There are, of course, a variety of tribunals that have been constituted to address international crimes of a serious nature, ranging from tribunals established exclusively under international law, those established under a mixture of international and national law (sometimes referred to as "hybrid tribunals"), to those established exclusively under national law. Whether a particular tribunal is an "international criminal tribunal" will depend on how the tribunal was constituted. Further, the obligations of States with respect to any given tribunal will also vary. For example, the agreement of the United Nations with Sierra Leone creating the Special Court for Sierra Leone places no express obligations on other States to cooperate with the tribunal. See Statute of the Special Court for Sierra Leone (footnote 254 above); and United Nations Security Council resolution 1315 (2000) of 14 August 2000 (requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create the Special Court).

[304] See Vienna Convention on the Law of Treaties, art. 30.

200. There are various examples of provisions that attempt to address potential conflicts, whereby rights or obligations under one treaty supersede those arising under another. Article 103 of the Charter of the United Nations provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The Marrakesh Agreement Establishing the World Trade Organization provides: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict" (art. XVI, para. 3). In light of such examples, and in light of the reference in draft article 9 to "competent international criminal tribunal", one possible formulation for the present draft articles might be: "In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail."

201. Consideration might also be given as to whether it is necessary to include an even broader provision in the present draft articles relating to *any* conflict with other international or national law or instruments. As a general matter, treaties concerning crimes in national law, as well as human rights treaties, do not address the broad possibility of conflicts with other sources of rights or obligations. As such, most treaties are drafted provision-by-provision to take account of any such conflicts, and leave any other possible conflicts to be resolved through the law of treaties, as contained in the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention") and customary international law, or other rules of international law addressing conflicts.[305]

202. Even so, some treaties do contain provisions addressing in a broad fashion the possibility of conflicts between the treaty and other rules. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a "without prejudice" clause with respect to other treaties and national laws on torture, extradition or expulsion. Specifically, article 16, paragraph 2, of the Convention provides: "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion." While such a provision addresses both international and national law, it does not expressly address a situation where such law provides lesser protection than contained in the Convention.[306]

203. Some other treaties focus solely on the treaty's relationship with international law, asserting that nothing in the treaty "shall affect other rights, obligations and responsibilities of States under international law". Thus, the International Convention for the Suppression of Terrorist Bombings provides in article 19, paragraph 1, that "[n]othing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law". The International Convention for the Suppression of the Financing of Terrorism similarly provides in article 21 that "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions". Here, too, such a provision does not expressly address a situation where other instruments provide lesser protection than the relevant convention.

204. In contrast, the International Convention for the Protection of All Persons from Enforced Disappearance specifically addresses the situation where either international or national law provides lesser protection than the Convention. Article 37 of that Convention states: "Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in: (*a*) The law of a State Party; (*b*) International law in force for that State." Thus, in a situation where other international or national law is less "conducive to the protection of all persons from enforced disappearance", the relevant provisions of the International Convention for the Protection of All Persons from Enforced Disappearance take precedence.

205. Such a broad provision addressing potential conflicts might be included in the present draft articles, but these draft articles have been crafted so as generally to prevail over conflicting national law, except as otherwise specified in the context of particular draft articles. For example, draft article 3, which contains a definition of crimes against humanity, provides in paragraph 4 that the draft article is without prejudice to any broader definition provided for in "any international instrument or national law". Draft article 5, paragraph 7, provides that "[*s*]*ubject to the provisions of its national law*, each State shall take measures, where appropriate, to establish the liability of legal persons". Draft article 6, paragraph 3, provides that "[t]he present draft articles do not exclude the exercise of any criminal jurisdiction established by a State *in accordance with its national law**". Draft article 8 states in its paragraph 1 that "custody and legal measures shall be *as provided in the law of that State*,* but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted". Draft article 9 provides that the authorities of a State shall take the decision regarding whether to prosecute "in the same manner as in the case of

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[305] See *Yearbook … 2006*, vol. II (Part Two), chapter XII, on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

[306] According to Nowak and McArthur, "[a]rticle 16 (2) makes it clear that any wider protection mechanism relating to cruel, inhuman or degrading treatment in national or international law is not affected by the provisions of the Convention. Accordingly, insofar as other international instruments or national laws provide better protection to individuals, they are entitled to benefit from it; however, other international instruments or national law can never restrict the protection which the individual enjoys under the Convention. A typical example of the application of the savings clause in Article 16 (2) is the *non-refoulement* principle derived from Article 3 [of the European Convention on Human Rights] and Article 7 [of the International Covenant on Civil and Political Rights] which, according to the jurisprudence of the relevant treaty bodies, applies not only to the danger of being subjected to torture (as in Article 3 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]), but also to the danger of being subjected to cruel, inhuman or degrading treatment" (Nowak and McArthur, *The United Nations Convention against Torture*, p. 575).

any other offence of a grave nature under the law of that State". Draft article 10, paragraph 1, provides for the full protection of an alleged offender's rights "under applicable national and international law", while paragraph 3 provides that rights of consular access "shall be exercised in conformity with the laws and regulations" of the host State, provided that those laws and regulations enable full effect to be given to such rights. Though not yet considered by the Commission, several provisions proposed in this report also seek to calibrate the relationship between the present draft articles and other sources of law, such as in proposed draft article 11 on extradition, proposed draft article 13 on mutual legal assistance and proposed draft article 14 on victims, witnesses and others.

206. One difficulty with crafting a broad provision on potential conflicts is that it might inadvertently undermine the present draft articles anytime they conflict with national law. For example, a provision allowing for the operation of national law whenever it is more conducive to the protection of persons from crimes against humanity might be viewed as allowing a State to deviate from the protections accorded to the alleged offender under draft article 10. Consequently, in light of the attention already given in the present draft articles to addressing possible conflicts in context of specific issues, a broader provision is not recommended in this report.

B. Draft article 15. Relationship to competent international criminal tribunals

207. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 15. Relationship to competent international criminal tribunals*

"In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail."

Chapter VI

Federal State obligations

A. Overview

208. Article 29 of the 1969 Vienna Convention provides: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[307] Thus, normally a treaty binds a State with respect to its entire territory, including States that are "federal" in nature, in which significant autonomy is accorded to the constituent parts of the State.[308] Yet "a different intention" may be expressed either in the treaty itself or by States, through reservations or declarations, when signing or ratifying a treaty.[309] When the latter occurs, other States may react by accepting or rejecting such reservations or declarations.[310] To address such circumstances, treaties that address a specific subject matter, such as criminal jurisdiction, sometimes seek to address the scope and application of that treaty to different levels of national jurisdiction.[311]

209. There are different ways that treaties have sought to address the issue of federal State obligations.[312] Some treaties "include a 'territorial clause' where the treaty may apply to some of a State's sub-federal territorial units but not others" or "may include a 'federal State clause' that limits the scope of the treaty's obligations to those that the federal State's government has constitutional authority to assume".[313] For example, the 1980 United Nations Convention on Contracts for the International Sale

[307] For commentary, see Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, pp. 489–503; Corten and Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*; and Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, pp. 389–394.

[308] See Hollis, *The Oxford Guide to Treaties*, p. 314; and Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties*, p. 493. See also *Yearbook…1966*, vol. II, document A/6309/Rev.1, Part II, p. 213, para. (4) of the commentary to art. 25 ("One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is composed of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words 'unless a different intention appears from the treaty or is otherwise established' in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory").

[309] Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties*, p. 493. See also Aust, *Modern Treaty Law and Practice*, p. 189 (noting that "only in the last forty or so years … federations have sought to use reservations to deal with their problems in participating in treaties").

[310] See Hollis, *The Oxford Guide to Treaties*, p. 719 ("it is important to recognize that where a treaty neither prohibits nor permits federalism accommodations, several federal States have made reservations to limit their obligations to those areas of legislative jurisdiction that the federal government has assumed. On occasion, other States have objected to such reservations"). The Secretary-General's practice with respect to federal clauses is that "[d]eclarations of territorial application are to be distinguished from declarations made under 'federal clauses' in treaties whose subject-matter falls within the legislative jurisdiction of constituent States, provinces or other territorial units" (United Nations, *Summary of Practice of the Secretary-General as Depositary of Multilateral treaties* (United Nations publication, Sales No. E/F.94.V.15, document ST/LEG/7/Rev.1), para. 272). Where declarations are made pursuant to federal clauses, the Secretary-General "duly circulates and records such declarations" (*ibid.*).

[311] Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties*, pp. 492–493.

[312] Hollis, *The Oxford Guide to Treaties*, p. 719 (indicating that States may opt to include "clauses that: (*a*) authorize limited exceptions to a treaty's obligations for federal States; (*b*) differentiate implementation among federal and non-federal States; (*c*) limit treaty obligations to the 'national' level; or (*d*) reject any accommodation for federal States"). For examples of each type of clause, see *ibid.*, pp. 720–723.

[313] *Ibid.*, p. 719. See also Looper,"'Federal State' clauses in multilateral instruments", p. 164 ("The 'federal State' clause, then, is a method of qualifying multilateral treaty obligations at their inception. Such a clause is a concession granted to federal States in view of their peculiar constitutional structure. Concession it certainly is, for its main effect is to create a disparity of obligations between federal and unitary signatories to multilateral instruments").

of Goods contains a "territorial clause" which provides: "If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time" (art. 93, para. (1)). Although territorial clauses are "mostly confined to treaties on commercial law, private law or private international law",[314] federal State clauses have been used in a range of treaties. Yet in recent years there has been less enthusiasm for federal State clauses, especially in the context of human rights obligations, where differentiated obligations within a State are viewed as inappropriate.[315] Indeed, "[t]he serious complications to which the 'federal clause' has given rise are probably responsible for the growing distrust levelled against it".[316]

210. As a result, some treaties include clauses that expressly deny any accommodation to federal States.[317] For example, article 50 of the International Covenant on Civil and Political Rights provides that its "provisions … shall extend to all parts of federal States without any limitations or exceptions".[318] The 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty contains the same provision in its article 9.[319] Similarly, article 41 of the International Convention for the Protection of All Persons from Enforced Disappearance provides that its "provisions … shall apply to all parts of federal States without any limitations or exceptions".

B. Draft article 16. Federal State obligations

211. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"Draft article 16. Federal State obligations

"The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions."

[314] Aust, *Modern Treaty Law and Practice*, p. 188.

[315] See, for example, Hollis, *The Oxford Guide to Treaties*, p. 316 ("In recent years, there seems to be less enthusiasm for federal clauses … especially where human rights treaties are designed to establish universal minimum standards").

[316] Corten and Klein, *The Vienna Conventions on the Law of Treaties*, p. 745, para. 41.

[317] Hollis, *The Oxford Guide to Treaties*, p. 316.

[318] There are 168 States parties to the Covenant, including several States with federal systems (Australia, Canada, Germany, Switzerland and the United States of America). For analysis, see Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 809 (noting that "the express rule that the provisions of the Covenant extend to all parts of federal States without limitation or exception only serves to make clear that which in the absence of a federal clause in any event applies under international law").

[319] Art. 9 ("The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions"). There are 84 States parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, including several States with federal systems (Australia, Canada, Germany and Switzerland).

Chapter VII

Monitoring mechanisms and dispute settlement

212. In the event that the present draft articles are used as a basis for a convention, consideration may be given to the value of one or more mechanisms for monitoring a State's implementation of and compliance with the convention.

213. The purpose of this chapter is to analyse existing monitoring mechanisms with respect to crimes against humanity, supplemental monitoring mechanisms that might be considered by States for a convention, and the issue of inter-State dispute settlement.

A. Existing monitoring mechanisms

214. Currently there are numerous mechanisms that monitor potential situations of crimes against humanity, which can only briefly be surveyed. In the United Nations system, the Security Council, General Assembly and Secretariat regularly identify and respond to potential crimes against humanity. Subsidiary bodies or offices of the United Nations, including the Human Rights Council and the Office of the Special Adviser on the Prevention of Genocide, also monitor situations that involve crimes against humanity. Treaty bodies established by human rights instruments have addressed crimes against humanity to the extent that they relate to the body's mandate. Finally, international tribunals and regional tribunals have helped identify and address crimes against humanity.

215. Under Article 39 of the Charter of the United Nations, the Security Council is tasked with determining the existence of a threat to peace, breach of the peace or act of aggression, as well as making recommendations and deciding on measures to maintain or restore international peace and security. As such, situations of crimes against humanity can fall within the Council's mandate. The Security Council can receive information regarding potential crimes against humanity from numerous sources, including letters from States,[320]

[320] See, for example, the letter dated 14 January 1994 from the Permanent Respresentative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council (S/1994/45) (presenting in the annex a letter from the Mayor of the city of Tuzla reporting crimes against humanity in his city); the letter dated 15 April 1994 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council (S/1994/453) (informing the Security Council of reports that the safe area of Gorazde in Bosnia was about to fall as part of an ongoing campaign of crimes against humanity); the letter dated 30 January 1997 from the Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council (S/1997/96) (reporting in the annex mass deportation of ethnic Tajiks in Afghanistan by the Taliban and stating that the State strongly believed such acts were crimes against humanity); the letter dated 16 January 1999 from the Permanent

groups of States[321] and the Secretary-General,[322] and reports from the Prosecutor of the International Criminal Court.[323] In response to this information, the Security Council can adopt resolutions,[324] call for a commission of inquiry to be carried out by the Secretariat[325] or issue a Statement of the President, on behalf of all 15 members of the Council.[326]

216. The General Assembly also has identified potential situations of crimes against humanity and called on States to respond. Under Article 10 of the Charter of the United Nations, the General Assembly may discuss any questions or matters within the scope of the Charter of the United Nations, one of which is to maintain international peace and security (Art. 1). Similar to the Security Council, when information regarding crimes against humanity is brought to the attention of the General Assembly, it can respond by passing resolutions[327] as well as by calling for commissions of inquiry to be administered by the Secretariat.

217. The Secretariat monitors crimes against humanity in conjunction with the other United Nations organs. It administers commissions of inquiry on crimes against humanity as requested by the Security Council, the General Assembly and subsidiary bodies, such as the Human Rights Council. Upon completion of the inquiry, the Secretariat reports its findings to the body that requested the inquiry.[328] The Secretariat can also monitor the implementation of Security Council[329] and General Assembly resolutions.[330] Additionally, the Secretary-General can bring to the attention of the Security Council any matter which may threaten international peace and security, including potential situations of crimes against humanity.[331]

218. In particular, the Office of the Special Adviser on the Prevention of Genocide, located within the Secretariat, is tasked with collecting information on massive and serious violations of human rights and humanitarian law. The Office acts as an early warning system for the Secretary-General and, through him, the Security Council, to address situations that could potentially result in genocide.[332] The Office of the Special Adviser collects information on potential atrocities, often from within the United Nations system, and identifies situations of concern using the Office's Framework of analysis for atrocity crimes,[333] which specifically aims to identify genocide,

Representative of Albania to the United Nations addressed to the President of the Security Council (S/1999/50) (calling for immediate action of the Security Council to address crimes against humanity in Kosovo); and the letter dated 16 January 2003 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council (S/2003/52) (reporting that mass rape and other atrocities had occurred in the the Democratic Republic of the Congo and calling on the Security Council to act to punish those responsible for crimes against humanity).

[321] See, for example, the letter dated 26 January 1999 from the Chargé D'affaires a.i. of the Permanent Mission of Qatar to the United Nations addressed to the President of the Security Council (S/1999/76) (statement of the Islamic Group at the United Nations condemning crimes against humanity being committed in Kosovo).

[322] See, for example, the letter dated 24 May 1994 from the Secretary-General to the President of the Security Council (S/1994/674), paragraphs 72–86 (transmitting the results of a commission of inquiry into crimes in the former Yugoslavia, specifically identifying acts that occurred which constitute crimes against humanity); and the letter dated 19 December 2014 from the Secretary-General addressed to the President of the Security Council (S/2014/928) (transmitting the results of the commission of inquiry into the Central African Republic, which concluded that crimes against humanity occurred).

[323] See, for example, International Criminal Court, Sixteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), available from https://iccforum.com/media/background/general/2012-12_ICC_OTP-16th_Report_of_Prosecutor_to_UNSC.pdf (stating that the Office of the Prosecutor is continuing to monitor alleged attacks against civilians in Darfur that could be a part of ongoing crimes against humanity).

[324] See, for example, Security Council resolution 556 (1984) of 23 October 1984 (condemning the apartheid system in South Africa and acknowledging that the system has been characterized as a crime against humanity); Security Council resolution 1970 (2011) of 26 February 2011 (considering that widespread attacks in Libya against civilians may amount to crimes against humanity); Security Council resolution 1975 (2011) of 30 March 2011 (considering that acts committed in Cote d'Ivoire could amount to crimes against humanity); Security Council resolution 2165 (2014) of 14 July 2014 (expressing grave alarm at indiscriminate attacks in populated areas of Syria and stating that such acts may amount to crimes against humanity); Security Council resolution 2187 (2014) of 25 November 2014 (expressing grave concern that there are reasonable grounds to believe crimes against humanity have been committed in South Sudan); and Security Council resolution 2217 (2015) of 28 April 2015 (stating that acts of violence in the Central African Republic may amount to crimes against humanity).

[325] See, for example, Security Council resolution 2127 (2013) of 5 December 2013 (calling for the establishment of a Commission of Inquiry into the Central African Republic).

[326] See, for example, the Statement by the President of the Security Council of 5 November 2014 (S/PRST/2014/22) (calling on the Great Lakes Region to neither harbour nor provide protection of any kind to persons accused of human rights abuses, in particular crimes against humanity); the Statement by the President of the Security Council of 11 June 2015 (S/PRST/2015/12) (reiterating the Security Council's condemnation of attacks by the Lord's Resistance Army in the Central African Republic, including acts that may constitute crimes against humanity); and the Statement by the President of the Security Council of 9 November 2015 (S/PRST/2015/20) (urging the Government of the Democratic Republic of the Congo to continue efforts to bring to justice perpetrators of human rights abuses, in particular those that may amount to crimes against humanity).

[327] See, for example, General Assembly resolution 48/143 of 20 December 1993 (condemning sexual violence in the former Yugoslavia and affirming that perpetrators of crimes against humanity are individually responsible for such crimes); General Assembly resolution 53/156 of 9 December 1998 (strongly condemning the crimes of genocide and crimes against humanity that were committed in Rwanda in 1994); General Assembly resolution 66/253 B of 3 August 2012 (recalling that the United Nations High Commissioner for Human Rights had stated that violence in the Syrian Arab Republic may amount to crimes against humanity); and General Assembly resolution 67/262 of 15 May 2013 (recalling statements that crimes against humanity have likely occurred in the Syrian Arab Republic and expressing concern at incidents of gender-based violence which could amount to crimes against humanity).

[328] See, for example, the letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council (S/1994/1125) (updating the Security Council on conclusions reached by a Commission of Experts on their inquiry into Rwanda, concluding that individuals from both sides of the armed conflict had perpetrated crimes against humanity).

[329] See, for example, Report of the Secretary-General on the implementation of Security Council resolution 2139 (2014) (S/2014/208) (finding that crimes against humanity were committed in the Syrian Arab Republic). See also Security Council resolution 2139 (2014) of 22 February 2014.

[330] See, for example, Report of the Secretary-General on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia (A/52/497).

[331] See Article 99 of the Charter of the United Nations.

[332] See letter dated 12 July 2004 from the Secrtary-General addressed to the President of the Security Council (S/2004/567).

[333] United Nations, Framework of analysis for atrocity crimes: a tool for prevention (2014), available from www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

crimes against humanity and war crimes. The Special Adviser then uses this information to issue statements[334] and brief the Security Council.[335]

219. Subsidiary bodies of the United Nations also monitor the occurrence of crimes against humanity. For example, the Human Rights Council will often receive information from non-governmental organizations (NGOs)[336] or special rapporteurs[337] that identifies potential crimes against humanity. The Human Rights Council may respond to such reports by establishing a commission of inquiry,[338] mandating the Office of the High Commissioner for Human Rights to conduct an investigation into a situation[339] or adopting resolutions.[340] Further, through its universal periodic review, the Council assesses the human rights records of all Member States of the United Nations.[341]

220. Human rights treaty bodies will often identify situations of crimes against humanity and provide recommendations for response, when the crimes against humanity intersect with the subject matter of the treaty. For example, when receiving reports from States parties, the Human Rights Committee addresses violations of the International Covenant for Civil and Political Rights such as violations of the right to life or the right not to be subjected to torture, which include circumstances where those violations rise to the level of crimes against humanity.[342] Thus, while the mandates of the Human Rights Committee and other subsidiary bodies do not specifically include monitoring crimes against humanity, these bodies can identify and recommend appropriate State responses to crimes against humanity.

221. Crimes against humanity are also monitored and addressed through international courts and tribunals. Such crimes were included within the jurisdiction of the International Criminal Court,[343] the International Tribunal for the Former Yugoslavia,[344] the International Tribunal for Rwanda[345] and other special courts and tribunals.[346] Additionally, regional human rights courts identify and speak to crimes against humanity when such crimes intersect with human rights violations under their constitutive instruments,[347] similarly to human rights treaty bodies.

B. Potential monitoring mechanisms under a convention

222. There are a range of supplemental monitoring mechanisms that might be considered by States for a convention on the prevention and punishment of crimes

[334] See, for example, United Nations press release, Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the situation in Yarmouk, Syria, 9 April 2015 (noting that all parties to the conflict in Syria have reportedly committed grave violations and abuses of human rights that may amount to crimes against humanity). See also United Nations press release, Statement by Adama Dieng, Special Advisor on the Prevention of Genocide and Jennifer Welsh, Special Adviser on the Responsibility to Protect, on the situation in Yemen, 16 February 2016 ("Evidence gathered suggests that some of these actions may amount to war crimes and crimes against humanity").

[335] See, for example, the statement of Under-Secretary-General/Special Adviser on the Prevention of Genocide Mr. Adama Dieng to the Meeting of the Security Council in Arria format on Inter-communities Dialogue and prevention of crimes in Central African Republic on 14 March 2014 ("Such widespread and systematic targeting of civilians based on their religion or ethnicity indicates that crimes against humanity are being committed").

[336] See, for example, the joint written statement submitted by CIVICUS: World Alliance for Citizen Participation, a non-governmental organization in general consultative status, the Arab NGO Network for development, a non-governmental organization on the roster (A/HRC/S-15/NGO/1) (urging the Human Rights Council to call upon the Security Council to create a Commission of Inquiry into potential crimes against humanity in Libya); and the written statement submitted by Amnesty International, a non-governmental organization in special consultative status (A/HRC/S-19/NGO/2) (calling on the Human Rights Council to take a strong stand on the crimes against humanity and human rights abuses taking place in Syria, included recommending that the Security Council refer the situation to the Prosecutor of the International Criminal Court).

[337] See, for example, the report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (A/HRC/31/70) (concluding that crimes against humanity continue to occur in the Democratic People's Republic of Korea and stressing the need for a framework on accountability measures for crimes against humanity).

[338] See, for example, Human Rights Council resolution 22/13 of 21 March 2013, on the situation of human rights in the Democratic People's Republic of Korea (establishing a Commission of Inquiry into potential human rights violations and crimes against humanity in the Democratic People's Republic of Korea); Human Rights Council resolution S-17/1 of 23 August 2011 on the the situation of human rights in the Syrian Arab Republic (establishing a Commission of Inquiry into potential human rights violations and crimes against humanity in the Syrian Arab Republic); and Human Rights Council resolution 22/24 of 22 March 2013 on the situation of human rights in the Syrian Arab Republic (same).

[339] See, for example, Human Rights Council resolution 25/1 of 27 March 2014, promoting reconcilliation, accountability and human rights in Sri Lanka (requesting that the Office of the High Commissioner monitor the human rights situation in Sri Lanka and undertake a comprehensive investigation into the human rights abuses). See also comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka (A/HRC/30/61) (identifying numerous human rights abuses that occurred in Sri Lanka, including gender-based violence, forced recruitment, torture, enforced disappearance and unlawful killings which may amount to crimes against humanity).

[340] See, for example, Human Rights Council resolution 19/22 of 23 March 2012 on the situation of human rights in the Syrian Arab Republic (acknowledging that human rights violations in the Syrian Arab Republic may amount to crimes against humanity and recommending that the main bodies of the United Nations urgently act to address crimes against humanity that may have been committed); and Human Rights Council resolution 25/25 of 28 March 2014 on the situation of human rights in the Democratic People's Republic of Korea (acknowledging that information received by the Commission of Inquiry provided reasonable grounds to believe that crimes against humanity have been committed and recommends that the General Assembly submit the report of the Commission of Inquiry to the Security Council to consider appropriate international criminal justice mechanisms to ensure perpetrators are held to account).

[341] General Assembly resolution 60/251 of 15 March 2006, para. 5 (*e*).

[342] See, for example, the concluding observations of the Human Rights Committee on the fifth periodic report of Colombia (CCPR/CO/80/COL) (identifying as a subject of concern proposed legislation on alternate penalties to imprisonment and recommending that such legislation does not apply to persons who commited crimes against humanity). See also Decision 2 (66) of the Committee on the Elimination of all Forms of Racial Discrimination on the Situation in Darfur (CERD/C/DEC/SDN/1) (recommending to the Secretary-General, and through him, the Security Council, the enlargement of the African Union force in Darfur with a mandate to protect civilians against crimes against humanity).

[343] See art. 5 of the Rome Statute of the International Criminal Court.

[344] See updated Statute of the International Tribunal for the Former Yugoslavia (footnote 251 above), art. 5.

[345] See Statute of the International Tribunal for Rwanda (footnote 252 above), art. 3.

[346] See Special Rapporteur's first report on crimes against humanity, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680, chap. III, sect. C.

[347] See Huneeus, "International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts", pp. 14–15 and 18.

against humanity. A particularly useful resource in this regard is the Secretariat's 2016 study on information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission on the topic of crimes against humanity.[348] Among other matters, the study surveys institutional structures and procedures under existing treaties,[349] which indicate a range of possible options for States. The following provides a summary of those institutions and procedures.

1. Types of institutions

223. Existing treaties have created different institutional structures to assist in the monitoring of, implementation of and compliance with the relevant treaty. Generally, these structures may be grouped into four categories: (*a*) committees; (*b*) commissions; (*c*) courts; and (*d*) meetings of States parties.[350]

224. First, *committees* typically consist of independent experts who are nationals of the States parties to the treaty and are nominated and elected by States parties.[351] Requirements for committee membership often include high moral standing or character, competence in the field relevant to the treaty and impartiality, which is accomplished by having such experts serve in their personal capacity.[352] Such requirements may also call for equitable geographical distribution, representation of the principal legal systems or balanced gender representation.[353]

225. The specific mandate of a committee varies depending on the instrument. Some instruments will create committees with a general mandate, to consider progress made "in the implementation of"[354] or "in achieving the realization of the obligations undertaken in"[355] their respective treaty. Other treaties will list specific functions for the committee, such as: examining reports submitted by States parties;[356] adopting general comments or recommendations;[357] considering individual complaints;[358] assessing inter-State complaints;[359] undertaking inquiries and/or visits;[360] considering urgent action requests;[361] and providing information to an assembly of the States parties.[362] A committee can also have a limited mandate, focused on a single function or on a particular region, such as the Committee Against Torture's Sub-Committee on the Prevention of Torture, which monitors places of detention within States parties,[363] or the International Conference on the Great Lakes Region Committee for the prevention and the punishment of the crime of genocide, war crimes, and crimes against humanity and all forms of discrimination, whose work is limited to the Great Lakes Region of Africa.[364]

226. Second, *commissions* are typically panels of independent experts, usually elected by States parties for a set number of years.[365] They are sometimes convened with

[348] Memorandum prepared by the Secretariat on information on existing treaty-based monitoring mechanisms which may be of relevance to the Commission's future work on the topic "Crimes against humanity", *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698.

[349] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention for the Protection of All Persons from Enforced Disappearance; and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination.

[350] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 5.

[351] *Ibid.* Committees are established by the following conventions: the International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; the International Covenant on Civil and Political Rights, art. 28, para. 2; the 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; the Convention on the Rights of the Child, art. 43, para. 2; the 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, paras. 1 and 2; and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6.

[352] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 7.

[353] *Ibid.*

[354] See Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1.

[355] See Convention on the Rights of the Child, art. 43, para. 1.

[356] See, for example, 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; and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 29.

[357] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; International Covenant on Civil and Political Rights, art. 40, para. 4; Convention on the Elimination of All Forms of Discrimination against Women, art. 21; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 4; and Convention on the Rights of the Child, art. 45 (*d*).

[358] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 14; Optional Protocol to the International Covenant on Civil and Political Rights, art. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 1; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 31; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5.

[359] See, for example, 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; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 32; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12.

[360] See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 3; Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women, art. 8, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 33; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13.

[361] See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 30.

[362] *Ibid.*, art. 27.

[363] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5.

[364] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination, art. 26, para. 1, and art. 38.

[365] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 11–17.

similar functions to committees but are often focused on a particular dispute or type of treaty violation.[366] Commissions can be permanent bodies[367] or may be convened *ad hoc*.[368] The mandate of any given commission varies. For example, *ad hoc* conciliation commissions typically have a limited mandate to resolve inter-State disputes that could not be satisfactorily resolved through negotiation,[369] while other commissions may be called upon only to address alleged breaches of the constitutive treaty.[370] Other commissions have much more general mandates, such as the Inter-American Commission on Human Rights, which has broad "competence with respect to matters relating to the fulfilment of the commitments made by the States Parties".[371]

227. Commissions may also have an obligation periodically to report to an international body. Currently this practice is specific to regional commissions, with the Inter-American Commission on Human Rights reporting to the Organization of American States and the African Commission on Human and Peoples' Rights reporting to the African Union.[372]

228. Third, the treaty may establish a *court*. This is a particular feature of the regional human rights conventions.[373] Such courts are permanent judicial institutions charged with monitoring the conduct of the States parties in the implementation of the treaty.[374] The court typically has jurisdiction over matters relating to the interpretation and application of the treaty establishing the court, though the African Court on Human and Peoples' Rights also extends its jurisdiction to "any other relevant Human Rights instrument ratified by the States concerned".[375] Each court has a different process for cases to be brought before it, with some courts allowing individuals or even NGOs to bring cases,[376] while others limit standing to States parties and the treaty's commission.[377]

229. Fourth, the treaty may establish a *meeting of the States parties*, during which the States parties perform various monitoring functions.[378] Such a meeting might occur on a regular basis,[379] such as annually or biennially, or only when convened by the Secretary-General of the United Nations,[380] by the depositary of the treaty[381] or upon the request of one or more States parties (if then approved by the majority of States parties).[382] Meetings of States parties will generally have broad mandates, such as with the Convention on the Safety of United Nations and Associated Personnel, which gives a mandate "to review the implementation of the Convention, and any problems encountered with regard to its application" (art. 23).[383]

2. Types of procedures

230. Monitoring mechanisms can entail a range of procedures, including: (*a*) reports by States parties; (*b*) complaints, applications or communications by individuals; (*c*) inter-State complaints; (*d*) inquiries or visits; (*e*) urgent action; and (*f*) presentation of information for meetings of States parties.[384]

231. First, reports by States parties may be required on a regular basis by the treaty's committee, commission or other body.[385] Reports will typically include measures

[366] See, for example, the Inter-American Commission on Human Rights, created by the American Convention on Human Rights: "Pact of San José, Costa Rica", art. 33; the African Commission on Human and Peoples' Rights, created by the African Charter on Human and Peoples' Rights, art. 30; and the International Fact-Finding Commission, created by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 90. Under the Fact-Finding Commission associated with Protocol I, States parties must declare their acceptance of article 90; to date, only 76 of 174 States parties have done so. While that Commission is capable of being operational, it has never been used.

[367] See, for example, the Inter-American Commission on Human Rights; the African Commission on Human and Peoples' Rights; and the International Fact-Finding Commission.

[368] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*); and International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[369] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 19. See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*); and International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[370] See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 90, para. 2 (*c*).

[371] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 20–23, at para. 20. See American Convention on Human Rights: "Pact of San José, Costa Rica", art. 41; and African Charter on Human and People's Rights, art. 45.

[372] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 24. See also American Convention on Human Rights: "Pact of San José, Costa Rica", art. 41, subpara. *g*; and the African Charter on Human and People's Rights, articles 54 and 59, para. 3.

[373] See European Convention on Human Rights, art. 19; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 33; and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[374] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 25.

[375] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 7. See also European Convention on Human Rights, art. 32; and American Convention on Human Rights: "Pact of San José, Costa Rica", art. 62, para. 3.

[376] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 5; and European Convention on Human Rights, art. 34.

[377] See American Convention on Human Rights: "Pact of San José, Costa Rica", art. 61.

[378] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 32–33. See, for example, Convention on the Safety of United Nations and Associated Personnel, art. 23; Rome Statute of the International Criminal Court, art. 112; United Nations Convention against Transnational Organized Crime, art. 32; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 7.

[379] See, for example, the Rome Statute of the International Criminal Court, art. 112, para. 6; and United Nations Convention against Transnational Organized Crime, art. 32.

[380] See, for example, Convention on the Safety of United Nations and Associated Personnel, art. 23.

[381] See, for example, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 7.

[382] See, for example, Convention on the Safety of United Nations and Associated Personnel, art. 23.

[383] See also *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paragraphs 35–37.

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

[385] *Ibid.*, paras. 39–46. See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 9; the International Covenant on Civil and Political Rights, art. 40; the American Convention on Human Rights: "Pact of San José, Costa Rica", art. 42; the Convention on the Elimination of All Forms of Discrimination against Women, art. 18; African Charter on Human and Peoples'

undertaken by the State party to implement the treaty, such as the enactment of any necessary national laws and regulations, as well as any difficulties the State is experiencing with respect to implementation or compliance.[386] In response to the report by a State party, the monitoring institution may provide "recommendations" or "comments" to the State party,[387] and in some instances to the United Nations or other international body.[388]

232. Second, treaties also may provide for complaints, applications or communications by individuals.[389] Individual complaint mechanisms typically take effect if a State either declares that it recognizes the competence of the respective institution to assess individual complaints[390] or signs an optional protocol,[391] but may also be designed to operate without such State action.[392]

233. Depending on the treaty, such complaints may be filed by individuals, groups of persons or non-governmental entities.[393] Typically local remedies must first be exhausted, there must be no local remedy available to provide effective redress or there must be undue delay in the remedial process before an individual complaint can be submitted.[394] Specific monitoring mechanism institutions may also have additional admissibility criteria.[395] Once the relevant body receives an individual complaint, a procedure will be initiated whereby, ultimately, suggestions, recommendations or views are given by the body to the State party concerned, after which the State may be required to provide a written response, indicating any remedies that it has taken to resolve the situation.[396]

234. Third, the treaty may provide for inter-State complaints.[397] Some treaties allow for such complaints with

Rights, art. 62; 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; Convention on the Rights of the Child, art. 44; and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 29.

[386] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 39–46.

[387] *Ibid*., para. 47. See, for example, International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention for the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; and International Convention for the Protection of All Persons from Enforced Disappearance, art. 29, para. 3.

[388] See, for example, Convention on the Rights of the Child, art. 45 (*b*) (the Committee on the Rights of the Child transmits reports of States parties to specialized agencies, the United Nations Children's Fund and other competent bodies, as it considers appropriate).

[389] See European Convention on Human Rights, art. 34; International Convention on the Elimination of All Forms of Racial Discrimination, art. 14; Optional Protocol to the International Covenant on Civil and Political Rights, arts. 1–2; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 44; the African Charter on Human and Peoples' Rights, art. 55; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, art. 5; Inter-American Convention on the Forced Disappearance of Persons, art. XIII; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 2; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 31; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5.

[390] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 2; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 44; 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.

[391] The 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.

[392] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 49–56.

[393] *Ibid.* See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 14, para. 2 (permitting complaints from individuals and groups of individuals); American Convention on Human Rights: "Pact of San José, Costa Rica", art. 44 (permitting complaints from any person, group of persons or legally recognized non-governmental entity); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 22, para. 1 (permitting complaints from individuals); Optional Protocol to the International Covenant on Civil and Political Rights, art. 1 (permitting complaints from individuals); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2 (permitting complaints from individuals and groups of individuals); International Convention for the Protection of All Persons from Enforced Disappearance, art. 31, para. 1 (permitting complaints from or on behalf of victims); and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 5 (permitting complaints by or on behalf of an individual or group of individuals).

[394] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 57. See, for example, 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, subpara. (*b*); Optional Protocol to the International Covenant on Civil and Political Rights, articles 2 and 5, para. 2 (*b*); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4, para. 1; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 31, para. 2 (*d*); and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7, para. 5.

[395] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 58–65. See, for example, European Convention on Human Rights, art. 35 (requiring that the application cannot be anonymous, the matter cannot be substantially the same as another matter addressed by the court, the application cannot be manifestly ill founded and the applicant cannot abuse the right of the individual application); and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 7 (considering communications inadmissible if: "(*a*) The communication is anonymous; (*b*) The communication is not in writing; (*c*) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto; (*d*) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; (*e*) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief; (*f*) The communication is manifestly ill-founded or not sufficiently substantiated; (*g*) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date; (*h*) The communication is 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").

[396] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 66–69 and 71–78.

[397] See, for example, European Convention on Human Rights, art. 33; International Convention on the Elimination of All Forms of Racial Discrimination, art. 11; International Covenant on Civil and Political Rights, art. 41; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 45; African Charter on Human and Peoples' Rights, art. 47; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, art. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 32; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12.

respect to all States parties, while others only permit inter-State complaints if the respondent State has made a declaration accepting such a complaint procedure.[398] Under the International Covenant on Civil and Political Rights and the International Convention for the Elimination of All Forms of Racial Discrimination, if a complaint is not resolved to the satisfaction of the States parties involved, their respective committees will create an *ad hoc* conciliation commission for further proceedings.[399]

235. Fourth, the treaty may establish a process for inquiries or visits.[400] For treaties with inquiries, the relevant body can initiate an inquiry upon receipt of reliable information indicating that a serious breach by a State party has occurred.[401] This inquiry may include a visit to the State party if warranted and if the State party agrees.[402] The findings of the inquiry are then transmitted to the State party, along with comments, suggestions or recommendations.[403] Alternatively, the treaty may provide for regular visits to a State party. For example, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes "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" (art. 1).

236. Fifth, the treaty may provide procedures for urgent action. However, such a procedure has only been established by the International Convention for the Protection of All Persons from Enforced Disappearance to trace disappeared persons. An urgent action can be initiated via request to the Committee on Enforced Disappearances by relatives of a disappeared person (art. 30, para. 1). The urgent action will only be considered by the Committee if the request: (*a*) is not manifestly unfounded; (*b*) does not constitute an abuse of the right of submission; (*c*) has already been duly presented to the competent bodies of the State party concerned; (*d*) is not incompatible with the provisions of the Convention; and (*e*) the same matter is not being examined under another procedure of international investigation (art. 30, para. 2). The Committee can then transmit recommendations to the State party concerned, which can include a request for the State party to take all necessary measures to locate and protect the person concerned (art. 30, para. 3). The urgent action remains in place "for as long as the fate of the person sought remains unresolved" (art. 30, para. 4).

237. Sixth, and finally, the treaty may provide for a procedure for the presentation of information to meetings of States parties.[404] For example, the treaty may allow the treaty's committee or commission to bring a matter to the urgent attention of the States parties (or another international body) in "special cases" where the committee or commission has received one or more communications that reveal widespread or systematic violations of the treaty.[405] That, in turn, may lead to a further study of the situation with findings.[406]

238. In the event that the present draft articles are transformed into a convention on the prevention and punishment of crimes against humanity, there exists a possibility for the selection of one or more of the above mechanisms to supplement existing mechanisms. Such mechanisms might help ensure that States parties fulfil their commitments under the convention, such as with respect to adoption of national laws, pursuing appropriate preventive measures, engaging in prompt and impartial investigations of alleged offenders and complying with their *aut dedere aut judicare* obligation. Selection of a particular mechanism or mechanisms, however, turns less on legal reasoning and more on policy factors, the availability of resources and the relationship of any new mechanism with those that already exist.[407] Further, choices would need to be made with respect to structure: a new monitoring mechanism might be incorporated immediately in a new convention or might be developed at a later stage,[408] such as occurred with the creation of a committee for the International Covenant on Economic,

[398] 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; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 1.

[399] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 12, para. 1 (*a*); and the International Covenant on Civil and Political Rights, art. 42, para. 1 (*a*).

[400] See European Convention on Human Rights, art. 52; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 90, para. 2; 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; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 33; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13.

[401] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 88–89. See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, para. 3; Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women, art. 8, para. 2; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 2.

[402] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, para. 90

[403] See, for example, 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; and Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 13, para. 4.

[404] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 105–107.

[405] *Ibid.* See, for example, African Charter on Human and Peoples' Rights, art. 58, para. 1; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 34; and 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 (*c*).

[406] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698, paras. 105–107.

[407] States recently engaged in extensive discussions regarding a possible new mechanism for monitoring compliance with international humanitarian law, which revealed a range of views as to the best means for doing so. See Pejic, "Strengthening compliance with IHL: the ICRC–Swiss Initiative".

[408] See Galbraith, "Treaty options: towards a behavioral understanding of treaty design", p. 341 (empirical and behavioural economics study finding that States are much more willing on average to embrace monitoring mechanisms when they are presented in optional protocols, which are separate documents from the main treaty, than when these commitments are presented in "opt-in" clauses).

Social and Cultural Rights.[409] Finally, such a monitoring mechanism might be developed in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide, for which there have been periodic calls.[410]

C. Inter-State dispute settlement

239. This section explores inter-State dispute settlement.[411] The basic methods for peaceful settlement of disputes, of course, are captured in Article 33, paragraph 1, of the Charter of the United Nations, which requires that Member States "shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" for disputes that may endanger international peace and security.[412]

240. There is currently no obligation upon States to resolve inter-State disputes specifically in relation to crimes against humanity. To the extent that such disputes can be resolved, it will occur in the context of a broader obligation for inter-State dispute settlement,[413] which may (or may not) include disputes with respect to crimes against humanity.

241. Disputes concerning, *inter alia*, crimes against humanity may also be channelled into a mechanism relating to a different crime, such as genocide or torture, for which there exists a means for inter-State dispute settlement. For example, the claims brought by Bosnia and Hezegovina and by Croatia against Serbia before the International Court of Justice, as well as the counterclaims by Serbia, focused on violation of the obligation to prevent or punish genocide,[414] as there was no treaty providing for the Court's jurisdiction with respect to crimes against humanity. The case brought by Belgium before the Court focused on whether Senegal had violated its obligations to extradite or prosecute Hissène Habré for torture, as, again, there was no treaty providing for the Court's jurisdiction with respect to crimes against humanity.[415] In both these cases, there were also allegations of crimes against humanity.

242. Crimes against humanity have been mentioned in the European Court of Human Rights and the Inter-American Court of Human Rights when evaluating issues such as fair trial rights,[416] *ne bis in idem*,[417] *nullum crimen, nulla poena sine praevia lege poenali*[418] and the legality of amnesty provisions.[419]

243. Treaties addressing crimes in national law often include dispute settlement provisions and, in recent decades, have established an increasingly detailed process for dispute settlement.[420] For example, article IX of the Convention on the Prevention and Punishment of the Crime of Genocide allows parties to bring a dispute to the International Court of Justice but does not provide for any other dispute settlement process: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[421]

244. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination provides solely for dispute settlement by the International Court of Justice, although it also makes reference to the possibility of negotiation or of some other mode of settlement. Article 22 reads: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

245. More recent treaties set out a process for dispute settlement that begins with negotiation, then calls for arbitration, and finally resort to the International Court of Justice. For example, article 12, paragraph 1, of the Convention for the Suppression of Unlawful Seizure of Aircraft provides:

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[409] See Economic and Social Council resolution 1985/17 of 28 May 1985.

[410] See Schabas, *Genocide in International Law: the Crime of Crimes*, pp. 649–651.

[411] See, generally, Gray and Kingsbury, "Developments in dispute settlement: Inter-State arbitration since 1945".

[412] See also Cede, "The settlement of international disputes by legal means—arbitration and judicial settlement", pp. 358–360.

[413] For example, crimes against humanity arose before the International Court of Justice in the context of counter-claims filed by Italy in the case brought by Germany under the 1957 European Convention for the Peaceful Settlement of Disputes (*Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, *I.C.J. Reports 2010, p.* 310, at pp. 311–312, para. 3). In that instance, however, the Court found that since the counterclaims by Italy predated the entry into force of the Convention, they fell outside the scope of the Court's jurisdiction (*ibid*., pp. 320–321, para. 30).

[414] *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; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, *ICJ, 2015 General List No. 118*, p. 118.

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

[416] *Streletz, Kessler and Krenz v. Germany [GC]*, Nos. 34044/96 and two others, ECHR 2001-II (concurring opinion of Judge Loucaides); and *K.-H.W. v. Germany [GC]*, No. 37201/97, ECHR 2001-II (extracts) (concurring opinion of Judge Loucaides).

[417] *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C, No. 154, p. 62, para. 154.

[418] *Kolk and Kislyiy v. Estonia* (dec.), Nos. 23052/04 and 24018/04, ECHR 2006-I.

[419] *Barrios Altos v. Peru*, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75, concurring opinion of Judge Sergio García-Ramírez, para. 13; *Gelman v. Uruguay*, Judgment of 24 February 2011, Inter-American Court of Human Rights, Series C, No. 221, paras. 198 and 210; and *Marguš v. Croatia [GC],* No. 4455/10, ECHR 2014 (extracts), paras. 130–136.

[420] Cede, "The settlement of international disputes by legal means …", p. 360.

[421] In contrast, the Geneva Conventions for the protection of war victims do not provide for dispute settlement at the International Court of Justice, but do provide for a type of conciliation procedure—by means of Protecting Powers—in the interest of protected persons, "particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention". See, for example, art. 11 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I). To date, this procedure has not been used.

> Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

246. This language is replicated, either identically or with only minor modifications, in several treaties: the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 13, para. 1); the International Convention against the Taking of Hostages (art. 16); 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 International Convention for the Suppression of Terrorist Bombings (art. 20, para. 1); the International Convention for the Suppression of Financing of Terrorism (art. 24); 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); the United Nations Convention against Corruption (art. 66, para. 2); and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 42).

247. While there are some alternative possibilities,[422] this multi-step dispute settlement process of negotiation, arbitration and judicial settlement is often used in treaties addressing crimes in national law. Such provisions appear to reflect a belief by States that a dispute settlement process is an important mechanism for helping to ensure compliance with treaty commitments. Even if relatively few cases ultimately are taken to arbitration or filed at the International Court of Justice, the process provides a channel for inter-State negotiation "in the shadow" of a possible resort to arbitration or judicial settlement. Each of these steps—negotiation, arbitration and judicial settlement—is discussed briefly below.

1. Negotiation

248. The antecedent requirement that there be negotiations prior to resort to inter-State compulsory dispute settlement is commonly included in inter-State dispute settlement provisions. Such provisions, however, do not usually specify what exactly it means when a dispute "cannot be settled by negotiation". The *travaux préparatoires* of the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime indicates that such a provision "is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies".[423]

249. In *Mavrommatis*, the Permanent Court of International Justice held that the requirement for negotiation prior to resort to compulsory dispute settlement was intended to ensure that the respondent party simply had notice of the impending case before it was filed.[424] The International Court of Justice reached a similar conclusion in the *South West Africa* cases, where it held that the duty to negotiate can be met even when no direct or formalized negotiations have taken place.[425] In more recent cases, however, the Court has indicated that the applicant State must make a good faith effort to resolve the dispute through negotiation. For example, in *Armed Activities on the Territory of Congo*, the Court distinguished between merely providing notice of an impending case and engaging in actual good faith negotiations with the intent of resolving the dispute.[426] In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court stated:

> In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires—at the very least—a genuine

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[422] For example, the OAU Convention on the Prevention and Combating of Terrorism does not require that States submit a dispute to arbitration prior to referring a case to the International Court of Justice. The Convention provides that, after negotiation, a State party to the dispute can elect to submit the case either to arbitration or to the International Court of Justice (art. 22). The ASEAN Convention on Counter Terrorism provides for dispute settlement through consultation, negotiation or "any other peaceful means" (art. XIX). Further, treaties establishing international criminal tribunals may have alternative methods of dispute settlement given the existence of institutional mechanisms. See, for example, the Rome Statute of the International Criminal Court, art. 119 ("1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court").

[423] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official Records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime, Tenth Session* (A/AC.254/33), para. 34.

[424] *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, *P.C.I.J., Series A, No. 2*, pp. 13–15 ("[This rule] recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. … When negotiations between the private person and the authorities have already—as in the present case—defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely" (*ibid.*, p. 15)).

[425] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, *I.C.J. Reports 1962*, p. 319, at p. 346 ("[N]o such direct negotiations have ever been undertaken by [the parties]. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties").

[426] *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 pp. 40–41, para. 91 (despite various protests by the Democratic Republic of the Congo with respect to the actions of Rwanda, made both directly to Rwanda and within international organizations, the Court held there was insufficient evidence that the Democratic Republic of the Congo sought to commence negotiations).

attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.[427]

250. The Court maintained that fulfilment of this step does not mean that States must settle their dispute through negotiation, but that they must negotiate until they reach a deadlock or a stage where further negotiations would be futile.[428]

251. In addition, most treaties do not specify the amount of time required for negotiations prior to resort to inter-State compulsory dispute settlement.[429] In some cases, the relevant provision may indicate that disputes which "cannot be settled through negotiation within a reasonable time" may be referred to compulsory dispute settlement,[430] or indicate that a specific period of time for negotiations must have passed, although this is not common with respect to treaties addressing crimes at the national level.[431]

2. Arbitration

252. As indicated above in paragraph 245, the Convention for the suppression of Unlawful Seizure of Aircraft, at article 12, paragraph 1, provides that a dispute "which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration", and "[i]f within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to" judicial settlement. Such a provision provides considerable flexibility to the States in the formation of the arbitral tribunal and its procedures. While further detail might be provided in the provision with respect to those matters, including designation of an appointing authority and a registry, the approach taken in treaties addressing crimes under national law is not to do so. Instead, if an arbitral process is not organized within a set period of time, either State party may resort to judicial settlement.

253. Under the Convention for the Suppression of Unlawful Seizure of Aircraft, and most other treaties addressing crimes in national law, the amount of time during which arbitration must first be pursued is six months.[432]

254. In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice found that a State party can satisfy the requirement to submit a dispute to arbitration by attempting to resort to arbitration, even if the other party refuses to respond.[433] The Court held that the requirement to submit the case to arbitration was complied with when "[a] direct request to resort to arbitration was made by Belgium in a Note Verbale of 20 June 2006", in which Belgium stated that "the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and referenced its obligations under article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[434] After Senegal did not respond, Belgium sent a Note Verbale on 8 May 2007, which reiterated "its wish to constitute an arbitral tribunal" and noted that they had "received no response from the Republic of Senegal on the issue of this proposal of arbitration".[435] The Court concluded that "[t]he present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed", given that the request for arbitration was filed over two years before the case was brought before the Court, the requirement to submit the case to arbitration was met.[436]

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[427] *Case Concerning 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 p. 132, para. 157.

[428] *Ibid*., pp. 132–133, para. 158.

[429] Article 12, paragraph 1, of the Convention for the Suppression of Unlawful Seizure of Aircraft reads, in relevant part: "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration." See also Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft); International Convention against the Taking of Hostages, art. 16, para. 1 (almost identical language); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1 (almost identical language); and International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 1 (almost identical language).

[430] Article 20, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings reads, in relevant part: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration." See also International Convention for the Suppression of the Financing of Terrorism, art. 24 (language identical to that of the International Convention for the Suppression of Terrorist Bombings); United Nations Convention against Transnational Organized Crime, art. 35 (language almost identical to that of the International Convention for the Suppression of Terrorist Bombings); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15 (almost identical language); and United Nations Convention against Corruption, art. 66, para. 2 (almost identical language).

[431] See Rome Statute of the International Criminal Court, art. 119, para. 2, in relevant part ("Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties").

[432] Article 12, paragraph 1, reads, in relevant part: "If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." See also Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1 (identical language); the International Convention against the Taking of Hostages, art. 16, para. 1 (identical language); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1 (identical language); the Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 1 (almost identical language); the International Convention for the Suppression of Terrorist Bombings, art. 20, para. 1 (almost identical language); the International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 1 (almost identical language); United Nations Convention against Transnational Organized Crime, art. 35, para. 2 (almost identical language); 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 (almost identical language); the United Nations Convention against Corruption, art. 66, para. 2 (almost identical language); and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 1 (identical language).

[433] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 415 above), p. 448, para. 62.

[434] *Ibid.*, p. 447, para. 60 (quoting the Note Verbale of 20 June 2006).

[435] *Ibid.* (quoting the Note Verbale of 8 May 2007).

[436] *Ibid.*, p. 448, para. 61.

3. Judicial settlement

255. The judicial settlement provision in article 12, paragraph 1, of the Convention for the Suppression of Unlawful Seizure of Aircraft allows States to refer a dispute to the International Court of Justice, "by request in conformity with the Statute of the Court", when a dispute arises and the parties are unable to agree on the organization of the arbitration.

256. Article 36, paragraph 1, of the Statute of the International Court of Justice provides that the jurisdiction of the Court "comprises … all matters specially provided for … in treaties and conventions in force". The Court's jurisdiction often has been invoked on the basis of a compromissory clause contained in a treaty or convention.[437]

4. Opting out of inter-State dispute settlement

257. While most treaties addressing crimes under national law provide for inter-State dispute settlement, they also typically allow a State party to opt out of such dispute settlement.[438] For example, article 12, paragraph 2, of the Convention for the Suppression of Unlawful Seizure of Aircraft provides that "[e]ach State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation".

258. Equivalent clauses, allowing a State party to opt out of the entire dispute settlement mechanism, are contained in several other treaties addressing crimes under national law, including: the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[439] the International Convention against the Taking of Hostages;[440] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[441] the Convention on the Safety of United Nations and Associated Personnel;[442] the International Convention for the Suppression of Terrorist Bombings;[443] the International Convention of the Suppression of the Financing of Terrorism;[444] and the International Convention for the Protection of All Persons from Enforced Disappearance.[445]

259. In some recent treaties, however, the State party is only able to opt out of the portion of the dispute settlement mechanism that relates to arbitration and judicial settlement, not the portion relating to negotiation. Thus, article 66 of the United Nations Convention against Corruption only allows a State party to opt out of paragraph 2, containing the provisions on arbitration and judicial settlement. The provision on negotiation is separately included in paragraph 1:

> 1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
>
> 2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
>
> 3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
>
> 4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

260. This approach was first adopted in article 35 of the United Nations Convention against Transnational Organized Crime[446] and article 15 of its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which contains identical language. Although the term "reservation" is used in paragraphs 3 and 4, the term "declaration" would also appear appropriate in this context.[447]

261. As of January 2017, there are 181 States parties to the United Nations Convention against Corruption. Of those, 42 States parties have filed a reservation declaring that they do not consider themselves bound by paragraph 2 of article 66.[448] Similarly, there are 187 States parties to

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[437] For a list of treaties or conventions in force conferring jurisdiction upon the Court, either directly or through reference to the Permanent Court of Justice, see www.icj-cij.org, *Jurisdiction*.

[438] An alternative approach would be to allow States to opt into inter-State dispute settlement, but that approach tends to result in lower exposure to compulsory dispute settlement. See Galbraith, "Treaty options", p. 330 (empirical and behavioural economics study finding that when States have the right to opt out of the jurisdiction of the International Court of Justice, 80 per cent do not do so, whereas if States have the right to opt into such jurisdiction, only 5 per cent do so).

[439] Art. 13, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[440] Art. 16, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[441] Art. 30, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[442] Art. 22, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[443] Art. 20, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[444] Art. 24, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[445] Art. 42, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[446] Art. 35 (language identical to that of the United Nations Convention against Corruption).

[447] See, for example, the International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, paras. 2–3 ("2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration. 3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations").

[448] The European Community filed a declaration to article 66, paragraph 2, stating: "With respect to Article 66, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 66, paragraph 2, of the Convention, in disputes involving the Community, only dispute settlement by way of arbitration will be available." United Nations, *Multilateral Treaties Deposited with the Secretary-General*, chap. XVIII.14, available from https://treaties.un.org, *Depositary of Treaties, Status of Treaties*.

the United Nations Convention against Transnational Organized Crime. Of those, 43 States parties have made a reservation declaring that they do not consider themselves bound by paragraph 2 of article 35 of that Convention.[449]

D. Draft article 17. Inter-State dispute settlement

262. As outlined in the first section of this chapter, there is a variety of existing monitoring mechanisms that are used to address situations of crimes against humanity. In the event that the draft articles on crimes against humanity are transformed into a convention on the prevention and punishment of crimes against humanity, there also exists a possibility for the selection of one or more mechanisms to supplement existing mechanisms, but that selection would turn less on legal considerations and more on policy factors and the availability of resources. Moreover, some or all of such mechanisms might be optional and might be included in a supplemental protocol rather than in the convention itself. As such, no proposal is made in this report with respect to the selection of one or more new mechanisms.

263. As outlined above in the previous section, however, treaties addressing crimes in national law commonly include a provision for inter-State dispute settlement in the form of negotiation, arbitration and judicial settlement of a dispute concerning the interpretation or application of the treaty.[450] Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 17. Inter-State dispute settlement*

"1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.

"2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

"3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

"4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration."

[449] The European Community also filed a statement to article 35: "With respect to Article 35, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 35, paragraph 2, of the Convention, in disputes involving the community only dispute settlement by way of arbitration will be available." *Ibid*., chap. XVIII.12.

[450] See, generally, Gray and Kingsbury, "Developments in dispute settlement".

Chapter VIII

Remaining issues

264. This chapter addresses other issues that have arisen in the course of discussions within the Commission relating to this topic: concealment of crimes against humanity; immunity; and amnesty.

A. Concealment of crimes against humanity

265. During the course of the sixty-eighth session, it was suggested within the Commission that the present draft articles might include, in some fashion, an express obligation upon States to take necessary measures to criminalize "concealment" of a crime against humanity.[451] In other words, States might be obligated to criminalize an "after-the-fact" act of concealing one of the offences currently identified in draft article 5, even if an individual was not involved in the offences him or herself. Some members expressed a view, however, that inclusion of concealment was not appropriate, while others stated that concealment was already implicitly included in draft article 5, namely draft article 5, paragraph 2 (*c*).

266. Most treaties addressing crimes do not address, at least expressly, the criminalization of "concealment" of a crime. Thus, no provision on concealment appears in: the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the International Convention against the Taking of Hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism.

267. Only a few global treaties on crimes address criminalization of "concealment" as such and do so in the form of a provision relating to concealment of *property* rather than concealment of the crime itself. Article 24 of the United Nations Convention against Corruption provides:

> Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

[451] See *Yearbook … 2016*, vol. I, 3312th meeting, para. 60 (Mr. Candioti).

268. Under article 24, States are encouraged ("shall consider adopting"), but are not obligated, to take measures to criminalize the "concealment" of "property" that "is the result of" any of the offences established by the Convention. Further, article 24, by its terms, speaks of concealment that is (*a*) intentional, (*b*) committed after one of the other offences established by the Convention has been committed, and (*c*) committed by a person who did not participate in such other offence.[452]

269. Article 23 of the United Nations Convention against Corruption also obligates States parties to take measures criminalizing the laundering of the proceeds of a crime of corruption, which is also a form of concealment.[453] A few other treaties on crimes at the global and regional levels also address concealment in the context of the laundering of proceeds of crime. For example, in the United Nations Convention against Transnational Organized Crime, article 6, paragraph 1, on "Criminalization of the laundering of proceeds of crime" states, in part:

> Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (*a*) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
>
> (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

270. Similar articles may be found in: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3); the Inter-American Convention against Corruption;[454] the 2001 Southern African Development Community Protocol against Corruption;[455] and the African Union Convention on Preventing and Combating Corruption.[456] None of these conventions address concealment of the offence itself, but instead confine their scope to concealment of proceeds from the offence.

271. The Council of Europe's Criminal Law Convention on Corruption includes an article that addresses concealment in the context of "account offences" (art. 14), meaning offences such as creating an invoice with false or incomplete information or unlawfully omitting the record of a payment. This article obligates States to adopt legislative and other measures to establish certain account offences as "offences liable to criminal or other sanctions" when these offences are committed in order to "commit, conceal or disguise the offences referred to in [the Convention]" (art. 14).

272. The International Convention for the Protection of All Persons from Enforced Disappearance addresses concealment in two ways. First, the definition of "enforced disappearance" requires an act of depriving someone of his or her liberty "followed by a refusal to acknowledge the deprivation of liberty *or by concealment of the fate or whereabouts of the disappeared person**" (art. 2). Second, the Convention addresses concealment in the context of the falsification, concealment or destruction of documents attesting to the true identity of a child who is subject to enforced disappearance, whose father, mother or guardian was subjected to enforced disappearance, or who was born during the captivity of a mother subjected to enforced disappearance (art. 25, para. 1). Hence, the Convention does not include any provisions addressing generally the concealment of evidence that a crime occurred.

273. The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption both include an article on overall obstruction of justice. Article 25 of the United Nations Convention against Corruption reads:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (*a*) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;
>
> (*b*) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.[457]

274. This article obligates States to establish two acts as criminal offences under national law, namely efforts to influence witnesses or the production of evidence and any interference with the exercise of judicial or law enforcement officials.[458] The protection of witnesses and other individuals who participate in an investigation or criminal proceeding was addressed in chapter IV, subsection A, and in proposed draft article 14, paragraph 1. Regarding interference with the actions of judicial or law enforcement officers, there appear to be no other global treaties on crimes that address this other than the United Nations

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[452] See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 87, para. 313.

[453] Art. 23 ("Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: … (*a*) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime").

[454] Art. VI, para. 1 ("This Convention is applicable to the following acts of corruption: … *d*. The fraudulent use or concealment of property derived from any of the acts referred to in this article").

[455] Art. 3 ("This Protocol is applicable to the following acts of corruption: … *g*) the fraudulent use or concealment of property derived from any of the acts referred to in this Article").

[456] Article 4, in relevant part ("This Convention is applicable to the following acts of corruption and related offences: … (*h*) the use or concealment of proceeds derived from any of the acts referred to in this Article") and article 6, in relevant part ("State Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences: … (*b*) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences").

[457] See also United Nations Convention against Transnational Organized Crime, art. 23 (almost identical language).

[458] See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 75–76, paras. 255–260.

Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

275. While global treaties on crimes typically do not address "concealment" of a crime as such, the issue has been considered during negotiations. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, under article 4, paragraph 1, obligates States parties to make torture a crime under their national law, including an act "which constitutes complicity or participation in torture". When the Working Group tasked with drafting the Convention first proposed this text, some representatives questioned if "complicity or participation in torture" would "cover those persons who were accessories to the crime of torture after it had occurred or who had in some way concealed acts of torture".[459] Some speakers stated that, under their national legal systems, the term "complicity" encompassed persons who were an accomplice to the crime after the fact or engaged in concealing that a crime occurred, while others felt that the additional text was necessary. The English text of article 4 was not changed[460] but the Working Group proposed that the Spanish text of draft article 4, paragraph 1, be written to include the phrase *o encubrimiento de la tortura* ("concealment of torture").[461] Ultimately, however, the equally authentic Spanish text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contained no such language, referring instead in article 4, paragraph 1, to an act by any person which "*constituya complicidad o participación en la tortura*" ("constitutes complicity or participation in torture").

276. There was a similar debate within the Commission as to whether the proposed articles on individual responsibility in the draft code of crimes against the peace and security of mankind should incorporate the concept of an "attempt to conceal a crime".[462] Several members stated that concealment of a crime was not as serious as the commission of a crime and should not be viewed as meriting comparable treatment. Further, uncertainty was expressed as to what exactly was meant by "concealment", such as whether a government's unwillingness to release information might constitute "concealment". Ultimately, the Commission decided not to include express language on concealment in article 2 of the draft code.

277. Bearing these considerations in mind, the Special Rapporteur is of the view that the Commission should follow existing practice by not including a provision on "concealment" of a crime against humanity in these draft articles. Most treaties addressing crimes do not seek to single out, as a separate offence, "concealment" of the crime, leaving that instead to the operation of national laws as they currently exist.[463] When concealment is addressed, it typically concerns concealment of property or proceeds of the crime, not concealment of the crime itself.

B. Immunity

278. When prosecutions occur under national law of persons alleged to have committed crimes against humanity, it is possible that the alleged offender will assert that he or she is immune under international law from national jurisdiction. When this occurs, an immunity existing under customary or conventional international law may prevent a State from exercising its national criminal jurisdiction over a foreign State's official. Indeed, some international conventions provide detailed rules for certain classes of State officials, including diplomats,[464] consular officials,[465] those participating in special missions[466] and officials of international organizations.[467]

279. At its fifty-ninth session in 2007, the Commission decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its work programme.[468] The Commission appointed Mr. Roman A. Kolodkin as Special Rapporteur,[469] and requested the Secretariat to prepare a background study on the topic[470] which the Secretariat produced in 2008.[471] Mr. Kolodkin submitted three reports, which the Commission received and considered at its sixtieth session in 2008[472] and its sixty-third session in 2011.[473] Those reports did not include draft articles.

280. In 2012, Ms. Concepción Escobar Hernández replaced Mr. Kolodkin as Special Rapporteur, as Mr. Kolodkin was no longer a member of the Commission at that time. The Commission received and considered the preliminary report of the Special Rapporteur at the

[459] Nowak and McArthur, *The United Nations Convention against Torture*, p. 232; and Economic and Social Council, Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/1367), para. 34.

[460] Nowak and McArthur, *The United Nations Convention against Torture*, p. 232; and the Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (see previous footnote), para. 35.

[461] Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (see footnote 459 above), para. 36.

[462] See *Yearbook … 1996*, vol. I, 2437th meeting, pp. 38–39, paras. 59–60; see also *ibid.*, p. 40, paras. 76–77, and 2438th meeting, pp. 42–43, paras. 1–17.

[463] For example, the United Kingdom International Criminal Court Act, 2001 c.17, which was enacted to implement the Rome Statute of the International Criminal Court, includes as an ancillary offence under section 55, paragraph (1) (*d*), "assisting an offender or concealing the commission of an offence". Section 55, paragraph (5) (*b*), provides that "the reference to concealing an offence is to conduct that in relation to an arrestable offence would amount to an offence under section 5 (1) of [the Criminal Law Act 1967]". An accompanying explanatory note indicates: "This section defines ancillary offences for the purposes of this Part. They include the forms of secondary liability in Article 25.3 of the [Rome Statute of the International Criminal Court] but are defined in terms of the principles of secondary liability under the law of England and Wales." The United Kingdom statute and explanatory note are available from www.legislation.gov.uk/ukpga/2001/17/contents.

[464] Vienna Convention on Diplomatic Relations.

[465] Vienna Convention on Consular Relations.

[466] Convention on Special Missions.

[467] See, for example, the Convention on the Privileges and Immunities of the United Nations.

[468] *Yearbook … 2007*, vol. II (Part Two), p. 98, para. 376.

[469] *Ibid.*

[470] *Ibid.*, p. 101, para. 386.

[471] Memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr. 1; available from the Commission's website, documents of the sixtieth session. The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One)).

[472] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 157 (preliminary report).

[473] *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).

same session in 2012,[474] her second report during the sixty-fifth session in 2013,[475] her third report during the sixty-sixth session in 2014,[476] her fourth report during the sixty-seventh session in 2015[477] and her fifth report during the sixty-eighth session in 2016.[478] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, and fourth reports, the Commission has provisionally adopted five draft articles and commentaries thereto.[479] It is noted that these draft articles do not address immunities that exist under "special rules of international law", such as those on the immunity of diplomats, consular officials, persons on special mission or officials of international organizations.[480] The Commission's work on this topic is ongoing.

281. Treaties addressing crimes typically do not contain a provision on the issue of immunity, leaving the matter to other treaties addressing immunities of classes of officials or to customary international law. Thus, there is no provision on immunity of State officials or officials of international organizations in: the Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions for the protection of war victims; the Convention for the Suppression of Unlawful Seizure of Aircraft; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the International Convention against the Taking of Hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Inter-American Convention to Prevent and Punish Torture; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; and the United Nations Convention against Transnational Organized Crime.[481] Some treaties provide that State officials have international criminal responsibility or shall be punished, but do not preclude procedural immunities in national courts.[482]

282. There is a provision on immunity in the Inter-American Convention on Forced Disappearance of Persons,[483] but that provision was not reproduced in the International Convention for the Protection of All Persons from Enforced Disappearance. Indeed, while an initial draft of what became the International Convention for the Protection of All Persons from Enforced Disappearance contained an article explicitly excluding immunity of State officials other than diplomats,[484] States decided to drop that article in the final version of the Convention.[485] There is also a provision on immunity in the United Nations Convention against Corruption,[486] but that provision is focused on the immunity of a State official within his or her own country, not on the immunity of a State official from foreign criminal jurisdiction.

283. Treaties establishing international courts and tribunals typically abrogate immunities of State officials, out of a belief that concerns with respect to prosecutions at the national level are not warranted before courts and tribunals consisting of international prosecutors and judges. Building upon the text of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (Nürnberg Charter)[487] and statutes of the *ad hoc* tribunals, article 27, paragraph 2, of the Rome Statute of the International Criminal Court provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". To the extent that the issue arises, international criminal tribunals seem to recognize the difference between prosecutions before international jurisdictions and national jurisdictions, such as by noting that "national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action", whereas

[474] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654.

[475] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

[476] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673.

[477] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686.

[478] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/701.

[479] Draft article 2 on the use of terms is still a developing text.

[480] Draft article 1, paragraph 2, provides: "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."

[481] Article 26, paragraph 3, of this Convention does address immunity from prosecution of a person who cooperates with law enforcement authorities in the investigation or prosecution of Convention offences ("Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention").

[482] See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, art. IV (individuals "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"); and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. III ("[i]nternational criminal responsibility shall apply … to … representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State"). Whatever effects may exist under the Convention for the Prevention and Punishment of the Crime of Genocide with respect to immunity, article VI limits jurisdiction over the crime to "the State in the territory of which the act was committed" and "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

[483] Article IX reads, in relevant part: "Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations."

[484] The initial draft was prepared by the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights. See Report of the sessional working group on the administration of justice (footnote 174 above), annex, art. 10, para. 2 ("No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations").

[485] The Convention does address immunities in the context of granting them to the members of that treaty's committee of experts; see art. 26, para. 8, of the Convention.

[486] Art. 30, para. 2 ("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").

[487] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (Nürnberg Charter) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.

such a risk "does not arise with international courts and tribunals, which are 'totally independent of states and subject to strict rules of impartiality' ".[488]

284. Consistent with the approach taken in prior treaties addressing crimes, the Special Rapporteur is of the view that the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law. This approach should not be construed as having any implications for the Commission's work on "Immunity of State officials from foreign criminal jurisdiction".

C. Amnesty

285. When prosecutions occur under national law of persons alleged to have committed crimes against humanity, it is also possible that the alleged offender will assert that he or she is protected by an amnesty granted by his or her State of nationality. An amnesty refers to legal measures that have the effect of prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption. It may also refer to legal measures that retroactively nullify legal liability that was previously established.[489] Amnesties accorded under national law by a State in which crimes have occurred may arise pursuant to constitutional, statutory or executive sources of law, and may be the product of a negotiated peace agreement ending an armed conflict. Such an amnesty may be general in nature or may be conditioned by certain requirements, such as disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed or an expression of apology to the victims or their families by the alleged offender.

286. Conflicting views exist as to the permissibility of amnesties under international law, including with respect to crimes against humanity. With respect to treaties, "[n]o international treaty explicitly prohibits amnesties",[490] including: the Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions for the protection of war victims; 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; or the Inter-American Convention to Prevent and Punish Torture.

287. To the contrary, article 6, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), which has 168 States parties, encourages States to enact amnesties at the end of hostilities. It reads: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." The 2005 study on *Customary International Humanitarian Law* published under the auspices of the ICRC interprets article 6, paragraph 5, as excluding persons suspected of, accused of or sentenced for war crimes, concluding that State practice established this as a norm of customary international law applicable in non-international armed conflicts.[491] That interpretation, however, has been criticized.[492]

288. Recently negotiated treaties also have not precluded amnesties, including treaties addressing serious crimes. Thus, the possibility of including a provision on amnesty was debated during the negotiations for both the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance, but the issue proved controversial and the final treaties excluded any such provision.[493]

289. Many treaties that address crimes at the national level impose an obligation on States parties to submit certain offences to prosecution (unless the person is extradited or surrendered to another authority capable of doing so) and sometimes obligate States parties to provide victims with reparations (see chapter IV, section D above). Some commentators,[494] treaty bodies[495] and courts[496] have found that such provisions implicitly preclude amnesties.

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[488] *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, International Criminal Court, para. 34 (citing Cassese, *International Criminal Law*, p. 312).

[489] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (HR/PUB/09/1; United Nations publication, Sales No. E.09.XIV.1), p. 5. That report distinguishes between amnesties, pardons, official immunities and other elements of impunity.

[490] See Transitional Justice Initiative, *Belfast Guidelines on Amnesty and Accountability*, University of Ulster, 2013, guideline 6 (*b*).

[491] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I: *Rules*, rule 159 ("At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes").

[492] See, for example, *Belfast Guidelines on Amnesty and Accountability* (footnote 490 above), p. 41 ("The limited evidence cited … seems to contradict the ICRC's justification for reformulating Article 6 (5)").

[493] *Ibid*., p. 36; Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (footnote 44 above), paras. 73–80; Gavron, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", pp. 107–108; and *Marguš v. Croatia* (footnote 419 above), para. 109.

[494] See, for example, Cassese *et al.*, *Cassese's International Criminal Law*, p. 310.

[495] See, for example, general comment No. 20 (footnote 144 above), para. 15, in which the Human Rights Committee concluded that amnesty laws were incompatible with article 7 of the International Covenant on Civil and Political Rights prohibiting torture and other cruel, inhuman or degrading treatment of punishment ("The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible").

[496] See, for example, *Ould Dah v. France* (dec.), No. 13113/03, ECHR 2009, p. 438; *Barrios Altos v. Peru* (footnote 419 above), paras. 41–44; and *Decision on Ieng Sary's Appeal against the Closing Order*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), 11 April 2011, Extraordinary Chambers in the Courts of Cambodia, para. 201.

It is noted, however, that such treaties do not require prosecution; they require that the matter be submitted to prosecution, which leaves intact prosecutorial discretion. Further, such treaties typically provide that when the offence is submitted to prosecution, the national authorities shall decide whether to prosecute in a similar manner as they would for ordinary offences of a serious nature.[497]

290. With respect to State practice, amnesties historically have been adopted by various States, even for serious crimes. For example, the 1999 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone provided for a blanket amnesty. Article IX, paragraph 2, read: "After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement."[498] At the same time, the Special Representative of the Secretary-General for Sierra Leone attached a disclaimer to the agreement stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[499]

291. In considering the effect of an amnesty, a distinction might be drawn between the ability of an amnesty to affect a prosecution in the State where the amnesty was issued, and its ability to affect a prosecution before the courts of other States or a prosecution before an international or "hybrid" court. With respect to prosecution before the courts of other States, it is generally accepted that the granting of amnesty by one State has no direct effect on prosecutions in a different State.[500]

292. With respect to international or "hybrid" courts, the International Tribunal for the Former Yugoslavia rejected any affect of a national amnesty upon its jurisdiction;[501] it further maintained that amnesties for international offences were generally invalid under international law, a position that has been criticized.[502] Other international courts or hybrid tribunals have been more cautious on the latter point, indicating that this is an area where the law is "developing" or where there is an "emerging consensus". For example, article 10 of the Statute of the Special Court for Sierra Leone included a clause providing that an amnesty was not a bar to prosecution before that court.[503] Based on article 10, the Appeals Chamber of the Special Court for Sierra Leone consistently held that article IX of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone was not a bar to the jurisdiction of the Special Court. While the Special Court found "support for the statement that it is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law",[504] it recognized that this presented the "direction in which customary international law is developing",[505] adopting Antonio Cassese's analysis that there was not yet any general obligation for States to refrain from amnesty laws for crimes against humanity.

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[497] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, para. 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"); and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 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").

[498] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), S/1999/777.

[499] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (S/2000/915), para. 23; see also *Rule-of-Law Tools for Post-Conflict States: Amnesties* (footnote 489 above), p. 11.

[500] See *Belfast Guidelines on Amnesty and Accountability* (footnote 490 above), guideline 18 *a*) ("Although amnesties bar criminal proceedings within the States that enacted the amnesty, they cannot bar international, hybrid or foreign courts from exercising jurisdiction. Such courts may decide under their own jurisdiction whether to recognise an amnesty"). See also O'Keefe, *International Criminal Law*, p. 477; and *Ould Dah v. France* (footnote 496 above), p. 438.

[501] See, for example, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, *Judicial Reports 1998*, vol. I, para. 155; see also *Belfast Guidelines on Amnesty and Accountability* (footnote 490 above), guideline 18; International Tribunal for the Former Yugoslavia, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, Trial Chamber, paras. 17 and 25; and International Tribunal for the Former Yugoslavia, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009, Appeals Chamber, para. 52.

[502] For example, the International Tribunal for the Former Yugoslavia held that the *jus cogens* prohibition on torture delegitimized any amnesty for torture. Roger O'Keefe, however, has argued that "the hypothetical peremptory status of an international criminal prohibition has no logical implications for the international legality of a statute of limitations or amnesty in respect of that crime" (O'Keefe, *International Criminal Law*, p. 476).

[503] Art. 10 of the Statute (see footnote 254 above) ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution"). For similar provisions, see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (footnote 253 above), art. 40 ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers"); and Statute of the Special Tribunal for Lebanon (footnote 254 above), article 6 ("An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution").

[504] *Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 25 May 2004, Appeals Chamber, Special Court for Sierra Leone, para. 3.

[505] *Prosecutor v. Kallon and Kamara*, Case Nos. SCSL-2004-15-AR72 and SCSL-2004-16-AR72, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, Appeals Chamber, Special Court for Sierra Leone, paras. 71 and 82–84, especially para. 84. See also Cassese *et al.*, *Cassese's International Criminal Law*, p. 312. Cassese further states that "[i]t should be added that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe. … The same argument should hold true for genocide and crimes against humanity, since there seems to be conclusive evidence that conduct amounting to such crimes is prohibited by peremptory norms of international law. It would follow that amnesty passed for such crimes would not be applicable as contrary to international law" (*ibid.*).

293. The Extraordinary Chambers in the Courts of Cambodia concluded that there was an "emerging consensus" that prohibits amnesties in relation to serious international crimes based on a duty to investigate and prosecute these crimes and to punish their perpetrators.[506] However, the Trial Chamber accepted that State practice was arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them.[507]

294. Amnesties have been found impermissible by regional human rights courts because they preclude accountability under regional human rights treaties, although some distinctions may be found as among those courts. In its seminal case of *Barrios Altos v. Peru*, the Inter-American Court of Human Rights held that all amnesty provisions are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious violations of non-derogable rights under the American Convention on Human Rights: "Pact of San José, Costa Rica".[508] In *Almonacid-Arellano* et al. *v. Chile*, the Court also concluded that "crimes against humanity are crimes which cannot be susceptible of amnesty".[509] In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Commission on Human and Peoples' Rights found that "[t]here has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights [violations] has become a rule of customary international law".[510] In *Marguš v. Croatia*, the European Court of Human Rights more cautiously recognized the "growing tendency in international law" to see amnesties to grave breaches of fundamental human rights as unacceptable as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes. However, the Court noted that amnesties may be possible in particular circumstances, such as a reconciliation process and/or as a form of compensation to victims, while holding that those circumstances were not relevant in that particular case.[511]

295. This mixed practice is summarized in *the Belfast Guidelines on Amnesty and Accountability*:

> Crimes against humanity and war crimes committed in non-international armed conflicts have been defined in the Rome Statute of the International Criminal Court (ICC) and where it has jurisdiction, the ICC can prosecute these crimes. These developments together with the case law of international courts and the opinions of authoritative bodies have provided greater clarity on the nature of these offences and contributed to a body of opinion to support the existence of a customary prohibition on amnesties for international crimes. However, other sources of *opinio juris* from domestic and hybrid courts together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes.[512]

296. As a result, many publicists have found it difficult to conclude that there is a consensus on whether a complete prohibition on amnesties, even for serious crimes, has attained the status of customary international law.[513] Rather, such publicists call for taking account of situation-specific various factors, such as whether the particular amnesty provisions amount to a blanket amnesty or provide relevant conditions, or exclude those most responsible for the crimes committed.[514]

297. Consistent with the approach taken in prior treaties addressing crimes, the Special Rapporteur is of the view that the present draft articles should not address the issue of amnesties under national law. Any amnesty granted by a State would have to be evaluated in light of that State's obligations under, *inter alia*, draft articles 9 and 14, and under customary international law as it currently exists or as it evolves in the future. Further, it should be recalled that a national amnesty would not bar prosecution of a crime against humanity by a competent international criminal tribunal or a foreign State with concurrent prescriptive jurisdiction over that crime.

[506] See *Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem *and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, 3 November 2011, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, para. 53. The European Court of Human Rights, in *Marguš* v. *Croatia* (see footnote 419 above) cited submissions by interveners in that case that, since the Second World War, States have increasingly relied on amnesty laws (para. 110). Although the number of new amnesty laws excluding international crimes had increased, so too had the number of amnesties including such crimes.

[507] *Decision on Ieng Sary's Rule 89 Preliminary Objections* (see previous footnote), para. 53.

[508] *Barrios Altos v. Peru* (see footnote 419 above), para. 41. See also *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of 25 October 2012, Inter-American Court of Human Rights, Series C, No. 252, paragraphs 283–286.

[509] *Almonacid-Arellano* et al. v. *Chile* (see footnote 417 above), para. 114. See also *ibid*., para. 129.

[510] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, Decision of 15 May 2006, African Commission on Human and Peoples' Rights, para. 201.

[511] *Marguš v. Croatia* (see footnote 419 above), para. 139.

[512] *Belfast Guidelines on Amnesty and Accountability* (see footnote 490 above), guideline 6 (*d*). See also Mallinder, "The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws", .

[513] See, for example, Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, pp. 570–572; and O'Keefe, *International Criminal Law*, pp. 468–469 and 474.

[514] See *Belfast Guidelines on Amnesty and Accountability* (footnote 490 above), guidelines 7 and 8. See also *Decision on Ieng Sary's Rule 89 Preliminary Objections* (footnote 506 above), paragraph 52, in which the Extraordinary Chambers in the Courts of Cambodia noted that certain conditional amnesties have met with widespread approval, such as in South Africa where amnesties were granted as part of the reconciliation process.

Chapter IX

Preamble

298. A preamble to the present draft articles might highlight several core elements that motivate and justify the present draft articles: the fact that over the course of history crimes against humanity, which deeply shock the conscience of humanity, have been committed, causing extreme harm and suffering to children, women and men; the fact that such crimes threaten international peace and security; the desire that such crimes be punished, including

through measures taken at the national level and with the support of inter-State cooperation; the value of punishment as a means of preventing such crimes from happening again; and therefore the duty of States to exercise their criminal jurisdiction over those responsible for such crimes. Further, the preamble is an appropriate place to reaffirm the basic purposes and principles of the Charter of the United Nations, including rules with respect to the use of force and non-intervention, with which the present draft articles are consistent and do not seek to change.

299. Prior instruments provide guidance in this regard. Notably, the preamble to the Convention on the Prevention and Punishment of the Crime of Genocide provides in part:

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required …

300. The preamble of the Rome Statute of the International Criminal Court provides in part:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming 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,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State …

301. Bearing these considerations in mind, the Special Rapporteur proposes the following draft preamble:

"*Draft preamble*

"*Mindful* that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

"*Recognizing* that such crimes against humanity threaten the peace, security and well-being of the world,

"*Affirming* that crimes against humanity, one of 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,

"*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

"*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

"*Reaffirming* the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

"*Emphasizing* in this connection that nothing in the present draft articles shall be taken as authorizing any State to intervene in an armed conflict or in the internal affairs of any other State,"

Chapter X

Final clauses of a convention

A. Final clauses in the work of the Commission

302. The syllabus for this topic provided that the objective is "to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity".[515] Such a convention ultimately would need to have final clauses, potentially addressing issues such as: adoption and authentication of the treaty; the depositary; participation in the treaty; signature; methods of consent to be bound; provisional application; reservations; declarations; notifications; entry into force; registration and publication; authentic texts; amendment; duration; and termination.[516]

303. The statute of the Commission is silent on the possibility for the Commission to propose final clauses of a draft convention to the General Assembly. At the same time, the statute does not place any limitation on the type of draft articles that can be submitted to the General Assembly. Article 22 of the statute merely requires the Commission to prepare a "final" draft and explanatory report, which it shall submit with its recommendation. Article 23, paragraph 1 (*c*), of the statute provides that the draft can be recommended with a view to the conclusion of a convention, without limiting the possible content of the draft.

304. In practice, however, the Commission has only twice proposed final clauses for draft conventions to the General Assembly: the draft convention on the reduction of future statelessness and the draft convention on the elimination of

[515] See *Yearbook … 2013*, vol. II (Part Two), p. 84, annex II, para. 3.

[516] See *Final Clauses of Multilateral Treaties: Handbook* (United Nations publication, Sales No. E.04.V.3).

future statelessness.[517] Those two topics were included in the Commission's list of topics of international law selected for codification. Noting these recommendations, in 1950 the Economic and Social Council requested the Commission to undertake the drafting of two conventions.[518] Thereafter, at its sixth session in 1954, the Commission adopted the draft convention on the reduction of future statelessness and the draft convention on the elimination of future statelessness, both of which contained final clauses.

305. In light of this prior practice, the present report does not recommend that the Commission adopt draft articles that would serve as final clauses to a convention. Nevertheless, given the Commission's prior work on the topic of reservations, and the possibility that States may wish for further guidance on this issue specifically in the context of a convention on the prevention and punishment of crimes against humanity, the remainder of this chapter discusses possible options for a final clause relating to reservations.

B. Balancing of interests with respect to reservations to a treaty

306. The Commission has previously addressed reservations in the context of treaty law generally, notably in the 1969 Vienna Convention (arts. 19–23), the 1978 Vienna Convention on Succession of States in respect of Treaties (art. 20) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention"), and most recently in its 2011 Guide to Practice on Reservations to Treaties.[519] Adopting a composite of the definitions included in the 1969 Vienna Convention[520] and the 1986 Vienna Convention,[521] the Commission defined reservations in guideline 1.1 of the 2011 Guide to Practice on Reservations to Treaties as follows:

> "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.[522]

307. The Commission recognized that reservations are substantially linked to a State's consent to be bound by a treaty and are an important tool for building consensus around and participation in multilateral treaties.[523] Appropriately formulated reservations allow States to participate in treaties while providing a method to account for their different legal and political systems. Allowing such flexibility is particularly pertinent for treaties and conventions that promote the adoption of national laws.[524] Further, the Commission concluded that there was no reason to apply different rules on reservations to human rights treaties determining that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying the legal regime.[525]

308. On the other hand, in the context of human rights treaties, some States,[526] treaty bodies[527] and commentators have expressed concern about the potential for general, unlimited reservations to undermine the integrity of a treaty. For example, concerns have been expressed[528]

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[517] *Yearbook … 1954*, vol. II, document A/2693, p. 143.

[518] Economic and Social Council resolution 304 D (XI) of 17 July 1950; and Economic and Social Council resolution 319 B (XI) of 11 August 1950.

[519] Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three).

[520] Art. 2, para. (1) (*d*) (" 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

[521] Art. 2, para. (1) (*d*) (" 'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization").

[522] Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), p. 23.

[523] *Ibid*., pp. 278 *et seq.*, guideline 4.3 and the commentary thereto. See also General Assembly resolution 68/111 of 16 December 2013, preamble ("Recognizing the role that reservations to treaties may play in achieving a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and facilitating wide participation therein").

[524] In the Guide to Practice on Reservations to Treaties, the Commission noted that a State very often formulates a reservation because the treaty imposes on it obligations incompatible with its internal law, which it is not in a position to amend, at least initially. The Commission developed guideline 3.1.5.5, concerned with reservations relating to internal law "to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of specific rules of internal law—on the understanding that, as is the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate" (*Yearbook … 2011*, vol. II (Part Three), p. 228, para. (7) of the commentary to guideline 3.1.5.5)). Further, the Commission recognized that the concern of a State or international organization to preserve its freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty is particularly present in two situations: "where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules" (*ibid.*, p. 82, para. (1) of the commentary to guideline 1.7.1).

[525] *Ibid*., pp. 230–231, paras. (5)–(9) of the commentary to guideline 3.1.5.6. Professor Edward Swaine similarly observes that, "[w]hile reservations, by definition, seek unilaterally to compromise a State's treaty obligations, States are nonetheless presumptively free to propose them. Generally they do so to adapt the treaty to domestic legal and political circumstances in matters that are usually of keen local (and, happily, minimal international) interest" (Swaine, "Treaty reservations"). Professor Schabas also asserts that "[a]rticle 27 should not be invoked in the context of the legality of reservations. Normally, [S]tates make reservations precisely because their internal law is in conflict with the treaty. Indeed, the Human Rights Committee specifically urges [S]tates 'to indicate in precise terms the domestic legislation or practices which [they believe] to be incompatible with the Covenant obligation reserved'" (Schabas, "Reservations to human rights treaties: time for innovation and reform", p. 59).

[526] See Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex VI, sect. B, observations of the United Kingdom, para. 3.

[527] See Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant (*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. 210).

[528] See Schabas, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child", p. 80. Despite these criticisms, Professor Schabas observes that, "[i]n many cases, these reservations are quite precise and limited, and leave most of the instrument intact. … Indeed, [the drafters'] intent was to allow such minor reservations specifically in order to encourage widespread ratification, and this goal has been accomplished" (*ibid., p.* 110).

about the extent and impact of reservations on the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. In a report following its eighteenth and nineteenth sessions, the Committee on the Elimination of Discrimination against Women adopted a statement on reservations, noting with concern the number and extent of reservations to the Convention, including the fact that some reservations are drawn so widely that they cannot be limited to specific provisions.[529] The 1993 Vienna Declaration and Programme of Action from the World Conference on Human Rights urged States, as far as possible, to avoid resorting to reservations.[530]

309. Thus, the issue of reservations may be seen, to a large extent, as a debate between promoting breadth of State participation in a treaty regime (by allowing States to calibrate their obligations so as to harmonize with difficult-to-change national law)[531] and ensuring that the depth of the regime remains meaningfully intact (by limiting or prohibiting such changes). Reflecting on this debate, the Commission noted, in its conclusions on the reservations dialogue, the necessity of bearing in mind "the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein".[532]

C. Approaches taken in existing treaties to reservations

310. There appear to be at least five different approaches for addressing the issue of reservations. For each approach, the treaty is governed, in the first instance, by any relevant provision within the treaty on reservations and, in the second instance, by the provisions on reservations contained in the conventional or customary international law relating to reservations.

311. First, the treaty might be completely silent on the issue of reservations, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions for the protection of war victims and the International Covenant on Civil and Political Rights. Alternatively, the treaty might contain a provision permitting reservations.[533]

312. Second, the treaty generally might be silent on the issue of reservations, except for a provision that permits a reservation (sometimes styled as a declaration) to the treaty's dispute settlement mechanism. This is the dominant approach[534] for treaties addressing crimes in national law, as may be seen in: the Convention for the Suppression of Unlawful Seizure of Aircraft;[535] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[536] the International Convention against the Taking of Hostages;[537] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[538] the Convention on the Safety of United Nations and Associated Personnel;[539] the International Convention for the Suppression of Terrorist Bombings;[540] the International Convention for the Suppression of the Financing of Terrorism;[541] the United Nations Convention against Transnational Organized Crime[542] and accompanying Protocols; and the International Convention for the Protection of All Persons from Enforced Disappearance.[543] Such an approach does not necessarily implicitly preclude other reservations to the treaty.[544]

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[529] See Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 38* (A/53/38/Rev.1), pp. 47–49.

[530] See Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I)), section I, para. 26. In section II, the Declaration notes that, "[t]he World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them" (*ibid.*, chap. II, para. 5).

[531] For example, in the Guide to Practice on Reservations to Treaties, the Commission noted the reservation by Mozambique to the International Convention against the Taking of Hostages as an example of reservations relating to the application of internal law that "give rise to no objections and have in fact not met with any" (*Yearbook … 2011*, vol. II (Part Three), pp. 227–228, para. (4) of the commentary to guideline 3.1.5.5). Mozambique declared that, in accordance with its Constitution and domestic law, it could not extradite its citizens (*ibid.*, footnote 1757).

[532] *Ibid*., annex, p. 349.

[533] See, for example, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, art. 14, para. 1 ("When definitively signing, ratifying or acceding to this Convention or any amendment hereto, a State Party may make reservations").

[534] Exceptions to this include: the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 9 (prohibiting all reservations); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 26, para. 1 (prohibiting all reservations); the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (silent on reservations); and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (silent on reservations).

[535] Art. 12, para. 2 ("Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation").

[536] Art. 13, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[537] Art. 16, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[538] Art. 30, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft). Article 28, paragraph 1, contains a clause providing for an opt-out in relation to article 20, concerning the competence of the Committee against Torture. In contrast, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 30, prohibits reservations completely.

[539] Art. 22, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[540] Art. 20, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[541] Art. 24, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[542] Art. 35, para. 3 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft).

[543] Art. 42, para. 2 (language almost identical to that of the Convention for the Suppression of Unlawful Seizure of Aircraft). At the fifth session of the inter-sessional open-ended working group, the Chairperson noted that States parties would have the right to enter reservations at the time of accession, on the understanding that such reservations must be in keeping with international law (Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57), para. 160).

[544] The 1969 Vienna Convention, article 19 (*a*) and (*b*), provides that a reservation may be formulated unless the treaty prohibits all reservations or the treaty prohibits specified reservations which do not include the reservation in question. Such language does not directly address the situation of a treaty that permits specified reservations and is silent with

Rather, it simply makes clear that a reservation to the treaty's dispute settlement mechanism does not defeat the object and purpose of the treaty.

313. Third, the treaty might contain a provision identifying articles to which reservations may be formulated, while prohibiting all other reservations. Examples of this approach may be found in: the 1949 Revised General Act for the Pacific Settlement of International Disputes;[545] the 1961 Single Convention on Narcotic Drugs;[546] the 1971 Convention on psychotropic substances;[547] the 1982 United Nations Convention on the Law of the Sea;[548] the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;[549] and the 1992 European Charter for Regional or Minority Languages.[550]

314. Fourth, the treaty might contain a provision identifying treaty articles, or category of articles, to which reservations may not be formulated, while permitting all other reservations. Examples of this approach are: the Convention relating to the Status of Refugees;[551] the 1958 Convention on the Continental Shelf;[552] and the International Sugar Agreement, 1977.[553]

315. A variation of this approach is a provision prohibiting reservations that defeat the object and purpose of the treaty, but otherwise allowing reservations. Examples of such an approach are: the International Convention on the Elimination of All Forms of Racial Discrimination;[554] the Convention on the Elimination of All Forms of Discrimination against Women;[555] the Convention on the Rights of the Child;[556] and the OAU Convention on the Preven-

respect to other reservations. In its Guide to Practice on Reservations to Treaties, the Commission stipulated that: "A cursory reading of article 19, subparagraph (*b*), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (*a*) represents the other. The symmetry is far from total, however. To have total symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (*b*) contains additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions: (*a*) The treaty's reservation clause must permit the formulation of reservations; (*b*) The reservations permitted must be 'specified'; (*c*) It must be specified that 'only' those reservations 'may be made'" (*Yearbook … 2011*, vol. II (Part Three), p. 205, para. (1) of the commentary to guideline 3.1.2).

[545] Art. 39, paras. (1)–(2) ("1. In addition to the power given in the preceding article, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession. 2. These reservations may be such as to exclude from the procedure described in the present Act: (*a*) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute; (*b*) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States; (*c*) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories").

[546] Art. 50, paras. (1)–(3) ("1. No reservations other than those made in accordance with article 49 or with the following paragraphs shall be permitted. 2. Any State may at the time of signature, ratification or accession make reservations in respect of the following provisions of this Convention: Article 12, paragraphs 2 and 3; article 13, paragraph 2; article 14, paragraphs 1 and 2; article 31, paragraph 1 (*b*), and article 48. 3. A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation").

[547] Art. 32, paras. (1)–(3) ("1. No reservation other than those made in accordance with paragraphs 2, 3 and 4 of the present article shall be permitted. 2. Any State may at the time of signature, ratification or accession make reservations in respect of the following provisions of the present Convention: (*a*) Article 19, paragraphs 1 and 2; (*b*) Article 27; and (*c*) Article 31. 3. A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraphs 2 and 4 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have signed without reservation of ratification, ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation").

[548] Art. 309 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention"). In fact, no article of the Convention expressly permits reservations, although article 298 allows for declarations opting out of compulsory procedures for certain categories of disputes. Article 310 of the Convention provides that interpretative declarations are permitted "provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State".

[549] Art. 2, para. 1 ("No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime").

[550] Art. 21, para. 1 ("Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make one or more reservations to paragraphs 2 to 5 of Article 7 of this Charter. No other reservation may be made").

[551] Art. 42 ("1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36–46 inclusive. 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations"). See also Convention relating to the Status of Stateless Persons, article 38.

[552] Art. 12 ("1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive. 2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations").

[553] Article 78, paragraph 3, reads, in relevant part: "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement."

[554] Art. 20, para. 2 ("A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it"). For criticisms of the formulation adopted in this Convention, see the Commission's Guide to Practice on Reservations to Treaties in which the Commission noted that "[i]t must be admitted, however, that such clauses—however attractive they may seem intellectually—are, in any case, far from resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them and they leave important questions unanswered" (*Yearbook … 2011*, vol. II (Part Three), p. 234, para. (4) of the commentary to guideline 3.2).

[555] Art. 28, para. 2 ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted").

[556] Art. 51, para. 2 ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted").

tion and Combating of Terrorism.[557] The "object and purpose" test, of course, was articulated in the International Court of Justice's 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[558] where the Court held that the "object and purpose" of the Convention limits both the freedom of making reservations and that of objecting to them.[559] This "object and purpose" test was adopted in article 19, paragraph (*c*), of the 1969 and 1986 Vienna Conventions, and was analysed in the Commission's 2011 Guide to Practice on reservations to treaties.[560]

316. A further variation is where a treaty prohibits "reservations of a general character", an approach designed to avoid vague reservations whose effects are unclear and therefore difficult to assess.[561] Examples of such a provision may be found in: the European Convention on Human Rights;[562] the Inter-American Convention to Prevent and Punish Torture;[563] and the Inter-American Convention on Forced Disappearance of Persons.[564]

317. Fifth, the treaty may contain a provision prohibiting all reservations.[565] Whether a particular treaty actually prohibits all reservations needs to be carefully assessed based on other flexibility mechanisms[566] or techniques used[567] for opting out of some obligations. Notable examples of treaties that prohibit all reservations are the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change[568] and the Rome Statute of the International Criminal Court.[569] Aside from some treaties that are found at the regional or subregional level,[570] most treaties that prohibit reservations are not focused on how a State party should regulate persons or property within the State's territory; the few that do so typically do not concern criminal jurisdiction.[571]

318. With respect to the Rome Statute of the International Criminal Court, the prohibition on reservations appears closely tied to the desire to establish an international institution that would have the exact same legal relationship *vis-à-vis* all States parties. The Commission noted in its draft of what became the Rome Statute of the International Criminal Court that "[t]he draft statute has been constructed as an overall scheme, incorporating important balances and qualifications in relation to the working of the court: it is intended to operate as a whole. These considerations tend to support the view that reservations to the statute and its accompanying treaty should either not be permitted, or should be limited in scope".[572] Of course, a complete prohibition of reserva-

[557] Art. 19, para. 4 ("No State Party may enter a reservation which is incompatible with the object and purposes of this Convention").

[558] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15. Some scholars consider the International Court of Justice's 1951 advisory opinion as the "starting point" in any analysis of reservations to international human rights treaties. See Schabas, "Reservations to human rights treaties …", p. 45.

[559] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see previous footnote), p. 24. The International Court of Justice further held that "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation" (*ibid.*).

[560] See, for example, Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), p. 29, guideline 3.1.5 on "Incompatibility of a reservation with the object and purpose of the treaty" ("A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty").

[561] *Ibid.*, guideline 3.1.5.2 on "Vague or general reservations" ("A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess its compatibility with the object and purpose of the treaty").

[562] Art. 57 ("1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned").

[563] Art. 21 ("The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions").

[564] Art. XIX ("The States may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions").

[565] See Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), p. 29, guideline 3.1.1.

[566] For example, many environmental and labor treaties include differential treatment rules. See Helfer, "Not fully committed? Reservations, risk and treaty design", p. 377. See also Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 23–24, guidelines 1.1.6 and 1.7, on alternatives to reservations and interpretative declarations. The Guide to Practice cites the statement of the Legal Adviser of the International Labour Organization to the 1968 United Nations Conference on the Law of the Treaties. The Legal Adviser stated that reservations to international labour conventions were incompatible with the object and purpose of those Conventions and inapplicable because of the tripartite character of the ILO as an organization but noted that great flexibility was required for the application of certain international labour conventions to widely varying circumstances (*ibid.*, p. 48, para. (3) of the commentary to guideline 1.1.6).

[567] Professor Swaine notes that a number of treaties, including in the area of trade, environmental and arms control in the first instance appear to prohibit all reservations, but on inspection actually enable reservations to affiliated agreements or to technical and dynamic content (Swaine, "Treaty reservations", p. 290).

[568] Art. 26 ("No reservations made be made to this Protocol").

[569] Art. 120 ("No reservations may be made to this Statute"). Article 124 of the Rome Statute of the International Criminal Court did provide a transitional provision allowing States not to accept the jurisdiction of the Court in respect of war crimes for a period of seven years.

[570] See, for example, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, as amended by Protocol No. 11, art. 4; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 21.

[571] See, for example, Convention against Discrimination in Education, art. 9; Montreal Protocol on Substances that Deplete the Ozone Layer, art. 18; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 19; and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. XXII (although reservations are permitted to the Convention's annexes that are not incompatible with its object and purpose). Yet treaties prohibiting reservations and touching upon national criminal jurisdiction do exist. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 9; and Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 26.

[572] *Yearbook … 1994*, vol. II (Part Two), p. 69, appendix I, para. 3 (*e*). The Commission also noted that, "[w]hether or not the statute would be considered to be 'a constituent instrument of an international organization' within the meaning of article 20, paragraph 3, of the Vienna Convention of the Law of Treaties, it is certainly closely analogous to a constituent instrument, and the considerations which led the drafters to

tions does not prevent controversy arising when a State ratifies a treaty, as the State may still file a "declaration" that arguably seeks to alter unilaterally the State's obligations. A scholarly commentary to the Rome Statute of the International Criminal Court noted that forbidding reservations, in the belief that the problems with reservations can be prevented, is a "deceptively simple" solution.[573] For example, Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Sweden and the United Kingdom objected to the "interpretative declaration" by Uruguay to the Rome Statute of the International Criminal Court as amounting, in substance, to a reservation.[574]

319. For treaties that allow reservations, it is possible to include a provision requiring States parties to indicate reasons why the reservation is being made. For example, the European Convention on Human Rights requires that States should indicate the reasons why a reservation is being formulated, specifically providing that any reservation made "shall contain a brief statement of the law concerned".[575] While recognizing that this Convention is *lex specialis* and that there is no requirement under the 1969 and 1986 Vienna Conventions[576] to give reasons for reservations, the Commission concluded that there were "obvious advantages of giving reasons",[577] and included in guideline 2.1.2 that "[a] reservation should, to the extent possible, indicate the reasons why it is being formulated".[578]

320. Other mechanisms, not amounting to reservations, can also be used to enable States and international organizations to modify obligations under treaties to which they are parties, including restrictive clauses,[579] escape clauses,[580] "opting-in" or "contracting-in clauses",[581] "opting-out" or "contracting-out clauses",[582] clauses which offer the parties a choice among several provisions or provisions allowing for suspension or amendments to a treaty. In its Guide to Practice on reservations to treaties, the Commission noted that "these procedures, far from constituting invitations to States to limit the effects of the treaty, would instead help to make recourse to reservations less 'necessary' or frequent by offering more flexible treaty techniques".[583]

D. Reservations in the context of a convention on crimes against humanity

321. To the extent that the present draft articles are transformed into a convention, it would appear that the approaches identified above are all available as possibilities for one of the final clauses to the convention.

322. The convention could be completely silent on the issue of reservations or expressly permit all reservations, leaving it open for States to file reservations that they deem necessary, within the constraints of the rules set forth in the Vienna Conventions.

323. The convention could be generally silent on the issue of reservations, though provide for an opportunity for States to opt out of any dispute settlement mechanism. If draft article 17 (discussed above in the chapter on monitoring mechanisms and dispute settlement) is adopted as proposed, then States would have this opportunity. Such an approach in a convention on the prevention and punishment of crimes against humanity would be consistent with the approach taken in other global treaties addressing crimes. If this is done, background rules on treaty law, either conventional or customary in nature, would still apply, thereby barring States from making reservations that defeat the object and purpose of the convention.

324. The convention could contain a provision identifying articles of the convention to which reservations may be filed, while prohibiting all other reservations. Conversely, the convention might contain a provision identifying treaty articles to which reservations may not be filed, while permitting all other reservations. Such approaches obviously would require identifying the particular articles

require the consent of the 'competent organ of that organization' under article 20, paragraph 3, apply in rather similar fashion to it" (*ibid.*).

[573] See Schabas, *The International Criminal Court*, p. 1489. Writing outside his capacity as Special Rapporteur, Professor Pellet observed that "[i]t is not certain that the possibility of limited, well-circumscribed reservations would have harmed the fundamental objectives aimed at, and it would have certainly facilitated ratification of the Rome Statute [of the International Criminal Court] by States that in good faith strive to overcome constitutional obstacles they meet on technical points that all in all are of only secondary importance" (Pellet, "Entry into force and amendment of the Statute", p. 156).

[574] See *Multilateral Treaties Deposited with the Secretary-General*, chap. XVIII.10, available from https://treaties.un.org, *Depositary of Treaties, Status of Treaties*. The interpretative declaration stated that, "as a State party to the [Rome Statute of the International Criminal Court], the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic". The interpretative declaration was withdrawn in a communication on 26 February 2008.

[575] See European Convention on Human Rights, art. 57, para. 2.

[576] The Commission has noted: "Neither the Commission's work on the law of treaties nor the 1969 and 1986 Vienna Conventions establish any requirement that a State or international organization that formulates a reservation must give its reasons for doing so or explain why it considered it necessary to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects" (Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), p. 91, para. (1) of the commentary to guideline 2.1.2).

[577] *Ibid.*, p. 92, para. (8) of the commentary to guideline 2.1.2.

[578] *Ibid*., p. 91, guideline 2.1.2.

[579] Defined in the Guide to Practice on Reservations to Treaties as clauses " 'which limit the purpose of the obligation by making exceptions to and placing limits on it' in respect of the area covered by the obligation or its period of validity" (Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 83–84, para. (6) of the commentary to guideline 1.7.1).

[580] Defined in the Guide to Practice on Reservations to Treaties as clauses " 'which have as their purpose to suspend the application of general obligations in specific cases', and among which mention can be made of saving and derogations clauses" (*ibid.*).

[581] Defined in the Guide to Practice on Reservations to Treaties as clauses " 'to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole' " (*ibid.*).

[582] Defined in the Guide to Practice on Reservations to Treaties as clauses " 'under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time' " (*ibid.*).

[583] *Ibid.*, p. 82, para. (1) of the general commentary to subsection 1.7 on "Alternatives to reservations and interpretative declarations". See also *ibid.*, guideline 1.7.1, entitled "Alternatives to reservations" ("In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as: (*a*) the insertion in the treaty of a clause purporting to limit its scope or application; (*b*) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves").

within a convention to which States parties see a strong need to allow for, or prohibit, reservations.

325. Alternatively, a more general provision might be crafted that prohibits certain types of reservations, such as reservations that defeat the object and purpose of the treaty. While such a provision, strictly speaking, is not necessary since reservations of that kind are already prohibited under international law, this type of text appears in many conventions relating to human rights and is apparently seen as a useful reminder to States parties. Further, a provision could be included stating that when reservations are made, they must be focused on specific provisions of the convention, thereby prohibiting reservations of a general nature. This additional element could help to avoid the problem of "constitutional" reservations or reservations that seek to subordinate a treaty to the national law of the reserving State as a whole, from which it is difficult to determine the effect on the reserving State's obligations. Finally, a provision might be included requiring States to provide reasons both for any reservations formulated or objections by other States to a reservation, as included in the European Convention on Human Rights in relation to reservations. If this is done, such a provision might read as follows:

> "1. States may, at the time of approval, signature and ratification, or accession, make reservations to this convention, [other than to articles …], provided that such reservations are not incompatible with the object and purpose of the convention and concern one or more specific provisions.
>
> "2. States shall, to the extent possible, indicate the reasons why a reservation in accordance with paragraph 1, or objection to a reservation, is being formulated."

326. Finally, the convention could contain a complete prohibition on reservations. Doing so might avoid some types of reservations that radically alter the obligations of the convention, but would also deny States any opportunity to calibrate the interface of the convention with uncontroversial aspects of their national criminal law, some of which may be constitutional and therefore difficult to change. If so, a complete prohibition might preclude the widespread adherence of States to the convention.

Chapter XI

Future programme of work

327. A possible timetable for the subsequent programme of work would be to complete this topic on first reading in 2017. Alternatively, if additional work is required, a fourth report addressing any further matters could be submitted in 2018, after which a first reading could be completed.

328. If the topic is completed on first reading in 2017, then a second reading could be completed in 2019.

Annex I

Draft articles provisionally adopted by the Commission to date

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 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.

Article 5. Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(*a*) committing a crime against humanity;

(*b*) attempting to commit such a crime; and

(*c*) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also 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 subparagraph (*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.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

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 in the following cases:

(*a*) when the offence is 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 or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(*c*) when the victim is a national of that State if that 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 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 7. Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 8. Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 9. Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. 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.

Article 10. Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed 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 who is in prison, custody or detention in a State that is not of his or her nationality 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;

(*b*) to be visited by a representative of that State or those States; and

(*c*) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Annex II

Draft articles and preamble proposed in the third report

Draft article 11. Extradition

1. Each of the offences referred to in draft article 5 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence referred to in draft article 5 shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence referred to in draft article 5.

4. A State that makes extradition conditional on the existence of a treaty shall:

(*a*) use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles; and

(*b*) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States to the present draft articles in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize offences to which this draft article applies as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition.

7. States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article 5.

8. If necessary, the offences set forth in draft article 5 shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 6, paragraph 1.

9. Whenever a State is permitted under its national law to extradite or otherwise surrender one of its nationals only upon condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought, and that State and the State seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in draft article 9.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

13. States shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Draft article 12. Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Draft article 13. Mutual legal assistance

General cooperation

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions

and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 5, paragraph 7, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(*a*) taking evidence or statements from persons;

(*b*) effecting service of judicial documents;

(*c*) executing searches and seizures;

(*d*) examining objects and sites;

(*e*) providing information, evidentiary items and expert evaluations;

(*f*) providing originals or certified copies of relevant documents and records;

(*g*) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(*h*) facilitating the voluntary appearance of persons in the requesting State; or

(*k*) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as my be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this draft article.

Transmission of information without a prior request

6. Without prejudice to national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The transmission of information pursuant to paragraph 6 of this draft article shall be without prejudice to investigations, prosecutions and judicial proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State shall notify the transmitting State prior to the disclosure and, if so requested, consult with the transmitting State. If, in an exceptional case, advance notice is not possible, the receiving State shall inform the transmitting State of the disclosure without delay.

Relationship to treaties on mutual legal assistance between the States concerned

8. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

9. Paragraphs 10 to 28 of this draft article shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the provisions of that treaty shall apply instead, unless the States agree to apply paragraphs 10 to 28 of this draft article in lieu thereof. States are strongly encouraged to apply those paragraphs if they facilitate cooperation.

Designation of a central authority

10. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to

each State at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

12. A request for mutual legal assistance shall contain:

(*a*) the identity of the authority making the request;

(*b*) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(*c*) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(*d*) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(*e*) where possible, the identity, location and nationality of any person concerned; and

(*f*) the purpose for which the evidence, information or action is sought.

13. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

14. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

15. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

16. Mutual legal assistance may be refused:

(*a*) if the request is not made in conformity with the provisions of this draft article;

(*b*) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(*c*) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(*d*) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

17. Reasons shall be given for any refusal of mutual legal assistance.

18. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

19. Before refusing a request pursuant to paragraph 16 of this draft article or postponing its execution pursuant to paragraph 18 of this draft article, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

20. The requested State:

(*a*) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(*b*) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

21. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

22. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

23. Without prejudice to the application of paragraph 27 of this draft article, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory

under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

24. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in requested State

25. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences referred to in draft article 5, may be transferred if the following conditions are met:

(*a*) the person freely gives his or her informed consent; and

(*b*) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

26. For the purposes of paragraph 25 of this draft article:

(*a*) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(*b*) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(*c*) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(*d*) The person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

27. Unless the State from which a person is to be transferred in accordance with paragraphs 25 and 26 of this draft article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

28. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Draft article 14. Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(*a*) any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities; and

(*b*) complainants, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. These measures shall be without prejudice to the rights of the alleged offender referred to in draft article 10.

2. Each State shall, subject to its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 10.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation, on an individual or collective basis, consisting of one or more of the following forms: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition.

Draft article 15. Relationship to competent international criminal tribunals

In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail.

Draft article 16. Federal State obligations

The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions.

Draft article 17. Inter-State dispute settlement

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Draft preamble

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that such crimes against humanity threaten the peace, security and well-being of the world,

Affirming that crimes against humanity, one of 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,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in the present draft articles shall be taken as authorizing any State to intervene in an armed conflict or in the internal affairs of any other State.

JUS COGENS

[Agenda item 7]

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Second report on *jus cogens*, by Mr. Dire D. Tladi, Special Rapporteur*

[*Original: English*]
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International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid*., vol. 999, No. 14668, p. 171.
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Introduction

1. During its sixty-sixth session in 2014, the International Law Commission decided to place the topic "*Jus cogens*" on its long-term programme of work.[1] The General Assembly, during 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 (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur. At its seventieth session, the General Assembly took note of the decision of the Commission to place the topic on its agenda and to appoint a Special Rapporteur.[3]

2. At its sixty-eighth session, the Commission considered the first report of the Special Rapporteur and decided to refer two draft conclusions to the Drafting Committee.[4]

3. The first report of the Special Rapporteur addressed conceptual issues. In the first report, the Special Rapporteur proposed that the second report would consider the criteria for *jus cogens*. This proposal was generally supported by the Commission. The purpose of the present report is to consider the criteria for *jus cogens*. Since the Commission has proceeded to base its consideration of the topic on the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention), the report will take the Convention as a point of departure in developing the criteria.

[1] See *Yearbook … 2014*, vol. II (Part Two), para. 268 and annex.

[2] See General Assembly resolution 69/118 of 10 December 2014, para. 8.

[3] See General Assembly resolution 70/236 of 23 December 2015.

[4] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693. On the decision to refer two draft conclusions to the Drafting Committee, see *Yearbook … 2016*, vol. II (Part Two), para. 100.

CHAPTER I

Previous consideration of the topic

A. Debate in the Commission

4. In the first report, the Special Rapporteur proposed three draft conclusions. Draft conclusion 1 set out the general scope of the topic.[5] Draft conclusion 2 stated that *jus cogens* is an exception to the general rule that international law rules are *jus dispositivum*.[6] Draft conclusion 3 laid out the general characteristics of *jus cogens*.[7] The first report also raised a number of methodological questions, including whether the Commission should, as part of the consideration of the topic, provide an illustrative list of norms that qualify as *jus cogens*. The report further traced the historical and theoretical foundations of *jus cogens*.

5. The report was generally well-received by members of the Commission. Some members, however, criticized particular conclusions and the methods by which they were arrived at. It is unnecessary to summarize all aspects of the debate, which is well covered in the report of the Commission.[8] Some issues that were raised in the debate, however, will have an impact on the future work of the Commission on the topic. It is these issues that are briefly discussed in chapter I, section C, below. The first

[5] Draft conclusion 1, as proposed by the Special Rapporteur (see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74), provided as follows: "The present draft conclusions concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them." The Drafting Committee adopted the following draft conclusion: "The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)." See statement of the Chair of the Drafting Committee, *Jus cogens*, 9 August 2016 (available from https://legal.un.org/ilc/sessions/68/, *Jus cogens*).

[6] Draft conclusion 2, as proposed by the Special Rapporteur (see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74), provided as follows:

"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".

[7] Draft conclusion 3, as proposed by the Special Rapporteur (see *ibid.*), provided as follows:

"1. Peremptory norms of international law (*jus cogens*) are those norms of general international 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".

[8] See *ibid.*, vol. II (Part Two), paras. 112–129.

of these issues concerns the name of the topic. Several members pointed out that the name "*jus cogens*" did not quite capture the essence of the topic.[9] It was pointed out that there were *jus cogens* norms in domestic law which fell outside the scope of the topic. Referring to the topic as *jus cogens* might create the impression that the Commission was also considering those norms. Some members suggested that it would be best to use the name used in the Vienna Convention, that is, "Peremptory norms of general international law (*jus cogens*)".[10] While other members had suggested "Peremptory norms (*jus cogens*) of general international law", there was a preponderance of support for "Peremptory norms of general international law (*jus cogens*)". Although some members questioned whether the topic, as currently formulated, covered areas beyond treaties, most members accepted that the topic did (and should) cover areas of international law relevant to *jus cogens* beyond treaty law.

6. The debate on the first report focused on the draft conclusions prepared by the Special Rapporteur. There was general support for draft conclusion 1, although some members suggested that the draft conclusion should make express the intention to cover the law of State responsibility. Draft conclusion 2 was almost universally criticized, with only a few members of the Commission expressing support for it.[11] The Special Rapporteur, in the face of the criticism, decided to withdraw the proposal for draft conclusion 2, on the understanding that paragraph 2 of draft conclusion 2 would be incorporated into the definitional aspects of draft conclusion 3.

7. It was draft conclusion 3 that attracted the widest divergence of views. While there were some proposals for the redrafting of paragraph 1 of draft conclusion 3, its content was not the subject of any serious disagreements. Paragraph 2, however, raised a heated debate. Most members of the Commission who spoke on the topic supported the contents of the paragraph.[12] A few members rejected its content, suggesting that international law did not recognize that *jus cogens* norms "protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable".[13] A handful of members expressed agreement with the content of paragraph 2 but suggested that the first report did not provide sufficient basis for the core characteristics identified therein.

8. A final issue that received significant attention from the Commission concerned the question whether the Commission should provide an illustrative list as part of its consideration of the topic. The views in the Commission were evenly split, with some members suggesting that the Commission should provide an illustrative list as originally planned in the syllabus, while others suggested that the illustrative list should not be provided.[14] The Special Rapporteur will consider these views, together with the views expressed by States, and provide a recommendation to the Commission in due course.

9. On the basis of its debate, the Commission decided to refer draft conclusions 1 and 3 to the Drafting Committee.

B. Debate in the Sixth Committee

10. Many delegations welcomed the inclusion of the topic in the Commission's programme of work. Delegations also generally welcomed the Commission's consideration of the topic as well as the Special Rapporteur's first report. A handful of delegations continued to express reservations about the Commission's decision to embark upon the consideration of the topic. France was particularly critical of the Special Rapporteur's approach, suggesting that it did not give due consideration to the practices and opinions of States and, instead, adopted "an overly theoretical or ideological approach" to *jus cogens*.[15] Still on the question of the practice and opinions of States, France contended in its statement that the Special Rapporteur, "despite [France's] well-known reservations … concludes that France is not a persistent objector".[16]

11. The idea of referring to the topic as "peremptory norms of international law (*jus cogens*)" received support from at least one delegation, while no delegation objected to it.[17] With respect to the scope of the topic, different delegations expressed differing views. Some delegations expressed the view that the Commission should limit its consideration of the subject of *jus cogens* to treaty law.[18] Most delegations that commented on the question, however, adopted the view that the topic should be broad and cover areas beyond treaty law.[19]

12. Some delegations expressed concern about the existence and availability of practice. The United States of America, for example, expressed the concern that, from a methodological point of view, only limited international practice existed, which might make it difficult to draw valid conclusions.[20] The Netherlands was more direct, stating that the clear majority of sources cited by the Special Rapporteur in his first report would qualify

[9] See, for example, *ibid.*, vol. I, 3317th session, para. 41 (Mr. Candioti).

[10] *Ibid*., paras. 41–42.

[11] See *ibid.*, vol. II (Part Two), para. 124. For support of the content of draft conclusion 2, see *ibid*., vol. I, 3314th meeting, para. 34 (Mr. Caflisch).

[12] For a summary of the debate on draft conclusion 3, see *ibid*., vol. II (Part Two), paras. 125–127.

[13] *Ibid*.

[14] See *ibid.*, paras. 116–118.

[15] A/C.6/71/SR.20, para. 77.

[16] See statement of France (on file with the Special Rapporteur): "In his report, Mr. Tladi is particularly interested in the French position. Despite my country's well-known reservations with regard to the concept of *jus cogens*, he concludes that France is not a persistent objector … and that France has accepted it in principle. He does not, however, take into account the reservations expressed about this concept by the French delegations, *especially in recent years**." See also A/C.6/71/SR.20, para. 78.

[17] See Austria, A/C.6/71/SR.25, para. 87 ("[i]t would be preferable to use the expression 'peremptory norms of international law (*jus cogens*)'"). Although Austria was concerned with the wording of draft conclusion 3, paragraph 1, it did support the idea that the proper reference should be "peremptory norms of international law (*jus cogens*)".

[18] See France, A/C.6/71/SR.20, para. 77.

[19] See, for example: Cyprus, A/C.6/71/SR.22, para. 55; Greece, A/C.6/71/SR.25, para. 39; Portugal, A/C.6/71/SR.25, paras. 95–96 (see also statement on file with the Special Rapporteur); Republic of Korea, A/C.6/71/SR.24, para. 86; and the Russian Federation, A/C.6/71/SR.25, para. 67.

[20] United States, A/C.6/71/SR.26, para. 125.

as "doctrine".[21] The Netherlands went on to state that the first report did not clarify how, in practice, States dealt with the notion of *jus cogens*, cautioning that, whatever the outcome of the Commission's work, it should take into account, and be based upon, State practice.[22]

13. As was the case in the Commission, the debate in the Sixth Committee focused on the draft conclusions. In general, delegations expressed support for the draft conclusions, although draft conclusion 2 did attract some words of caution and criticism.[23] Similarly, as was the case with the debate in the Commission, views on the second paragraph of draft conclusion 3 differed. It will be recalled that the second paragraph of draft conclusion 3 identified three characteristic elements of *jus cogens*, namely that they are hierarchically superior to other norms, are universally applicable and reflect the values of the international community. Some States rejected those elements.[24] Other States, however, supported these characteristic elements.[25] There were still other States that commented on only some of the elements of the draft conclusion.[26]

14. While it is clear that, of those States that expressed a view on paragraph 2 of draft conclusion 3, the majority supported its contents, it is useful to focus on the criticism expressed against the elements of paragraph 2. For China, the problem with the elements was that they were "obviously at variance with the basic elements of *jus cogens* set out in article 53 of the Vienna Convention".[27] The elements in the second paragraph were seen as adding new core elements or requirements.[28] With respect to hierarchical superiority, China questioned whether this "new" element would imply that *jus cogens* should prevail over the Charter of the United Nations, given that Article 103 of the Charter provides that obligations under the Charter prevail over other obligations.[29] The United States, on the other hand, feared that the elements of paragraph 2, in particular the notion that *jus cogens* norms are universally applicable and reflect the fundamental values of the international community, would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by States.[30]

15. There is one final point that arose in the debate in the Sixth Committee that needs to be mentioned. The delegation of Turkey took issue with the first report's use of the Treaty of Guarantee[31] and the reliance on it by some States as an example of the application of *jus cogens*.[32] This concern provides the Special Rapporteur an opportunity to clarify that all the examples given in the first and second reports, as well as in any future report, are given only as examples of practice without prejudice to the quality of the practice or correctness of the views implied by the practice in question. The Commission cannot, however, be prevented from relying on practice because that particular practice is disputed by States.

C. Issues arising from the debates

16. It is perhaps useful to begin with the observations concerning the need to rely on practice. The view of the Special Rapporteur is reflected in the first report. In that report the Special Rapporteur stated that "the Commission approaches its topics by conducting a thorough analysis of State practice in all its forms, judicial practice, literature and any other relevant material".[33] Indeed this view was emphasized during the debate in the Sixth Committee.[34] It is the Special Rapporteur's considered view that the approach adopted in the first and current reports has remained true to this approach.

17. While, as suggested in the statement by the Netherlands,[35] there is more "doctrine" than practice, it is equally true that there is no single conclusion proposed

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[21] Netherlands, *ibid*., para. 43.

[22] *Ibid*.

[23] Greece was critical of the draft conclusion (see A/C.6/71/SR.25, para. 41). The following States, while not expressing criticism of the content, adopted a cautious approach: Romania, *ibid*., para. 79, Spain, A/C.6/71/SR.26, para. 12 ("Spain was not entirely convinced that draft conclusion 2 should allude to *jus dispositivum* norms … in international law") and Malaysia, *ibid*., para. 76. Austria expressed support for the content of draft conclusion 2, noting that it agreed with the proposal to distinguish between *jus dispositivum* and *jus cogens* (A/C.6/71/SR.25, para. 87).

[24] States that opposed the elements in paragraph 2 of draft conclusion 3 were China (A/C.6/71/SR.24, para. 89, noting that the elements were at variance with article 53 of the Vienna Convention) and the United States (A/C.6/71/SR.26, para. 126).

[25] States that supported the elements in paragraph 2 of draft conclusion 3 were: Brazil, A/C.6/71/SR.26, para. 91; the Czech Republic, A/C.6/71/SR.24, para. 72 ("*Jus cogens* norms were exceptions to other rules of international law. They protected the fundamental values of the international community and were universally applicable."); El Salvador, A/C.6/71/25, para. 62; Slovenia, A/C.6/71/SR.26, para. 114 ("his delegation took note of the thorough consideration of the characteristics inherent in a *jus cogens* norm and agreed with the enunciation of *jus cogens* norms as being of a special and exceptional nature, reflecting the common and overarching values" and requiring universal adherence); and South Africa, (*ibid*., para. 87 ("[South Africa] was disappointed that the Commission had not been able to agree on what South Africa believed were basic and uncontroversial characteristics. It was generally accepted that *jus cogens* norms were universally binding, reflected fundamental values and interests and were hierarchically superior.").

[26] Cyprus expressed support for the element of "hierarchical superiority" (A/C.6/71/SR.22, para. 56), while Spain expressed doubt concerning that notion (A/C.6/71/SR.26, para. 12). Iceland, on behalf of the Nordic countries, questioned the need to refer to "the values of the international community" (A/C.6/71/SR.24, para. 63), while Slovakia supported the notion that *jus cogens* reflected "fundamental values of the international community" (A/C.6/71/SR.26, para. 147). The Islamic Republic of Iran expressed support for the notion that *jus cogens* norms were universally applicable (*ibid*., para. 122).

[27] A/C.6/71/SR.24, para. 89.

[28] *Ibid*.

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

[30] A/C.6/71/SR.26, para. 126.

[31] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 39 ("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").

[32] Turkey, A/C.6/71/SR.29, para. 68.

[33] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 14. See also *ibid*., para. 45 ("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. 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.").

[34] See the statement by the Czech Republic, A/C.6/71/SR.24, para. 72 (the work of the Commission on the topic "should be based on both State and judicial practice, and supplemented by scholarly writing"). See also Ireland, A/C.6/71/SR.27, para. 18.

[35] See A/C.6/71/SR.26, para. 43.

in the first report or the present report that is not based on practice. In the summary of the Commission's debate, the Special Rapporteur noted (with examples) that many texts on other topics of the Commission have been adopted on significantly less practice than what is provided in support of the contents of paragraph 2 of draft conclusion 3.[36] This practice has been accurately analysed and assessed. It is true, as France noted, that the practice of France was of particular interest to the Special Rapporteur. This was because France was known as having objected to the very idea of *jus cogens*. Yet actual practice, as seen from the statements of France itself, shows this to be inaccurate. The assessment was not concerned with whether France is or is not a persistent objector and nowhere does the first report draw any conclusions in this respect. All that the report states, with regard to France, is the well-documented fact that, at the adoption of the Vienna Convention, France did not object to the idea of *jus cogens*. Rather, France expressed concern about the lack of clarity concerning how it would be applied and the possibility for its abuse.

18. With respect to the second paragraph of draft conclusion 3, it is important to recall that, contrary to the statement of the United Kingdom of Great Britain and Northern Ireland, the paragraph was in fact referred to the Drafting Committee by the Commission, and that the text enjoyed a large measure of support both within the Commission and during the debate in the Sixth Committee. With regard to the substance, it is useful to begin by addressing the concern raised by the United States. As stated in the first report, the Special Rapporteur does not intend to resolve the natural law versus positive law debate or adopt one approach over the other. The elements in paragraph 2 of draft conclusion 3 should not be seen as an attempt to surreptitiously insert a natural law approach into the work of the Commission. As the present report will illustrate, the criteria for the determination of whether a norm has reached the status of *jus cogens* remains those in article 53 of the Vienna Convention. Similarly, in response to concerns of China, such elements should not be seen as additional elements. Rather, they should be seen as descriptive and characteristic elements, as opposed to constituent elements (or criteria) of norms of *jus cogens*.[37] Such characteristics may, however, be relevant in assessing the criteria for *jus cogens* norms of international law.

19. It is worth recalling, in considering the elements in the second paragraph of draft conclusion 3, that all delegations that spoke, and the vast majority of the members of the Commission who spoke, took the view that the topic should be based on practice.[38] These elements are ubiquitous in practice, both in the form of State practice and judicial practice, and, as the delegation of South Africa mentioned during the debate in the Sixth Committee, they are "basic and uncontroversial" and "generally accepted".[39] In the view of the Special Rapporteur, the first report already provided sufficient practice to form the basis of the elements.[40] Nonetheless, in the light of suggestions by a few members of the Commission[41] that there was insufficient practice, the Special Rapporteur provided additional materials in his summary of the debate. Since the additional materials are not reflected in the first report, the current report provides a brief summary of the materials, even though the draft conclusions have already been referred to the Drafting Committee.

1. Fundamental values

20. In addition to numerous statements by States,[42] the judgments of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[43] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*[44] and its advisory opinion on *Reservations to the Genocide Convention*,[45] the International Tribunal for the Former Yugoslavia in *Furundžija*,[46] and the Inter-American Commission on Human Rights decision in *Michael Domingues*,[47] there have been countless separate and dissenting opinions and scholarly writings in

[36] See *Yearbook … 2016*, vol. I3323rd meeting, paras. 46–81 (Special Rapporteur).

[37] See *Ibid*., vol. II (Part One), document A/CN.4/693, para. 72: "While these are core characteristics … of *jus cogens*, they do not tell us how *jus cogens* norms are to be identified in contemporary international law."

[38] The only member of the Commission who suggested that the Commission should base its work on doctrine was Mr. Valencia-Ospina (see *ibid*., vol. I, 3322nd meeting, paras. 66–68).

[39] A/C.6/71/SR.26, para. 87.

[40] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, paras. 61–72.

[41] Sir Michael Wood, *ibid.*, vol. I, 3314th meeting, para. 50; Mr. Forteau, *ibid*., 3317th meeting; Mr. McRae, A/CN.4/SR.3315th meeting, para. 37; Mr. Valencia-Ospina, *ibid*., 3322nd meeting, paras. 65–75; Mr. Hmoud (3322nd meeting, paras. 54–55; and Mr. Murphy, *ibid*., SR.3316th meeting, para. 42.

[42] See, for example: Germany, A/C.6/55/SR.14, para. 56 ("[h]is Government reiterated its conviction regarding the need to define more clearly peremptory norms of international law that protected fundamental humanitarian values"); Italy, A/C.6/56/SR.13, para. 15 ("[t]he Vienna Convention on the Law of Treaties contained a tautological definition of peremptory law, which doctrine and jurisprudence had endeavoured to interpret as being a framework of rules prohibiting conduct judged intolerable because of the threat it posed to the survival of States and peoples and to basic human values"); Mexico, A/C.6/56/SR.14, para. 13 ("[t]he very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States"); and Portugal, *ibid*., para. 66 ("[c]oncepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law").

[43] *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.

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, *I.C.J. Reports 2008*, p. 412; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports 2015*, p. 3.

[45] *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at p. 23.

[46] *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, *Judicial Reports 1998*, vol. I, paras. 153–154, where the Tribunal expressly linked the status of the prohibition of torture as a *jus cogens* norm to the "importance of the values it protects", noting that "[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community". This was quoted with approval by the European Court of Human Rights in *Al-Adsani v. United Kingdom* [GC], No. 35763/97, ECHR 2001-XI, para. 30.

[47] *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, para. 49.

support of the idea that *jus cogens* norms protect the fundamental values of the international community. These authorities, on their own, ought to be a sufficient basis for the element that the norms of *jus cogens* protect the fundamental values of international law.[48]

21. In his summary of the debate, the Special Rapporteur presented many more authorities. In *Siderman de Blake v. Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit stated that *jus cogens* norms are "derived from values taken to be fundamental by the international community".[49] Similarly, the United States District Court for the Eastern District of New York observed that it equated *jus cogens* with norms of "the highest standing in international legal norms".[50] These same or similar sentiments have also been expressed by courts in other jurisdictions.[51] The Constitutional Court of Peru has, for example, referred to the "extraordinary importance of the values underlying" *jus cogens* obligations.[52] The Supreme Court of the Philippines, for its part, in defining *jus cogens*, noted that the relevant norms had been "deemed … fundamental to the existence of a just international order".[53] In the *Arancibia Clavel* case, the Supreme Court of Argentina stated that the purpose of *jus cogens* was to "protect States from agreements concluded against some values and general interests of the international community of States as a whole".[54] The South African Constitutional Court similarly noted that norms of *jus cogens* "reflect the most fundamental values of the international community".[55]

22. It is clear from the above that *jus cogens* norms reflect and protect fundamental values of the international community. This notion has never been seriously questioned. Kolb, for example, a commentator critical of the notion, has stated that it "is the absolutely predominant theory" today.[56] Of course, different authorities use different words to describe the central notion but the notion itself is generally accepted in international law. For example, some authorities state that *jus cogens* norms "protect" the fundamental values, while others state that these norms "reflect" the fundamental values. Furthermore, some speak of the "fundamental values" while other speak of the "fundamental interests". The general theme, however, is the same.

2. Hierarchical superiority

23. As with the idea that *jus cogens* reflects fundamental values, the view that *jus cogens* norms are hierarchically superior to other rules and norms of international law is generally accepted.[57] Indeed, the Commission has already concluded that *jus cogens* norms are hierarchically superior to other rules,[58] and that conclusion ought to be a sufficient basis to include hierarchical superiority as a characteristic element of *jus cogens*.

24. The first report already provided, in addition to the previous work of the Commission, statements by States,[59] judicial decisions[60] and scholarly writings[61] in support of

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[48] During the summary of the debate, the Special Rapporteur made the following observations concerning the adequacy of these authorities: "[by comparison], the Commission had approved the persistent objector requirement essentially on the strength of two *obiter dicta* in the *Fisheries* and *Asylum* cases, far less than what was referred to in the present instance" (*Yearbook … 2016*, vol. I, 3323rd meeting, para. 65).

[49] United States, *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 *Federal Reporter, 2nd Series* 699; 1992 U.S. App., p. 715. This decision was cited with approval by several other United States cases as follows: *Estate of Hernandez-Rojas v. United States* 2013 US District Lexis 136922 (Southern District California 2013), p. 14; *Estate of Hernandez-Rojas v. United States* 2014 US District Lexis 101385 (Southern District California 2014), p. 9; *Doe I v. Reddy* 2003 US District Lexis 26120 (North District California 2003); opinion of Judge McKeown in *Alvarez-Machain v. United States* 331 *Federal Reporter, 3rd Series* 604 (9th Cir. 2001), p. 613. See also dissenting opinion of Judge Pregerson in *Sarei v. Rio Tinto PLC* 671 *Federal Reporter, 3rd Series* 736 (Ninth Circuit, 2011), p. 778 ("*jus cogens* norms represent fundamental components of the ordered international community").

[50] United States, *Nguyen Thang Loi v. Dow Chemical Company (In Agent Orange Product Liability Litigation)* 373 *Federal Supplement* (East District of New York, 2005), p. 136.

[51] See, for example, United Kingdom, *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* [2006], England and Wales Court of Appeal (Civil Division) 1279, para. 101. The Canadian Supreme Court referred to *jus cogens* norms as those norms that "are vital or fundamental to our societal notion of justice", *Kazemi Estate v. Islamic Republic of Iran [2014] Supreme Court of Canada 62*, 3 *Supreme Court Reports* 176, para. 151. The Plenary Session of the Supreme Court of the Russian Federation has similarly described *jus cogens* norms as "basic imperative norms of international law" (*On the Application of Universal Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction*, decision of the Plenary Session of the Supreme Court of the Russian Federation, No. 5 (10 October 2003), as amended on 5 March 2013).

[52] Peru, *25% del número legal de congresistas*, Case. No. 0024-2010-PI/TC, Judgment, 21 March 2011, Plenary Jurisdictional Chamber, Constitutional Court, para. 53 ("*de la extraordinaria importancia de los valores que subyacen a tal* [jus cogens] *obligación*" ["of the extraordinary importance of the values underlying such a [*jus cogens*] obligation"]).

[53] Philippines, *Bayan Muna as represented by Representative Satur Ocampo et al v. Alberto Romulo, in his capacity as Executive Secretary et al*, Supreme Court (2011).

[54] Argentina, *Arancibia Clavel, Enrique Lautaro s/ Homicidio Calificado y Asociación Ilícita y Otros*, Case No. 259, judgment of 24 August 2004, Supreme Court ("*es proteger a los Estados de acuerdos concluidos en contra de algunos valores e intereses generales de la comunidad internacional de Estados en su conjunto*" ["is to protect States from agreements made against certain values and general interests of the international community of States as a whole"]).

[55] South Africa, Constitutional Court, *Kaunda and Others v. President of the Republic of South Africa* 2005 (4) SA 235 (CC), para. 169, quoting with approval the first report on diplomatic protection by John Dugard, Special Rapporteur (*Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, para. 89).

[56] Kolb, *Peremptory International Law …*, p. 32.

[57] See Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law".

[58] See the conclusions of the work of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, annex, paras. (33)–(34).

[59] See the Netherlands (A/C.6/68/SR.25, para. 101:"*Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law") and the United Kingdom (*Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11; United Nations publication, Sales No. E.68.V.7), 53rd meeting, para. 53: "in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out").

[60] See, for example, *Furundžija* (footnote 46 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").

[61] See, for example, Danilenko, "International *jus cogens* … "; Conklin, "The peremptory norms of the international community",

hierarchical superiority. It is worth pausing here to mention that the Commission has, in the past, adopted text on significantly less practice. Nonetheless, in the aftermath of the debate, the Special Rapporteur produced further authorities in support of what can only be described as an obvious characteristic element of *jus cogens*.

25. Famously, in *Kadi v. Council and Commission*, the Court of First Instance of the Court of Justice of the European Union described *jus cogens* as a "body of higher rules of public international law".[62] The European Court of Human Rights has similarly described *jus cogens* as "a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[63] In *Michael Domingues*, the Inter-American Commission on Human Rights stated that *jus cogens* norms are derived from "superior legal order norms".[64]

26. That the hierarchical superiority of *jus cogens* is beyond question was recognized by Judge Pregerson of the United States Court of Appeals for the Ninth District in a dissenting opinion in *Sarei v. Rio Tinto*.[65] It bears mentioning that, while this was in a dissent, the majority in *Siderman de Blake* recognized that *jus cogens* norms were "deserving of the highest status in international law".[66] In *Mann v. Republic of Equatorial Guinea*, the Supreme Court of Zimbabwe described *jus cogens* as those norms "endowed with primacy in the hierarchy of rules that constitute the international normative order".[67] *Jus cogens* has also been described as holding "the highest hierarchical position amongst all other customary norms and principles",[68] as being "not only above treaty law, but over all sources of law",[69] as taking "precedence over other rules of international law",[70] and as norms which "prevail over both customary international law and treaties".[71] Italian courts have similarly held that *jus cogens* norms hold a higher rank than other norms.[72]

27. From the above, it should be clear that hierarchical superiority as a descriptive, characteristic element of *jus cogens* cannot be seriously questioned. Different terms may have been utilized, but the idea of *jus cogens* being hierarchically superior or having a higher status is generally accepted.

3. Universal application

28. The idea that *jus cogens* norms are universally applicable denotes the fact that they apply to all States. As with the other two elements, it is well-supported in State practice and international judicial practice (referred to herein by the shorthand "State and judicial practice"). The first report provided support for this element in the form of decisions of courts[73] and scholarly writings.[74]

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*", p. 360.

[62] *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005], Case No. T-315/01, Judgment, 21 September 2005, Court of First Instance, Court of Justice of the European Union, *European Court Reports 2005*, p. II-3649, at para. 226.

[63] *Al-Adsani* (footnote 46 above), para. 60, quoting the International Tribunal for the Former Yugoslavia in *Furundžija* (footnote 46 above). See also paragraph 1 of the joint dissenting opinion of Judges Rozakis and Caflisch in the *Al-Adsani* case ("The majority recognise that [*jus cogens* norms are] hierarchically higher than any other rule of international law"). See also the concurring opinion of Judges Pinto de Albuquerque, Hajiyev, Pejchal and Dedov in *Al-Dulimi and Montana Management Inc v. Switzerland* [GC], No. 5809/08, 21 June 2016, para. 34.

[64] *Michael Domingues v. United States* (footnote 47 above), para. 49. See *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Case No. T-49/04, Judgment, 12 July 2006, Court of First Instance, Court of Justice of the European Union, *European Court Reports*, p. II 00052, at para. 92.

[65] *Sarei v. Rio Tinto* (note 49 above), p. 19395.

[66] *Siderman de Blake v. Argentina* (note 49 above), p. 717.

[67] See Zimbabwe, *Mann v. Republic of Equatorial Guinea* [2008], judgment, of 23 January 2008, Supreme Court of Zimbabwe 1. See also United States, *Nguyen Thang Loi v. Dow Chemical Company* (footnote 50 above), at 136, describing *jus cogens* norms as of "the highest standing in international legal norms".

[68] Philippines, *Bayan Muna* (footnote 53 above). See also Canada, *Certain Employees of Sidhu and Sons Nursery Ltd.* [2012] British Colombia Labour Relations Board No. B28/2012, para. 44, where the British Columbia Labour Relations Board (Canada), citing *Furundžija* (note 46 above), identified *jus cogens* norms as enjoying a "higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules". See also United Kingdom, *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* (footnote 51 above), para. 101, citing *R v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet (No. 3)* [2000] 1 *Appeal Cases* 147, p. 198.

[69] Argentina, *Julio Héctor Simón y Otros s/ privación ilegítima de la libertad*, Case No. 17/768, judgment, 14 June 2005, Supreme Court, para. 48 ("que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho" ["which is not only above treaties, but also above all sources of law"]). See also *Julio Lilo Mazzeo y Otros s/ Rec. de Casacíon e Inconstitucionalidad*, judgment, 13 July 2007, Supreme Court, para. 15 (*jus cogens* "se trata de la más alta fuente del derecho internacional" ["is the highest source of international law"]).

[70] See concurring opinion of Lord Hoffman in United Kingdom, *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and Others* [2007] 1 *Appeal Cases* 270, para. 39.

[71] United States, *Mani Kumari Sabbithi et al v. Major Waleed KH N.S. Al Saleh*, 605 *Federal Supplement* 122, United States District Court for the District of Columbia, p. 129.

[72] Italy, *Mario Luiz Lozano v. the General Prosecutor for the Italian Republic*, Case No. 31171/2008, appeal judgment, 24 July 2008, Supreme Court of Cassation, First Criminal Chamber, p. 6 ("dandosi prevalenza al principio di rango più elevato e di *jus cogens*" ["giving precedence to the principle of higher rank and of *jus cogens*"]). See also *Germany v. De Gugleilmi and De Guglielmi and Italy (joining)*, Case No. 941/2012, *Oxford Reports on International Law in Domestic Courts* 1905 (IT 2012), appeal judgment, 14 May 2012, Turin Court of Appeal, p. 15.

[73] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, at para. 190 ("The 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 Convention on Genocide, Advisory Opinion* (footnote 45 above), p. 23, where the International Court of Justice refers to "the universal character … of the condemnation of genocide"; separate opinion of Judge Moreno Quintana in the *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, at pp. 106–107 ("These principles … . have a peremptory character and a universal scope"); and United States, *Hanoch Tel-Oren et al v Libyan Arab Republic et al*, Judgment, 3 February 1984, United States Court of Appeals for the District of Columbia, 726 *Federal Reporter, 2nd Series* 774, 233 United States Court of Appeals for the District of Columbia 384 (there are a "handful of heinous actions—each of which violates definable, universal and obligatory norms").

[74] See, for example, Conklin, "The peremptory norms of the international community". See also Rozakis, *The Concept of Jus Cogens in*

(*Continued on next page.*)

29. The Inter-American Court of Human Rights has described *jus cogens* norms being "applicable to all States" and as ones which "bind all States".[75] Similarly, in *Michael Domingues*, the Inter-American Commission on Human Rights determined that *jus cogens* norms "bind the international community as a whole, irrespective of protest, recognition or acquiescence".[76] The United States Court of Appeals for the Second Circuit has described *jus cogens* norms as those that "do not depend on the consent of individual States but are universally binding by their very nature".[77] Similarly, in *Belhas v. Moshe Ya'Alon*, the United States Court of Appeals for the District of Columbia described *jus cogens* norms as "norms so universally accepted that all States are deemed to be bound by them under international law".[78] Similarly, the Swiss Federal Supreme Court decided that the norms of *jus cogens* were "binding on all subjects of international law".[79]

30. The materials cited above illustrate that, in their practice, States and courts have consistently accepted that *jus cogens* norms protect and reflect fundamental values of the international community, are universally applied and are hierarchically superior to other norms of international law. That these materials may, at times, use different words to express the same basic ideas should not detract from the wide acceptance of these characteristics.

(*Footnote 74 continued.*)

the Law of Treaties, p. 78; Gaja, "*Jus cogens* beyond the Vienna Convention", p. 283; Danilenko, *Law-Making in the International Community*, p. 211; Alexidze, "Legal nature of *jus cogens* in contemporary international law", p. 246; Dupuy and Kerbrat, *Droit international public*, p. 320 ("la cohésion de cet ensemble normatif exige la reconnaissance par tout ses sujets d'un minimum de règles *imperatives*" ["the cohesion of this set of standards requires recognition by all its subjects of a minimum of mandatory rules"]); Rohr, *La responsabilidad internacional del Estado por violación al* jus cogens, p. 6; Dubois, "The authority of peremptory norms in international law: State consent or natural law?", p. 135 ("A *jus cogens* … is applicable to all States regardless of their consenting to it."); and Saul, "Identifying *jus cogens* norms: the interaction of scholars and international judges", p. 31 ("[*j*]us *cogens* norms are supposed to be binding on all States").

[75] *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion* OC-18/03 of 17 September 2003, requested by the United Mexican States, paras. 4 and 5. See also the written statement by Mexico on the request for an advisory opinion submitted to the International Court of Justice by the forty-ninth United Nations General Assembly (resolution 49/75 K), in *Legality of the Threat or Use of Nuclear Weapons*, contained in a Note Verbale dated 19 June 1995, para. 7 ("The norms … are of a legally binding nature for all the States (*jus cogens*)". For the text of the written statement, see www.icj-cij.org/en/case/95/written-proceedings.

[76] *Michael Domingues v. United States* (footnote 47 above), para. 49.

[77] United States, *Smith v. Socialist People's Libyan Arab Jamahiriya*, United States Court of Appeals, Second Circuit, 101 Federal Reporter, 3rd Series 239 (1996), p. 242.

[78] United States, *Belhas v. Moshe Ya'Alon*, United States Court of Appeals, District of Columbia Circuit, 515 Federal Reporter, 3rd Series 1279 (2008), pp. 1291–1292.

[79] Switzerland, *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Case No. 1A 45/2007, administrative appeal, judgment, 14 November 2007, Federal Supreme Court of Switzerland, *Oxford Reports on International Law in Domestic Courts* 461 (CH 2007), para. 7.

Chapter II

Criteria for *jus cogens*

A. General

31. It is perhaps useful to make two preliminary points. First, the question of who determines whether the criteria have been met falls beyond the scope of the topic. That said, future reports, in connection with the consequences of *jus cogens* for treaty law, in particular invalidity of treaty, will have to address article 66 of the Vienna Convention concerning the compulsory adjudication of a dispute relating to the invalidity of a treaty on account of *jus cogens*. Second, the elements in paragraph 2 of draft conclusion 3 proposed in the first report of the Special Rapporteur are not criteria for *jus cogens*. They are descriptive elements of *jus cogens* norms. The criteria, or requirements, for the identification of *jus cogens* norms of international law refer to the elements that should be present before a rule or principle can be called a norm of *jus cogens*. It is these criteria that are the subject of the present chapter.

32. As alluded to by the Sudan, the identification of *jus cogens* norms is a complex process.[80] Similarly, in the commentary to draft article 50 of the Commission's 1966 draft articles on the law of treaties, the Commission noted that "there is no simple criterion" by which to identify a norm of *jus cogens*.[81] During the debate in the Sixth Committee in 2016, many States emphasized that the criteria for *jus cogens* should be based on article 53 of the Vienna Convention.[82] The Special Rapporteur did not interpret the view that the criteria for *jus cogens* should be based on article 53 of the Vienna Convention to mean that the Commission may not move beyond article 53 *even if practice so determined*, as might be inferred from the statement of Malaysia.[83] The present report therefore takes, as its point of departure, the elements of article 53 of the Vienna Convention as the basis for the criteria for the identification of *jus cogens* norms. However, State practice and the decisions of international courts and tribunals are relied upon to give content and meaning to article 53.

[80] Sudan, A/C.6/71/SR.25, para. 73.

[81] See para. (2) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, chap. II, sect. C, at pp. 247–248.

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

[83] See Malaysia, A/C.6/71/SR.26, para. 75 ("On the topic of *jus cogens*, her delegation cautioned against expanding the principle beyond the language of article 53 of the Vienna Convention on the Law of Treaties. Given that international law was developing through consent-based instruments, it would be unwise to widen a principle whereby certain universal norms could bind States, with or without their consent").

33. The decision to proceed from the basis of article 53 is not only based on the views expressed by States during the debate in the General Assembly. It is generally consistent with practice and scholarly writings. When referring to *jus cogens*, international courts and tribunals generally referred to article 53 of the Convention.[84] Moreover, much of the academic literature proceeds from the premise that article 53 provides the definition for *jus cogens*.[85] Moreover, the syllabus on which the topic is based also recognizes article 53 of the Vienna Convention as "the starting point for any study of *jus cogens*".[86]

34. Before addressing the text of article 53, it is important to emphasize that the criteria developed in this report are based not on predetermined views or particular philosophical inclinations of the Special Rapporteur, but on the relevant materials of practice. They are not, and ought not to be, based on the intention to propagate a narrow or broad approach, or a natural law or positive law approach.

35. Since the criteria for *jus cogens* are based on article 53 of the Vienna Convention, it is worth recalling the terms of the article:

> 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.

36. The first sentence of article 53 is not definitional. It rather set outs the consequence, from the perspective of treaty law, of conflict with *jus cogens*. It is the second sentence that sets out the definition of *jus cogens* norms of international law.[87] Article 53 does spell out that the definition is for the purposes of the Vienna Convention. However, as stated in paragraphs 32 and 33 above, the definition in the Vienna Convention is accepted as the definition, in general terms, of *jus cogens*, even beyond the law of treaties.[88] The Commission itself, whenever it has considered *jus cogens* in the context of other subjects, has relied on the definition contained in article 53 of the Vienna Convention.[89]

37. Article 53 sets forth two cumulative criteria for the identification of *jus cogens*. First, the relevant norm must be a norm of general international law. Second, this norm of general international law must be accepted and recognized as having certain characteristics, namely that it is one from which no derogation is permitted and one which can be modified only by a subsequent norm of *jus cogens*.[90] Sévrine Knuchel sees article 53 as comprising three elements, namely, norm of general international law, acceptance and recognition as a norm from which no derogation is permitted and that such norms may only be modified by a subsequent norm of *jus cogens*.[91] Yet, from a definitional perspective, the third element is, first of all, not a criterion but only describes how an existing norm of *jus cogens* can be modified. This comes *after* the identification of a norm as a *jus cogens* and can therefore not be a criterion for its identification.[92] Moreover, even as part of

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[84] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice, *I.C.J. Reports 1996*, para. 83; *Furundžija* (footnote 46 above), para. 155; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, p. 399, at para. 60. See also Colombia, Constitutional Tribunal of Colombia, Case No. C-578/95, Judgment. See, especially, separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, International Court of Justice, *I.C.J. Reports 2006*, p. 6, at p. 88, para. 8.

[85] See, for example, Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 19 ("Given that Article 53 provides the only written legal definition of the effects of *jus cogens* … as well as the process by which such norms come into being … it is the necessary starting point for analysing this concept"); Linderfalk, "Understanding the *jus cogens* debate …", p. 52. See also Kadelbach, "Genesis, function and identification of *jus cogens* norms", p. 166, noting that "treatises on *jus cogens* usually start" with article 53 of the Vienna Convention.

[86] See *Yearbook … 2014*, vol. II (Part Two), annex, para. 7.

[87] Shelton, "Sherlock Holmes and the mystery of *jus cogens*", p. 26. See also Linderfalk, "The creation of *jus cogens*: making sense of Article 53 of the Vienna Convention".

[88] Weatherall, *Jus Cogens: International Law and Social Contract*, p. 6 ("Although the Vienna Convention concerns the law of treaties and binds only signatories … Article 53 reflected a concept with legal effect beyond the treaty context").

[89] See para. (5) of the commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 85 ("The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law … but further that it should be recognized as having peremptory character by the international community of States as whole."). See also para. (34) of the draft conclusions of the work of the Study Group on fragmentation of international law *Yearbook… 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, at p. 108 ("A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, article 53 of the 1969 Vienna Convention), that is, norms 'accepted and recognized by the international community of States as a whole from which no derogation is permitted'."). See further, though not a product of the Commission, the report of the Study Group, *ibid.*, para. 375 ("The starting point [for establishing the criteria] must be the formulation of article 53 itself, identifying *jus cogens* by reference to what is 'accepted and recognized by the international community of States as a whole'.").

[90] See also Ireland, A/C.6/71/SR.27, para. 20. See, especially, Canada, Court of Appeal for Ontario, *Bouzari and Others v. Islamic Republic of Iran* (2004) 71 *Ontario Reports* (3d) 675, para. 86, where the Court of Appeal for Ontario, having determined that the *jus cogens* is a higher form of customary international law, makes clear that the non-derogation elements in article 53 is qualified by the element of recognition and acceptance. ("A peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary international law. It is one accepted and recognized by the international community of States as a norm from which no derogation is permitted."). See also de Wet, "*Jus cogens* and obligations *erga omnes*", p. 542 ("In essence, this implies that a particular norm is first recognized as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted."); see also Vidmar, "Norm conflicts and hierarchy in international law …", p. 25.

[91] Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, pp. 49–136. See also the Islamic Republic of Iran, A/C.6/71/SR.26, para. 118, where the two criteria identified are said to be, first, a norm recognized by the international community of States as a whole as a norm from which no derogation was permitted, and, second, a norm which could be modified only by a subsequent *jus cogens* norm.

[92] See also *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* (footnote 59 above), 52nd meeting (Greece), para. 19. ("In his view the third element led to a vicious circle, for the fact that a rule of *jus cogens* could be modified only by a rule 'having the same character' could not be one of the conditions governing the 'character' of the rule.").

the definition, it is not an independent criterion but rather forms part of the "acceptance and recognition" criterion.

38. Textually, there are other ways that article 53 could be interpreted. It is possible, from a textual perspective, to interpret the "accepted and recognized" as qualifying the "general international law" rather than the non-derogation language. Seen from this perspective, article 53 would have three criteria, as follows: (*a*) a norm of general international law which is recognized (as such) by the international community of States as a whole; (*b*) a norm from which no derogation is permitted; and (*c*) a norm which can only be modified by another norm of *jus cogens*. Apart from the fact that neither practice nor the negotiating history of article 53 supports such an interpretation, it would also raise a number of difficulties. First, it would render the first criterion tautologous, since "general international law" ought to be generally accepted and recognized by the international community. Second, in that form the second and third criteria would not be criteria but rather a consequence of *jus cogens* and a description of how *jus cogens* norms can be modified, respectively.

39. Based on the above, for a rule to qualify as a norm of *jus cogens* it has to be a norm of general international law and it has to be accepted and recognized as a norm from which no derogation is permitted. The report will consider each of these criteria in turn.

B. First criterion: a norm of general international law

40. The first criterion, namely that *jus cogens* are norms of general international law, is explicitly spelled out in article 53. Moreover, the view that what *jus cogens* refers to is a "norm of general international law" is repeated several times in the commentary to draft article 50 of the Commission's articles on the law of treaties.[93] It is worth pointing out that, during the United Nations Conference on the Law of Treaties (Vienna Conference), many drafting suggestions to amend the Commission's text were made, but none concerned the concept of "norm of general international law". It was accepted as a given and all delegates who spoke on various aspects of *jus cogens* defined it in those terms.[94] Moreover, judicial decisions, both international and domestic, have consistently adopted the approach that *jus cogens* norms of international law emerge from norms of general international law.[95] Echoing the same point, Knuchel observes that this first criterion "addresses the process by which the norm is created, as opposed to the process by which it acquires peremptory status".[96] This suggests that the first criterion implies a two-step process for the emergence of *jus cogens* norms, namely, the establishment of a "normal" rule under general international law and the "elevation" of that rule to the status of *jus cogens*.[97] This two-step process is aptly captured by the Commission in the commentaries to the articles on state responsibility:

> The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question meet all the criteria for recognition as a norm of general international law, binding as such, but *further** that it should be recognized as having peremptory character by the international community of States as a whole.[98]

41. The concept of "norm of general international law" as a criterion has, thus, not been in doubt. What may be an issue is precisely what this criterion means. The Study Group on fragmentation of international law established by the Commission observed that "there is no accepted definition of 'general international law'".[99] Nonetheless, elements of the concept can be deduced from the practice and literature. The Study Group itself distinguishes between, *inter alia*, general international law, on the one hand, and *lex specialis*[100] and treaty law,[101] respectively, on the other hand. The distinction between general international law on the one hand, and treaty law and *lex specialis* on the other hand, appears to be borne out by the International Court of Justice in the *Military and Paramilitary Activities* case.[102] Yet this distinction *might* preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*. Indeed the text from the *Gabčíkovo-Nagymaros*

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[93] See, for example, para. (2) of the commentary to draft article 50, *Yearbook … 1966*, vol. II (Part II), document A/6309/Rev.1, Part II, chap. II, sect. C, at pp. 247–248.

[94] See, for example, the following statements in the *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* (footnote 59 above): Union of Soviet Socialist Republics, fifty-second meeting, para. 3, Greece, fifty-second meeting, para. 19; Cuba, fifty-second meeting, para. 34; Nigeria, fifty-second meeting, para. 48, Austria, fifty-third meeting, para. 42, Uruguay, fifty-third meeting, para. 51.

[95] See, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, International Court of Justice, *I.C.J. Reports 2012*, p. 422, at para. 99 ("the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)"); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* International Court of Justice, *I.C.J. Reports 2010*, p. 403, at para. 81 ("egregious violations of norms of general international law, in particular those of peremptory character (*jus cogens*"); United States of America, *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001), p. 372 ("some customary norms of international law reach a 'higher status', in which they 'are recognized by the international community of States as peremptory …'"); and *Kazemi Estate v. Islamic Republic of Iran* (footnote 51 above), p. 209.

[96] See Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 49. See also Linderfalk, "The creation of *jus cogens*: making sense of Article 53 of the Vienna Convention", p. 371 ("by 'the creation of a rule of *jus cogens*' I mean, not the creation of a rule of law, but rather the elevation of a rule of law to a *jus cogens* status").

[97] Rivier, *Droit international public*, p. 566 ("*Ne peut accéder au rang de règle impérative qu'une provision déjà formalisée en droit positif et universellement acceptée comme règle de droit.*" ["Only a provision already formalized in positive law and universally accepted as law can achieve the rank of peremptory norm"].)

[98] Para. (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 85.

[99] Para. (10), footnote 976, of conclusions of the Study Group, *Yearbook … 2006*, vol. II (Part Two), para. 251, at p. 179. The Study Group pointed out, rather, that the meaning of the term was context specific.

[100] See *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, para. 8 ("What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law', etc."). See also *ibid*., paras. 81 and 194.

[101] *Ibid*., para. 92. It should be noted that the Study Group, in some respects, treats treaty law as *lex specialis*.

[102] *Military and Paramilitary Activities* (footnote 73 above), para. 274. See also *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 76, at para. 132.

case,[103] on which the Study Group relied, illustrates the point. There the Court was referring to the special rules developed between the parties, Slovakia and Hungary, and which were distinct from rules that were generally applicable to the international community of States.

42. It would seem, thus, that the "general" in norms of general international law", in the context of article 53, refers to the scope of applicability. This understanding seems consistent with the approach adopted in judgments, advisory opinions and individual opinions of the International Court of Justice. Although, in the *North Sea Continental Shelf* cases, the Court did not employ the word "general" when making a distinction between "rules of international law [that] can, by agreement, be derogated from in particular cases, or as between particular parties" and rules of *jus cogens* which cannot, it is these former rules that apply generally between States, but which can be derogated from by (more) specific rules, to which the term "general rules of international law" refers.[104] The distinction between general international law and *lex specialis*, alluded to by the Study Group, was put into context by the Court when it made the distinction between "purely conventional rules and obligations [regarding which] some faculty of making unilateral reservations may, within certain limits, be admitted" and "general or customary law rules and obligations which … must have equal force for all members of the international community".[105]

43. The most obvious manifestation of general international law is customary international law.[106] Indeed many see customary international law as the most common basis for the formation of *jus cogens* norms.[107] Gérard Cahin, for example, observes that customary international law is "a normal and common, if not exclusive, means of formation of *jus cogens* norms."[108] The strong relationship between the rules of customary international law and norms of *jus cogens* is reflected in the statements by States in the General Assembly over the years.[109] The notion that norms of *jus cogens* are constituted by rules of customary international law is equally borne out in case law of both domestic and international courts. In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm (*jus cogens*)."[110] Similarly, the Court's description of "many of the rules of humanitarian law" as constituting "intransgressible principles of international customary law" confirms the idea that *jus cogens* norms—referred to by the Court as "intransgressible principles"—have a customary basis.[111]

44. Decisions of other international tribunals confirm the relationship between customary international law and norms of *jus cogens*. The International Tribunal for the Former Yugoslavia, for example, has noted that the prohibition against torture is a "norm of customary international law" and that it "further constitutes a norm of *jus cogens*."[112] In *Furundžija*, the Tribunal described *jus cogens* norms as those that "enjoy a higher rank in the hierarchy of international law than treaty law or even 'ordinary' customary rules."[113] This quote appears to make a distinction between "ordinary" rules of customary international law and norms of *jus cogens* as a particular form of customary international law. Similarly, in *Jelisić* the Court stated that "there can be absolutely no doubt" that the prohibition against genocide in the Genocide Convention falls "under customary international law" and is now "at the level of *jus cogens*."[114]

45. Domestic courts have similarly confirmed customary international law as the source of many *jus cogens*

[103] *Gabčíkovo–Nagymaros Project* (see previous footnote), para. 132, where the Court noted that the relationship between Slovakia and Hungary was governed by, *inter alia*, both "the rules of general international law" and "above all, by the applicable rules of the 1977 [Agreement concerning Mutual Assistance in the Construction of the Gabcikovo–Nagymaros System of Locks] as a *lex specialis*".

[104] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, para. 72.

[105] *Ibid*., para. 63.

[106] Cassese, "For an enhanced role of *jus cogens*", p. 164 ("The second question amounts to asking by which means an international tribunal should ascertain whether a general rule or principle of international law has acquired the status of a peremptory norm. Logically, this presupposes the existence of such a *customary* rule or principle.") (emphasis in original). See also de Wet, "*Jus cogens* and obligations *erga omnes*", p. 542.

[107] See, for discussion, Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 86.

[108] Cahin, *La coutume internationale et les organisations internationales*, p. 615 ("sinon la source exclusive des règles du *jus cogens*, du moins la voie 'à la fois normale et fréquente' de leur formation" ["if not the exclusive source of the rules of *jus cogens*, at least the "both normal and frequent" way of their formation"]). See also Rivier, *Droit international public*, p. 566 ("Le mode coutumier est donc au premier rang pour donner naissance aux règles destinées à alimenter le droit impératif" ["Customary law is thus a primary source of rules that will form the basis of mandatory law"]). See, additionally, Cassese, *International Law*, p. 199 ("a special class of *general rules* made by custom has been endowed with a *special legal force*: they are peremptory in nature and make up the so-called *jus cogens*"). See, further, Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, p. 115 ("As the most likely source of general international law, customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms"). See, for a contrary view, Janis, "The nature of *jus cogens*", p. 361.

[109] See Pakistan, A/C.6/34/SR.22, para. 8 ("The principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter but also because they had become norms of customary international law recognized by the international community"). See also United Kingdom, A/C.6/34/SR.61, para. 46, and Jamaica, A/C.6/42/SR.29, para. 3 ("The right of peoples to self-determination and independence was a right under customary international law, and perhaps even a peremptory norm of general international law"). See also the written statement of Jordan, 30 January 2004, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available from www.icj-cij.org/en/case/131/written-proceedings, paras. 5.42–5.45.

[110] *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 95 above), para. 99. See also *Military and Paramilitary Activities* (footnote 73 above), para. 190.

[111] *Legality of the Threat or Use of Nuclear Weapons* (footnote 84 above), para. 79. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 43 above), para. 161. See, further, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 161, Separate Opinion of Judge Simma, at p. 327, para. 6 ("I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force").

[112] *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 454.

[113] *Furundžija* (footnote 46 above), para. 153.

[114] *Jelisić* (footnote 84 above), para. 60.

norms. In *Siderman de Blake*, the United States Court of Appeals for the Ninth Circuit described *jus cogens* norms as "an elite subset of the norms recognized as customary international law."[115] The Court also noted that, in contrast to ordinary rules of customary international law, *jus cogens* "embraces customary laws considered binding on all nations".[116] In *Buell*, the United States Court of Appeals for the Sixth Circuit also noted, with respect to *jus cogens*, that some customary norms of international law reach a "higher status", namely that of *jus cogens*.[117] In *Kazemi Estate* the Supreme Court of Canada described *jus cogens* norms as a "higher form of customary international law".[118]

46. The Supreme Court of Argentina similarly recognized that *jus cogens* norms relative to war crimes and crimes against humanity emerged from rules of customary international law already in force.[119] Similarly, the Constitutional Tribunal of Peru stated that *jus cogens* rules referred to "customary international norms which, under the auspices of an *opinio juris seu necessitatis*".[120] In *Bayan Muna*, the Philippines defined *jus cogens* as "the highest hierarchical position among all other customary norms and principles."[121] Similarly, in *Kenya Section of the International Commission of Jurists v. Attorney-General and Another*, the High Court of Kenya determined the "duty to prosecute international crimes" to be both a rule of customary international law and a norm of *jus cogens*.[122] The Kenya Court of Appeal noted that, even if Kenya had not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it would "still have been bound to proscribe torture within its territory under customary international law", which, the Court continued, is a principle of *jus cogens* and is a peremptory norm of international law.[123] Similarly, Italian courts had also recognized that *jus cogens* norms emerged from rules of customary international law.[124]

47. Based on the foregoing, it can be concluded that customary international law rules qualify as norms of general international law for the purposes of the criteria for *jus cogens* derived from article 53 of the Vienna Convention.

48. Another general source of international law is the general principles of law recognized by civilized nations (hereinafter "general principles of law") in Article 38 (1) (*c*) of the Statute of the International Court of Justice.[125] General principles of law, like rules of customary international law, are generally applicable. Unlike treaty law, the scope of general principles of law is not limited to the specific parties to the treaty. However, while there is ample authority in practice for the proposition that customary international law rules form the basis of *jus cogens* norms, there is significantly less authority for the proposition that general principles of law also constitute a basis for *jus cogens* norms.

49. There is, however, sufficient support in literature.[126] Moreover, it is clear that when the Commission determined *jus cogens* norms to be "norms of general international law" it included, in the phrase "general international law", also general principles of law. The first time that the notion of invalidity of a treaty on account of a violation of a general rule of international law was considered was in the first report of Sir Hersch Lauterpacht (the fourth report overall) on the law of treaties.[127] In the

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[115] *Siderman de Blake v. Argentina* (footnote 49 above), p. 715, citing *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 Federal Reporter 2d 929 (U.S. Court of Appeals for the District of Columbia Circuit 1988), p. 940.

[116] *Ibid*. This contrast between "ordinary" rules of customary international law and *jus cogens*—suggesting the latter constitutes extraordinary rules of customary international law—is often based on the decision of the International Tribunal for the Former Yugoslavia in *Furundžija* (footnote 46 above), at para. 153, where a similar distinction is drawn. It has been mentioned, with approval, in several decisions, including decisions of the courts of the United Kingdom. See, for example, *R v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet* (footnote 68 above), p. 198. See also *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* (footnote 51 above), para. 101.

[117] *Buell v. Mitchell* (footnote 95 above), p. 373.

[118] See *Kazemi Estate v. Islamic Republic of Iran* (footnote 51 above), para. 151. See also *Steen v. Islamic Republic of Iran*, 2013 ONCA 30, 114 *Ontario Reports* (3d) 206, para. 30 ("Peremptory norms of international law, or *jus cogens*, are high forms of customary international law from which no derogation is permitted"); *Bouzari and Others v. Islamic Republic of Iran* (footnote 90 above), para. 86 ("A peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary international law").

[119] See *Arancibia Clavel* (footnote 54 above), para. 28.

[120] *25% del número legal de congresistas* (footnote 52 above), para. 53 ("*[l]as normas de* jus cogens *parecen pues encontrarse referidas a normas internacionales consuentudinarias que bajo el auspicio de una* opinio juris seu necessitatis" ["the norms of *jus cogens* seem therefore to refer to customary international norms which, under the auspices of an *opinio juris seu necessitatis*"]).

[121] *Bayan Muna* (footnote 53 above).

[122] *Kenya Section of the International Commission of Jurists v. the Attorney-General and Others*, Judgment, of the High Court of Kenya of 28 November 2011, [2011] *Electronic Kenya Law Reports*, para. 14.

[123] *Koigi Wamwere v. The Attorney-General*, Judgment of the Court of Appeal of Kenya of 6 March 2015, [2015] *Electronic Kenya Law Reports*, para. 6.

[124] *Germany v. Milde (Max Josef)*, Appeal Judgment of 13 January 2009, 1st Criminal Section, case No. 1072/2009, *Oxford Reports on International Law in Domestic Courts* 1224 (IT 2009), para. 6 ("customary rules aiming to protect inviolable human rights did not permit derogation because they belonged to peremptory international law or *jus cogens*").

[125] Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice provides that the Court shall apply "the general principles of law recognized by civilized nations".

[126] See, for example, Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 52 ("general principles [of law] may be elevated to *jus cogens* if the international community of States recognise and accept them as such"); Shelton, "Sherlock Holmes and the mystery of *jus cogens*", pp. 30–34; Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case law", p. 27. See also Weatherall, *Jus Cogens: International Law and Social Contract*, p. 133; Kleinlein, "*Jus cogens* as the 'highest law'?", p. 195 ("a peremptory norm must first become general international law i.e. customary international law or general principles of law pursuant to Article 38 (1) of the ICJ Statute"). See also Conklin, "The peremptory norms of the international community", p. 840; Dajani, "Contractualism in the law of treaties", p. 60; Bianchi, "Human rights and the magic of *jus cogens*", p. 493 ("The possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law"); Nieto-Navia, "International peremptory norms (*jus cogens*) and international humanitarian law", pp. 613–615 ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties … and (ii) General principles of law recognized by civilized nations"); Orakhelashvili, *Peremptory Norms in International Law*, p. 126; and Santalla Vargas, "In quest of the practical value of *jus cogens* norms", p. 214 ("*jus cogens* derives from customary law and general principles of international law").

[127] *Yearbook … 1953*, document A/CN.4/63, p. 90.

commentary to draft article 15 on the law of treaties, Lauterpacht regarded norms of *jus cogens* "as constituting principles of international public policy" and "as forming part of those principles of law generally recognized by civilized nations" (general principles of law).[128] Members of the Commission also generally accepted that general principles of law could give rise to norms of *jus cogens*.[129]

50. It has been contended that at the Vienna Conference, delegations did not believe that general principles of law could be the source of *jus cogens* norms.[130] This view appears to be based on the consideration that a proposal by the United States to the text of the Commission was rejected on account of the fact that some States interpreted it as "implying that peremptory norms would arise from the third source of international law", namely general principles.[131] It seems, however, that this was not the import of the proposal.[132] The proposal seems to have been intended, rather than to introduce a new source of *jus cogens*, to introduce an additional requirement, namely that in addition to being a norm of general international law, the said norm should enjoy recognition by national and regional legal systems.[133] More to the point, States generally rejected the United States proposal for fear that it would create additional requirements and therefore additional burden for the establishment of *jus cogens* norms. In its statement, for example, Cuba expressed opposition to the United States amendment on account of the fact that it "would subordinate the rules of *jus cogens* of international law to national and regional systems" "and would "enable a State to thwart any rule of *jus cogens* by invoking its domestic legislation."[134] Similarly, Poland opposed the United States proposal on the basis that it seemed to suggest the supremacy of the national and regional systems over the international legal order.[135] Even those States that supported the proposal did not generally adopt the view that it implied general principles of law but rather saw it as a confirmation of recognition and acceptance of the norm as *jus cogens*.[136] Moreover, even where States did interpret the proposed amendment as referring to (or at least being linked to) general principles of law, they did not reject it on that account. Uruguay, for example, was opposed to the proposed amendment as it might be interpreted as implying that *all* general principles of law had the status of *jus cogens*.[137] In other words, Uruguay's statement did not exclude the possibility that *some* general principles of law could rise to the level of *jus cogens*.

51. The dearth in actual practice of instances in which general principles were said to be the basis of a *jus cogens* norm does not justify the conclusion that general principles cannot form the basis of *jus cogens* norms.[138] Clearly the text of article 53 of the Vienna Convention, by referring to "general international law", was meant to signify that general principles of law could form the basis of *jus cogens* norms. As Knuchel points out, general principles in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice constitute "a source generative of general international law" and, as such, "may be elevated to *jus cogens*" if they meet the rest of the criteria for such elevation.[139] General principles of law, once accepted as such, create general rights and obligations for States under international law and as such qualify as norms of general international law. The Commission itself, in the context of the conclusions of the work of the Study Group on fragmentation of international law, considered the role of article 31, paragraph 3 (*c*), of the Vienna Convention in systemic integration. Article 31, paragraph 3 (*c*), it will be recalled, provides that in the interpretation of treaties, "any relevant rules of international law applicable in the relations between the parties" shall be considered.[140] In its conclusions, the Commission distinguished, in relation to the interpretation of a treaty under article 31, paragraph 3 (*c*), between the application of treaty law on the one hand, and of general international law on the other.[141] The latter, according to the Commission, consists of both "customary international law and general principles of law".[142]

52. The phrase "general international law" therefore encompasses, in addition to customary international law, general principles of law.

53. A question that has been posed is whether treaty law, though on the surface not "general international law", could qualify as "general international law" for the purposes of article 53 of the Vienna Convention. On its face, article 53 of the Vienna Convention does not apply to

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[128] Para. 4 of the commentary to article 15, *ibid*., p. 155.

[129] See, for example, *Yearbook … 1966*, vol. I, 828th meeting, para. 31 (Mr. de Luna, quoting Lord McNair); and *Yearbook* … 1963, 684th meeting, para. 21 (Mr. Tunkin), and, *ibid.*, para. 70 (Mr. Gros).

[130] Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 44 ("State representatives did not seem to consider the general principles of law recognised by civilised nations mentioned in Article 38(1) (*c*) of the ICJ Statute as a possible norm of *jus cogens.*")

[131] *Ibid*., p. 45.

[132] The United States proposal, contained in document A/CONF.39/C.1/L.302, as recorded in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March–24 May 1968 and 9 April–22 May 1969: Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), p. 174, para. 462, subparagraph (*b*) provided as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted."

[133] See *Ibid., First Session, Vienna, 26 March–24 May 1968: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (footnote 59 above), 52nd meeting, para. 17 (United States).

[134] *Ibid*., para. 38 (Cuba).

[135] *Ibid*., 53rd meeting, para. 41 (Poland).

[136] See, for example, *ibid*., para. 30 (Colombia).

[137] *Ibid*., para. 51 (Uruguay). See, however, *ibid*., 56th meeting, para. 64 (Trinidad and Tobago).

[138] While the practice is not as substantial as that concerning customary international law, there has been some recognition of general principles of law. See, for, example, *Jelisić* (footnote 84 above), para. 60, where the Tribunal notes that the International Court of Justice, having observed that the prohibition of genocide was a norm of *jus cogens*, stated that the principles underlying the prohibition were "principles … recognised by civilised nations". See also Islamic Republic of Iran (A/C.6/71/SR.26), para. 120: "The general principles of law to which Article 38 of the Statute of the International Court of Justice referred were the best normative foundation for norms of *jus cogens*".

[139] Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 52.

[140] Para. (17) of the conclusions of the work of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1).

[141] Paras. (20) (referring to general international law) and (21) (treaty law), *ibid*.

[142] Para. (20), *ibid*.

treaty law. As noted above, in the conclusions of the work of the Study Group on fragmentation, the Commission drew a distinction between treaty law and general international law for the purposes of what it called systemic integration.[143] This might suggest that treaty law would not qualify as general international law.

54. Grigory Tunkin suggested that treaty law can constitute general international law.[144] Moreover, it appears that some delegations during the Vienna Conference took the view that treaties could be the source of *jus cogens* norms. Perhaps the clearest statement recognizing treaty law as part of general international law was that of Poland, in which the following was stated:

> The form or source of such rules was not of essential importance in determining their peremptory character. Some were conventional and some customary. Some first emerged as custom and were later codified in multilateral conventions. Some, on the other hand, first appeared in conventions and only passed later into customary law.[145]

55. The more common view, however, is that treaty rules, as such, do not generate norms of general international law that could rise to the status of *jus cogens*.[146] The text of article 53, on which our consideration of *jus cogens* is based, describes norms of *jus cogens* as norms of general international law, which are distinct from treaty rules, the latter applying only to the parties to the treaty. The Commission's commentary to draft article 50 makes a clear distinction between "norms of general international law" and treaty law. The commentary, for example, distinguishes "the general rules of international law" from treaty rules, through which States may contract out of "the general rules of international law".[147] Paragraph (4) of the commentary states that a "modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty".[148] This statement could be interpreted as a recognition by the Commission that treaty rules can form the basis of *jus cogens*. However, the following sentence states that such a multilateral treaty would fall outside the scope of the article.[149] The language "norm of general international law" was inserted by the Commission to indicate the exclusion of multilateral treaty law, implying a clear distinction between treaty rules and rules of general international law.[150]

56. That treaty rules do not, as such, constitute norms of general international law does not mean that treaties are irrelevant for general international law and the identification of *jus cogens*. The relationship between general international law—in particular customary international law—and treaty law was described in *North Sea Continental Shelf*.[151] In that case the International Court of Justice observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law,[152] or the adoption of a treaty rule can help crystallize an emerging general rule of international law,[153] or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.[154] Perhaps the best example of a treaty embodying a norm of general international law that meets the criteria for *jus cogens* is what the Commission referred to as "the law of the Charter concerning the prohibition of the use of force".[155] While the basic norm is found in a treaty, the Charter of the United Nations, it is also a norm of general international law, in the form of customary international law.

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[143] Paras. (19)–(21), *ibid*. See also the report of the Study Group, *ibid.*, para. 77.

[144] Tunkin, "Is general international law customary law only?", especially p. 541 ("I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international law"). See, specifically in the context of *jus cogens*, Tunkin, "*Jus cogens* in contemporary international law", p. 116 (principles of *jus cogens* consist of "rules which have been accepted either expressly by treaty or tacitly by custom" … "[m]any norms of general international law are created jointly by treaty and custom"). See also Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 50 ("Contemporary international law comprises, in the words of the ICJ, 'instruments of universal or quasi-universal character', and nothing precludes future conventions from creating universally binding norms which could be elevated to *jus cogens*."). See also Nieto-Navia, "International peremptory norms (*jus cogens*) and international humanitarian law", p. 613 ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties … and (iii) General principles of law recognized by civilized nations").

[145] See *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* (footnote 59 above), 53rd meeting, para. 34 (Poland). See also *ibid*., 56th meeting, para. 63 (Trinidad and Tobago) ("[g]eneral multilateral treaties such as the United Nations Charter could also be a source of norms having the character of *jus cogens*").

[146] See Weatherall, *Jus Cogens: International Law and Social Contract*, pp. 125–126; and Hannikainen *Peremptory Norms (*Jus Cogens*) in International Law*, p. 92. See also Bianchi, "Human rights and the magic of *jus cogens*", p. 493; Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 341. See further Orakhelashvili, *Peremptory Norms in International Law*, p. 113 ("The propensity for academics to place emphasis on custom seems to follow from the general acknowledgment of the unsuitability of treaties to create peremptory norms"); Linderfalk, "The effect of *jus cogens* norms …", p. 860.

[147] Para. (2) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II (Part II), document A/6309/Rev.1, Part II, chap. II, sect. C, at pp. 247–248. The Commission further stated that it would not "be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted".

[148] Para. (4), *ibid*., at p. 248.

[149] *Ibid.*

[150] *Ibid.*

[151] *North Sea Continental Shelf* (footnote 104 above). See also draft conclusion 11 of the draft conclusions on identification of customary international law, *Yearbook … 2016*, vol. II (Part Two), para. 62, at p. 61.

[152] *North Sea Continental Shelf* (footnote 104 above), para. 61.

[153] *Ibid*., paras. 61–69.

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

[155] See para. (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II (Part II), document A/6309/Rev.1, Part II, chap. II, sect. C, at p. 247. This language was also repeated in *Military and Paramilitary Activities* (footnote 73 above), para. 190. See also Verdross, "*Jus dispositivum* and *jus cogens* in international law", p. 59; Frowein, "*Ius cogens*"; Paust, "The reality of *jus cogens*", pp. 82–83 ("*Jus cogens* is a form of customary international law. It may be reflected also in treaties but, as a custom, its birth, growth, other change and death, depend on the patterns of expectation and behaviour that are recognizably generally conjoined in the ongoing social process."). See also *Yearbook … 1966*, vol. I (Part I), 828th meeting, para. 15 (Mr. Ago) ("Even if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty …, it was already a rule of general international law").

57. Judicial practice has reflected the role of treaty rules for the identification of norms of *jus cogens* in similar ways. Famously in the *Questions Relating to the Obligation to Prosecute or Extradite* case, the International Court of Justice based its conclusion that the prohibition of torture is a norm of *jus cogens* on its customary status and not its conventional status.[156] The decisions of the International Tribunal for the Former Yugoslavia in relation to torture and genocide have been particularly instructive in this regard. In *Furundžija*, the Tribunal, after recognizing that torture is prohibited by human rights treaties,[157] proceeds to determine the *jus cogens* status of the prohibition on the basis of customary international law.[158] This approach is most clearly evident in *Prosecutor v. Tolimir*, where the Tribunal, having recognized that genocide is prohibited by the Genocide Convention, identifies the prohibition as a *jus cogens* on the basis, not of the conventional rule, but of the customary international law rule.[159] The InterAmerican Court of Human Rights has similarly determined the prohibition in common article 3 of the Geneva Conventions to be *jus cogens* on the basis of its customary status.[160]

58. This trend of determining the existence of a *jus cogens* norm on the basis of customary international law when the norm in question also exists in treaty law, is also conspicuous in State practice, including domestic decisions. In *Siderman*, for example, while torture is prohibited under the Convention against Torture, the United States Court of Appeal for the Ninth Circuit describes *jus cogens* as an "elite subset of the norms recognized as customary international law."[161] The notion that treaty rules, even if themselves not constituting norms of general international law, can still reflect or embody such norms, which may then be elevated to the status of *jus cogens*, is also captured in scholarly writings.[162] The approach identified in the present report is also supported by findings of international non-judicial monitoring bodies which refer to, *inter alia*, national practice. The Working Group on Arbitrary Detention, for example, found that the prohibition of all forms of arbitrary deprivation of liberty constituted both "customary international law and a peremptory norm (*jus cogens*)", but it also concluded that the prohibition of arbitrary detention "appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States. Lastly, arbitrary detention is regularly denounced within national and international forums".[163] In *Belhaj and Another v. Straw and Others*, Lord Sumption of the United Kingdom Supreme Court (with whom Lord Hughes concurred) agreed with the Working Group on the identification of the abovementioned *jus cogens* norm,[164] and by invoking the principles contained in article 9 of the International Covenant on Civil and Political Rights, found an almost complete consensus on an irreducible core of the international obligation under which "detention is unlawful if it is without any legal basis or recourse to the courts".[165]

59. Thus, while treaty provisions do not, as such, constitute norms of general international law capable of forming the basis for *jus cogens* norms, they can reflect rules of general international law which can reach the status of *jus cogens*.

C. Second criterion: recognition and acceptance

60. In the first report on the topic of *jus cogens*, the Special Rapporteur stated that 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.[166] This applies not only to treaty rules, but also to norms of general international law. While the Commission was not in a position to approve language recognizing, expressly, the distinction between *jus dispositivum* and *jus cogens*, the Special Rapporteur is of the opinion that it is an important conceptual distinction with strong support in practice and academics writings,[167]

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[156] *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 95 above), para. 99.

[157] *Furundžija* (note 46 above), para. 144.

[158] *Ibid*., para. 153.

[159] *Prosecutor v. Tolimir*, Judgment, Case No. IT-05-88/2-T, Trial Chamber II, 12 December 2012, para. 733 ("These provisions of the Genocide Convention are widely accepted as customary international law rising to the level of *jus cogens.*"). See also *Jelisić* (footnote 84 above), para. 60. See further *Prosecutor v. Radovan Karadžić*, Judgment, Case No. IT-95-5/18-T, Trial Chamber, 24 March 2016, para. 539.

[160] *"Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009, Inter-American Court of Human Rights, concurring opinion of Ramón Cadena Rámila, Judge *ad hoc* ("At the time when the events of the instant case occurred, the prohibition established in common Article 3 to the Geneva Conventions was already part of the customary international law, and even of the *jus cogens* domain").

[161] *Siderman de Blake v. Argentina* (footnote 49 above), p. 715. For other examples where the customary international law prohibition of torture is advanced as the basis for the *jus cogens* norm, instead of the treaty law prohibition, see the following among many others: *R v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet)* (footnote 68 above); *Al-Adsani v. United Kingdom* (footnote 46 above), para. 30; *Kazemi v. Islamic Republic of Iran* (footnote 51 above), paras. 151 and 152.

[162] Weatherall, *Jus Cogens: International Law and Social Contract*, pp. 125–126 ("Treaty law is representative of *jus dispositivum* against which *jus cogens* is juxtaposed, and whatever role treaties may play in the crystallization of peremptory norms, they are not themselves the formal source of peremptory norms"); see also Orakhelashvili, "Audience and authority …", p. 124 ("The *Nicaragua* case has sorted this analytical dilemma three decades ago … The International Court of Justice chose to speak of customary rules made via concerted and collective expression of positions of dozens, even hundreds, of [S]tates, manifested through their participation in [*inter alia*] multilateral treaties"); Criddle and Fox-Decent, "A fiduciary theory of *jus cogens*", p. 341. See also Gallant, *The Principle of Legality in International and Comparative Criminal Law*, pp. 401–402, suggesting that the principle of non-retroactivity of crimes and punishment as a *jus cogens* norm (or at least an emerging *jus cogens* norm), in addition to its customary international law status, is repeatedly recognized "in near universal treaty law", adopted "as a matter of domestic law by so many [S]tates" and faces no "opposition … in modern times".

[163] See report of the Working Group on Arbitrary Detention on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37), para. 11.

[164] *Belhaj and Another v. Straw and Others*, [2017] UKSC 3, Judgment of 17 January 2017, para. 271.

[165] *Ibid*., para. 270 ("The consensus on that point is reflected in the terms of the [International Covenant on Civil and Political Rights, which] … has been ratified by 167 [S]tates to date … Malaysia is one of a handful of states which are not party, but it has declared that it adheres to its principles").

[166] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, paras. 64–65.

[167] See *North Sea Continental Shelf* (note 104 above), para. 72 ("Without 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,

(*Continued on next page.*)

which will hopefully be reconsidered by the Commission. But the distinction is also significant because it serves to confirm that not all "norms of general international law" are *jus cogens*. The majority of these norms—norms of general international law—are *jus dispositivum*. Norms of general international law have the *potential* to become norms of *jus cogens*. To become norms of *jus cogens* additional requirements, spelled out in article 53 of the Vienna Convention, must be met.

61. Before addressing the requirements for the elevation of a norm of general international law to *jus cogens* status, it is necessary to address a preliminary question of sequence. The structure of article 53—a norm of *jus cogens* is a norm of general international law which is accepted and recognized by the international community as one from which no derogation is permitted—suggests that what comes first, both in terms of formation of the norm and in terms of its identification, is to be a norm of general international law. Once a norm meets the test of being a norm of general international law, the next step is to show that such a norm meets the acceptance and recognition requirement. Purportedly based on *Nicaragua*, Alexander Orakhelashvili's analysis seems to suggest that the "norm of general international law" requirement can be proven after the determination that the norm in question is a norm of *jus cogens*.[168] However, this sequence does not follow. Apart from the divergence of opinion as to whether *Nicaragua* recognized the prohibition on the use of force as *jus cogens*,[169] it is not clear what the purpose of determining the customary nature of a norm would be once it is established that it is a norm of *jus cogens*.

62. This does not mean that a court will *always* have to methodically show the sequencing of its determination that a norm constitutes a norm of *jus cogens*. But it is nonetheless important, in the identification of a norm as *jus cogens*, to be aware of the structure of article 53 and the consequent requirements.

63. Article 53 states that, to qualify as a norm of *jus cogens*, a norm of general international law must also be one that is "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". As explained above, this is a composite requirement. The requirement is one of acceptance and recognition. But this requirement of "acceptance and recognition" is made up of other elements, namely (*a*) "international community of States as a whole" and (*b*) "from which no derogation is permitted". The elements describe different aspects concerning the acceptance and recognition referred to in article 53. They describe who must accept and recognize and what must be accepted and recognized.

64. As previously suggested, it is not required to show that the norm in question is "one from which no derogation is permitted", nor is it required to show that the norm in question "may be modified only by a norm of general international law having the same character". Without prejudging the contents and conclusions of future reports, the former is a consequence of *jus cogens* norms, while the latter describes how the *jus cogens* norms may be modified. For the purposes of the present report, and in particular the criteria for *jus cogens*, these elements show what the international community of States as a whole should be shown to have "accepted and recognized".

65. As stated above, it is the "international community of States as a whole" that must accept and recognize the *jus cogens* character of a norm. It is worth recalling that the Commission itself, when adopting draft article 50, had not included the element of recognition and acceptance by the international community of States a whole, stating only that a norm of *jus cogens* is one "from which no derogation is permitted".[170] However, even during the deliberations of the Commission, the link between norms of *jus cogens* and the acceptance of the "international community of States" had been expressed by various members of the Commission.[171]

66. The proposal of the United States to amend the Commission's text (draft article 50) so that *jus cogens* norms were qualified as those norms that were "recognized in common by the national and regional legal systems of the world"[172] was purportedly inspired by the objective to ensure that the peremptory character of the norm in question was "endorsed by the international community as a whole."[173] While the United States proposal was rejected

(*Footnote 167 continued.*)

or as between particular parties."); *South West Africa, Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6, Dissenting Opinion of Judge Tanaka, at 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") and *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, separate opinion of Judge Shahabuddeen, at 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. 4, Separate Opinion of Judge ad hoc Torres Bernárdez at p. 245, 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'"). For literature, see Verdross, "*Jus dispositivum* and *jus cogens* in international law", p. 58 ("[t]here was clearly 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 dispositivum*"*);* 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"); 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" ["most of the rules [of international law] have a dispositive character—*jus dispositivum*—, created by an agreement of wills, which can also be derogated by an agreement of wills"]).

[168] Orakhelashvili, *Peremptory Norms in International Law*, pp. 119–120 ("once a norm is part of *jus cogens*, its customary status can be proved by criteria different from those applicable to other norms").

[169] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693), para. 46. See, for discussion, Green, "Questioning the peremptory status of the prohibition of the use of force".

[170] See draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II (Part II), document A/6309/Rev.1, Part II, chap. II, sect. C, at p. 183.

[171] See *Yearbook … 1966*, vol. I, 828th meeting, para. 34 (Mr. de Luna) ("[*jus cogens*] was positive law created by States, not as individuals but as organs of the international community").

[172] See note 132 above.

[173] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968:*

for, *inter alia*, fear that it implied the subordination of *jus cogens* norms to domestic law,[174] the idea of acceptance and recognition by the international community was widely accepted by the Vienna Conference. The proposal of Finland, Greece and Spain, which was more direct on that point, described *jus cogens* norms simply as those norms "recognized by the international community" from which no derogation was permitted.[175]

67. It was on the basis of the joint proposal of Finland, Greece and Spain that the Vienna Conference adopted the formulation in article 53.[176] The Drafting Committee, for its part, inserted the word "accepted" in that proposal, so that the international community "accepted and recognized" the non-derogability of that particular norm.[177] According to the Chairman of the Drafting Committee, this was done because Article 38 of the Statute of the International Court of Justice includes both the words "recognized" and "accepted"[178]—"recognized" was used in connection with convention and treaties and general principles of law, while accepted was used in connection with customary international law. The phrase, "as a whole" was inserted by the Drafting Committee "to indicate that no individual State should have the right of veto" with respect to the recognition of a norm as *jus cogens*.[179] The Chairman of the Drafting Committee explained that the insertion of the words "as a whole" was meant to indicate that it was not necessary for the peremptory nature of the norm in question "to be accepted and recognized by all States" and that it would be sufficient if "a very large majority did so".[180] The phrase "as a whole" indicates that it is not States individually, but rather States as a collective, that are required to accept and recognize the non-derogability of the norm in question. Even within the Commission, some members seemed to understand *jus cogens* as requiring collective acceptance.[181]

68. What is not explained in the *travaux préparatoires* is how the Drafting Committee arrived at the insertion of "States" to make it "international community of States as a whole". Within the Commission, some members understood "international community" as referring to the international community of States, while others understood it as being broader than just the community of States.[182] It is clear, however, that, even without the addition of the words "of States", delegates at the Vienna Conference interpreted "international community as a whole" to mean "international community of States as whole".[183] The United States, for example, explaining the purport of its proposal, referred to the recognition of the "international community as a whole" but equated this with the "voice" that "individual States and groups of States" should have in "formulating *jus cogens* norms."[184] Similarly, Cyprus, having expressed the view that *jus cogens* was intended to protect the interest of the international community as a whole, proceeded to stress that the "smaller States had an even greater interest than the larger ones in the adoption" of the rule.[185]

69. The issue of whether the language of article 53 should *now* be read to mean "international community as a whole", so that it includes entities other than States, like international organizations, non-governmental organizations and perhaps even individuals, in the creation of *jus cogens* norms has come up recently. In its statement during the Sixth Committee's consideration of the report of the Commission, Canada, while stressing the need for any definition of *jus cogens* not to deviate from article 53, nonetheless stated that "it would be beneficial for the Commission … to enlarge the idea of the acceptance and recognition of peremptory norms to include other entities, such as international and non-governmental organizations".[186] Indeed, in the context of the draft articles on the law of treaties between States and international organizations or between two or more international organizations, the Commission considered using the phrase "international community as a whole".[187] However, on reflection, the

Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole (footnote 59 above), 52nd meeting, para. 17 (United States).

[174] *Ibid*., 52nd meeting (Cuba), para. 38; *ibid.*, 53rd meeting (Poland), para. 41; and *ibid*., para. 51 (Uruguay), suggesting that, while the United States proposal was intended to signify recognition, the idea was "not, perhaps, expressed as well as it might have been".

[175] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March–24 May 1968 and 9 April–22 May 1969: Documents of the Conference* (footnote 132 above), p. 174, para. 462, subparagraph (*c*). See also *ibid*., *First Session, Vienna, 26 March–24 May 1968: Summary Records of the Plenary Meetings and Meetings of the Committee of the Whole* (footnote 59 above) , 53rd meeting (Uruguay), para. 52, to the effect that the Finnish, Greek and Spanish proposal captured the intention behind the United States proposal.

[176] See *ibid*., 80th meeting (Mr. Yasseen, Chairperson of the Drafting Committee), para. 4.

[177] *Ibid*.

[178] *Ibid*.

[179] *Ibid*., para. 7.

[180] *Ibid*. para. 12. See also de Wet, "*Jus cogens* and obligations *erga omnes*", p. 543 ("This threshold for gaining peremptory status is high, for although it does not require consensus among all States … it does require the acceptance of a large majority of States."). See further Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, p. 111 ("[reflects] the consent of an overwhelming majority of States. Neither one State nor a very small number of States can obstruct the formative process of peremptory norms.").

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

[182] As an example of a broader reading of "international community", see *ibid*., para. 9 (Mr. Verdross) ("there were some rules of international law that … related to the interests of the international community, *in other words, to those of all mankind**"). For an example of a narrower reading, see previous footnote.

[183] For an interesting account of the concept of the "international community see Karakulian, "The idea of the international community in the history of international law", especially p. 590, where the author argues that the idea, initially, was meant to suggest "a certain commonality of the human species" but gradually "acquired an inter-State character, and the presumed general human community remained within the framework of erudition or classical formation, losing its legal dimension".

[184] See *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* (footnote 59 above), 52nd meeting, para. 17 (United States).

[185] *Ibid*., 53rd meeting (Cyprus), para. 67.

[186] A/C.6/71/SR.27, para. 9. See also *Yearbook … 2016*, vol. I, 3322nd meeting (Mr. Petrič during the Commission's debate on *jus cogens*), para. 4: "He concurred with the Special Rapporteur's analysis and conclusions on the subject of the controversy over the role of consent in the formation of *jus cogens*. It should be added that the consent of the international community of States as a whole referred *ipso facto* to the consent of human society, since one could not exist without the other."

[187] See para. (3) of the commentary to draft article 53 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook … 1982*, vol. II (Part Two), p. 17, para. 63, at p. 56.

Commission decided that "in the present state of international law, it is States that are called upon to establish or recognize peremptory norms".[188]

70. The International Court of Justice, likewise, in *Questions Relating to the Obligation to Prosecute or Extradite*, determined the *jus cogens* character of the prohibition of torture on the basis of State-developed instruments.[189] The International Criminal Court has also stated that *jus cogens* requires recognition by States.[190] Domestic courts have similarly continued to link the establishment of *jus cogens* norms with State recognition.[191] While *jus cogens* continues to be linked to notions of the conscience of mankind in practice and scholarly writings,[192] the material advanced to illustrate recognition of norms as *jus cogens* remain State-developed materials, such as treaties and General Assembly resolutions.

71. In its consideration of the topics of identification of customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation, the Commission has also grappled with the role of non-State actors. With respect to practice in the formation and expression of customary international law, the Commission determined that it is "primarily the practice of States" that is relevant.[193] The use of the adverb "primarily" was intended to emphasize that, in some instances, the practice of international organizations may also contribute to customary international law.[194] The practice, or "conduct", of non-State actors such as non-governmental organizations does not contribute to the formation or expression of customary international law, but "may be relevant when assessing the practice".[195] Similarly, in the context of subsequent agreements and subsequent practice, the Commission determined that while the practice of non-State actors does not amount to subsequent practice for the purposes of treaty interpretation, it "may … be relevant when assessing the subsequent practice of parties to a treaty".[196]

72. In the same vein, while it is the recognition and acceptance of States that is relevant for the identification of a norm as *jus cogens*, the practice of non-State actors is not irrelevant. It may lead to recognition and acceptance by States of the peremptoriness of the norm, or may contribute to assessing such recognition and acceptance. But it remains, nonetheless, the acceptance and recognition of "the international community of States as a whole" that is relevant.

73. In order for a norm of general international law to acquire the status of *jus cogens* it has to be recognized by the "international community of States as a whole" as having a particular quality, namely that it may not be derogated from. As explained above, non-derogation is itself not a criterion for *jus cogens* status.[197] Rather, the acceptance and recognition that the norm has that quality constitutes the criterion for *jus cogens*. On its own, non-derogation is the primary consequence of peremptoriness[198] and will be addressed in the third report of the Special Rapporteur (2018). This consequence is what distinguishes *jus cogens* norms from the majority of other norms of international law, namely *jus dispositivum*.[199]

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[188] *Ibid.*

[189] *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 95 above), para. 99. The Court cites, among others, the Universal Declaration of Human Rights (General Assembly resolution 217 (III) A of 10 December 1948), the Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX) of 9 December 1975, annex) and domestic legislation.

[190] *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the application for the interim release of detained witnesses, Trial Chamber II, 1 October 2013, p. 15, para. 30 ("peremptoriness [of the principle of *non-refoulement*] finds increasing recognition among States").

[191] See, for example, *Buell v. Mitchell* (footnote 95 above), para. 102 ("recognized by the international community of States as a whole"); *Bouzari and Others v. Islamic Republic of Iran* (footnote 90 above), para. 49; *Application of Universal Recognized Principles and Norms* (footnote 51 above); and *Arancibia Clavel* (footnote 54 above), para. 29.

[192] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] (footnote 44 above), para. 87, quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 43 above); Cançado Trindade, *International Law for Humankind*, p. 144 ("It is my view that there is, in the multicultural world of our times, an irreducible minimum, which, in so far as international law-making is concerned, rests on its ultimate material source: human conscience.").

[193] See draft conclusion 4, paragraph 1, of the draft conclusions on identification of customary international law, *Yearbook … 2016*, vol. II (Part Two), para. 62, at p. 60.

[194] Para. 2 of draft conclusion 4 (*ibid.*). See also para. (2) of the commentary to draft conclusion 4 (*ibid.*, at p. 66).

[195] Para. 3 of draft conclusion 4 (*ibid.*, at p. 60).

[196] Para. 2 of draft conclusion 5 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, para. 75, at p. 85.

[197] See, for a contrary view, Orakhelashvili, "Audience and authority …", p. 119, who suggests that nonderogability determines "which rules falls within the category of *jus cogens*". In his view, nonderogability implies "non-bilateralisable". However, interesting though this theory may be, it is but a theory and one not supported by any authority in practice. See also Kleinlein, "*Jus cogens* as the 'highest law'?", p. 192. See however, Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 65 ("[A norm's] acceptance and recognition by the international community of States as a whole as a norm from which no derogation is permitted is determinative of its acquisition of peremptory character"). This does not mean, however, that the content of the norm is irrelevant. See *Legality of the Threat or Use of Nuclear Weapons* (footnote 84 above), para. 83 ("question whether a norm is part of *jus cogens* relates to the legal character of the norm").

[198] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), I.C.J. Reports 2012*, p. 99, at p. 141, para. 95 ("[a] *jus cogens* rule is one from which no derogation is permitted."); Kolb, *Peremptory International Law …*, p. 2 ("The key term for the classical understanding of *jus cogens* is therefore '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"). Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 60 ("derogability is the presumptive feature of international norms"); Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, p. 125 ("The non-derogable aspect of peremptory norms is a non-dissociable feature, perhaps the most important one, in the definition of *ius cogens*."); Costello and Foster, "*Non-refoulement* as custom and *jus cogens*?", p. 280 ("[w]hile non-derogability is the defining feature of *jus cogens*, it is a necessary but insufficient one").

[199] *North Sea Continental Shelf* (note 104 above) para. 72 ("Without 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 *South West Africa* (footnote 167 above), Dissenting Opinion of Judge Tanaka, 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").

74. While a more detailed analysis of non-derogation will be provided in a subsequent report, for the purposes of the present report it is sufficient to state that "the international community of States as whole" must accept and recognize that the norm in question is one from which no derogation is permitted. In other words, the international community of States as a whole accepts and recognizes that rules and other norms of *jus dispositivum* that are inconsistent with the candidate norm in question are invalid. In particular, any special or subsequent norm of *jus dispositivum* will not take priority over the norm in question and will be invalid if inconsistent with it.[200] The criterion, then, is that the international community of States as a whole accepts and recognizes that, in contrast to other general norms of international law, the norm in question will remain universally applicable and not subject to fragmentation.[201] In other words, it is, as a matter of law, not possible "to repeal or abrogate, to destroy and impair the force and effect of, to lessen the extent of authority" of the norm.[202]

75. A treaty provision prohibiting the conclusion of a treaty derogating from or modifying the former treaty in the sense of article 41 of the Vienna Convention is not necessarily a norm of *jus cogens*.[203] Such a provision would not be a norm of general international law and would operate only *inter partes*. Thus other States not party to the said treaty could validly conclude a treaty prohibited by the former treaty. Moreover, the consequences for a treaty in violation of such a clause will not necessarily be invalidity but will be subject to other rules of international law, including the rules of the treaty itself.[204] Though not itself a norm of *jus cogens*, such a provision may reflect such a norm. Moreover, for the purposes of the criteria, any such provision may be useful as evidence concerning a norm which may not be derogated from.

76. The above analysis explains whose acceptance and recognition is required and what must be accepted and recognized. But it does not explain how that acceptance and recognition is to be shown. It is the acceptance and recognition that is at the heart of the elevation of a norm to *jus cogens* status. The element of acceptance and recognition is the most important of the criteria for the identification of *jus cogens* norms of international law. While the content of the norms, and the values such norms serve to protect, are the underlying reasons for the norm's peremptoriness, what identifies them as *jus cogens* norms is the acceptance and recognition of such status by the international community of States as a whole.[205]

77. Jure Vidmar and Erika de Wet have suggested that the requirement for acceptance and recognition implies "double acceptance" since such a norm would first have to be accepted as a "normal" norm of international law and then as a peremptory norm of international law.[206] This characterization is correct, as long as it is understood that the "first" and "second" acceptance are qualitatively different from each other. In the first acceptance, the norm is accepted as a norm of international law, either through "acceptance as law" (*opinio iuris sive necessitatis*) for customary international law or recognition "by civilized nations" for general principles of law. The second acceptance is the acceptance of the special qualities of that norm of general norm of international law, namely its non-derogability.[207] This latter acceptance has been referred to as *opinio juris cogentis*.[208] More importantly, consistent with the discussion above concerning the implications of the phrase "as a whole", this double acceptance does not require the "acceptance" or "consent" of States individually, but, rather, requires that the international community of States as a whole, or collectively, embrace the non-derogability of the norm in question.[209]

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[200] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, pp. 125–126. See also Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 60.

[201] Orakhelashvili, "Audience and authority …", p. 118 ("A *jus cogens* norm is therefore … meant to operate uniformly in relation to all members of [the international] community. Non-derogability means the legal impossibility of opting out from the substantive scope of the rule or from the peremptory effect of the same rule, reinforcing the requirement of the continuing uniformity in the application of the relevant norm .."). See also Weatherall, *Jus Cogens: International Law and Social Contract*, p. 86 ("This legal effect of *jus cogens* reflects the resistance of peremptory norms to modification or repeal by the particular will of individual States.")

[202] Orakhelashvili, *Peremptory Norms in International Law*, p. 73.

[203] Article 41 paragraph 1, of the Vienna Convention on the Law of Treaties provides that "[t]wo or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if … (*b*) the modification of the treaty is not prohibited by the treaty".

[204] See, for discussion, Costelloe, *Legal Consequences of Peremptory Norms in International Law*, p. 27 ("Articles 41(1) and 58(1) of the Vienna Convention suggest that an attempted modification or suspension of a treaty not in conformity with the respective provision would be without effect, yet the exact consequences remain unspecified and untested. Since these provisions do not fall under Part V, Section 2 of the Vienna Convention (Invalidity of Treaties) the consequences of such *inter se* agreements would not necessarily produce the consequences of invalidity").

[205] See also Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms*, p. 66.

[206] De Wet, "*Jus cogens* and obligations *erga omnes*", p. 542 ("The international community of states as a whole would therefore subject a peremptory norm to 'double acceptance'"); Vidmar, "Norm conflicts and hierarchy in international law", p. 25 ("A peremptory norm may be said to be subject of to a "double acceptance" by the international community of States as a whole: the acceptance of the content of the norm, and the acceptance of the its special, i.e. peremptory, character.")

[207] See, for discussion, Vidmar, "Norm conflicts and hierarchy in international law", p. 26. See also Costello and Foster, "*Non-refoulement* as custom and *jus cogens*?", p. 281 ("to be *jus cogens*, a norm must meet the normal requirements for customary international law … and furthermore have that additional widespread endorsement as to its nonderogability."); Hameed, "Unravelling the mystery of *jus cogens* in international law", p. 62. See further Christenson "*Jus cogens*", p. 593 ("The evidence would also need to demonstrate requisite *opinio juris* that the obligation is peremptory, by showing acceptance of the norm's overriding quality"); *Committee of United States Citizens Living in Nicaragua* (footnote 115 above), ("in order for such a customary norm of international law to become a peremptory norm, there must be a further recognition by "the international community … as a whole" [that it is] a norm from which no derogation is permitted.").

[208] Bartsch and Elberling, "*Jus cogens* vs. State immunity, round twoon", p. 485 ("As can be derived from Art. 53 of the Vienna Convention …, the evolution of a *jus cogens* rule … presupposes, apart from the elements of [S]tate practice and *opinio juris*, the conviction of the large majority of [S]tates that the rule concerned is of fundamental importance and that it may thus not be derogated from (*opinio juris cogentis*)."). See, pertinently, Kadelbach, "Genesis, function and identification of *jus cogens* norms", p. 167 ("Most proposals take an intermediate route. Still, practice and *opinio juris* is required with respect to the recognition of the rule itself. However, the non-derogatory character, the *opinio juris cogentis*, can accordingly, be ascertained by criteria found in treaty law.").

[209] See, for example, Pellet "The normative dilemma", p. 38, stating that the requirement in article 53 for acceptance and recognition of the international community as a whole "excludes a State by State acceptance or even recognition".

78. While this approach is generally accepted,[210] the important question is how the acceptance and recognition of non-derogability—*opinio juris cogentis*—is to be shown. This question itself raises two issues. First, what materials may be advanced to show that a norm has acquired peremptory status? Second, what should be the content of the relevant materials?

79. With regard to the nature of the materials that may be used to show acceptance and recognition, it is worth recalling that the phrase "international community of States as a whole" implies that it is the "acceptance and recognition" of States that is at issue. As such, it is materials that are capable of expressing the views of States that are relevant. In particular, this means materials developed, adopted and/or endorsed by States. Materials emanating from other sources may well be relevant, but as a subsidiary source and as a means of assessing materials reflecting the views of States.

80. The approach of the International Court of Justice in *Questions Relating to the Obligation to Prosecute or Extradite* may offer some valuable lessons with respect to the criteria for *jus cogens* norms. First, consistent with the general approach described above, the Court identifies the prohibition of torture as "part of customary international law" and then notes that it "has become a peremptory norm (*jus cogens*)".[211] In what follows, the Court describes the materials on which it concludes there is *opinio juris*.[212] The list includes treaties and resolutions, as well as references to legislation:

> The prohibition is grounded in a widespread international practice and on the *opinion juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the Protection of War Victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452 (XXX) of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally acts of torture are regularly denounced within national and international fora.[213]

81. The Court is not explicit about whether it is here describing *opinio juris cogentis* or merely *opinio juris sive necessitatis*. It is even possible that the Court has conflated the two. It appears, however, that the Court views these as relevant materials for the establishment of acceptance and recognition of non-derogability. The reference to instruments of "universal application"—a core characteristic of *jus cogens* norms—suggests that the Court is concerned with the acceptance and recognition of the norms' peremptoriness. Alternatively, the Court implies that the materials relevant for assessing "normal" *opinio juris* are the same materials that are relevant for assessing whether the international community of States as a whole has accepted and recognized the peremptory nature of a norm.

82. While States and other actors of international law did not always clearly indicate the basis on which they believed particular norms had risen to the level of *jus cogens*,[214] the reliance on treaties and resolutions of international organizations as evidence of the acceptance and recognition of the non-derogability of norms is common and ought not to be controversial.[215] The view that treaties and resolutions of international organizations, particularly those of the United Nations, are relevant materials for finding the acceptance and recognition of non-derogability is also reflected in statements by States. This view is also consistent with the notion that it is the view of States that is determinative of the derogability.

83. While treaties and resolutions provide examples of materials for acceptability and recognition of non-derogation, these are not the only materials relevant for the identification of *jus cogens* norms. Any materials from which it can be shown that States collectively believe that a particular norm is one from which no derogation is permitted is relevant for the purposes of identification of *jus cogens* norms. As with *opinio juris sive necessitatis*, acceptance and recognition may be "reflected in a wide variety of forms".[216] Materials included in the non-exhaustive list of forms of evidence of *opinio juris* in draft conclusion 10 of the Commission's draft conclusions on identification of customary international law may also

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[210] See, for example, statement of Ireland, A/C.6/71/SR.27, para. 20. See also Linderfalk, "Understanding the *jus cogens* debate", especially pp. 65–69, discussing different, non-mainstream, approaches. Positivists, he suggests, argue that, for there to be a general practice, "[s]tates do not generally derogate from a rule of law … and they generally do not modify [the rule] by means of ordinary international law. Secondly there has to be an *opinio iuris generalis*: states widely subscribe to the opinion that, by virtue of an authoritative set of customary rules … no derogation from [the rule] is permitted." Thus, in addition to the need to show the existence of a rule through the normal process, for positivists, it is also necessary to show that the no-derogation aspects meet the customary requirement of practice and *opinio iuris*.

[211] *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 95 above), para. 99.

[212] *Ibid*.

[213] *Ibid*. This language approach was followed in the report of the Working Group on Arbitrary Detention (A/HRC/30/37; see note 163 above). It is worth observing that the sources referred to by the Court are similar to those referred to in *Filartiga v. Pena-Irala*, United States Court of Appeals (2nd Cir.), Judgment of 30 June 1980 (630 F.2d 876), pp. 7–11.

[214] See, for discussion, de Wet, "*Jus cogens* and obligations *erga omnes*", p. 544.

[215] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 43 above), para. 161, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] (footnote 44 above), para. 87. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582, at p. 595, para. 28, referring to the argument of Guinea that the right to a fair trial was *jus cogens* on the basis of, *inter alia*, a number of instruments; *Legal Consequences for States of the Contitiued 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, at p.79, relying on General Assembly and Security Council resolutions for the conclusion that the right to self-determination is a peremptory right; written statement of the Solomon Islands, contained in the letter dated 19 June 1995 from the Permanent Representative of Solomon Islands to the United Nations in *Legality of the Threat or Use of Nuclear Weapons*, available from www.icj-cij.org/en/case/95/written-proceedings, at p. 41, para. 3.39 ("It is quite normal in international law for the most common and the most fundamental rules to be reaffirmed and repeatedly incorporated into treaties").

[216] Para. (2) of the commentary to draft conclusion 10 of the draft conclusions on identification of customary international law, *Yearbook … 2016*, vol. II (Part Two), para. 62, at p. 72.

serve as evidence of acceptance and recognition of non-derogability.[217] Thus, in addition to treaty provisions and resolutions, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts may also serve as evidence of acceptance and recognition.[218] It is, however, the content of these various forms of evidence that determines whether the evidence constitutes acceptance as law (for the purposes of customary international law) or acceptance and recognition of non-derogability (for the purposes of *jus cogens*).

84. Because it is the acceptance and recognition of States that is required to show that a norm is *jus cogens*, all the forms of materials listed above emanate from State processes. This does not mean, however, that sources from civil society, expert bodies and other sources may not be used to assess and give context to the State-made instruments. In *RM and Another v. Attorney-General*, for example, the High Court of Kenya relied on Human Rights Committee general comment No. 18 (1989), on nondiscrimination,[219] for a suggestion that non-discrimination is a peremptory norm of general international law.[220] Similarly, for its conclusion that the principle of *non-refoulement* was a norm of *jus cogens*, the International Criminal Court advanced, *inter alia*, the opinion of the United Nations High Commissioner for Refugees.[221] Similarly, the finding by the International Tribunal for the Former Yugoslavia in *Furundžija* that the prohibition of torture was a norm of *jus cogens* was based, *inter alia*, on the observations of the Inter-American Commission on Human Rights, the Human Rights Committee and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[222] These "other" materials can, of course, not be evidence of acceptance and recognition. But they can provide a context for the primary forms of evidence and help to assess the primary materials.

85. Decisions of international courts and tribunals have also regularly been referred to in support of the proposition that a particular norm has reached the level of *jus cogens*. In *Prosecutor v. Popović*, the International Tribunal for the Former Yugoslavia quoted the statement of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (quoting *Armed Activities of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*) to the effect that "the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)".[223] Although the International Court of Justice did not refer to *jus cogens* in the advisory opinion on *Reservations to the Genocide Convention*,[224] the advisory opinion has been cited on many occasions as support for the conclusion that the prohibition of genocide is a norm of *jus cogens*.[225] The statement of the International Court of Justice concerning the consequences of "intransgressible principles of international customary law" in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* has also been referred to in support of the conclusion that grave breaches of the Geneva Conventions constitute violations of *jus cogens* norms.[226] In *Furundžija*, for example, the conclusion of the International Tribunal for the Former Yugoslavia that the prohibition of torture was a norm of *jus cogens* was based, *inter alia*, on the extensiveness of the prohibition, including the fact that States are "prohibited from expelling, returning or extraditing" a person to a place where they may be subject to torture.[227] To demonstrate the extensiveness of this prohibition, the Court referred to judgments of, *inter alia*, the European Court of

[217] Para. 2 of draft conclusion 10 of the draft conclusions on identification of customary international law (*ibid.*, at p. 61) contains a list of examples of forms of evidence of *opinio juris*.

[218] See, for example, *Furundžija* (note 46 above), para. 156, where the International Tribunal for the Former Yugoslavia referred to, among others, the following domestic court cases: *Siderman de Blake v. Argentina* (footnote 49 above); *Committee of United States Citizens Living in Nicaragua* (footnote 115 above); *Cabiri v. Assasie-Gyimah*, 921 F. Supp 1189, 1196 (SDNY 1996); *In re Estate Ferdinand E Marcos*, 978 F.2d 493 (9th Cir.); *Marcos Manto v. Thajane*, 508 U.S. 972, 125L Ed 2d 661, 113 S Ct. 2960.

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

[220] Kenya, *RM and Another v. Attorney-General*, Judgment, High Court, 1 December 2006, *Electronic Kenya Law Reports* [2006] , p. 18.

[221] See *Katanga* (footnote 190 above), para. 30, referring to the 2007 advisory opinion of the Office of the United Nations High Commissioner for Refugees on the extraterritorial application of *non-refoulement* obligations. The Court also referred to several conclusions of the Executive Committee of the High Commissioner's Programme.

[222] See *Furundžija* (note 46 above), paras. 144 and 153. The Tribunal referred to the American Convention on Human Rights, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V) and a report by the Special Rapporteur on Torture (E/CN.4/1986/15).

[223] *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010, para. 807, footnote 2910. For other references to judgments of the International Criminal Court relating to Bosnia and Herzegovina, see *Karadžić* (footnote 159 above), para. 539, footnote 1714.

[224] See, for discussion, *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693), para. 54, footnote 190, where the case is made that, while the International Court of Justice does not use the phrase *jus cogens* or peremptory norms, it describes the prohibition of genocide in terms that suggest peremptoriness.

[225] See, for example, *Karadžić* (note 159 above), para. 539; *Case 002, Decision on Ieng Sary's Appeal Against the Closing Order*, Extraordinary Chambers in the Courts of Cambodia, document No. D427/1/30 (11 April 2011), para. 244; *Armed Activities of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (footnote 84 above), para. 66; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 43 above), para. 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] (footnote 44 above), para. 87.

[226] *Decision on Ieng Sary's Appeal Against the Closing Order* (see previous footnote), para. 256; *Decision on Evidence Obtained through Torture*, case No. 002/19-09-2007/ECCC/TC, 5 February 2016, Extraordinary Chambers in the Courts of Cambodia, document No. 350/8, para. 25, where the court relied on, *inter alia*, *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 95 above). Other international decisions referred to by the Extraordinary Chambers in the Courts of Cambodia in the *Decision on Evidence Obtained through Torture* include *Othman (Abu Qatada) v. United Kingdom*, No. 8139/09, European Court of Human Rights, ECHR 2012 (extracts) and *Cabrera Garcia and Montiel Flores v. Mexico*, Judgment, 26 November 2010, Inter-American Court of Human Rights.

[227] *Furundžija* (footnote 46 above), para. 144.

Human Rights.[228] The Special Tribunal for Lebanon in *Ayyash et al.* concluded that both the principles of legality[229] and fair trial[230] enjoy the status of *jus cogens*, and in *El Sayed* that the right to access justice has "acquired the status of peremptory norm (*jus cogens*)"[231] on the basis, *inter alia*, of the jurisprudence of national and international courts.

86. The Commission has also been referred to in assessing whether a particular norm has attained the status of *jus cogens*. Famously, in assessing the status of the prohibition of the use of force, the International Court of Justice observed that "the International Law Commission … expressed the view that 'the law of the Charter 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*'".[232] Most contributions that provide a list of generally accepted norms of *jus cogens* rely on the list provided by the Commission in the commentary to draft article 26 of the Articles on State Responsibility.[233] The Commission's own work may thus also contribute to the identification of norms of *jus cogens*. Scholarly writings may also be useful, as secondary material, in assessing and providing context to the primary forms of acceptance and recognition of peremptory status.[234]

87. It should be apparent that the materials referred to above are essentially the same materials that are also relevant for the identification of customary international law, i.e., they may be advanced as practice or evidence of *opinio iuris*. As described above, what separates the acceptance and recognition as a criterion for *jus cogens* and the potential uses of such materials for the purposes of the identification of customary international law is that, for the former, the materials must show a belief by the international community of States as a whole that the norm in question is one from which no derogation is permitted.[235] Provisions in treaties prohibiting reservations or withdrawal and providing for non-derogability, though not conclusive, would also be relevant for that purpose.

88. Whether the materials justify a conclusion that there is a belief by the international community of States as a whole that a norm is non-derogable is to be determined by examining all the materials in their context and according them the relevant weight. A number of factors may be relevant when assessing whether the available materials provide evidence of acceptance and recognition of a norm as *jus cogens*. Express reference in the materials to the non-derogability of a norm of general international law would be an important factor. It is also important that the materials, when considered as a whole, show a belief in the international community of States as a whole of non-derogability.

89. As described above, the characteristics of *jus cogens* identified in the first report of the Special Rapporteur and further expounded upon in the current report are not criteria for the identification of norms of *jus cogens*. They are, rather, descriptive elements that characterize the nature of *jus cogens*. It is therefore not necessary to show that a particular norm has the characteristics in order to qualify as a norm of *jus cogens*. Put differently, these descriptive elements are not additional requirements for *jus cogens* norms. In the light of the strong evidence described above, however, the belief by States that particular norms reflect these characteristics may be advanced in support of non-derogability. Thus, where the materials, when considered in their context and as a whole, show an acceptance and recognition by the international community of States as a whole that a norm of general international law protects or reflects the fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable, this may be evidence that States believe such a norm to be non-derogable and, thus, a norm of *jus cogens*. The relevance of these characteristics, albeit only as indicative material, is related to the fact that, as noted by the International Court of Justice, whether a norm is a norm of *jus cogens* "relates to the legal character of the norm".[236]

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[228] *Soering v. the United Kingdom*, 7 July 1989, European Court of Human Rights, Series A, No. 161; *Cruz Varas and Others v. Sweden*, 20 March 1991, European Court of Human Rights, Series A, No. 201; and *Chahal v. the United Kingdom*, 15 November 1996, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-V.

[229] *Prosecutor v. Ayyash et al.* (STL-11-01/I), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011, para. 76, referring to the case of the International Tribunal for the Former Yugoslavia.

[230] *Prosecutor v. Ayyash et al.* (STL-11-01/AC.AR90.1), Decision on Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Appeals Chamber, 24 October 2012 (referring to the *Kadi* judgment (see footnote 62 above) in the Court of Justice of the European Union).

[231] *El Sayed* (CH/PRES/2010/01), Order assigning Matter to Pre-Trial Judge, President of the Special Tribunal of Lebanon, 15 April 2010, para. 29 (referring to judgments of the InterAmerican Court of Human Rights).

[232] *Military and Paramilitary Activities* (footnote 73 above), para. 190. See also *Re Víctor Raùl Pinto, Re, Pinto v. Relatives of Tomàs Rojas*, Decision on Annulment of the Supreme Court of Chile 13 March 2007, Case No 3125-04, *Oxford Reports on International Law in Domestic Courts*1093 (CL 2007), paras. 29 and 31.

[233] Para. (5) of the commentary to draft article 26 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 85. See den Heijer and van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law, p. 9, referring to the norms in the list as those "beyond contestation"; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, p. 151; and Weatherall, *Jus Cogens: International Law and Social Contract*, p. 202. See also de Wet, "*Jus cogens* and obligations *erga omnes*", p. 543. She relies, however, not on the Commission's list, but rather on the list included in the report of the Study Group of the Commission (*Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1), with a list that was slightly modified from that of the Commission. For example, in the list she provides, "the right of self-defence" is included as a *jus cogens* norm its own right, while the list of the Commission contains the "prohibition of aggression" but not "self-defence" as an independent norm of *jus cogens*.

[234] See, for example, *Nguyen Thang Loi v. Dow Chemical Company* (footnote 50 above), p. 108, relying on Bassiouni, "Crimes against humanity"; *Prosecutor v. Kallon and Kamara* (SCSL-2004-15-AR72E and SCSL-2004-16-AR72E), Decision on Challenge of Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 71, relying on Moir, *The Law of Internal Armed Conflict*; *Bayan Muna* (footnote 53 above), citing Bassiouni, "International crimes". See also *Siderman de Blake v. Argentina* (footnote 49 above), p. 718, citing several authors, including Parker and Neylon, "*Jus cogens*" and Randall, "Universal jurisdiction under international law", in support of the proposition that the prohibition of torture is a norm of *jus cogens*.

[235] See authorities cited in footnotes 207 and 208 above.

[236] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 84 above), para. 83.

Chapter III

Proposals

A. Name of the topic

90. In the light of the debate in the Commission during the sixty-eighth session, the Special Rapporteur proposes that the Commission change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)".

B. Draft conclusions

91. On the basis of the analysis above, the Special Rapporteur proposes the following draft conclusions for consideration by the Commission.

Draft conclusion 4. Criteria for jus cogens

To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

(*a*) It must be a norm of general international law; and

(*b*) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

Draft conclusion 5. Jus cogens *norms as norms of general international law*

1. A norm of general international law is one which has a general scope of application.

2. Customary international law is the most common basis for the formation of jus cogens norms of international law.

3. General principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.

4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

Draft conclusion 6. Acceptance and recognition as a criterion for the identification of jus cogens

1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.

2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

Draft conclusion 7. International community of States as a whole

1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.

2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.

3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

Draft conclusion 8. Acceptance and recognition

1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

Draft conclusion 9. Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.

2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a jus cogens norm of international law.

4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials.

CHAPTER IV

Future work programme

92. The present report has focused on the criteria for the identification of a norm of *jus cogens*. The first report of the Special Rapporteur focused on the nature and historical evolution of *jus cogens*. In the first report, the Special Rapporteur also provided a road map for 2017, 2018 and 2019. While it was stated that the road map would be approached with flexibility, the Special Rapporteur does not, at this stage, see a need to deviate from it.

93. In the next report, in 2018, the Special Rapporteur intends to begin consideration of the effects or consequences of *jus cogens*. The report will address, *inter alia*, the consequences of *jus cogens* in general terms. The report will also consider effects of *jus cogens* in treaty law and other areas of international law, such as the law of State responsibility and the rules on jurisdiction. With respect to the effects of *jus cogens*, the Special Rapporteur would appreciate comments from the Commission on other areas of international law that could benefit from study. The fourth report of the Special Rapporteur will address miscellaneous issues arising from the debates within the Commission and the Sixth Committee.

94. The Special Rapporteur will also consider, on the basis of the debates within the Commission and the Sixth Committee, whether, on what basis and in what form to propose an illustrative list of *jus cogens* norms. The Special Rapporteur will provide proposals on this question in the fourth report.

SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

[Agenda item 8]

DOCUMENT A/CN.4/708

First report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur*

[*Original: English*]
[*31 May 2017*]

CONTENTS

* The Special Rapporteur wishes to thank the Secretariat for an informal stocktaking of relevant materials and Ms. Claire Marguerettaz for her assistance with the preparation of the present report.

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	Source
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Treaty of Peace between the Allied and Associated Powers and Hungary (Peace Treaty of Trianon) (Trianon, 4 June 1920)	*Ibid*., 1920, vol. CXIII, London, HM Stationery Office, 1923, p. 486.
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.
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Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
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Introduction

A. Overview

1. During its sixty-ninth session, in May 2017, the Commission decided to place the topic "Succession of States in respect of State responsibility" on its current programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[1] The Special Rapporteur has prepared the present preliminary report as his first report, examining in particular the scope and tentative programme of work, as a basis for an initial debate later in the sixty-ninth session.

2. The topic is one that the Commission identified and included in the long-term programme of work at its sixty-eighth session in 2016;[2] the syllabus for the topic appears as an annex to the report of the Commission to the General Assembly.[3]

3. During the debate of the Sixth Committee at the seventy-first session of the General Assembly, in 2016, at least ten delegations commented briefly on the inclusion of the topic "Succession of States in respect of State responsibility" in the programme of work of the Commission. Several delegations welcomed its inclusion. The Sudan considered that the inclusion in the Commission's agenda of the topic was timely and expressed the hope that the Commission would continue to examine the topic, given the need created by current circumstances, and that conclusions could be reached that would contribute to the progressive development and codification of international law.[4] Similarly, the delegation of Togo, welcoming the fact that the Commission was now expanding its work into areas that brought international law closer to the daily concerns of people throughout the world, supported the proposal of the Commission for the inclusion of the topic in its long-term programme of work.[5]

4. The most substantive comments came from the delegations of Slovakia and Slovenia: countries that had recently experienced the problems of succession. The delegation of Slovakia considered that the topic of succession of States in respect of State responsibility definitely merited the Commission's attention. Indeed, it would complement the Commission's earlier work relating to the issue, even if State practice might not have been sufficient and evident enough at the time of consideration of the responsibility of States for internationally wrongful

[1] *Yearbook … 2017*, vol. II (Part Two), para. 21.

[2] *Yearbook … 2016*, vol. II (Part Two), para. 308.

[3] *Ibid.*, annex II.

[4] A/C.6/71/SR.21, para. 143.

[5] A/C.6/71/SR.23, para. 20.

acts. As a State that had faced the problem in the past, particularly in the *Gabčíkovo-Nagymaros Project* case,[6] Slovakia considered the topic useful, but drew attention to the possible difficulties in identifying rules and principles governing succession of States in respect of responsibility.[7] The delegation of Slovenia also welcomed the inclusion of the topic in the long-term programme of work of the Commission, recognizing its potential for filling the gaps that remained after the completion of the codification of succession in respect of treaties as well as State property, archives and debts. However, Slovenia pointed out that different types of succession entailed different types of State responsibility. For example, in the dissolution of a federally organized predecessor State, as had been the case of the former Yugoslavia, the responsibility of a successor State for internationally wrongful acts could not be treated in the same manner as in secession from a centrally organized State. The work on the topic should cover such specificities. Indeed, Slovenia highlighted that it would be helpful to consider whether several already codified provisions dealing with State succession might have gained the status of customary international law.[8]

5. The delegations of the Czech Republic,[9] Egypt[10] and Mongolia[11] also supported the inclusion of the topic in the Commission's long-term programme of work, since it would help to fill gaps in international law.

6. Romania pointed out that, even if the topic was of interest in international law, especially in the context of the State dissolution in the 1990s in Central and Eastern Europe, its analysis by the Commission would be of limited contemporary relevance. It was nonetheless ready to listen to arguments in favour of engaging in a research exercise and its proposed outcome, since it had been considered that such an exercise would complete the codification of succession of States in respect of treaties, State property, archives and debts and nationality.[12]

7. A few delegations questioned the contemporary relevance of the topic. Austria underlined that the topic was a highly controversial one that had been excluded from the previous work of the Commission. It acknowledged that the topic had recently been discussed by the Institute of International Law, resulting in an outcome that Austria found difficult to accept. Austria doubted that an examination of the most controversial issues of State responsibility would lead to an acceptable result at the current stage.[13] The delegation of Turkey, noting the decision of the Commission to include the topic in its long-term programme of work, pointed out that States had still not been able to agree on a course of action and that that was a complex issue presenting numerous aspects. It expressed doubt as to whether States would be able to reach a common understanding on the topic and was not convinced of the relevance of the Commission taking it up.[14]

B. Previous work of the Commission

8. The present topic deals with two areas of international law that were already the object of codification and progressive development by the Commission. However, the previous work of the Commission had left the issue of succession of States in respect of State responsibility for possible development in the future.

9. The Commission touched on this problem in the context of its work on State succession in the 1960s. In 1963, Mr. Manfred Lachs, the Chairperson of the Commission's Sub-Committee on Succession of States and Governments, proposed including succession in respect of responsibility for torts as one of possible subtopics to be examined in relation to the work of the Commission on the question of succession of States.[15] Because of a divergence of views on its inclusion, the Commission decided to exclude the problem of torts from the scope of the topic.[16] Since that time, however, State practice and doctrinal views have developed.

10. The Commission completed its work on the responsibility of States for internationally wrongful acts in 2001. However, it did not address situations where a succession of States occurs after the commission of a wrongful act. Such succession may occur in relation to a responsible State or an injured State. In both cases, succession gives rise to rather complex legal relationships and, in that regard, it is worth noting a certain development in views within the Commission and elsewhere. While in the 1998 report the Special Rapporteur, Mr. James Crawford, wrote that there was a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State,[17] the Commission's commentary to the 2001 articles on responsibility of States for internationally wrongful acts (hereinafter "articles on State responsibility") reads differently, saying: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory".[18] The development of the practice, case law and doctrinal views from the negative succession rule to its partial rebuttal has been succinctly described by Mr. James Crawford.[19]

11. It is a normal and largely successful method for the Commission, after completing one topic, to work on other related subjects from the same area of international law. The Commission took this approach, *inter alia*, to two topics in the field of international responsibility by completing first its 2001 articles on State responsibility and

[6] *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7.

[7] A/C.6/71/SR.23, para. 27.

[8] *Ibid.*, para. 36. See also the full statement given by the delegation of Slovenia.

[9] A/C.6/71/SR.21, para. 11.

[10] A/C.6/71/SR.23, para. 46.

[11] A/C.6/71/SR.29, para. 98.

[12] A/C.6/71/SR.21, para. 68. See also the full statement given by the delegation of Romania.

[13] *Ibid.*, para. 80.

[14] *Ibid.*, para. 22. See also the full statement given by the delegation of Turkey.

[15] *Yearbook … 1963*, vol. II, document A/5509, annex II, Report of the Chairman of the Sub-Committee on Succession of States and Governments, document A/CN.4/160 and Corr.1, p. 261, para. 15.

[16] *Ibid.*, working paper by Mr. Manfred Lachs, p. 298.

[17] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, para. 279.

[18] Para. (3) of the commentary to article 11 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 52. The text of the articles is contained in General Assembly resolution 56/83 of 12 December 2001, annex.

[19] Crawford, *State Responsibility*, pp. 435–455.

then its 2011 articles on the responsibility of international organizations,[20] and to three topics in the field of succession of States, by completing draft articles for what later became the Vienna Convention on Succession of States in Respect of Treaties (hereinafter "1978 Vienna Convention") and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter "1983 Vienna Convention"), as well as its 1999 articles on nationality of natural persons in relation to the succession of States.[21]

12. Although the two Vienna Conventions mentioned above did not receive a high number of ratifications, it does not mean that the rules codified therein did not influence State practice.[22] On the contrary, States in Central Europe in particular applied such rules to their own succession.[23] In the same vein, non-binding documents, such as the articles on State responsibility or the articles on nationality of natural persons in relation to the succession of States, have been largely followed in practice.

13. In particular, definitions contained in the articles on State responsibility and in the 1978 and 1983 Vienna Conventions are applicable to the present topic. The applicability or not of other rules in the two Vienna Conventions will be addressed later in the present report (see chap. II, sect. C, below).

14. The issues of succession also appear in the context of the codification of diplomatic protection. First, they appear, as a matter of definition, in article 4 of the 2006 articles on diplomatic protection:

> For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.[24]

15. Next, article 10, paragraph 1, of the articles on diplomatic protection addresses State succession in a sense: "A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim." This rule clearly bears on a transfer of the rights or claims of an injured predecessor State. Those issues, including the rule of continuing nationality of both natural and legal persons, as well as exceptions to it, will be dealt with at a later stage (see chap. III below).

16. Finally, it is worth noting that the issue of State succession and State responsibility was addressed by the International Law Association in 2008[25] and the Institute of International Law in 2013. The latter has established one of its thematic commissions to deal with the issue.[26] At its Tallinn session in 2015, it finally adopted, on the basis of the report of the Rapporteur, Mr. Marcelo G. Kohen, its resolution on State succession in matters of State responsibility, consisting of a preamble and 16 articles. The resolution rightly stresses the need for codification and progressive development in this area.[27]

17. Chapter I of the resolution of the Institute of International Law consists of two articles, namely article 1, entitled "Use of terms", building on the terms used in the 1978 and 1983 Vienna Conventions, and article 2, entitled "Scope of the present Resolution". Chapter II includes common rules applicable to all categories of succession of States (arts. 3 to 10). Article 3 stresses the subsidiary character of the guiding principles. Articles 4 and 5 govern, respectively, the invocation of responsibility for an internationally wrongful act committed by or against the predecessor State before the date of succession of States. The common point in those two articles is the continuing existence of the predecessor State. It reflects a general rule of non-succession if the predecessor State continues to exist. The following article (art. 6) deals with devolution agreements and unilateral declarations. Chapter III (arts. 11 to 16) includes provisions concerning specific categories of succession of States, namely transfer of part of the territory of a State, separation (secession) of parts of a State, merger of States and incorporation of a State into another existing State, dissolution of a State, and emergence of newly independent States.

18. In both the above cases, the work of private codification bodies could and should be taken into consideration by the Special Rapporteur. It does not mean, however, that they should in any way pre-empt or limit the work of the Commission on this topic. This is basically for two reasons. As a matter of form, the legitimacy and authority of the private bodies, such as the International Law Association or the Institute of International Law, seem to be different from that of the Commission, which is a subsidiary body of the General Assembly. The Commission works in cooperation with and for the benefit of Member States, in particular through the debate on its annual reports in the Sixth Committee. As a matter of substance, the Commission and its Special Rapporteur should be free to take a different approach if and to the extent that it is appropriate.

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[20] General Assembly resolution 66/100 of 9 December 2011. The text of the draft articles on the responsibility of international organizations with commentary thereto is reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88.

[21] Text adopted in the annex to the General Assembly resolution 55/153 of 12 December 2000. The text of the draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto is reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

[22] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, *I.C.J. Reports 2008*, p. 412, at para. 109.

[23] E.g. both the Czech Republic and Slovakia made a declaration, when depositing the instruments of ratification of the 1978 Vienna Convention, under article 7, paragraphs 2 to 3, that they would apply the Convention to their own successions, which took place before the entry into force of the 1978 Vienna Convention. See *Status of Multilateral Treaties Deposited with the Secretary-General*, chapter XXIII.2, available from https://treaties.un.org, *Depositary of Treaties, Status of Treaties.*

[24] Art. 4 of the articles on diplomatic protection, General Assembly resolution 62/67 of 6 December 2006, annex. The text of the draft articles on diplomatic protection with commentary thereto is reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50.

[25] International Law Association, *Report of the Seventy-third Conference, Rio de Janeiro, 17–21 August 2008*, pp. 250 *et seq.*

[26] See Institute of International Law, Fourteenth Commission, "State succession in matters of State responsibility", provisional report by the Rapporteur, Mr. Marcelo G. Kohen.

[27] Institute of International Law, resolution on succession of States in matters of international responsibility, 28 August 2015, *Yearbook of the Institute of International Law, Tallinn Session*, vol. 76, p. 711, at second preambular paragraph: "*Convinced* of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

Chapter I

Scope and outcome of the topic

19. The present topic deals with the succession of States in respect of State responsibility. That title should determine its scope. The aim of examining the topic is to shed more light on the question of whether there are rules of international law governing both the transfer of obligations and the transfer of rights arising from international responsibility of States for internationally wrongful acts. The present and subsequent reports will delve into rules on State succession as applicable in the area of State responsibility.

20. The topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts. From this point of view, the topic remains within the scope of and the definitions contained in the articles on State responsibility, namely the definition of "international responsibility"[28] and the definition of "internationally wrongful act".[29] According to the commentary to article 1 of the articles, the term "international responsibility" covers:

> the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.[30]

21. Consequently, the scope of the present topic will not extend to any issues of international liability for injurious consequences arising out of acts not prohibited by international law. The obligations ensuing from such liability, which arise mainly from specialized treaty regimes, are reflected in two final texts already adopted by the Commission, i.e. the 2001 articles on prevention of transboundary harm from hazardous activities[31] and the 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[32] The main reason for not including those issues in the present topic is that "international liability" provides for various kinds of primary obligations, ranging from prevention to allocation of harm (compensation), and not secondary obligations triggered by an internationally wrongful act. However, such primary obligations are treaty-based obligations. Therefore, any question of the transfer of such obligations should be resolved on the basis of applicable rules on the succession of States in respect of treaties.

22. Nor will the scope of the present topic include questions of succession in respect of the responsibility of international organizations. This does not mean that, in principle, a transfer of obligations or rights arising from the international responsibility of an international organization or the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization is impossible.[33] The reason for the non-inclusion relates more to the organization of work; the idea being not to overburden the present topic. While the succession of States in respect of State responsibility is not free from certain controversies about the nature of rules to be codified, the uncertainties are even greater when it comes to the succession and responsibility of international organizations. First, the very idea of succession is problematic in respect of international organizations, which are entities created by States on the basis of an international act, typically an international treaty. It seems, therefore, that rare cases of the end of an organization and its possible replacement by another organization are governed by a special treaty rather than by rules of general international law. Second, even the articles on the responsibility of international organizations do not yet enjoy the same authority as the articles on State responsibility.

23. However, the above considerations do not preclude the possibility of addressing certain issues at a later stage. Such issues may include the question of how the rules on succession with respect to State responsibility apply to injured international organizations or to injured individuals or private corporations. This is a matter for the future programme of work (see chap. III below).

24. The issue of the succession of States in respect of State responsibility deserves examination by the Commission. This is one of the topics of general international law where customary international law was not well established in the past; therefore, the Commission did not include it in its programme at an early stage. Now is the time to assess new developments in State practice and jurisprudence. This topic could fill gaps that remain after the completion of the codification of succession of States in respect of treaties (1978 Vienna Convention) and State property, archives and debts (1983 Vienna Convention), as well as in respect of nationality (1999 articles on nationality of natural persons in relation to the succession of States), on the one hand, and State responsibility, on the other.

25. The work on the topic should follow the main principles of the succession of States in respect of treaties, concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State. A realistic approach, supported by the study of case law and other State practice, warrants a distinction between cases of dissolution

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[28] See art. 1 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[29] See art. 2, *ibid.*

[30] Para. (5) of the commentary to article 1 of the articles on State responsibility, *ibid*., para. 77, at p. 33.

[31] Articles on prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex. The text of the draft articles on prevention of transboundary harm from hazardous activities with commentary thereto is reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98.

[32] Principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities, General Assembly resolution 61/36 of 4 December 2006. The text of the draft principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentary thereto is reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67.

[33] See art. 1 of the articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two) and corrigendum, p. 40, para. 87.

and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.[34] It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

26. Nevertheless, the work on the topic should focus more on secondary rules on State responsibility. It is important to point out that the project looks to both active and passive aspects of responsibility, i.e. the transfer (or devolution) of both obligations of the acting (wrongdoing) State and rights (claims) of the injured State. The structure can be as follows: (*a*) general provisions on State succession, stressing in particular the priority of agreement; (*b*) residual (subsidiary) principles on the transfer of obligations arising from State responsibility; (*c*) principles on the transfer of rights to reparation; and (*d*) miscellaneous and procedural provisions.

27. Concerning the outcome of the topic, it should be both codification and progressive development of international law. It is important to note that the International Court of Justice admitted in the *Genocide (Croatia v. Serbia)* case that the rules on succession that may have come into play in that case fell into the same category as those on treaty interpretation and responsibility of States.[35]

28. Without prejudice to a future decision, an appropriate form for this topic seems to be draft articles with commentaries thereto. Particularly notable precedents are the articles on State responsibility and those draft articles that became the 1978 and 1983 Vienna Conventions, as well as the articles on nationality of natural persons in relation to the succession of States. Those precedents support the choice of draft articles rather than other options, such as principles or guidelines.

29. In view of the above considerations, the following draft article is proposed:

"*Draft article 1. Scope*

"The present draft articles apply to the effect of a succession of States in respect of responsibility of States for internationally wrongful acts."

[34] See Crawford, *State Responsibility*, p. 455.

[35] *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. 56, para. 115.

Chapter II

General provisions

A. Is there a general principle guiding succession in respect of State responsibility?

30. Traditionally, neither State practice nor doctrine gave a uniform answer to the question of whether and in what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it is possible to identify the division or allocation of responsibility between successor States.

31. In the past, the doctrine of State succession generally denied the possibility of the transfer of responsibility to a successor State.[36] As a result, it is unsurprising that most international law textbooks do not address the succession of international responsibility.[37] Where it has been included, the topic is usually only mentioned briefly and in passing.[38] Additionally, some authors only address cases of singular succession of States with respect to treaties and with respect to State property, archives, and debts.[39] These subjects were codified in the 1978 Vienna Convention and the 1983 Vienna Convention.[40] This lack of inclusion or discussion demonstrates that the relationship between the succession of States and international responsibility remains largely neglected in international legal doctrine.

32. When addressing issues of State succession, most authors assert that there is no transfer of obligations arising from international responsibility to a successor State — the theory of non-succession.[41] Support for the theory of non-succession stems from various theoretical arguments.[42] One theory is based on an analogy of internal law — the theory of universal succession in private law — which has origins in Roman law.[43] It follows

[36] See, e.g., Cavaglieri, "Règles générales …", pp. 374, 378 and 416 *et seq.*; Marek, *Identity and Continuity of States in Public International Law*, pp. 11 and 189; Eisemann and Koskenniemi, *State Succession: Codification Tested against the Facts*, pp. 193–194; Craven, "The problem of State succession and the identity of States under international law", pp. 149–150; Malenovský, "Problèmes juridiques liés à la partition de la Tchécoslovaquie … ", p. 334; Mälksoo, *Illegal Annexation and State Continuity* …, p. 257; Monnier, "La succession d'Etats en matière de responsabilité internationale"; O'Connell, *State Succession in Municipal Law and International Law*, p. 482.

[37] Cf., e.g., D'Amato, *International Law Anthology*, pp. 189–196; Combacau and Sur, *Droit international public*, pp. 430–442; Jennings and Watts, *Oppenheim's International Law*, pp. 208–218 (includes a few lines on succession in relation to torts, in contrast to international responsibility).

[38] Cf., e.g., Daillier and Pellet, *Droit international public*, pp. 555–556; Dupuy, *Droit international public*, p. 61; Crawford, *Brownlie's Principles of Public International Law*, p. 442.

[39] Cf., e.g., Mikulka, *Sukcese států: Teoretická studie*.

[40] Cf. *ibid.*

[41] Cf., e.g., Cavaglieri, "Règles générales …"; Marek, *Identity and Continuity of States*; Eisemann and Koskenniemi, *State Succession*; Craven, "The problem of State succession"; Malenovský, "Problèmes juridiques"; Mälksoo, *Illegal Annexation*; Monnier, "La succession d'Etats"; O'Connell, *State Succession*.

[42] See Dumberry, *State Succession to International Responsibility*, pp. 38 *et seq.*

[43] Cf., e.g., Cavaglieri, "Règles générales …", p. 374.

that there is an important exception for responsibility *ex delicto*, which is not transferable from a wrongdoer to a successor.[44] Other arguments point out that a State is generally only responsible for its own internationally wrongful acts and not for acts of other States.[45] Therefore, a successor State should not be held responsible for wrongful acts of its predecessor, which has different international legal personality.[46] A final argument against the transfer of State responsibility draws from the "highly personal nature" of claims and obligations that arise for a State towards another State as a result of a breach of international law.[47]

33. None of these theories or private law analogies is a perfect fit because they cannot discard a possible transfer of at least some obligations of States arising from international responsibility. As a rule, they do not take into consideration new developments and changes of the concept of State responsibility.[48] Nevertheless, the theory of non-succession has not been questioned for most of the twentieth century.[49] O'Connell wrote in 1967 that it has "been taken for granted that a successor State is not liable for the delicts of its predecessor".[50] However, in the past twenty years, the view has evolved and has become more nuanced in this regard and critical of the theory of non-succession to the extent that succession is admitted in certain cases.[51] Some authors who accept as a general principle the theory of non-succession to State responsibility admit that an exception exists in cases where a State has declared an intention to succeed to the rights and obligations of its predecessor State.[52] In these cases, the State would be liable to provide reparations for damages caused by its predecessor.[53]

34. However, not all scholars who question the strict theory of non-succession assert the existence of a general rule on State succession.[54] They deny that current international law includes a norm excluding a possibility of any transfer of obligations arising from State responsibility.[55] In fact, they admit that responsibility under modern international law is not based on fault but rather on the more objective concept of internationally wrongful act.[56] It is conceivable, therefore, that certain obligations, including the legal consequences of responsibility, such as reparation, would transfer to a successor State.[57]

35. The development of views on whether a new State succeeds to any State responsibility of the predecessor State is well documented in the shift of Mr. James Crawford, Special Rapporteur for the topic of State responsibility, from a refusal in 1998 to a partial acceptance in 2001:

> In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.[58]

36. That issue was addressed by the Institute of International Law in 2013.[59] The final resolution of the Institute, adopted at the Tallinn Session in 2015, was amended slightly to include a preamble and 16 articles, which provide for the transfer of responsibility under certain circumstances.[60] The final resolution stressed the need for codification and further progressive development in this area.[61] One paragraph of the preamble, which could provide useful guidance for possible codification by the Commission, calls for flexibility to allow for the tailoring of different solutions to different situations.[62]

37. Before coming to the detailed analysis of different categories of State succession (a matter to be addressed in the second report in 2018), a preliminary survey of State practice is presented in the next section.

B. Different cases of succession

1. Early cases

38. Early decisions held that the successor State has no responsibility in international law for the international delicts of its predecessor. In the *Robert E. Brown* claim,[63] the claimant sought compensation for the refusal of local officials of the Boer Republics to issue licences to exploit a goldfield. The tribunal held that Brown had acquired a property right and that he had been injured by a denial of justice, but this was a delictual responsibility that did not devolve on Britain. Similarly, in the *Frederick Henry Redward* claim,[64] the claimants had been wrongfully

[44] See Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 131–132 and 283–284.

[45] Cf., e.g., De Visscher, *Theory and Reality in Public International Law*, p. 172; Daillier and Pellet, *Droit international public*, p. 555.

[46] Monnier, "La succession d'Etats", p. 89.

[47] See Seidl-Hohenveldern, *Mezinárodní právo veřejné*, pp. 246–247.

[48] Cf. Stern, "La succession d'États", p. 174.

[49] See O'Connell, *State Succession*, p. 482.

[50] *Ibid*.

[51] Cf., e.g., Czaplinski, "State succession and State responsibility", pp. 346 and 356; Kamminga, "State succession in respect of human rights treaties", p. 483; Mikulka, "State succession and responsibility", p. 291; Dumberry, *State Succession*; O'Connell, "Recent problems of State succession in relation to new States", p. 162; Stern, "Responsabilité internationale et succession d'États", p. 336.

[52] See D'Argent, *Les réparations de guerre en droit international public*, p. 814; Schachter, "State succession: the once and future law", p. 256; Ziemele, "State continuity, succession and responsibility: Reparations to the Baltic States and their peoples?", p. 176.

[53] Cf. Dupuy, *Droit international public*, p. 61.

[54] *Ibid*.

[55] See Dumberry, *State Succession*, p. 58.

[56] Stern, "Responsabilité international", p. 335.

[57] *Ibid*. p. 338.

[58] Para. (3) of the commentary to article 11 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 52.

[59] See Institute of International Law, Fourteenth Commission, "State succession in matters of State responsibility", provisional report by the Rapporteur (see footnote 26 above).

[60] Institute of International Law, resolution on succession of States in matters of international responsibility (see footnote 27 above).

[61] *Ibid*., preambular para. 2: "*Convinced* of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

[62] *Ibid*., preambular para. 4: "*Taking into account* that different categories of succession of States and their particular circumstances may lead to different solutions".

[63] *Robert E. Brown (United States) v. Great Britain*, 23 November 1923, UNRIAA, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 120.

[64] *F. H. Redward and Others (Great Britain) v. United States (Hawaiian Claims)*, 10 November 1925, UNRIAA, vol. VI (see previous footnote), p. 157, at p. 158.

imprisoned by the Government of the Hawaiian Republic, which was subsequently annexed by the United States of America. The tribunal held that "legal liability for the wrong [had] been extinguished" with the disappearance of the Hawaiian Republic. However, if the claim had been reduced to a money judgment, which may be considered a debt, or an interest on the part of the claimant in assets of fixed value, there would have been an acquired right for the claimant, and an obligation to which the successor State had succeeded.[65]

39. However, with respect to the *Brown* and *Redward* awards, it has been observed that:

> These cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for the delicts of States which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some cases, it would be unfair to deny the claim of an injured party because the State that committed the wrong was absorbed by another State.[66]

40. The early practice also includes the dissolution of the Union of Colombia (1829–1831) after which the United States invoked the responsibility of the three successor States (Colombia, Ecuador and Venezuela), leading to the conclusion of agreements on compensation for illegal acquisition of American ships. After the independence of India and Pakistan, prior rights and liabilities (including liabilities in respect of an actionable wrong) associated with Great Britain were allocated to the State in which the cause of action arose. Many devolution agreements concluded by the former dependent territories of the United Kingdom of Great Britain and Northern Ireland also provide for the continuity of delictual responsibility of the new States.[67] However, the relevance of devolution and other agreements will be discussed at a later stage (see sect. D of the present chapter below).

41. Although decisions of arbitral tribunals are not uniform, in the *Lighthouses* arbitration,[68] the tribunal found that Greece was liable as successor State to the Ottoman Empire for breaches of the concession contract between that Empire and a French company after the union of Crete with Greece in 1913.[69] According to this award, "the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract".[70] Some authors, however, take the position that Greece was found liable for its own acts committed both before and after the cession of territory to Greece. The *Lighthouses* decision is also important for its critique of absolutist solutions both for and against succession with respect to responsibility: "It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors."[71]

42. There are also some other cases outside Europe concerning State responsibility in situations of unification, dissolution and secession of States. One example was the United Arab Republic, created as a result of the unification of Egypt and Syria in 1958. There are three examples where the United Arab Republic as successor State took over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against Western properties in the context of the nationalization of the Suez Canal in 1956 and the nationalization of foreign-owned properties. The first case deals with the nationalization of the Société Financière de Suez by Egypt, which was settled by an agreement between the United Arab Republic and the private corporation (1958). In other words, the new State paid compensation to the shareholders for the act committed by the predecessor State.[72] Another example is an agreement between the United Arab Republic and France resuming cultural, economic and financial relations between the two States in 1958. The agreement provided that the United Arab Republic, as the successor State, would restore the goods and property of French nationals taken by Egypt and that compensation would be paid for any goods and property not restituted (art. 5).[73] A similar agreement was also signed in 1959 by the United Arab Republic and the United Kingdom.[74]

43. The United Arab Republic lasted only until 1961 when Syria left the united State. After the dissolution, Egypt, as one of the two successor States, entered into agreements with other States (e.g. Italy, Sweden, the United Kingdom, and the United States) on compensation to foreign nationals whose property had been nationalized by the United Arab Republic (the predecessor State) during the period 1958 to 1961.[75]

44. More complicated situations arise in case of secession. After Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to United States nationals during a fire in the city of Colon in 1855. However, in 1926, the United States and Panama signed the Claims Convention.[76] The treaty envisaged

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[65] See O'Connell, *State Succession*, pp. 482 and 485–486.

[66] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn., 1987), vol. I, sect. 209, reporters' note No. 7.

[67] See United Nations, *Legislative Series, Materials on Succession of States*, ST/LEG/SER.B/14 (United Nations publication, Sales No. E/F.68.V.5).

[68] *Affaire relative à la concession des phares de l'Empire ottoman*, 24/27 July 1956, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), p. 155 (1956). See ILM, vol. 23 (1956), p. 81.

[69] *Ibid.*

[70] *Ibid.*, p. 92.

[71] *Ibid.*, p. 91.

[72] See Focsaneanu, "L'accord ayant pour objet l'indemnisation de la Compagnie de Suez nationalisée par l'Égypte", pp. 196 *et seq.*

[73] Accord entre le Gouvernement de la République française et le Gouvernement de la République arabe unie [Agreement between France and the United Arab Republic] (Zurich, 22 August 1958), RGDIP, vol. 62 (1958), pp. 738–739. Cf. Rousseau, "Chronique des faits internationaux", p. 681.

[74] Agreement between the United Kingdom and the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt (Cairo, 28 February 1959), United Nations, *Treaty Series*, vol. 343, No. 4925, p. 159. Cf. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", p. 366.

[75] See Weston, Lillich and Bederman, *International Claims*, pp. 139, 185, 179 and 235, respectively. Cf. Dumberry, *State Succession*, pp. 107–110.

[76] Convention between the United States and Panama for the Settlement of Claims (Washington, D.C., 28 July 1926), League of Nations, *Treaty Series*, vol. 138, No. 3183, p. 119.

future arbitration proceedings with respect to the consequences of the 1855 fire in Colon, including the question whether, "in case there should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903". Although no arbitration ever took place, this example shows, at least implicitly, that both States had recognized the possibility of succession in respect of State responsibility.[77]

45. The transfer of responsibility was also invoked in the case of cession of the Tarapacá region by Peru to Chile in 1883. In the view of Italy,

> the action taken with respect to the Tarapacá nitrate mines by the Peruvian Domain (action which is to be still to be [*sic*] considered as a disguised form of forced expropriation) was *Government action*, responsibility for which has now passed from the old to the new ruler of the province, from Peru to Chile.[78]

46. Another example relates to the independence of India. Both India and Pakistan became independent States on 15 August 1947. The 1947 Indian Independence (Rights, Property and Liabilities) Order deals with issues of succession of States.[79] Section 10 of the Order provides for the "transfer of liabilities for actionable wrong other than breach of contract" from the British Dominion of India to the new independent State of India. In many cases, Indian courts have interpreted Section 10 of the Order,[80] finding that India remains responsible for internationally wrongful acts committed before the date of succession.[81]

2. Cases of succession in Central and Eastern Europe in the 1990s

47. More recent cases concern situations of State succession in the second half of the twentieth century, some of which gave rise to the question of responsibility. They include in particular the cases of succession in Central and Eastern Europe in 1990s, such as the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union, as well as the unification of Germany. It is worth noting that according to Opinion No. 9 of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission), the successor States of the Socialist Federal Republic of Yugoslavia had to settle by way of agreements all issues relating to their succession and to find an equitable outcome based on principles inspired by the 1978 and 1983 Vienna Conventions and by the relevant rules of customary international law.[82] Some cases also relate to Asia and, although more rarely, to Africa, where a few cases of succession took place outside the context of decolonization (Eritrea, Namibia and South Sudan). Relevant findings concerning these developments may be found in the jurisprudence of the International Court of Justice and other judicial bodies, as well as treaties and other State practice.

48. The most important decision may be that of the International Court of Justice in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case. It is true that the dissolution of Czechoslovakia was based on agreement and even done in conformity with its constitution. Yet both Czech and Slovak national parliaments declared before the dissolution their willingness to assume the rights and obligations arising from the international treaties of the predecessor State.[83] Article 5 of the Constitutional Act No. 4/1993 even stated:

> The Czech Republic assumes all rights and obligations of the Czech and Slovak Federative Republic … resulting from international laws as of the date of dissolution of the Czech and Slovak Federative Republic, except for the rights and obligations of the Czech and Slovak Federative Republic linked to those sovereign territories of the Czech and Slovak Federative Republic which are not sovereign territories of the Czech Republic.[84]

49. The International Court of Justice said concerning the international responsibility of Slovakia:

> Slovakia … may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.[85]

50. Notwithstanding the special agreement between Hungary and Slovakia, the Court thus seems to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts.

51. The issues of State succession after the collapse of the former Yugoslavia were more complex than in the case of Czechoslovakia. One of the reasons was that, in 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself to be a continuator of the Socialist Federal Republic of Yugoslavia. However, the other former Yugoslav republics did not agree. The Security Council and the General Assembly also refused to recognize the Federal Republic of Yugoslavia as the continuing State in resolutions dated September 1992.[86] The Badinter Commission took the same position.[87] Finally, the Federal Republic of Yugoslavia changed its position

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[77] General Claims Commission (United States and Panama) constituted under the Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932 (22 May 1933–29 June 1933), UNRIAA, vol. VI (see footnote 63 above), p. 293, at p. 302. Cf. Dumberry, *State Succession*, pp. 164–165.

[78] "Cession of the Tarapacá region by Peru to Chile, 1883, Observations from the Government of Italy", in United Nations, *Legislative Series, Materials on Succession of States in Respect of Matters other than Treaties*, ST/LEG/SER.B/17 (United Nations publication, Sales No. E/F.77.V.9), p. 16.

[79] See Whiteman, *Digest of International Law*, pp. 873–874.

[80] Quoted in O'Connell, *State Succession*, p. 493.

[81] See Dumberry, *State Succession*, p. 173.

[82] Arbitration Commission of the Conference on Yugoslavia, *Opinion No. 9 of 4 July 1992*, contained in A/48/874-S/1994/189, annex, p. 5. See also ILM, vol. 31 (1992), p. 1523, at p. 1524.

[83] See proclamation of the National Council of the Slovak Republic to the parliaments and peoples of the world (3 December 1992; A/47/848, annex II); proclamation of the Czech National Council to all parliaments and nations of the world (17 December 1992; *ibid.*, annex I).

[84] Constitutional Act No. 4/1993 on measures relating to the dissolution of the Czech and Slovak Federative Republic. Available from www.psp.cz/en/docs/laws/1993/4.html.

[85] *Gabčíkovo–Nagymaros Project* (see footnote 6 above), p. 81, para. 151.

[86] Security Council resolution 777 (1992) of 19 September 1992; General Assembly resolution 47/1 (1992) of 22 September 1992.

[87] Arbitration Commission of the Conference on Yugoslavia, Opinion No. 10 of 4 July 1992, contained in A/48/874-S/1994/189, annex, p. 7. See also ILM, vol. 31 (1992), p. 1525, at p. 1526.

in 2000, when it applied for admission to the United Nations as a new State.[88]

52. On the basis of the recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by agreement. The Agreement on Succession Issues was concluded on 29 June 2001. According to its preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". The content of this Agreement and annex F thereto will be discussed later (see sect. D of the present chapter below).

53. The first "Yugoslav" case in which the International Court of Justice touched upon the issue of succession in respect of responsibility, although in an indirect way, is the *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case. The Court was not called upon to resolve the question of succession but rather to identify the respondent party:

> The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State. … The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. … That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.[89]

54. The same solution was adopted by the Court in the parallel *Genocide* dispute between Croatia and Serbia in 2008.[90] However, it is only the recent final judgment in the *Genocide (Croatia v. Serbia)* case that dealt more in detail with the issue of succession to State responsibility.[91] In spite of the fact that the Court rejected the claim of Croatia and the counter-claim of Serbia on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession.

55. The Court recalled that, in its judgment of 18 November 2008, it had found that it had jurisdiction to rule on the claim of Croatia in respect of acts committed as from 27 April 1992, the date when the Federal Republic of Yugoslavia came into existence as a separate State and became party, by succession, to the Convention on the Prevention and Punishment of the Crime of Genocide, but reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date. In its 2015 judgment, the Court began by stating that the Federal Republic of Yugoslavia could not have been bound by the Convention before 27 April 1992, even as a State *in statu nascendi*, which was the main argument of Croatia.

56. The Court took note, however, of an alternative argument relied on by the applicant during the oral hearing in March 2014, namely that the Federal Republic of Yugoslavia (and subsequently Serbia) could have succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia for breaches of the Convention prior to that date. In fact, Croatia advanced two separate grounds on which it claimed that the Federal Republic of Yugoslavia had succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia. First, it claimed that this succession came about as a result of the application of the principles of general international law regarding State succession.[92] It relied upon the award of the arbitration tribunal in the *Lighthouses* arbitration, which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible for the former's wrongdoing.[93] Secondly, Croatia argued that the Federal Republic of Yugoslavia, by the declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the [Socialist Federal Republic of Yugoslavia], but also that it succeeded to the responsibility incurred by the [Socialist Federal Republic of Yugoslavia] for the violation of those treaty obligations".[94]

57. Serbia maintained, in addition to the arguments relating to jurisdiction and admissibility (a new claim introduced by Croatia: no legal basis in article IX or other provisions of the Convention on the Prevention and Punishment of the Crime of Genocide), that there was no principle of succession to responsibility in general international law. Quite interestingly, Serbia also maintained that all issues of succession to the rights and obligations of the Socialist Federal Republic of Yugoslavia were governed by the Agreement on Succession Issues, which lays down a procedure for considering outstanding claims against the Socialist Federal Republic of Yugoslavia.[95]

58. It is worth mentioning that the Court did not refuse and thus accepted the alternative argument of Croatia as to its jurisdiction over acts prior to 27 April 1992. The Court stated that, in order to determine whether Serbia is responsible for violations of the Convention,

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[88] General Assembly resolution 55/12 of 1 November 2000.

[89] *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. 75–76, paras. 74, 77–78.

[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, *I.C.J. Reports 2008*, p. 412, at pp. 421–423, paras. 23–34.

[91] *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.

[92] *Ibid.*, at pp. 53–54, para. 107.

[93] See the pleadings of Prof. J. Crawford, advocate for Croatia, public sitting held on Friday, 21 March 2014, at 10 a.m., at the Peace Palace, President Tomka presiding, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/21, p. 21, para. 42: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either."

[94] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 91 above), at pp. 53–54, para. 107.

[95] Cf. the pleadings of Prof. A. Zimmermann, advocate for Serbia, who referred to article 2 of annex F to the Agreement, which provides for the settlement of disputes by the Standing Joint Committee established under the Agreement. Public sitting held on Thursday, 27 March 2014, at 3 p.m., at the Peace Palace, President Tomka presiding, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/22, p. 27, paras. 52–54.

the Court would need to decide:

(1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention;

(2) if so, whether those acts were attributable to the [Socialist Federal Republic of Yugoslavia] at the time that they occurred and engaged its responsibility; and

(3) if the responsibility of the [Socialist Federal Republic of Yugoslavia] had been engaged, whether the [Federal Republic of Yugoslavia] succeeded to that responsibility.[96]

59. It is important to note that the Court considered that the rules on succession that may have come into play in that case fell into the same category as those on treaty interpretation and responsibility of States.[97] However, not all the Judges of the Court shared the view of the majority. In her Declaration, Judge Xue said that "[t]o date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated … Rules of State responsibility in the event of succession remain to be developed".[98] Notwithstanding the scepticism of certain judges, the topic seems to fit perfectly with the mandate of the Commission, which includes both progressive development and codification of international law.

60. Another interesting case is the investment arbitration *Mytilineos Holdings SA*. In this case, the arbitral tribunal noted that, after the commencement of the dispute, the declaration of independence of Montenegro took place. Although the tribunal was not called upon to decide on legal issues of State succession, it noted that it was undisputed that the Republic of Serbia would continue in the legal status of Serbia and Montenegro at the international level.[99]

61. Numerous examples providing evidence of State succession relate to German unification. After the reunification, the Federal Republic of Germany assumed the liabilities arising from the delictual responsibility of the former German Democratic Republic.[100] One of the unsettled issues existing at the time of unification concerned compensation for possessions expropriated in the territory of the former German Democratic Republic. Except for a few lump sum agreements, the German Democratic Republic had always refused to pay compensation. It was only in the last period before the unification that the German Democratic Republic adopted an act on settlement of property issues (29 June 1990). In connection with this development the Governments of the Federal Republic of Germany and the German Democratic Republic adopted the joint declaration on the settlement of outstanding issues of property rights (15 June 1990).[101] According to section 3 of the joint declaration, the property confiscated after 1949 should be returned to the original owners. This may be mostly interpreted as a matter of delictual liability (torts) rather than that of State responsibility.

62. However, it is worth noting that the Federal Administrative Court of the Federal Republic of Germany dealt with the issue of State succession in respect of aliens. Although the Court refused to accept the responsibility of the Federal Republic of Germany for an internationally wrongful act (expropriation) committed by the German Democratic Republic against a Dutch citizen, it recognized that the obligations of the former German Democratic Republic to pay compensation transferred to the successor State.[102]

63. It would be possible to list a number devolution agreements and other agreements that are of interest for the present topic. However, they will be addressed in a section of the report focused on the impact of agreements or unilateral declarations on the succession to State responsibility (see sect. D of the present chapter below).

64. As a provisional conclusion, the Special Rapporteur favours a realistic approach. Such approach, supported by the study of case law and State practice, warrants a distinction between cases of dissolution and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.[103] It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

C. Do any rules in the two Vienna Conventions on succession apply?

65. The present section will address the relevance and possible application to the present topic of certain rules in the two Vienna Conventions on succession. This is a very important question because international law is one legal system. If the principle of harmonization should apply in the relationships between various branches of international law, it is even more relevant within one single branch, being the law of State succession. Therefore, terms should be used in a uniform manner for succession in respect of treaties, State property debts and archives, nationality of natural persons, and State responsibility, unless there are serious reasons for a special use of terms.

66. It is not surprising that the topic of State responsibility was excluded from the scope of the two Vienna Conventions on succession of States. It was done precisely in two "without prejudice" clauses, namely in article 39 of the 1978 Vienna Convention, according to which: "The provisions of the present Convention shall not prejudge

[96] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 91 above), at pp. 53–54, para. 112.

[97] *Ibid.*, at pp. 55–56, para. 115.

[98] *Ibid.*, Declaration of Judge Xue, at p. 387, para. 23.

[99] *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia*, Partial Award on Jurisdiction (arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules), Zurich, 8 September 2006, para. 158.

[100] Art. 24 of the Treaty on the Establishment of German Unity (Berlin, 31 August 1990), *Bundesgesetzblatt* (Federal Law Gazette of the Federal Republic of Germany), part II, No. 35, 28 September 1990, p. 885, reproduced in English in ILM, vol. 30 (1991), p. 463.

[101] *Bundesgesetzblatt* [Federal Law Gazette of the Federal Republic of Germany], part II, 1990, No. 35, 28 September 1990, p. 1237.

[102] Decision of 1 July 1999 of the Supreme Administrative Court, BVerG (7 B 2.99). Cf. Dumberry, *State Succession*, p. 90.

[103] See Crawford, *State Responsibility*, p. 455.

any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States". In a similar sense, but even more broadly drafted, such a clause appears in article 5 of the 1983 Vienna Convention: "Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention".

67. In the view of the Special Rapporteur, such without prejudice clauses only excluded the international responsibility of States from the scope of those Vienna Conventions, without taking any position on the existence or not of rules on succession of States in respect of matters other than those provided for in those Conventions. This a technique widely used in the practice of States and in the drafts of the Commission, for example in the law of treaties.[104]

68. Consequently, nothing prevents the use of the terms and definitions that appear in both Vienna Conventions and, eventually, in the articles on nationality of natural persons in relation to the succession of States. Rather to the contrary, in the light of a systemic integration approach, it is necessary to use the same terms for succession in respect of treaties, State property, debts and archives, nationality of natural persons, and State responsibility, unless there are serious reasons to use a special meaning.

69. As was done by the Commission in the past, the Special Rapporteur proposes to leave unchanged the relevant definitions contained in article 2 of the 1978 and 1983 Vienna Conventions and in article 1 of the articles on nationality of natural persons in relation to the succession of States so as to ensure consistency in the use of terminology in the work on questions relating to the succession of States.[105] Terms used in the draft articles refer, at this stage, to "succession of States", "predecessor State", "successor State" and "date of the succession of States". This does not preclude a possibility of inclusion of other definitions depending on the needs and progress of work. Such definitions may include, in particular, specific categories of succession of States.

70. The term "succession of States" is defined identically in article 2, paragraph 1, of both Vienna Conventions[106] and article 2, subparagraph (*a*), of the articles on nationality of natural persons in relation to the succession of States.[107] It is used here as referring "exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event".[108] It is important to stress that usage in particular in the context of State responsibility, where a possible transfer of rights and obligations arising from an internationally wrongful act will only be discussed at a later stage.

71. The meaning of other terms, namely "predecessor State",[109] "successor State"[110] and "date of the succession of States"[111] are consequential upon the meaning of the term "succession of States". Therefore, the definitions of these terms in article 2, paragraph 1, of both Vienna Conventions and article 2 of the articles on nationality of natural persons in relation to the succession of States can easily be used also for the purpose of the present topic. However, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.[112]

72. However, the adoption of certain terms does not imply that all or most rules of the two Vienna Conventions are applicable to the present topic. First, as it is generally recognized, there is no universal succession of States but rather several areas of legal relations to which succession of States applies. Therefore, rules on succession of States in one area, e.g. in respect of treaties, may differ from the rules in another area, e.g. in respect of State property, debts and archives. This must be taken into consideration when it comes to the issue of succession in respect of State responsibility.

73. Second, the so-called singular succession of States (i.e. special rules governing special cases of succession) also suggests a preliminary conclusion that the application of rules governing succession of States in one area does not prejudge or condition the applicability of rules governing succession of States to another category of relations. In other words, while it may be a presumption that a successor State that succeeded to a treaty of the predecessor State could also succeed to obligations arising from the violation of the treaty, it should not be taken for granted. The two areas of succession of States are independent and governed by special rules. The question whether or not the successor State has certain obligations or rights arising from the responsibility of the predecessor State is a separate question from the succession in respect of primary obligations (under the given treaty).

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[104] Cf. art. 73 of the Vienna Convention on the Law of Treaties; art. 74, para. 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[105] *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

[106] Art. 2, para. 1 (*b*), of the 1978 Vienna Convention; and art. 2, para. 1 (*a*), of the 1983 Vienna Convention.

[107] Art. 2, subpara. (*a*), of the articles on nationality of natural persons in relation to the succession of States, General Assembly resolution 55/153 of 12 December 2000, annex. The text of the draft articles on nationality of natural persons in relation to the succession of States with commentary thereto is reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

[108] Para. (2) of the commentary to article 2, *Yearbook … 1999*, vol. II (Part Two), para. 48.

[109] Art. 2, para. 1 (*c*), of the 1978 Vienna Convention; art. 2, para. 1 (*b*), of the 1983 Vienna Convention; art. 2, subpara. (*b*), of the articles on nationality of natural persons in relation to the succession of States.

[110] Art. 2, para. (1) (*d*), of the 1978 Vienna Convention; art. 2, para. 1 (*c*), of the 1983 Vienna Convention; art. 2, subpara. (*c*), of the articles on nationality of natural persons in relation to the succession of States.

[111] Art. 2, para. 1 (*e*), of the 1978 Vienna Convention; art. 2, para. 1 (*d*), of the 1983 Vienna Convention; art. 2, subpara. (*g*), of the articles on nationality of natural persons in relation to the succession of States.

[112] Para. (3) of the commentary to article 2 of the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), para. 48 at p. 26.

This question thus must be resolved not on the basis of the 1978 Vienna Convention but under the present topic.

74. In addition to the terms carried over from article 2 of the 1978 and 1983 Vienna Conventions and article 1 of the articles on nationality of natural persons in relation to the succession of States, it seems that the term "State responsibility" needs to be defined at this stage of the work. Here again, the Special Rapporteur wishes to rely on the previous work of the Commission and not to depart from the articles on State responsibility. The central terms appear in article 1: "Every internationally wrongful act of a State entails the international responsibility of that State."[113]

75. According to the commentary to article 1, the term "international responsibility" in that article "covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law".[114] The Special Rapporteur is of the view that this definition could be also used for the purposes of the present topic. Even though the present report does not envisage the succession of States in respect of State responsibility as a transfer of the responsibility as such, but rather as a transfer of rights and obligations arising from international responsibility of a (predecessor) State, the definition of "State responsibility" seems to appropriate. Its inclusion helps to distinguish the present topic from other possible issues, such as "international liability" of States or responsibility of international organizations. It also concurs with the distinction, noted by O'Connell and other authors, between the succession to responsibility with respect to an internationally wrongful act as opposable to another State and succession with respect to a municipal tort.[115]

76. Last but not least, the above definition also serves another purpose, which is to distinguish the present topic from the succession of States in respect of State debts. This seems to be one of the fundamental distinctions proving the limited application of rules in the two Vienna Conventions to succession in respect of State responsibility. The question of whether obligations arising from wrongful acts are "illiquid debts" subject to the 1983 Vienna Convention is not an easy one. However, it needs to be addressed, preferably at this early stage of the work.

77. The question was addressed in a classical manner by O'Connell. According to him,

> [a] tort committed by agents of a State merely gives rise to a right of action for unliquidated damages of a penal or compensatory character. It does not create an interest in assets of a fixed or determinable value. The claimant has no more than the capacity to appear before a court which thereupon may or may not create in his favour a debt against the offending State. Until such a debt is created, however, the claimant's interest is not an acquired right in the sense defined [previously].[116]

78. This distinction seems to be helpful even today, although the cited book reflects the traditional or absolute approach of non-succession in respect of responsibility[117] or, in other words, the "negative succession" rule.[118] O'Connell's distinction should not be discarded on the ground that he may refer to municipal torts rather than to international responsibility of States. According to his traditional approach, succession in respect of State responsibility was hardly conceivable. Nevertheless, he referred to the same early cases, such as the *Brown* and the *Redward* claims, which have been analysed in the present report (see sect. B above). And he concluded that "[t]he test of a tortious unliquidated claim must be sought in the law under which the claim arises".[119] Of course, as the definition of "State responsibility" suggests, for the purposes of the present topic, the applicable law will be international law, instead of the municipal legal order that O'Connell probably had in mind.

79. One reading that can be taken from his book is, however, quite clear and important. A debt means "an interest in assets of a fixed or determinable value" existing on the date of the succession of States. Such a debt may arise from a contract, a municipal tort or even from an internationally wrongful act of a State. In particular, it will be a debt for the purposes of rules on succession in respect of State debts if such an interest in assets of a fixed or determinable value was acknowledged by the State or adjudicated by an international court or arbitration at the date of succession. In this example, the rules on succession of States in respect of State debts are to be applied.

80. If, however, an internationally wrongful act occurs before the date of the succession but the legal consequences arising therefrom have not yet been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility. In other words, the question of whether there is a transfer of rights and obligations or not is one that belongs to the present topic and not the rules under the 1983 Vienna Convention.

81. In view of the above considerations, the following draft article on definitions is proposed:

"*Draft article 2. Use of terms*

"For the purposes of the present draft articles:

(*a*) 'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) 'predecessor State' means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) 'successor State' means the State which has replaced another State on the occurrence of a succession of States;

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[113] Art. 1 of the articles on State responsibility.

[114] Para. (5) of the commentary to art. 1 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 33.

[115] O'Connell, *State Succession*, p. 482. See also Crawford, *State Responsibility*, p. 436.

[116] O'Connell, *The Law of State Succession*, p. 201.

[117] See Dumberry, *State Succession*, pp. 35–37.

[118] See Crawford, *State Responsibility*, p. 437.

[119] O'Connell, *The Law of State Succession*, p. 206.

(*d*) 'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of territory to which the succession of States relates;

(*e*) 'international responsibility' means the relations which arise under international law from the internationally wrongful act of a State;

…"

82. Other definitions of terms may be added to draft article 2 in a course of the future work.

D. Nature of the rules to be codified and the relevance of agreements and unilateral declarations

83. The most important and complicated issue seems to be determining the nature of the rules on succession of States in respect of State responsibility. The analysis of State practice, case law and writings done so far points to two preliminary conclusions. First, the traditional thesis of non-succession has been questioned by modern practice. Second, this does not mean that the opposite thesis, i.e. automatic succession in all cases, is true. At best, it is possible to conclude that succession occurs in certain cases. The transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needs to be proved on a case-by-case basis.

84. At the same time, it is important to take into account that situations of succession of States, although not so rare as may appear at first glance, are not too frequent either. This is relevant even more with respect to State responsibility. While all cases of State succession involve the issue of succession in respect of treaties, the transfer of rights or obligations arising from State responsibility is at issue only in certain cases of succession of States. In addition, the situation may differ in cases of negotiated succession and contested succession.

85. Finally, succession of States is of a highly political nature, in particular if contested. Even cases of negotiated succession involve a number of complex and technical questions that are settled by agreement between the States concerned. Therefore, any general customary norms of international law in this area crystallise and are established only slowly. States prefer to have freedom to negotiate conditions of succession, if necessary. It also reflects the fact that a low number of States have ratified the 1978 and 1983 Vienna Conventions thus far. Most of them perhaps do not find the codification of rules on succession of States useful. However, the experience of the States that underwent succession during past 25 years proves the usefulness of such rules.[120] Some of them applied such rules to their own succession, even though the Vienna Conventions were not yet in force at the date of succession.

86. This seems to support the view that in the present topic, like in the two Vienna Conventions and articles on nationality of natural persons in relation to the succession of States, the rules to be codified should be of a subsidiary nature. As such, they may serve two purposes. First, they can present a useful model that may be used and modified by the States concerned. Second, where there is no agreement, they can present a default rule to be applied in case of dispute.

1. Relevance of the agreements

87. In principle, an agreement between the States concerned should have priority over subsidiary general rules on succession to be proposed in the work under the present topic. However, a careful analysis of the relevance of such agreements is warranted, having in view the *pacta tertiis* rule.[121] From this point of view, there is a difference between the 1978 Vienna Convention and the 1983 Vienna Convention. The former includes article 8, which reflects the relative effect of treaties in the following way:

> The obligations and rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.[122]

88. However, it is worth mentioning the following extract from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*:

> A change in participation entails a change in the obligations and rights of all parties to the treaty, and it cannot therefore result from the provisions of another treaty, by virtue of the rule *pacta tertiis nec nocent nec prosunt*, which has been codified as article 34 of the Vienna Convention on the Law of Treaties. However, if the devolution agreements unambiguously provide that the successor State shall henceforth assume all obligations and enjoy all rights which would exist by virtue of the application of treaties, the Secretary-General, if he were to receive such a devolution agreement, would treat such an agreement as an instrument of succession, but only if the treaties concerned were clearly and specifically identified.[123]

89. By contrast, there is no similar provision in the 1983 Vienna Convention. Neither is such a provision contained in the articles on nationality of natural persons in relation to the succession of States. It seems that it follows from the object and purpose of the respective instruments. By definition, the 1978 Vienna Convention governs the succession to treaties that are to bind the successor State and one or more third States. Consequently, the *pacta tertiis* rule is always applicable. However, this is not necessarily

[120] This is shown in case of the 1978 Vienna Convention, which has 22 Parties (status as of 20 May 2017). Whereas the former Yugoslavia ratified the Convention on 28 April 1980 and the six successor States became Parties by way of succession, the situation of the former Czechoslovakia was different. Slovakia became Party on 24 April 1995 and the Czech Republic on 26 July 1999. However, both States made declarations pursuant to article 7, paragraphs 2 and 3, of the said Convention that they would apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other Contracting States or State Party to the Convention accepting the declaration (see *Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXIII.2, available from https://treaties.un.org/, *Depositary of Treaties*, *Status of Treaties*; the texts of the two declarations differ slightly).

[121] Art. 34 of the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent."

[122] Art. 8, para. 1, of the 1978 Vienna Convention.

[123] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, Prepared by the Treaty Section of the Office of Legal Affairs*, ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15), p. 91, para. 310.

the case in succession of States in respect of State property, archives and debts, where an agreement often provides for distribution of property, archives and debts between a predecessor State and a successor State or among two or more successor States.

90. As to the articles on nationality of natural persons of natural persons in relation to the succession of States, they deal mostly with the issues of internal laws. As the commentary of the Commission points out, "[u]nlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals".[124] Therefore, any reference to the *pacta tertiis* rule was not considered necessary.

91. The situation seems to be more complex when it comes to the present topic. On the one hand, rules on State responsibility are different from the law of treaties. Whereas treaties are based on the consent of the parties, State responsibility arises from internationally wrongful acts. This may imply that the *pacta tertiis* rule could be less important for the succession of States in this area. On the other hand, agreements between States concerning their succession are different in nature. They may confirm that a successor State is ready to accept obligations arising from State responsibility of its predecessor. However, they may also limit or exclude such obligations. That is why consent of the third States is important and cannot be presumed in all cases.

92. This was probably the reason why the resolution of the Institute of International Law adopted in Tallinn in 2015 paid attention to the impact of devolution agreements and unilateral acts (art. 6). As to the role of agreements, this article divides the problem of agreements in two paragraphs:

> 1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
>
> 2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.[125]

93. While paragraph 1 deals with more general issue of validity and effects of agreements between the predecessor State and non-State entity (such as a national liberation movement) or an autonomous entity of that State from the point of view of the law of treaties, only paragraph 2 refers to the *pacta tertiis* rule concerning devolution agreements. The content of paragraph 1 seems to be generally acceptable. However, the Special Rapporteur intends to address certain issues, such as national liberation movements, insurgents and other non-State entities, at a later stage of the present topic.

94. Concerning paragraph 2, which reflects in substance the content of article 8 of the 1978 Vienna Convention, however, the analysis of a variety of relevant agreements suggests that a nuanced approach be taken. It depends very much on the content of and parties to such agreements. Indeed, the vast majority of agreements are classical devolution agreements between the predecessor State and the successor State. The second category, however, consists of some agreements that concern the transfer of obligations that are adopted between the successor State and the third State or States. Finally, there are also a few agreements of a mixed nature that do not fit for any of the above categories.

(*a*) *Devolution agreements*

95. The first and largest group of examples are classical devolution agreements. They date from a period of several decades (between 1947 and the 1970s) and are clearly related to the process of decolonization. Probably one of the first examples is the Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan, which provides, in article 4:

> Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.[126]

96. Most such devolution agreements were concluded by the United Kingdom with its former dominions and territories, such as Burma,[127] Ceylon,[128] Federation of Malaya,[129] Ghana,[130] Nigeria,[131] Sierra Leone,[132] Jamaica,[133]

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[124] Para. (2) of the commentary to article 2 of the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), para. 48, at p. 26.

[125] Institute of International Law, resolution on succession of States in matters of international responsibility (see footnote 27 above), art. 6.

[126] Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan [Schedule to the Indian Independence (International Arrangements) Order, 1947] (14 August 1947), in ST/LEG/SER.B/14 (see footnote 67 above), p. 162.

[127] Article 2 of the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters (London, 17 October 1947), United Nations, *Treaty Series*, vol. 70, No. 904, p. 183.

[128] External Affairs Agreement between the United Kingdom of Great Britain and Northern Ireland and Ceylon (Colombo, 11 November 1947), *ibid.*, vol. 86, No. 1149, p. 25.

[129] Exchange of letters constituting an agreement concerning succession to rights and obligations arising from international instruments (Kuala Lumpur, 12 September 1957), *ibid.*, vol. 279, No. 4046, p. 287.

[130] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Ghana (Accra, 25 November 1957), *ibid.*, vol. 287, No. 4189, p. 233.

[131] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of the Federation of Nigeria (Lagos, 1 October 1960), *ibid.*, vol. 384, No. 5520, p. 207.

[132] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Sierra Leone (Freetown, 5 May 1961), *ibid.*, vol. 420, No. 6036, p. 11.

[133] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Jamaica (Kingston, 7 August 1962), *ibid.*, vol. 457, No. 6580, p. 117.

Trinidad and Tobago,[134] Malta,[135] Gambia[136] and Seychelles.[137] Some agreements were concluded as treaties in full form, while others by an exchange of letters constituting an agreement. Since such agreements are treaties between the predecessor State and the successor State, it is clear that the *pacta tertiis* rule applies.

97. Similar devolution agreements were adopted by other States, such as: the Netherlands and the United States of Indonesia[138] — where, however, the situation is less clear (it seems that the agreement deals only with succession to or termination of certain treaties); France and India,[139] Laos[140] and Morocco;[141] or Italy and Somalia.[142] Another devolution agreement was concluded between New Zealand and Western Samoa.[143]

98. There is one agreement that can be singled out because, while having most features of devolution, it has more parties than just the predecessor State (the United Kingdom) and the successor State (Cyprus). Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus (1960) provides in paragraph 1 that: "All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus." Paragraph 2 refers similarly to the international rights and benefits.[144] The mixed nature arises from the fact that this agreement was concluded by four parties; in addition to the United Kingdom and Cyprus, it was also concluded by Greece and Turkey. Consequently, it is binding on all parties, which are those most likely affected by the transfer of rights and obligations. Regarding other States, however, the Treaty is subject to the *pacta tertiis* rule.

99. To sum up provisionally, devolution agreements are agreements between the predecessor State and the successor State, and therefore the *pacta tertiis* rule applies. They mostly relate to succession in respect of treaties. However, they also address the transfer of obligations and responsibilities arising from their application. They may nevertheless have a certain impact on third States. Concerning such possible effects, the rules in articles 35 and 36 of the Vienna Convention on the Law of Treaties should be taken into account. When it comes to rights of third States, their assent may be presumed. A transfer of obligations from State responsibility to the successor State may be viewed so as to accord rights to the third injured State. However, it is also possible that succession brings some obligations for third States. The third State must then expressly accept such obligations.

(*b*) *Claims agreements*

100. Of greater interest for the present topic are other agreements that may be called claims agreements. Those agreements seem to have certain distinctive features. They are concluded between the successor State and the third State that was affected by an internationally wrongful act committed by the predecessor State. Such agreements are less numerous but very important, because they are directly related to the transfer of obligations arising from State responsibility. Such agreements are not tied to the context of decolonization, as they appear even before and after this period. Therefore, they can also shed more light on other categories of succession of States.

101. One of the early examples is the agreement between Austria, Hungary and the United States of 1921. Under its article I,

> the three Governments shall agree upon the selection of a Commissioner who shall pass upon all claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the Treaty of August 24, 1921, between Austria and the United States and/or the Treaty of August 29, 1921, between the United States and Hungary, and/or the Treaties of St. Germain-en-Laye and/or Trianon, and shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of all such claims.[145]

102. Another example is the Claims Convention between the United States of America and Panama. Its article I provides, *inter alia*, that

> in case it should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903, and the Government of Panama agrees to co-operate with the Government of the United States by means of amicable representations in the negotiation of such arbitral agreement between the three countries.[146]

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[134] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Trinidad and Tobago (Port of Spain, 31 August 1962), *ibid.*, vol. 457, No. 6581, p. 123.

[135] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Malta (Floriana, Valletta and Valletta, 31 December 1964), *ibid.*, vol. 525, No. 7594, p. 221.

[136] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of the Gambia (Bathurst, 20 June 1966), *ibid.*, vol. 573, No. 8333, p. 203.

[137] Exchange of notes constituting an agreement concerning treaty succession (Victoria, 29 June 1976), *ibid.*, vol. 1038, No. 15527, p. 135.

[138] Art. 5 of the Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia (The Hague, 2 November 1949), *ibid*., vol. 69, No. 894, p. 3, at p. 266.

[139] Art. 3 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India (New Delhi, 21 October 1954), in ST/LEG/SER.B/17 (see footnote 78 above), p. 80: "The Government of India shall succeed to the rights and obligations resulting from such acts of the French administration as are binding on these Establishments."

[140] Art. 1 of the Traité d'amitié et d'association entre le Royaume du Laos et la République Française [Treaty of Friendship and Association between Laos and France] (Paris, 22 October 1953), in ST/LEG/SER.B/14 (see footnote 67 above), p. 72, also p. 188.

[141] Art. 11 of the Traité entre la France et le Maroc [Treaty between France and Morocco] (Rabat, 20 May 1956), *ibid*., p. 169.

[142] Treaty of Friendship (with Exchange of Notes), concluded between Italy and Somalia (Mogadishu, 1 July 1960), *ibid.*

[143] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Western Samoa (Apia, 30 November 1962), United Nations, *Treaty Series*, vol. 476, No. 6898, p. 3.

[144] Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus (Nicosia, 16 August 1960), *ibid.*, vol. 382, No. 5476, p. 8.

[145] Agreement for the Determination of the Amounts to be paid by Austria and by Hungary in satisfaction of their Obligations under the Treaties concluded by the United States with Austria on 24 August 1921, and with Hungary on 29 August 1921 (Washington, D.C., 26 November 1924), League of Nations, *Treaty Series*, vol. 48, No. 1151, p. 69.

[146] Art. I of the Claims Convention between the United States of America and Panama (Washington, D.C., 28 July 1926), UNRIAA, vol. VI (United Nations Publication, Sales No. 1955.V.3), p. 301, at p. 302.

103. To draw a provisional conclusion, such agreements resolve certain issues of succession of States in respect of obligations arising from State responsibility between the parties. They do not provide for obligations or rights regarding third parties. Therefore the *pacta tertiis* rule does not apply here. Such agreements are binding and have priority over any possible (subsidiary) general rules.

(*c*) *Other agreements*

104. The next group of agreements seems to be the most heterogeneous. It differs from the classical devolution agreements and the claims agreements. Some of these agreements include more than two parties. These agreements are the most recent ones, having been adopted from the 1990s onwards, not in the context of decolonization.

105. The first example concerns the unification of Germany, as article 24 of the Treaty on the Establishment of German Unity (1990) deals with settlements of claims and liabilities *vis-à-vis* foreign countries and the Federal Republic of Germany. It provides that "the settlement of the claims and liabilities remaining when the accession takes effect shall take place under instructions from, and under the supervision of, the Federal Minister of Finance".[147]

106. Although this provision may seem similar to those in devolution agreements, it may be singled out by the fact that it is the successor State that accepts, in principle, obligations towards the third States. In addition, it provides for certain administrative arrangements.

107. This is a typical element of the latest generation of agreements. Another example is the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (2012). It was concluded and operates in very different circumstances. First, it is an agreement between the predecessor State and the successor State in a case of separation of one part of the territory (secession). Second, it governs only their mutual rights and obligations of a financial nature. It is thus closer to a settlement of debts agreement. Third, the cancellation of outstanding claims between the parties is without prejudice to any private claimants. Fourth, the agreement envisages an establishment of joint committees or similar mechanisms.[148]

108. The most complex agreement settles the succession of the former Yugoslavia. According to the recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues of State succession by agreement and the Agreement on Succession Issues was thus concluded on 29 June 2001. According to its preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". Article 2 of annex F of the Agreement dealt with the issues of internationally wrongful acts against third States before the date of succession, saying that:

> [a]ll claims against the [Socialist Federal Republic of Yugoslavia] which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the [Socialist Federal Republic of Yugoslavia].

109. It can be assumed from this passage, which sets up a special mechanism for outstanding claims against the Socialist Federal Republic of Yugoslavia, that the obligations of the predecessor State do not disappear.[149] In addition, article 1 of annex F refers to the transfer of claims from the predecessor State to a successor State.[150]

110. The specific nature of this Agreement arises from the fact that it was concluded by five successor States, former federal republics of Yugoslavia (Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The former Yugoslav Republic of Macedonia). It is not a devolution agreement because the predecessor State no longer existed. Neither is it a claims agreement. Nevertheless, the Agreement and its implementation should be closely looked at, which the Special Rapporteur will likely do in a future report. The Agreement also highlights the issue of plurality of responsible States[151] and/or that of shared responsibility.[152] The issue of plurality of successor States was also dealt with in the 2015 resolution of the Institute of International Law.[153] Therefore, it seems premature to draw any conclusions at this early stage of the topic.

111. However, the preceding paragraphs of the present section allow for certain conclusions to be drawn on the impact of agreements on the succession of States in respect of State responsibility. It seems that devolution agreements, claims agreements and other agreements have to be taken into account when it comes to the transfer of obligations or rights arising from State responsibility.

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[147] Art. 24 of the Treaty on the Establishment of German Unity (see footnote 100 above); the text here is the translation provided by the German Historical Institute of Washington, D.C., available from http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=78.

[148] Art. 5 of the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (Addis Ababa, 27 September 2012), S/2012/733, annex, p. 37:

"5.1.1 Each Party agrees to unconditionally and irrevocably cancel and forgive any claims of non-oil related arrears and other non-oil related financial claims outstanding to the other Party …

"5.1.2 To that end, each Party acknowledges that there shall be no further liability owed to the other Party in respect of such arrears or other financial claims.

"5.1.3 The Parties agree that the provisions of Article 5.1.1 shall not serve as a bar to any private claimants. …

"5.1.4 The Parties agree to take such action as may be necessary, including the establishment of joint committees or any other workable mechanisms, to assist and facilitate the pursuance of claims by nationals or other legal persons of either State to pursue claims in accordance with, subject to the provisions of the applicable laws in each State."

[149] Cf. Dumberry, *State Succession*, p. 121.

[150] "All rights and interests which belonged to the [Socialist Federal Republic of Yugoslavia] and which are not otherwise covered by this Agreement (including, but not limited to, patents, trademarks, copyrights, royalties, and claims of and debts due to the [Socialist Federal Republic of Yugoslavia]) shall be shared among the successor States, taking into account the proportion for division of [Socialist Federal Republic of Yugoslavia] financial assets in Annex C of this Agreement."

[151] Cf. art. 47 (Plurality of responsible States) of the articles on State responsibility and the commentary thereto, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 124 *et seq.*

[152] See, e.g., Nollkaemper and Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of the State of Art* and *The Practice of Shared Responsibility in International Law*.

[153] Institute of International Law, resolution on succession of States in matters of international responsibility (see footnote 27 above), art. 7.

While devolution agreements are subject to the *pacta tertiis* rule and require consent of the third States, other agreements have full effects according to their provisions and the rules of the law of treaties. In view of these considerations, the following draft article is proposed:

"*Draft article 3. Relevance of the agreements to succession of States in respect of responsibility*

"1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

"2. The rights of a predecessor State arising from an internationally wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.

"3. Another agreement than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.

"4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties."

2. Relevance of unilateral acts

112. The next and last issue to be addressed in the present report concerns the role of unilateral acts. Like in the case of devolution agreements, the 1978 Vienna Convention takes a strict approach as to the relevance of such unilateral acts:

> Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.[154]

113. The resolution of the Institute of International Law reproduces almost verbatim this text in paragraph 3 of its article 6.[155] The only difference is that it speaks only about obligations of the predecessor State in respect of an internationally wrongful act accepted by the successor State. This rule, which is fully justified when it comes to *obligations or rights* under treaties in the field of succession of States in respect of treaties, seems to pose certain problems in the context of State responsibility. It is difficult to see why the successor State cannot accept with legally binding effects just the *obligations* of the predecessor State in respect of an internationally wrongful act committed by the predecessor State against another State before the date of succession of States. This is in particular important in cases where the predecessor State ceased to exist. Does it mean that the legal consequences cannot be accepted by the successor State?

114. The Special Rapporteur is not ready to accept this solution quickly. Instead, he proposes first analysing certain examples of unilateral acts and then the relevant rules on State responsibility and unilateral acts of States adopted thus far by the Commission. Only on the basis of this analysis may some conclusions be proposed.

115. It should be noted that such acts, being unilateral acts from the point of view of international law, usually take the form of laws or even constitutional laws. Therefore, they have certain authority and other States or other persons can rely on them.

116. One of the first modern examples of such acts is the Malaysia Act, section 76 of which states:

> (1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.[156]

117. Another example of legislation that may be interpreted as acknowledgment of the conduct of the organs of the predecessor State is article 140, paragraph 3, of the Constitution of Namibia. It reads as follows:

> Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.[157]

118. Last but not least, article 5 of the Czech Constitutional Act No. 4/1993 on measures related to the dissolution of the Czech and Slovak Federative Republic should be mentioned:

> (2) The Czech Republic assumes all rights and obligations of the Czech and Slovak Federative Republic not specified in Section 4 resulting from international laws as of the date of dissolution of the Czech and Slovak Federative Republic, except for the rights and obligations of the Czech and Slovak Federative Republic linked to those sovereign territories of the Czech and Slovak Federative Republic which are not sovereign territories of the Czech Republic. This in no way affects any claim of the Czech Republic on the Slovak Republic resulting from

[154] Art. 9, para. 1, of the 1978 Vienna Convention.

[155] Art. 6: "3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it."

[156] Sect. 76 of the Malaysia Act, 1963, in ST/LEG/SER.B/14 (see footnote 67 above), p. 93.

[157] Article 140 (3) of the Constitution of Namibia (1990), document S/20967/Add.2.

international legal obligations of the Czech and Slovak Federative Republic accepted by the Czech Republic pursuant to this provision.[158]

119. In the case of the Czechoslovakian dissolution, the Czech and the Slovak national parliaments both declared their willingness to assume the rights and obligations arising from the international treaties of the predecessor State before the dissolution.[159] In fact, there were several unilateral acts with a view to accepting rights and obligations of the predecessor State. First, the declaration of national parliaments of 3 December and 17 December 1992, respectively. Next, there were legislative acts, such as the Constitutional Act No. 4/1993 adopted by the Czech National Council.[160]

120. It also constitutes significant practice that both the Czech Republic and the Slovak Republic, when they applied for membership of the Council of Europe after the dissolution of Czechoslovakia and for accession to the European Convention on Human Rights, accepted to be bound by the obligations under that Convention between 1 January and 30 June 1993. The Committee of Ministers of the Council of Europe, at the 496th meeting of the Ministers' Deputies, on 30 June 1993, decided *inter alia* that the Czech Republic and Slovakia were to be considered Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms as from 1 January 1993, and that both States were considered bound as from that date by the declarations made by the Czech and Slovak Federative Republic regarding articles 25 and 46 of the Convention.[161] This acceptance of the jurisdiction of the European Court of Human Rights may be understood as an acceptance by the successor States of their responsibility under the Convention both for acts committed by Czechoslovakia before the date of succession and for their own acts in the period when they were not formally parties to the Convention.

121. Additional arguments supporting certain effects of unilateral acts for the succession of States in respect of responsibility can be drawn from the codification of rules on State responsibility. It is well known that the articles on State responsibility, after presentation of seven grounds of attribution of conduct to a State (in arts. 4 to 10), also introduce in article 11 the hypothesis of a course of conduct acknowledged and adopted by a State as its own.[162]

122. Although this rule of attribution envisages mainly situations where a State, by acts or pronouncements of its official organs, acknowledges and adopts wrongful acts of private persons, it may also be used, *mutatis mutandis*, for an internationally wrongful act of the predecessor State accepted by the successor State. In reality, some cases of succession show, namely in case of dissolution, that an organ of the predecessor State (persons acting in such capacity) simply becomes or devolves into an organ of the successor State. It seems to be logical to admit that the successor State can adopt the conduct in question as its own.

123. This argument is supported by the commentary of the Commission to article 11, referring to the *Lighthouses* arbitration,[163] where a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island". In the context of State succession, the commentary continues,

> it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.[164]

124. Of course, this does not mean that any unilateral act is able to produce the legal effect of acceptance by the successor State of all or some obligations arising from the internationally wrongful act of the predecessor State. Such a unilateral act (acknowledgment or adoption) is indeed subject to rules of international law governing unilateral acts of States. These rules were codified in the previous work of the Commission.[165]

125. Without claiming to make a complete study, it is useful to recall at least some of Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which can inform the debate of the Commission on unilateral declarations that may constitute acceptance of obligations arising from State responsibility of the predecessor State.

126. First, the wording of Guiding Principle 1 is very important, as it seeks to define unilateral acts and to indicate what they are based on:

> Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.

In principle, there is no reason why the unilateral acts of the successor State assuming responsibility for wrongful

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[158] Art. 5, para. 2, of the Constitutional Act No. 4/1993 on measures relating to the dissolution of the Czech and Slovak Federative Republic (see footnote 84 above).

[159] See proclamation of the National Council of the Slovak Republic (footnote 83 above); proclamation of the National Council of the Czech Republic (*ibid.*).

[160] See footnote 84 above.

[161] See note by the secretariat of the Council of Europe on the declarations contained in a note verbale from the Czech and Slovak Federative Republic, dated 13 March 1992, available from the page of the Treaty Office of the Council of Europe at www.coe.int.

[162] Art. 11: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State aknowledges and adopts the conduct in question as its own."

[163] *Affaire relative à la concession des phares de l'Empire ottoman* (see footnote 68 above), p. 198.

[164] Para. (3) of the commentary to article 11 of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 52.

[165] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, General Assembly resolution 61/34 of 4 December 2006. The text of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentary thereto is reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq.*, paras. 176–177.

acts of its predecessor should not follow this guiding principle. Unlike agreements, which are based on consent (including the implication of the *pacta tertiis* rule), unilateral declarations base their binding character on good faith.

127. Second, "[a]ny State possesses capacity to undertake legal obligations through unilateral declarations".[166] This is a very bold statement, therefore only a good argument could rebut it with respect to the successor States. However, the Special Rapporteur did not find any such argument.

128. Third, "[a] unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so".[167] Guiding Principle 4 refers namely to Heads of State, Heads of Government and Ministers for Foreign Affairs. It adds, however, that "[o]ther persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence". Without doubt, national parliaments, in particular in countries with a system of parliamentary democracy, are able to bind the State when adopting legislative acts on succession of States.

129. Fourth, "[u]nilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities".[168] This Guiding Principle also seems to apply to the adoption of a wrongful act of the predecessor State by the successor State. Depending on the particular situation, namely the nature of the obligation breached, the legal consequences of State responsibility may operate *inter partes*, *erga omnes partes* or even *erga omnes*.

130. Next, "[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner".[169] This is a very important qualification, which should be taken into account in considering the impact of unilateral acts on succession of States in respect of State responsibility.

131. Finally, "[n]o obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration".[170] This is probably one of the most important conclusions to be taken from the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations for the purposes of the present topic. It suggests treating differently the transfer of obligations and the transfer of rights arising from State responsibility, by way of a unilateral declaration of the successor State. Whereas the rights arising from State responsibility cannot be assumed by the successor State solely by way of a unilateral declaration (as it implies obligations of other States), the acceptance by the successor State of obligations arising from State responsibility should be possible.

132. In view of these considerations, the following draft article is proposed:

"Draft article 4. Unilateral declaration by a successor State

"1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.

"2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.

"3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States."

[166] Guiding Principle 2, *ibid.*
[167] Guiding Principle 4, *ibid.*
[168] Guiding Principle 6, *ibid.*
[169] Guiding Principle 7, *ibid.*
[170] Guiding Principle 9, *ibid.*

Chapter III

Future work

Future programme of work

133. Concerning the future programme of work on the present topic, it is the intention of the Special Rapporteur to divide the matter into four reports. The second report (2018) will address the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State. It will distinguish cases where the original State has disappeared (dissolution and unification) and cases where the predecessor State remains (territorial transfer, secession and newly independent States). The third report (2019) will in turn focus on the transfer of the rights or claims of an injured predecessor State to the successor State. The fourth report (2020) could address procedural and miscellaneous issues, including the plurality of successor States and the issue of shared responsibility, or a possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals. Depending on the progress of debate on the reports and the overall workload of the Commission, the entire set of draft articles may be adopted on first reading in 2020 or, at the latest, in 2021.

CHECKLIST OF DOCUMENTS OF THE SIXTY-NINTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/701	Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	Reproduced in *Yearbook … 2016*, vol. II (Part One).
A/CN.4/702	Provisional agenda for the sixty-ninth session	Available from the Commission's website, documents of the sixty-ninth session. For the agenda as adopted, see *Yearbook … 2017*, vol. II (Part Two).
A/CN.4/703	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat	
A/CN.4/704	Third report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur	Reproduced in the present volume.
A/CN.4/705 [and Corr.1]	Fourth report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	*Idem.*
A/CN.4/706	Second report on *jus cogens*, by Mr. Dire Tladi, Special Rapporteur	*Idem.*
A/CN.4/707	Provisional application of treaties: Memorandum by the Secretariat	*Idem.*
A/CN.4/708	First report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur	*Idem.*
A/CN.4/L.892 and Add.1	Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading	Available from the Commission's website, documents of the sixty-ninth session.
A/CN.4/L.893	Immunity of State officials from foreign criminal jurisdiction: Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session	*Idem.*
A/CN.4/L.894	Protection of the atmosphere: Text of draft guideline 9 and preambular paragraphs as provisionally adopted by the Drafting Committee during the sixty-ninth session	*Idem.*
A/CN.4/L.895/Rev.1	Provisional application of treaties: Texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions	*Idem.*
A/CN.4/L.896 and Add.1	Draft report of the International Law Commission on the work of its sixty-ninth session, chapter XI (Other decisions and conclusions of the Commission)	See the adopted text in *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10). The final text appears *in Yearbook … 2017*, vol. II (Part Two).
A/CN.4/L.897	*Idem*, chapter I (Organization of the session)	*Idem.*
A/CN.4/L.898	*Idem*, chapter II (Summary of the work of the Commission at its sixty-ninth session)	*Idem.*
A/CN.4/L.899	*Idem*, chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem.*
A/CN.4/L.900 and Add.1/ Rev.1 and Add.2–3	*Idem*, chapter IV (Crimes against humanity)	*Idem.*
A/CN.4/L.901 and Add.1–2	*Idem*, chapter V (Provisional application of treaties)	*Idem.*
A/CN.4/L.902 and Add.1–2	*Idem*, chapter VI (Protection of the atmosphere)	*Idem.*
A/CN.4/L.903/Rev.1 and Add.1–3	*Idem*, chapter VII (Immunity of State officials from foreign criminal jurisdiction)	*Idem.*

Document	*Title*	*Observations and references*
A/CN.4/L.904	*Idem*, chapter VIII (Peremptory norms of general international law (*jus cogens*))	*Idem.*
A/CN.4/L.905	*Idem*, chapter IX (Succession of States in respect of State responsibility)	*Idem.*
A/CN.4/L.906	*Idem*, chapter X (Protection of the environment in relation to armed conflicts)	*Idem.*
A/CN.4/SR.3348–A/CN.4/SR.3389	Provisional summary records of the 3348th to 3389th meetings	Available from the Commission's website, documents of the sixty-ninth session. The final text appears in *Yearbook … 2017*, vol. I.

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