



United Nations

Report of the International Law Commission

**Seventy-second session
(26 April–4 June and 5 July–6 August 2021)**

**General Assembly
Official Records
Seventy-sixth Session
Supplement No. 10 (A/76/10)**

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United Nations • New York, 2021

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

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2021*.

ISSN:

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Chapter I

Introduction

1. The International Law Commission held the first part of its seventy-second session from 26 April to 4 June 2021 and the second part from 5 July to 6 August 2021 at its seat at the United Nations Office at Geneva. Both parts were held in a hybrid format (in person and virtually). The session was opened by Mr. Pavel Šturma, Chair of the seventy-first session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Carlos J. Argüello Gómez (Nicaragua)
Mr. Bogdan Aurescu (Romania)
Mr. Yacouba Cissé (Côte d'Ivoire)
Ms. Concepción Escobar Hernández (Spain)
Mr. Mathias Forteau (France)
Ms. Patrícia Galvão Teles (Portugal)
Mr. Juan Manuel Gómez Robledo (Mexico)
Mr. Claudio Grossman Guiloff (Chile)
Mr. Hussein A. Hassouna (Egypt)
Mr. Mahmoud D. Hmoud (Jordan)
Mr. Huikang Huang (China)
Mr. Charles Chernor Jalloh (Sierra Leone)
Mr. Ahmed Laraba (Algeria)
Ms. Marja Lehto (Finland)
Mr. Shinya Murase (Japan)
Mr. Sean D. Murphy (United States of America)
Mr. Hong Thao Nguyen (Viet Nam)
Ms. Nilüfer Oral (Turkey)
Mr. Hassan Ouazzani Chahdi (Morocco)
Mr. Ki Gab Park (Republic of Korea)
Mr. Chris Maina Peter (United Republic of Tanzania)
Mr. Ernest Petrič (Slovenia)
Mr. Aniruddha Rajput (India)
Mr. August Reinisch (Austria)
Mr. Juan José Ruda Santolaria (Peru)

Mr. Gilberto Vergne Saboia (Brazil)
Mr. Pavel Šturma (Czech Republic)
Mr. Dire D. Tladi (South Africa)
Mr. Eduardo Valencia-Ospina (Colombia)
Mr. Marcelo Vázquez-Bermúdez (Ecuador)
Mr. Amos S. Wako (Kenya)
Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland)
Mr. Evgeny Zagaynov (Russian Federation)

B. Casual vacancy

3. At its 3511th meeting, on 29 April 2021, the Commission elected Mr. Mathias Forteau (France) to fill the casual vacancy occasioned by the resignation of Mr. Georg Nolte, who had been elected to the International Court of Justice.

C. Officers and the Enlarged Bureau

4. At its 3508th meeting, on 26 April 2021, the Commission elected the following officers:

Chair:	Mr. Mahmoud D. Hmoud (Jordan)
First Vice-Chair:	Mr. Dire D. Tladi (South Africa)
Second Vice-Chair:	Mr. Evgeny Zagaynov (Russian Federation)
Chair of the Drafting Committee:	Ms. Patrícia Galvão Teles (Portugal)
Rapporteur:	Mr. Juan José Ruda Santolaria (Peru)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairs of the Commission,¹ the Special Rapporteurs² and the Co-Chairs of the Study Group on sea-level rise in relation to international law.³

6. On 29 April 2021, the Planning Group was constituted, composed of the following members: Mr. Dire D. Tladi (Chair), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*).

¹ Mr. Ernest Petrič, Mr. Pavel Šturma and Mr. Eduardo Valencia-Ospina.

² Ms. Concepción Escobar Hernández, Mr. Juan Manuel Gómez Robledo, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Pavel Šturma, Mr. Dire D. Tladi and Mr. Marcelo Vázquez-Bermúdez.

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

D. Drafting Committee

7. At its 3508th, 3515th, 3522nd, 3537th and 3546th meetings, on 26 April, on 4 and 14 May and on 12 and 21 July 2021, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Immunity of State officials from foreign criminal jurisdiction*: Ms. Patrícia Galvão Teles (Chair), Ms. Concepción Escobar Hernández (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Mr. Mathias Forteau, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*);

(b) *Protection of the atmosphere*: Ms. Patrícia Galvão Teles (Chair), Mr. Shinya Murase (Special Rapporteur), Mr. Yacouba Cissé, Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*);

(c) *Provisional application of treaties*: Ms. Patrícia Galvão Teles (Chair), Mr. Juan Manuel Gómez Robledo (Special Rapporteur), Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. Pavel Šturma, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*);

(d) *Succession of States in respect of State responsibility*: Ms. Patrícia Galvão Teles (Chair), Mr. Pavel Šturma (Special Rapporteur), Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Sean D. Murphy, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*);

(e) *General principles of law*: Ms. Patrícia Galvão Teles (Chair), Mr. Marcelo Vázquez-Bermúdez (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*).

8. The Drafting Committee held a total of 37 meetings on the five topics indicated above.

E. Working Groups and Study Group

9. The Planning Group established the following Working Groups:

(a) *Working Group on the long-term programme of work*: Mr. Mahmoud D. Hmoud (Chair), Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Concepción Escobar

Hernández, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Chris Maina Peter, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Mr. Amos S. Wako, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Juan José Ruda Santolaria (*ex officio*);

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

10. At its 3529th meeting, on 27 May 2021, the Commission established a Study Group on sea-level rise in relation to international law, composed of the following members: Mr. Bogdan Aurescu (Co-Chair at the current session), Mr. Yacouba Cissé (Co-Chair), Ms. Patrícia Galvão Teles (Co-Chair), Ms. Nilüfer Oral (Co-Chair at the current session), Mr. Juan José Ruda Santolaria (Co-Chair), Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Evgeny Zagaynov.

F. Secretariat

11. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Jessica Elbaz and Mr. Arnold Pronto, Principal Legal Officers, served as Principal Assistant Secretaries to the Commission. Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Ms. Christiane Ahlborn, Mr. Carlos Ivan Fuentes, Ms. Patricia Georget and Ms. Carla Hoe, Legal Officers, and Ms. Rina Kuusipalo and Mr. Douglas Pivnichny, Associate Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

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

1. Organization of the work of the session.
2. Filling of casual vacancies.
3. Immunity of State officials from foreign criminal jurisdiction.

4. Provisional application of treaties.
5. Protection of the atmosphere.
6. Succession of States in respect of State responsibility.
7. General principles of law.
8. Sea-level rise in relation to international law.
9. Programme, procedures and working methods of the Commission and its documentation.
10. Date and place of the seventy-third session.
11. Cooperation with other bodies.
12. Other business.

Chapter II

Summary of the work of the Commission at its seventy-second session

13. With respect to the topic “**Protection of the atmosphere**”, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/736), as well as comments and observations received from Governments and international organizations (A/CN.4/735). The report examined the comments and observations received from Governments and international organizations on the draft preamble and guidelines, as adopted on first reading, and made recommendations for each draft guideline, as well as a proposal for a recommendation to the General Assembly.

14. The Commission adopted, on second reading, the entire set of draft guidelines on the protection of the atmosphere, comprising a draft preamble and 12 draft guidelines, together with commentaries thereto. The Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly: (a) take note in a resolution of the draft preamble and guidelines on the protection of the atmosphere, annex the draft guidelines to the resolution, and ensure their widest possible dissemination; (b) commend the draft preamble and guidelines, together with the commentaries thereto, to the attention of States, international organizations and all who may be called upon to deal with the subject (chap. IV).

15. With regard to the topic “**Provisional application of treaties**”, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/738), as well as comments and observations received from Governments and international organizations (A/CN.4/737). The report examined the comments and observations received from Governments and international organizations on the draft Guide, as adopted on first reading, and on several draft model clauses, proposed by the Special Rapporteur to the Commission at its seventy-first session (2019). It also contained proposals of the Special Rapporteur for consideration on second reading, in the light of the comments and observations, as well as a proposal for a recommendation to the General Assembly.

16. The Commission adopted, on second reading, the entire Guide to Provisional Application of Treaties, comprising 12 draft guidelines and a draft annex containing examples of provisions on provisional application of treaties, together with commentaries thereto. In accordance with article 23 of its statute, the Commission recommended to the General Assembly to take note of the Guide to Provisional Application of Treaties and to encourage its widest possible dissemination, to commend the Guide, and the commentaries thereto, to the attention of States and international organizations, and to request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic (chap. V).

17. With respect to the topic “**Immunity of State officials from foreign criminal jurisdiction**”, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/739), which examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; considered a mechanism for the settlement of disputes between the forum State and the State of the official; considered the issue of good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity; and presented proposals for draft articles 17 and 18. Following the debate in plenary, the Commission decided to refer draft articles 17 and 18 to the Drafting Committee, taking into account the debate and proposals made in plenary. The Commission received and adopted the reports of the Drafting Committee on draft articles 8 *ante*, 8, 9, 10, 11 and 12, and

provisionally adopted those draft articles together with the commentaries thereto (chap. VI).

18. With regard to the topic “**Succession of States in respect of State responsibility**”, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/743), which addressed questions related to the impact of succession of States on forms of responsibility, in particular the different forms of reparation, the obligation of cessation and assurances and guarantees of non-repetition. Following the debate in plenary, the Commission decided to refer draft articles 7 *bis*, 16, 17, 18 and 19, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee, taking into account the comments made in plenary. The Commission provisionally adopted draft articles 7, 8 and 9, which had been provisionally adopted by the Drafting Committee at the seventy-first session, together with commentaries thereto. Furthermore, the Commission took note of the interim report of the Chair of the Drafting Committee on draft articles 10, 10 *bis* and 11, provisionally adopted by the Committee at the present session, which was presented to the Commission for information only (chap. VII).

19. With regard to the topic “**General principles of law**”, the Commission had before it the second report of the Special Rapporteur (A/CN.4/741 and Corr.1), which discussed the identification of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Following the debate in plenary, the Commission decided to refer draft conclusions 4, 5, 6, 7, 8 and 9, as presented in the second report, to the Drafting Committee, taking into account the comments made in plenary. The Commission received and adopted the report of the Drafting Committee on draft conclusions 1, 2 and 4, and provisionally adopted those draft conclusions, together with commentaries. Furthermore, the Commission took note of draft conclusion 5, which was also contained in the report of the Drafting Committee (chap. VIII).

20. With respect to the topic “**Sea-level rise in relation to international law**”, the Commission reconstituted the Study Group on sea-level rise in relation to international law. The Study Group had before it the first issues paper (A/CN.4/740 and Corr.1 and Add.1) concerning issues relating to the law of the sea, prepared by two of the Co-Chairs of the Study Group, Mr. Bogdan Aurescu and Ms. Nilüfer Oral, as well as informal contribution papers and comments submitted by members. The Study Group held a “plenary-like” debate on the various matters discussed in the first issues paper over five meetings, during the first part of the session. The Study Group subsequently undertook an interactive discussion, over three further meetings held during the second part of the session, on the basis of, *inter alia*, a series of guiding questions prepared by the Co-Chairs. Thereafter, the Co-Chairs reported to the plenary on the work of the Study Group (chap. IX).

21. As regards “**Other decisions and conclusions of the Commission**”, the Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, chaired by Mr. Mahmoud D. Hmoud, and the Working Group on methods of work, chaired by Mr. Hussein A. Hassouna (chap. X, sect. B). The Commission decided to include in its long-term programme of work the topic “**Subsidiary means for the determination of rules of international law**” (chap. X, sect. B, and annex).

22. Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission virtually on 22 July 2021. Owing to the coronavirus disease (COVID-19) pandemic, the Commission was regrettably unable to have its traditional exchanges of information with the African Union Commission on International Law; the Asian-African Legal Consultative Organization; the Committee of Legal Advisers on Public International Law of the Council of Europe; and the Inter-American Juridical Committee.

However, it was able to have an informal exchange of views with the International Committee of the Red Cross on 15 July 2021 (chap. X, sect. E).

23. The Commission decided that its seventy-third session would be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022 (chap. X, sect. C).

Chapter III

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

24. The Commission considers as still relevant the request for information contained in chapter III of the report of its seventy-first session (2019) on the topics “Immunity of State officials from foreign criminal jurisdiction” and “General principles of law”⁴ and would welcome any additional information.

A. Succession of States in respect of State responsibility

25. The Commission would appreciate being provided by States with information on their practice relevant to the succession of States in respect of State responsibility by 31 December 2021. The Commission would particularly appreciate receiving examples relevant to this topic of:

- (a) treaties, including lump sum agreements and other relevant multilateral and bilateral agreements;
- (b) domestic law, including legislation implementing multilateral or bilateral agreements;
- (c) decisions of domestic, regional and subregional courts and tribunals.

B. Sea-level rise in relation to international law

26. At the seventy-third session (2022), the Study Group will focus on the subtopics of sea-level rise in relation to statehood and the protection of persons affected by sea-level rise. In this connection, the Commission would welcome receiving, by 31 December 2021, any information that States, relevant international organizations and the International Red Cross and Red Crescent Movement could provide on their practice and other relevant information regarding sea-level rise in relation to international law, including on:

- (a) practice with regard to the construction of artificial islands or measures to reinforce coastlines, in each case in order to take into account sea-level rise;
- (b) instances of cession or allocation of territory, with or without transferral of sovereignty, for the settlement of persons originating from other States, in particular small island developing States, affected by sea-level rise;
- (c) regional and national legislation, policies and strategies, as applicable, regarding the protection of persons affected by sea-level rise;
- (d) practice, information and experience of relevant international organizations and the International Red Cross and Red Crescent Movement regarding the protection of persons affected by sea-level rise;
- (e) measures taken by third States with regard to small island developing States, in particular those affected by sea-level rise, including: (i) modalities for cooperation or association with such States, including the possibility of persons travelling to, as well as establishing residency and developing professional activities in, such third States; (ii)

⁴ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 29 and 30, respectively.

maintenance of the original nationality and/or access to the nationality or citizenship of the third State; and (iii) conservation of the cultural identity of such persons or groups.

27. As regards the subtopic of sea-level rise in relation to the law of the sea, the Commission would further welcome receiving from States, by 30 June 2022, in addition to the specific issues on which comments were requested in chapter III of the report of its seventy-first session (2019):⁵

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

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

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

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

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

28. The Commission would welcome receiving such examples of State practice and information, as well as any other examples of State practice and information relevant to the topic, from all regions and subregions of the world, including, in particular, from States within regions and subregions from whom it has received few or no submissions thus far.

⁵ *Ibid.*, para. 32.

Chapter IV

Protection of the atmosphere

A. Introduction

29. At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the atmosphere” in its programme of work, subject to an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.⁶

30. The Commission considered the first report of the Special Rapporteur at its sixty-sixth session (2014); the second report at its sixty-seventh session (2015); the third report at its sixty-eighth session (2016); the fourth report at its sixty-ninth session (2017) and the fifth report at its seventieth session (2018).⁷ At its seventieth session, on the basis of the draft guidelines proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission provisionally adopted 12 draft guidelines and a preamble, together with commentaries thereto, on first reading.⁸

B. Consideration of the topic at the present session

31. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/736), as well as comments and observations received from Governments and international organizations (A/CN.4/735). The Special Rapporteur, in his report, examined the comments and observations received from governments and international organizations on the draft preamble and guidelines, as adopted on first reading. He considered proposals for consideration on second reading, in the light of the comments and observations, and proposed a recommendation to the General Assembly.

⁶ At its 3197th meeting, on 9 August 2013 (*Yearbook ... 2013*, vol. II (Part Two), para. 168). The Commission included the topic in its programme of work on the understanding that: “(a) work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) the topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to ‘fill’ gaps in the treaty regimes; (c) questions relating to outer space, including its delimitation, are not part of the topic; (d) the outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur’s reports would be based on such understanding.” The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (*Yearbook ... 2011*, vol. II (Part Two), para. 365), on the basis of the proposal contained in annex II to the report of the Commission on its work at that session (*ibid.*, p. 189).

⁷ A/CN.4/667, A/CN.4/681 and Corr.1 (Chinese only), A/CN.4/692, and A/CN.4/705 and Corr.1, A/CN.4/711, respectively.

⁸ *Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10)*, paras. 53–54; *ibid.*, *Seventy-first Session, Supplement No. 10 (A/71/10)*, paras. 95–96; *ibid.*, *Seventy-second Session, Supplement No. 10 (A/72/10)*, paras. 66–67; and *ibid.*, *Seventy-third Session, Supplement No. 10 (A/73/10)*, paras. 77–78.

32. The Commission considered the sixth report of the Special Rapporteur at its 3508th to 3510th and 3512th to 3515th meetings, from 26 to 28 April, and on 30 April and 3 and 4 May 2021.

33. Following its debate on the report, the Commission, at its 3515th meeting, held on 4 May 2021, decided to refer draft guidelines 1 to 12, together with the preamble, as contained in the Special Rapporteur's sixth report, to the Drafting Committee, taking into account the debate in the Commission.

34. At its 3529th meeting, held on 27 May 2021, the Commission considered the report of the Drafting Committee (A/CN.4/L.951), and adopted the draft guidelines, together with a preamble, on the protection of the atmosphere on second reading (see sect. E.1 below).

35. At its 3549th to 3554th meetings, held from 26 to 29 July 2021, the Commission adopted the commentaries to the draft guidelines and the preamble (see sect. E.2 below).

36. In accordance with its statute, the Commission submits the draft guidelines, together with the preamble, to the General Assembly, with the recommendation set out below (see sect. C below).

C. Recommendation of the Commission

37. At its 3554th meeting, held on 29 July 2021, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note in a resolution of the draft preamble and guidelines on the protection of the atmosphere, annex the draft guidelines to the resolution, and ensure their widest possible dissemination;

(b) commend the draft preamble and guidelines, together with the commentaries thereto, to the attention of States, international organizations and all who may be called upon to deal with the subject.

D. Tribute to the Special Rapporteur

38. At its 3554th meeting, held on 29 July 2021, the Commission, after adopting the draft guidelines on the protection of the atmosphere, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the draft guidelines on the protection of the atmosphere,

Expresses to the Special Rapporteur, Mr. Shinya Murase, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft guidelines through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft guidelines on the protection of the atmosphere.”

E. Text of the draft guidelines on the protection of the atmosphere

1. Text of the draft guidelines

39. The text of the draft guidelines, adopted by the Commission on second reading, at the seventy-second session is reproduced below.

Protection of the atmosphere

Preamble

Acknowledging that the atmosphere is a natural resource, with a limited assimilation capacity, essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Considering that atmospheric pollution and atmospheric degradation are a common concern of humankind,

Aware of the special situation and needs of developing countries,

Noting the close interaction between the atmosphere and the oceans,

Noting in particular the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Recognizing that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that the present draft guidelines were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein,

Guideline 1

Use of terms

For the purposes of the present draft guidelines:

- (a) “atmosphere” means the envelope of gases surrounding the Earth;
- (b) “atmospheric pollution” means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth’s natural environment;
- (c) “atmospheric degradation” means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment.

Guideline 2

Scope

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with and are without prejudice to questions concerning the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle.
3. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Guideline 3**Obligation to protect the atmosphere**

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Guideline 4**Environmental impact assessment**

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5**Sustainable utilization of the atmosphere**

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with the protection of the atmosphere.

Guideline 6**Equitable and reasonable utilization of the atmosphere**

The atmosphere should be utilized in an equitable and reasonable manner, taking fully into account the interests of present and future generations.

Guideline 7**Intentional large-scale modification of the atmosphere**

Activities aimed at intentional large-scale modification of the atmosphere should only be conducted with prudence and caution, and subject to any applicable rules of international law, including those relating to environmental impact assessment.

Guideline 8**International cooperation**

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9**Interrelationship among relevant rules**

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties, including

articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Guideline 10 Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.

2. States should endeavour to give effect to the recommendations contained in the present draft guidelines.

Guideline 11 Compliance

1. States are required to abide by their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Guideline 12 Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.

2. Since such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of scientific and technical experts.

2. Text of the draft guidelines and commentaries thereto

40. The text of the draft guidelines and commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Protection of the atmosphere

General commentary

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

(2) The Commission recognizes the importance of being fully engaged with the international community's present-day needs. It is acknowledged that both the human and natural environments can be adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances or energy, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. The Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In doing so, the Commission, based on the 2013 understanding,⁹ does not desire to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein.

Preamble

Acknowledging that the atmosphere is a natural resource, with a limited assimilation capacity, essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Considering that atmospheric pollution and atmospheric degradation are a common concern of humankind,

Aware of the special situation and needs of developing countries,

Noting the close interaction between the atmosphere and the oceans,

Noting in particular the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Recognizing that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that the present draft guidelines were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein,

Commentary

(1) The preamble seeks to provide a contextual framework for the draft guidelines. The first preambular paragraph is overarching in acknowledging the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. The atmosphere is the Earth's largest single natural resource and one of its most important. It was listed as a natural resource – along with mineral, energy and water resources – by the former Committee on Natural Resources of the Economic

⁹ See footnote 6 above.

and Social Council,¹⁰ as well as in the 1972 Declaration of the United Nations Conference on the Human Environment (hereinafter, “Stockholm Declaration”)¹¹ and in the 1982 World Charter for Nature.¹² The World Charter recognizes that humankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.¹³ The atmosphere provides renewable “flow resources” essential for human, plant and animal survival on the planet, and it serves as a medium for transportation and communication. As a natural resource, the atmosphere was long considered to be non-exhaustible and non-exclusive. That view is no longer held.¹⁴ It must be borne in mind that the atmosphere is a natural resource with a limited assimilation capacity, also referred to in draft guideline 5.

(2) The second preambular paragraph addresses the functional aspect of the atmosphere as a medium through which transport and dispersion of polluting and degrading substances occurs, involving the large-scale movement of air. The atmospheric movement has a dynamic and fluctuating feature. Long-range transboundary movement of polluting and degrading substances is recognized as one of the major problems of the

¹⁰ The inclusion of “atmospheric resources” among “other natural resources” by the former Committee on Natural Resources was first mentioned in the Committee’s report on its first session, *Official Records of the Economic and Social Council, Fiftieth Session, Supplement No. 6* (E/4969-E/C.7/13), section 4 (“other natural resources”), para. 94 (d). The work of the Committee (later the Committee on Energy and Natural Resources for Development) was subsequently transferred to the Commission on Sustainable Development.

¹¹ “The natural resources of the earth including the air ... must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate” (adopted at Stockholm on 16 June 1972, see *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 ([A/CONF.48/14/Rev.1](#) and [Corr.1](#)), part one, chap. I, principle 2).

¹² “[A]tmospheric resources that are utilized by [humankind], shall be managed to achieve and maintain optimum sustainable productivity” (World Charter for Nature, General Assembly resolution 37/7 of 28 October 1982, annex, general principles, para. 4).

¹³ *Ibid.*, second preambular paragraph, subpara. (a).

¹⁴ See, for example, the World Trade Organization (WTO) Panel and Appellate Body, which recognized in the *Gasoline* case of 1996 that clean air was an “exhaustible natural resource” that could be “depleted”. Report of the Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R.

present-day atmospheric environment,¹⁵ with the Arctic region being identified as one of the areas seriously affected by the worldwide spread of deleterious pollutants.¹⁶

(3) The third preambular paragraph states that atmospheric pollution and atmospheric degradation are a “common concern of humankind”. This expression first appeared in General Assembly resolution 43/53 of 6 December 1988 on the protection of global climate for present and future generations of mankind, recognizing that climate change was a “common concern of [human]kind”, since the climate was an essential condition sustaining life on Earth. The first paragraph of the preamble to the 1992 United Nations Framework Convention on Climate Change¹⁷ acknowledges that “change in the Earth’s climate and its adverse effects are a *common concern of humankind*” (emphasis added),¹⁸ which was reiterated in the preamble of the 2015 Paris Agreement on climate change.¹⁹ Likewise, other conventions use this expression or similar language.²⁰ The phrase as used in this preambular paragraph reflects a concern of the entire international community that all may be affected by atmospheric pollution and atmospheric degradation, as defined in the draft guidelines. It is recalled that the expression has commonly been used in the field of environmental law, even though doctrine is divided on its scope, content and consequences.²¹ It is understood that the expression identifies a problem that requires

¹⁵ See the 2001 Stockholm Convention on Persistent Organic Pollutants, United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119 (noting in the preamble that “persistent organic pollutants, ... are transported, through air ... across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems”). The 2012 amendment to the Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg, 30 November 1999, United Nations, *Treaty Series*, vol. 2319, p. 81) indicates in the third preambular paragraph: “Concerned ... that emitted [chemical substances] are transported in the atmosphere over long distance and may have adverse transboundary effects”. The 2013 Minamata Convention on Mercury (Kumamoto, Japan, 10 October 2013, *ibid.*, vol. 3013, No. 54669 (volume number has yet to be determined), available from <https://treaties.un.org>) recognizes mercury as “a chemical of global concern owing to its long-range atmospheric transport” (first preambular para.); see, J.S. Fuglesvedt *et al.*, “Transport impacts on atmosphere and climate: metrics”, *Atmospheric Environment*, vol. 44 (2010), pp. 4648–4677; D.J. Wuebbles, H. Lei and J.-T. Lin, “Inter-continental transport of aerosols and photochemical oxidants from Asia and its consequences”, *Environmental Pollution*, vol. 150 (2007), pp. 65–84; J.-T. Lin, X.-Z. Liang and D.J. Wuebbles, “Effects of inter-continental transport on surface ozone over the United States: Present and future assessment with a global model”, *Geophysical Research Letters*, vol. 35 (2008).

¹⁶ See T. Koivurova, P. Kankaanpää and A. Stepien, “Innovative environmental protection: lessons from the Arctic,” *Journal of Environmental Law*, vol. 27 (2015), pp. 285–311, at p. 297.

¹⁷ New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

¹⁸ United Nations Framework Convention on Climate Change, first preambular para.

¹⁹ Paris Agreement (Paris, 12 December 2015), United Nations, *Treaty Series*, No. 54113 (volume number has yet to be determined), available from <https://treaties.un.org>, eleventh preambular para.

²⁰ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, United Nations, *Treaty Series*, vol. 1790, No. 30619, p. 79: the third preambular paragraph: “common concern of humankind”); Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994, *ibid.*, vol. 1954, No. 33480, p. 3: the first preambular paragraph: “centre of concerns”; second preambular paragraph: “urgent concern of the international community”; fourth preambular paragraph: “problems of global dimension”); Minamata Convention on Mercury (the first preambular paragraph: mercury as “a chemical of global concern”).

²¹ M. Bowman, “Environmental protection and the concept of common concern of mankind,” in M. Fitzmaurice, D.M. Ong and P. Merkouris, eds., *Research Handbook on International Environmental Law* (Cheltenham, Edward Elgar, 2010), pp. 493–518, at p. 501; D. French, “Common concern, common heritage and other global(-ising) concepts: rhetorical devices, legal principles or a fundamental challenge?” in M.J. Bowman, P.G.G. Davies and E.J. Goodwin, eds., *Research Handbook on Biodiversity and Law* (Cheltenham, Edward Elgar, 2016), pp. 334–360, at

cooperation from the entire international community, while at the same time that its inclusion does not create, as such, rights and obligations, and, in particular, that it does not entail *erga omnes* obligations in the context of the draft guidelines.

(4) The fourth preambular paragraph, having regard to considerations of equity, concerns the special situation and needs of developing countries.²² The need for special consideration for developing countries in the context of environmental protection has been endorsed by a number of international instruments, such as the 1972 Stockholm Declaration,²³ the 1992 Rio Declaration on Environment and Development (hereinafter, “Rio Declaration”),²⁴ and the 2002 Johannesburg Declaration on Sustainable Development.²⁵ Principle 12 of the Stockholm Declaration attaches importance to “taking into account the circumstances and particular requirements of developing countries”. Principle 6 of the Rio Declaration highlights “the special situation and needs of

pp. 349 ff.; J. Brunnée, “Common areas, common heritage, and common concern,” in D. Bodansky, J. Brunnée and E. Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007), pp. 550–573, at p. 565; A. Boyle and C. Redgwell, *International Law and the Environment*, 4th ed. (Oxford, Oxford University Press, 2009), pp. 143–145; D. Shelton, “Common concern of humanity,” *Environmental Policy and Law*, vol. 39 (2009), pp. 83–96; D. Shelton, “Equitable utilization of the atmosphere: rights-based approach to climate change?,” in S. Humphreys, ed., *Human Rights and Climate Change* (Cambridge, Cambridge University Press, 2010), pp. 91–125; S. Stec, “Humanitarian limits to sovereignty: common concern and common heritage approaches to natural resources and environment,” *International Community Law Review*, vol. 12 (2010), pp. 361–389; T. Cottier, ed., *The Prospects of the Common Concern of Humankind in International Law* (Cambridge, Cambridge University Press, 2021).

²² One of the first attempts to incorporate such a principle was the Washington Conference of the International Labour Organization in 1919, at which delegations from Asia and Africa succeeded in ensuring the adoption of differential labour standards, on the basis of article 405, paragraph 3, of the 1919 Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, *British and Foreign State Papers*, 1919, vol. CXII, London, HM Stationery Office, 1922, p. 1), which became article 19, paragraph 3, of the International Labour Organization Constitution (9 October 1946, United Nations, *Treaty Series*, vol. 15, No. 229, p. 35) (labour conventions “shall have due regard” to the special circumstances of countries where local industrial conditions are “substantially different”). The same principle also appeared in some of the conventions approved by the Organization in 1919 and in several conventions adopted afterwards. See I.F. Ayusawa, *International Labor Legislation* (New York, Columbia University, 1920), chap. VI, pp. 149 *et seq.* Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in draft article 23 of the Commission’s 1978 draft articles on most-favoured-nation clauses. See article 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) and article 30 (New rules of international law in favour of developing countries) of the draft articles on the most-favoured-nation clauses adopted by the Commission at its thirtieth session in 1978, *Yearbook ... 1978*, vol. II (Part Two), para. 74, see also paras. 47–72. See S. Murase, *Economic Basis of International Law* (Tokyo, Yuhikaku, 2001), pp. 109–179 (in Japanese). And see the earlier exceptions for developing countries specified in art. XVIII of the 1947 General Agreement on Tariffs and Trade (Geneva, 30 October 1947), United Nations, *Treaty Series*, vol. 55, No. 814, p. 194.

²³ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (A/CONF.48/14/Rev.1), Part One, chap. 1. See L.B. Sohn, “The Stockholm Declaration on the Human Environment”, *Harvard International Law Journal*, vol. 14 (1973), pp. 423–515, at pp. 485–493.

²⁴ Adopted at Rio de Janeiro on 14 June 1992, see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (vol. I) and Corr.1), resolution I, p. 3.

²⁵ *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (A/CONF.199/20; United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 1, annex.

developing countries, particularly the least developed and those most environmentally vulnerable”. The Johannesburg Declaration expresses resolve to pay attention to “the developmental needs of small island developing States and least developed countries”.²⁶ The principle is similarly reflected in article 3 of the United Nations Framework Convention on Climate Change and article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change. The formulation of the preambular paragraph is based on the seventh paragraph of the preamble of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.²⁷

(5) The fifth preambular paragraph acknowledges the “close interaction” that arises, as a factual matter, from the physical relationship between the atmosphere and the oceans. According to scientists, a significant proportion of the pollution of the marine environment from or through the atmosphere originates from land-based sources, including from anthropogenic activities on land.²⁸ Scientific research shows that human activities are also responsible for global warming, which causes a rise in temperature of the oceans and in turn results in extreme atmospheric conditions that can lead to flood and drought.²⁹ The General Assembly has confirmed the effect of climate change on oceans and stressed the importance of increasing the scientific understanding of the oceans-atmosphere interface.³⁰ Although not mentioned in the preambular paragraph, there are also close interactions between the atmosphere and other biospheres, as well as forests, lakes and rivers.³¹

(6) The First Global Integrated Marine Assessment (first World Ocean Assessment), as a comprehensive, in-depth study on the state of the marine environment, refers to substances polluting the oceans from land-based sources through the atmosphere, which bear on sea-surface temperature, sea-level rise, ocean acidification, salinity, stratification, ocean circulation, storms and other extreme weather events, and ultraviolet radiation and the ozone layer.³² The General Assembly has continued to emphasize the urgency of

²⁶ Johannesburg Declaration, para. 24. See also Outcome document of the United Nations Conference on Sustainable Development, “The future we want”, contained in General Assembly resolution 66/288 of 27 July 2012, annex.

²⁷ Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first session, Supplement No. 49 (A/51/49)*, vol. III, resolution 51/229, annex. The Convention entered into force on 17 August 2014.

²⁸ R.A. Duce *et al.*, “The atmospheric input of trace species to the world ocean”, *Global Biogeochemical Cycles*, vol. 5 (1991), pp. 193–259; T. Jickells and C.M. Moore, “The importance of atmospheric deposition for ocean productivity”, *Annual Review of Ecology, Evolution, and Systematics*, vol. 46 (2015), pp. 481–501.

²⁹ See Intergovernmental Panel on Climate Change (IPCC), “Climate change 2014 synthesis report: summary for policymakers”, p. 4. Because of the rise in ocean temperatures, many scientific analyses suggest risk of severe and widespread drought in the twenty-first century over many land areas. See Ø. Hov, “Overview: oceans and the atmosphere” and T. Jickells, “Linkages between the oceans and the atmosphere”, in “Summary of the informal meeting of the International Law Commission: dialogue with atmospheric scientists (third session), 4 May 2017”, paras. 4–12 and 21–30, respectively. Available from http://legal.un.org/docs/?path=../ilc/sessions/69/pdfs/english/informal_dialogue_4may2017.pdf&lang=E.

³⁰ General Assembly resolution 75/239 of 31 December 2020 on oceans and the law of the sea, parts IX and XI. See also General Assembly resolutions 71/257 of 23 December 2016; 72/73 of 5 December 2017; 73/124 of 11 December 2018; 74/19 of 10 December 2019.

³¹ IPCC, *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (2019). Available at www.ipcc.ch/srccl/.

³² United Nations 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

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.³³ Among other human activities that have an impact on the oceans, are greenhouse gas emissions from ships that contribute to global warming and climate change, including exhaust gases, cargo emissions, emissions of refrigerants and other emissions.³⁴

(7) The sixth preambular paragraph addresses one of the most profound impacts of atmospheric degradation for all States, that is the sea-level rise caused by global warming. It draws particular attention to the special situation of low-lying coastal areas and small island developing States due to sea-level rise. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100.³⁵ While exact figures and rates of change still remain uncertain, the report states that it is “virtually certain” that sea levels will continue to rise during the twenty-first century, and for centuries beyond – even if the concentrations of greenhouse gas emissions are stabilized. Moreover, sea-level rise 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”.³⁶ Such degree of change in sea levels may pose a potentially serious, maybe even disastrous, threat to many coastal areas, especially those with large, heavily populated and low-lying coastal areas, as well as to small island developing States.³⁷

(8) The sixth preambular paragraph is linked to the interrelationship between the rules of international law relating to the protection of the atmosphere and the rules of the law of the sea addressed in paragraph 1 of draft guideline 9.³⁸ Special consideration to be

“Coastal, riverine and atmospheric inputs from land”). The summary of the report was approved by the General Assembly at its seventieth session: see General Assembly resolution 70/235 of 23 December 2015 on oceans and the law of the sea.

³³ General Assembly resolution 70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, para. 14. See also “Oceans and the law of the sea: report of the Secretary-General” (A/71/74/Add.1), chap. VIII (“Oceans and climate change and ocean acidification”), paras. 115–122.

³⁴ The 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions, Ø. Buhaug *et al.*, *Second IMO GHG Study 2009* (London, IMO, 2009), p. 23. See also T.W.P. Smith *et al.*, *Third IMO GHG Study* (London, IMO, 2014), executive summary, table 1. M. Righi, J. Hendricks and R. Sausen, “The global impact of the transport sectors on atmospheric aerosol in 2030 – Part 1: land transport and shipping”, *Atmospheric Chemistry and Physics*, vol. 15 (2015), pp. 633–651.

³⁵ IPCC, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2013), p. 1180. See also chapter IX on sea-level rise in relation to international law.

³⁶ *Ibid.*, p. 1140. See also IPCC, *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019). Available at www.ipcc.ch/srocc/.

³⁷ See A.H.A. Soons, “The effects of a rising sea level on maritime limits and boundaries”, *Netherlands International Law Review*, vol. 37 (1990), pp. 207–232; M. Hayashi, “Sea-level rise and the law of the sea: future options”, in D. Vidas and P.J. Schei, eds., *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden, Brill/Martinus Nijhoff, 2011), pp. 187 *et seq.* See also, International Law Association, *Report of the Seventy-fifth Conference held in Sofia, August 2012* (London, 2012), pp. 385–428, and International Law Association, *Johannesburg Conference (2016): International Law and Sea Level Rise* (interim report), pp. 13–18. See also International Law Association, *Sydney Conference (2018): International Law and Sea Level Rise* (report), Part II, p. 866.

³⁸ See para. (9) of the commentary to draft guideline 9 below.

given to persons and groups in vulnerable situations are referred to in paragraph 3 of draft guideline 9.³⁹ The words “in particular” are intended to acknowledge specific areas without necessarily limiting the list of potentially affected areas.

(9) The seventh preambular paragraph emphasizes the interests of future generations, including with a view to human rights protection, as well as intergenerational equity. The goal is to ensure that the planet remains habitable for future generations. In taking measures to protect the atmosphere today, it is important to fully take into account the long-term conservation of the quality of the atmosphere. The Paris Agreement, in its preamble, after acknowledging that climate change is a common concern of humankind, provides that parties should, when taking action to address climate change, respect, promote and consider, among other things, their respective obligations on human rights, as well as intergenerational equity. The importance of “intergenerational” considerations was already expressed in principle 1 of the 1972 Stockholm Declaration.⁴⁰ It also underpins the concept of sustainable development, as formulated in the 1987 Brundtland Report, *Our Common Future*,⁴¹ and informs the 2030 Agenda for Sustainable Development.⁴² It is also reflected in the preamble of the 1992 Convention on Biological Diversity,⁴³ and in other treaties.⁴⁴ Article 3, paragraph 1, of the United Nations Framework Convention on Climate Change, for example, provides that: “Parties should protect the climate system for the benefit of present and future generations of humankind”. The International Court of Justice has noted, in its 1996 Advisory Opinion in the *Nuclear Weapons* case with respect to such weapons, the imperative to take into account “in particular their ... ability to cause damage to generations to come”.⁴⁵ The term “interests” is employed rather than “benefit” in the paragraph. A similar formulation is used in draft guideline 6, which refers to the interests of future generations in the context of “equitable and reasonable utilization of the atmosphere”.⁴⁶

³⁹ See paras. (16) to (18) of the commentary to draft guideline 9 below.

⁴⁰ Principle 1 of the Declaration refers to the “solemn responsibility to protect and improve the environment for present and future generations”.

⁴¹ Report of the World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987). It emphasized the importance of “development that meets the needs of the present without compromising the ability of future generations” (p. 43).

⁴² General Assembly resolution 70/1 of 25 September 2015, which emphasizes the need to protect the planet from degradation so that it can “support the needs of present and future generations”.

⁴³ The preamble of the Convention provides for the “benefit of present and future generations” in conservation and sustainable use of biological diversity.

⁴⁴ Article 4 (vi) of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Vienna, 5 September 1997, United Nations, *Treaty Series*, vol. 2153, No. 37605, p. 303) provides that parties shall “strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation”.

⁴⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 244, para. 36.

⁴⁶ There have been national court decisions that recognize intergenerational equity, see Australia, *Gray v. Minister for Planning*, [2006] NSWLEC 720; India, *Vellore Citizens' Welfare Forum and State of Tamil Nadu (joining) v. Union of India and others*, original public interest writ petition, 1996 5 SCR 241, ILDC 443 (IN 1996); Kenya, *Waweru, Mwangi (joining) and others (joining) v. Kenya*, miscellaneous civil application, Case No. 118 of 2004, Application No. 118/04, ILDC 880 (KE 2006); South Africa, *Fuel Retailers Association of South Africa v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and others*, [2007] ZACC 13, 10 BCLR 1059; Pakistan, *Rabab Ali v. Federation of Pakistan*, petition filed 6 April 2016 (summary available at www.ourchildrenstrust.org/pakistan). For commentary, see C. Redgwell, “Intra- and inter-generational equity”, in C.P. Carlarne, K.R. Gray and R.G. Tarasofsky, eds., *The Oxford Handbook of International Climate Change Law* (Oxford, Oxford University Press, 2016), pp.

(10) The eighth preambular paragraph is based on the 2013 understanding of the Commission according to which the topic was included in the programme of work at its sixty-fifth session.⁴⁷ This preambular paragraph was considered important to reflect certain elements of the 2013 understanding, as the latter resulted in a significant limitation on both the scope of the topic and the outcome of the work of the Commission. This preambular paragraph should be read in conjunction with paragraph 2 of draft guideline 2 on scope.

Guideline 1

Use of terms

For the purposes of the present draft guidelines:

- (a) “atmosphere” means the envelope of gases surrounding the Earth;
- (b) “atmospheric pollution” means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth’s natural environment;
- (c) “atmospheric degradation” means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment.

Commentary

(1) The present draft guideline on the “Use of terms” seeks to provide a common understanding of what is covered by the present draft guidelines. The terms used are

185–201, at p. 198. See also, E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo, United Nations University Press, 1989), p. 96; M. Bruce, “Institutional aspects of a charter of the rights of future generations”, in S. Busuttill *et al.*, eds., *Our Responsibilities Towards Future Generations* (Valetta, UNESCO and Foundation for International Studies, University of Malta, 1990), pp. 127–131; T. Allen, “The Philippine children’s case: recognizing legal standing for future generations”, *Georgetown International Environmental Law Review*, vol. 6 (1994), pp. 713–741 (referring to the judgment of the Philippine Supreme Court in *Minors Oposa et al. v. Factoran* (30 July 1993), *International Legal Materials*, vol. 33 (1994), p. 168). Standing to sue in some proceedings was granted on the basis of the “public trust doctrine”, which holds governments accountable as trustees for the management of common environmental resources. See M.C. Wood and C.W. Woodward IV, “Atmospheric trust litigation and the constitutional right to a healthy climate system: judicial recognition at last”, *Washington Journal of Environmental Law and Policy*, vol. 6 (2016), pp. 634–684; C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester, Manchester University Press, 1999); K. Coghill, C. Sampford and T. Smith, eds., *Fiduciary Duty and the Atmospheric Trust* (London, Routledge, 2012); M.C. Blumm and M.C. Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, 2nd ed. (Durham, North Carolina, Carolina Academic Press, 2015); and K. Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Cheltenham, Edward Elgar Publishing, 2015). In a 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 C.O. Okidi, ed., *Compendium of Judicial Decisions in Matters Related to the Environment: National Decisions*, vol. I (Nairobi, United Nations Environment Programme/United Nations Development Programme, 1998), p. 259. See J. Razzaque, “Application of public trust doctrine in Indian environmental cases”, *Journal of Environmental Law*, vol. 13 (2001), pp. 221–234.

⁴⁷ *Yearbook ... 2013*, vol. II (Part Two), para. 168.

provided only “for the purposes of the present draft guidelines”, and are not intended in any way to affect any existing or future definitions of any such terms in international law.

(2) No definition has been given of the term “atmosphere” in the relevant international instruments. A working definition for the present draft guidelines is provided in subparagraph (a). It is inspired by the definition given by IPCC.⁴⁸

(3) The definition provided is consistent with the approach of scientists. According to scientists, the atmosphere exists in what is called the atmospheric shell.⁴⁹ Physically, it extends upwards from the Earth’s surface, which is the bottom boundary of the dry atmosphere. The average composition of the atmosphere up to an altitude of 25 km is as follows: nitrogen (78.08%), oxygen (20.95%), together with trace gases, such as argon (0.93%), helium and radiatively active greenhouse gases, such as carbon dioxide (0.035%) and ozone, as well as greenhouse water vapour in highly variable amounts.⁵⁰ The atmosphere also contains clouds and aerosols.⁵¹ The atmosphere is divided vertically into five spheres on the basis of temperature characteristics. From the lower to upper layers, the spheres are: troposphere, stratosphere, mesosphere, thermosphere, and the exosphere. Approximately 80 per cent of air mass exists in the troposphere and 20 per cent in the stratosphere. The thin, white, hazy belt (with a thickness of less than 1 per cent of the radius of the globe) that one sees when looking at the earth from a distance is the atmosphere. Scientifically these spheres are grouped together as the “*lower atmosphere*”, which extends to an average altitude of 50 km, and can be distinguished from the “*upper atmosphere*”.⁵² The temperature of the atmosphere changes with altitude. In the troposphere (up to the tropopause, at a height of about 12 km), the temperature decreases as altitude increases because of the absorption and radiation of solar energy by the surface of the planet.⁵³ In contrast, in the stratosphere (up to the stratopause, at a height of nearly 50 km), temperature gradually increases with height⁵⁴ because of the absorption of ultraviolet radiation by ozone. In the mesosphere (up to the mesopause, at a height of above 80 km), temperatures again decrease with altitude. In the thermosphere,

⁴⁸ Fifth Assessment Report, Working Group III, annex I. IPCC, *Climate Change 2014: Mitigation of Climate Change*, O. Edenhofer *et al.*, eds. (Cambridge, Cambridge University Press, 2014), p. 1252, available at www.ipcc.ch/report/ar5/wg3/.

⁴⁹ The American Meteorology Society defines the “atmospheric shell” (also called atmospheric layer or atmospheric region) as “any one of a number of strata or ‘layers’ of the earth’s atmosphere” (available at http://glossary.ametsoc.org/wiki/Atmospheric_shell).

⁵⁰ Physically, water vapour, which accounts for roughly 0.25 per cent of the mass of the atmosphere, is a highly variable constituent. In atmospheric science, “because of the large variability of water vapor concentrations in air, it is customary to list the percentages of the various constituents in relation to dry air”. Ozone concentrations are also highly variable. Over 0.1 ppmv (parts per million by volume) of ozone concentration in the atmosphere is considered hazardous to human beings. See J.M. Wallace and P.V. Hobbs, *Atmospheric Science: An Introductory Survey*, 2nd ed. (Boston, Elsevier Academic Press, 2006), p. 8.

⁵¹ *Ibid.*

⁵² The American Meteorological Society defines the “lower atmosphere” as “generally and quite loosely, that part of the atmosphere in which most weather phenomena occur (i.e., the troposphere and lower stratosphere); hence used in contrast to the common meaning for the upper atmosphere” (available at http://glossary.ametsoc.org/wiki/Lower_atmosphere). The “upper atmosphere” is defined as residual, that is “the general term applied to the atmosphere above the troposphere” (available at http://glossary.ametsoc.org/wiki/Upper_atmosphere).

⁵³ The thickness of the troposphere is not the same everywhere; it depends on the latitude and the season. The top of the troposphere lies at an altitude of about 17 km at the equator, although it is lower at the poles. On average, the height of the outer boundary of the troposphere is about 12 km. See E.J. Tarbuck, F.K. Lutgens and D. Tasa, *Earth Science*, 13th ed. (New Jersey, Pearson, 2011), p. 466.

⁵⁴ Strictly, the temperature of the stratosphere remains constant to a height of about 20–35 km and then begins a gradual increase.

temperatures once more rise rapidly because of X-ray and ultraviolet radiation from the sun. The atmosphere “has no well-defined upper limit”.⁵⁵

(4) Aside from its physical characteristics, it is important to recognize the function of the atmosphere as a medium within which there is constant movement as it is within that context that the “transport and dispersion” of polluting and degrading substances occurs (see the second preambular paragraph). Indeed, the long-range transboundary movement of polluting substances is one of the major problems for the atmospheric environment. In addition to transboundary pollution, other concerns relate to the depletion of the ozone layer and to climate change.

(5) Subparagraph (b) defines “atmospheric pollution” and addresses transboundary air pollution, whereas subparagraph (c) defines “atmospheric degradation” and refers to global atmospheric problems. By stating “by humans”, both subparagraphs (b) and (c) make it clear that the draft guidelines concern “anthropogenic” atmospheric pollution and atmospheric degradation. The focus on human activity, whether direct or indirect, is a deliberate one, as the present draft guidelines seek to provide guidance to States and the international community.

(6) The term “atmospheric pollution” (or, air pollution) is sometimes used broadly to include global deterioration of atmospheric conditions such as ozone depletion and climate change,⁵⁶ but the term is used in the present draft guidelines in a narrow sense, in line with existing treaty practice. It thus excludes the global issues from the definition of atmospheric pollution.

(7) In defining “atmospheric pollution”, subparagraph (b) uses the language that is essentially based on article 1 (a) of the 1979 Convention on Long-Range Transboundary Air Pollution,⁵⁷ which provides that:

“[a]ir pollution” means “the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material

⁵⁵ See Tarbuck, Lutgens and Tasa, *Earth Science* (footnote 53 above), p. 467.

⁵⁶ For instance, art. 1, para. 1, of the Cairo resolution (1987) of the Institute of International Law (Institut de droit international) on “Transboundary Air Pollution” provides that: “[f]or the purposes of this Resolution, ‘transboundary air pollution’ means any physical, chemical or biological *alteration in the composition* or quality of the atmosphere which results directly or indirectly from human acts or omissions and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction.” (emphasis added). Available from www.idi-iil.org/Resolutions.

⁵⁷ Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217. The formulation of art. 1 (a) of the Convention on Long-Range Transboundary Air Pollution goes back to the definition of pollution by the Council of the Organization for Economic Cooperation and Development (OECD) in its Recommendation C(74)224 on “Principles concerning Transfrontier Pollution”, of 14 November 1974 (*International Legal Materials*, vol. 14 (1975), p. 243), which reads as follows: “For the purpose of these principles, pollution means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment”. See H. van Edig, ed., *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977), p. 13; see also Boyle and Redgwell, *International Law and the Environment*, (see footnote 21 above) pp. 364-371; A. Kiss and D. Shelton, *International Environmental Law*, 3rd ed. (New York, Transnational Publishers, 2004), p. 99 (definition of pollution: “also forms of energy such as noise, vibrations, heat, and radiation are included”).

property and impair or interfere with amenities and other legitimate uses of the environment, and ‘air pollutants’ shall be construed accordingly.”

(8) However, in departing from the language of the 1979 Convention, the words “contributing to” were used instead of “resulting in” in order to safeguard the overall balance in ensuring international cooperation. The change was made for this particular “use of terms” and “for the purpose of the present draft guidelines”, which are not intended to give a “definition” for international law in general, as noted in paragraph (1) of the present commentary.

(9) Another departure from the 1979 Convention is the addition the word “significant” before “deleterious”. This is intended, for the purposes of consistency, to align the wording of subparagraphs (b) and (c). The term “significant deleterious effects” is intended to qualify the range of human activities to be covered by the draft guidelines. The Commission has further employed the term “significant” in its previous work.⁵⁸ In doing so, the Commission has stated that “*significant is something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’*. The harm must lead to a real detrimental effect [and]... such detrimental effects must be susceptible of being measured by factual and objective standards”.⁵⁹ Moreover, the term “significant”, while determined by factual and objective standards, also involves a value determination that depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered “significant” because, at that time, scientific knowledge or human appreciation did not assign much value to the resource. The question of what constitutes “significant” is more of a factual assessment.⁶⁰ The deleterious effects arising from an introduction or release have to be of such a nature as to endanger human life and health and the Earth’s natural environment, including by contributing to endangering them.

(10) Article 1 (a) of the Convention on Long-Range Transboundary Air Pollution and article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea provide for “introduction of energy” (as well as substances) as part of the “pollution”.⁶¹ The reference to “energy” in the present subparagraph (b) is understood to include heat, light,

⁵⁸ See, for example, art. 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses (General Assembly resolution 51/229 of 21 May 1997, annex); art. 1 of the articles on prevention of transboundary harm from hazardous activities (2001) (General Assembly resolution 62/68 of 6 December 2007, annex); principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006) (General Assembly resolution 61/36 of 4 December 2006, annex); art. 6 of the articles on the law of transboundary aquifers (2008) (General Assembly resolution 63/124 of 11 December 2008, annex). It was also underlined that the term “significant” has been used in the jurisprudence of the International Court of Justice, including in its 2015 judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgment, I.C.J. Reports 2015, p. 665, at paras. 104–105 and 108; see also paras. 153, 155, 156, 159, 161, 168, 173, 196 and 217).

⁵⁹ Para. (4) of the commentary to article 2 of the articles on prevention of transboundary harm from hazardous activities, 2001, *Yearbook ... 2001*, Vol. II (Part Two) and corrigendum, p. 152, at para. 98.

⁶⁰ See, for example, the commentary to the articles on prevention of transboundary harm from hazardous activities (paras. (4) and (7) of the commentary to article 2), *ibid.* See also the commentary to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (paras. (1) to (3) of the commentary to principle 2), *Yearbook ... 2006*, vol. II (Part Two), para. 67.

⁶¹ See also the Protocol concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Oranjestad, 6 October 1999), *Treaties and Other International Acts Series*, 10-813, art. 1 (c).

noise and radioactivity introduced and released into the atmosphere through human activities.⁶² The reference to radioactivity as energy is without prejudice to peaceful uses of nuclear energy in relation to climate change in particular.⁶³

(11) The expression “effects extending beyond the State of origin” in subparagraph (b) clarifies that the draft guidelines address the transboundary effects, excluding as a matter of general orientation regarding scope, domestic or local pollution, and the expression is understood in the sense provided in article 1 (b) of the Convention on Long-Range Transboundary Air Pollution that:

“[l]ong-range transboundary air pollution” means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.”

(12) As is evident from draft guideline 2 below, on scope, the present draft guidelines are concerned with the protection of the atmosphere from both atmospheric pollution and atmospheric degradation. Since subparagraph (b) covers “atmospheric pollution” only, it is necessary, for the purposes of the draft guidelines, to address issues other than atmospheric pollution by means of a different definition. For this purpose, subparagraph (c) provides a definition of “atmospheric degradation”. This definition is intended to include problems of ozone depletion and climate change. It covers the alteration of the global atmospheric conditions caused by humans, whether directly or indirectly. These

⁶² With regard to heat, see World Meteorological Organization/International Global Atmospheric Chemistry, Project Report, “Impacts of megacities on air pollution and climate”, Global Atmosphere Watch Report No. 205 (Geneva, World Meteorological Organization, 2012); D. Simon and H. Leck, “Urban adaptation to climate/environmental change: governance, policy and planning”, Special Issue, *Urban Climate*, vol. 7 (2014) pp. 1–134; J.A. Arnfield, “Two decades of urban climate research: a review of turbulence, exchanges of energy and water, and the urban heat island”, *International Journal of Climatology*, vol. 23 (2003), pp. 1–26; L. Gartland, *Heat Islands: Understanding and Mitigating Heat in Urban Areas* (London, Earthscan, 2008); see, in general, B. Stone Jr., *The City and the Coming Climate: Climate Change in the Places We Live* (Cambridge, Massachusetts, Cambridge University Press, 2012). Regarding light pollution, see C. Rich and T. Longcore, eds., *Ecological Consequences of Artificial Night Lighting*, (Washington, D.C., Island Press, 2006); P. Cinzano and F. Falchi, “The propagation of light pollution in the atmosphere”, *Monthly Notices of the Royal Astronomical Society*, vol. 427 (2012), pp. 3337–3357; F. Bashiri and C. Rosmani Che Hassan, “Light pollution and its effects on the environment”, *International Journal of Fundamental Physical Sciences*, vol. 4 (2014), pp. 8–12. Regarding acoustic/noise pollution, see e.g. annex 16 of the 1944 Convention on International Civil Aviation (Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 295 p. 295), vol. I: *Aircraft Noise*, 5th ed. 2008; see P. Davies and J. Goh, “Air transport and the environment: regulating aircraft noise”, *Air and Space Law*, vol. 18 (1993), pp. 123–135. Concerning radioactive emissions, see D. Rauschnig, “Legal problems of continuous and instantaneous long-distance air pollution: interim report”, *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), pp. 198–223, at p. 219; and International Atomic Energy Agency, *Environmental Consequences of the Chernobyl Accident and their Remediation: Twenty Years of Experience – Report of the Chernobyl Forum Expert Group ‘Environment’*, Radiological Assessment Report Series (2006), STI/PUB/1239. See also United Nations Scientific Committee on the Effects of Atomic Radiation, 2013 Report to the General Assembly, *Scientific Annex A: Levels and effects of radiation exposure due to the nuclear accident after the 2011 great east-Japan earthquake and tsunami* (United Nations publication, Sales No. E.14.IX.1), available at www.unscear.org/docs/reports/2013/13-85418_Report_2013_Annex_A.pdf.

⁶³ International Atomic Energy Agency, *Climate Change and Nuclear Power 2014* (Vienna, 2014), p. 7.

may be changes to the physical environment or biota or alterations to the composition of the global atmosphere.

(13) The 1985 Vienna Convention for the Protection of the Ozone Layer⁶⁴ provides the definition of “adverse effects” in article 1, paragraph 2, as meaning “changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind.” Article 1, paragraph 2, of the United Nations Framework Convention on Climate Change defines “climate change” as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.

Guideline 2

Scope

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with and are without prejudice to questions concerning the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle.
3. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Commentary

(1) Draft guideline 2 sets out the scope of the draft guidelines on the protection of the atmosphere. Under paragraph 1, the draft guidelines deal with the protection of the atmosphere from atmospheric pollution and atmospheric degradation. Paragraphs 2 and 3 contain saving clauses.

(2) Paragraph 1 deals with the protection of the atmosphere in two areas, atmospheric pollution and atmospheric degradation. The draft guidelines are concerned only with anthropogenic causes and not with those of natural origins such as volcanic eruptions and meteorite collisions. The focus on transboundary pollution and global atmospheric degradation caused by human activity reflects current realities.⁶⁵

(3) In Agenda 21, it was recognized that transboundary air pollution has adverse health impacts on humans and other detrimental environmental impacts, such as tree and forest loss and the acidification of water bodies.⁶⁶ Moreover, according to IPCC, the science indicates with 95 per cent certainty that human activity is the dominant cause of observed warming since the mid-twentieth century. The Panel has noted that human influence on the climate system is clear. Such influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, in global mean sea-level rise, and in changes in some climate extremes.⁶⁷ The Panel has further noted that it is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the

⁶⁴ Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293.

⁶⁵ See, generally, IPCC, *Climate Change 2013: The Physical Science Basis, Summary for Policy makers*, available at www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf.

⁶⁶ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference (A/CONF.151/26/Rev.1(Vol. I))*; United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex II, para. 9.25.

⁶⁷ IPCC, *Climate Change 2013: The Physical Science Basis, Summary for Policy makers*.

anthropogenic increase in greenhouse gas concentrations and other anthropogenic “forcings” together.⁶⁸

(4) The guidelines do not deal with domestic or local pollution as such. It may be noted however that whatever happens locally may sometimes have a bearing on the transboundary and global context in so far as the protection of the atmosphere is concerned. Ameliorative human action, taken individually or collectively, may need to take into account the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

(5) Sulphur dioxide and nitrogen oxides are the main sources of transboundary atmospheric pollution,⁶⁹ while climate change and depletion of the ozone layer are the two principal concerns leading to atmospheric degradation.⁷⁰ Certain ozone depleting substances also contribute to global warming.⁷¹

(6) Paragraph 2 reflects what is not covered by the present draft guidelines. It is based on the 2013 understanding of the Commission. It should be read in conjunction with the eighth preambular paragraph. In order to provide greater clarity to the formula of the understanding which stated “do not deal with, but without prejudice to”, the paragraph has been reformulated to combine the two phrases with “and” instead of “but”. Paragraph 2 further explains that questions concerning the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle are excluded from the present draft guidelines. It should be noted that, in not dealing with these three specified principles, this paragraph does not in any way imply the legal irrelevance of those principles. Also excluded in the 2013 understanding from the scope of this topic were questions concerning liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

(7) The 2013 understanding also had a clause stating that “[t]he present draft guidelines would not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States”. This has also not been reflected in the text of the draft guideline.

(8) Paragraph 3 is a saving clause that the draft guidelines do not affect the status of airspace under international law. The atmosphere and airspace are two different concepts, which should be distinguished. The regimes covering the atmosphere and outer space are also separate. Accordingly, the draft guidelines do not affect the legal status of airspace nor address questions related to outer space.

(9) The atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries.⁷² The atmosphere is invisible, intangible and non-separable. Airspace, on the other hand, is a static and spatial-based institution over which the State, within its territory, has “complete and exclusive sovereignty”. For instance, article 1 of the Convention on International Civil Aviation provides that “every State has complete and exclusive

⁶⁸ *Ibid.* IPCC, *Global Warming of 1.5 °C. An IPCC Special Report, Summary for Policymakers* (2018), pp. 4–5. Available at www.ipcc.ch/sr15/chapter/spm/.

⁶⁹ Boyle and Redgwell, *International Law and the Environment* (see footnote 21 above), pp. 378–379.

⁷⁰ *Ibid.*, p. 379. The linkages between climate change and ozone depletion are addressed in the preamble as well as in article 4 of the United Nations Framework Convention on Climate Change. The linkage between transboundary atmospheric pollution and climate change is addressed in the preamble and article 2, paragraph 1, of the 2012 amendment of the Gothenburg Protocol.

⁷¹ *Ibid.*

⁷² See generally Boyle and Redgwell, *International Law and the Environment* (footnote 21 above), pp. 359–361.

sovereignty over the ‘airspace’ above its territory”.⁷³ In turn, article 2 of the same Convention deems the territory of a State to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. The airspace beyond the boundaries of territorial sea is not under the sovereignty of any State and is open for use by all States, like the high seas.

(10) The atmosphere is spatially divided into spheres on the basis of temperature characteristics. There is no sharp scientific boundary between the atmosphere and outer space. Beyond 100 km, traces of the atmosphere gradually merge with the emptiness of space.⁷⁴ The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, is silent on the definition of “outer space”.⁷⁵ The matter has been under discussion within the context of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space since 1959, which has looked at both spatial and functional approaches to the questions of delimitation.⁷⁶

Guideline 3

Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Commentary

(1) Draft guideline 3 restates the obligation to protect the atmosphere. It is central to the present draft guidelines. In particular, draft guidelines 4, 5 and 6, below, which seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere, flow from the present guideline.

(2) The draft guideline concerns both the transboundary and global contexts. It will be recalled that draft guideline 1 contains a “transboundary” element in defining “atmospheric pollution” (as the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to significant deleterious effects “extending beyond the State of origin”, of such a nature as to endanger human life and health and the Earth’s natural environment), and a “global” dimension in defining “atmospheric degradation” (as the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment).

(3) The present draft guideline delimits the obligation to protect the atmosphere to preventing, reducing or controlling atmospheric pollution and atmospheric degradation. The formulation of the present draft guideline finds its genesis in principle 21 of the 1972 Stockholm Declaration, which reflected the finding in the *Trail Smelter* arbitration.⁷⁷

⁷³ Convention on International Civil Aviation (Chicago, 7 December 1944), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295. See also article 2, paragraph 2, of the United Nations Convention on the Law of the Sea, which provides that “sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil”.

⁷⁴ Tarbuck, Lutgens and Tasa, *Earth Science* (see footnote 53 above), pp. 465 and 466.

⁷⁵ Moscow, London and Washington, D.C., 27 January 1967, United Nations, *Treaty Series*, vol. 610, No. 8843, p. 205.

⁷⁶ See, generally, B. Jasani, ed., *Peaceful and Non-Peaceful uses of Space: Problems of Definition for the Prevention of an Arms Race*, United Nations Institute for Disarmament Research (New York, Taylor and Francis, 1991), especially chaps. 2–3.

⁷⁷ See UNRIIAA, vol. III (Sales No. 1949.V.2), pp. 1905–1982 (Award of 11 March 1941), 1907, at p. 1965 *et seq.* (“under the principles of international law ... no State has the right to use or permit

According to principle 21, “States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. This principle is further reflected in principle 2 of the 1992 Rio Declaration.

(4) The reference to “States” for the purposes of the draft guideline denotes both the possibility of States acting individually and jointly, as appropriate.

(5) As presently formulated, the draft guideline is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts,⁷⁸ a matter on which there are different views.

(6) Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are not normally attributable to a State. In this respect, due diligence requires States to “ensure” that such activities within their jurisdiction or control do not cause significant adverse effects. This does not mean, however, that due diligence applies solely to private activities since a State’s own activities are also subject to the due diligence rule.⁷⁹ It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. It also requires taking into account the context and evolving standards of both regulation and technology. Therefore, even where significant adverse effects materialize, that does not necessarily constitute a failure of due diligence. Such failure is limited to the State’s negligence to meet its obligation to take all appropriate measures to prevent, reduce or control human activities where these activities

the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”) and the first report of the Special Rapporteur (A/CN.4/667), para. 43. See also A.K. Kuhn, “The Trail Smelter Arbitration, United States and Canada”, *American Journal of International Law*, vol. 32 (1938), pp. 785–788, and *ibid.*, vol. 35 (1941), pp. 665–666; and J.E. Read, “The Trail Smelter Dispute”, *Canadian Yearbook of International Law*, vol. 1 (1963), pp. 213–229.

⁷⁸ Article 48 (Invocation of responsibility by a State other than an injured State) provides that: “1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if ... (b) the obligation breached is owed to the international community as a whole” (General Assembly resolution 56/83 of 12 December 2001. For the articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. IV, sect. E).

⁷⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at pp. 55 and 179, paras. 101 and 197; *Certain Activities Carried Out by Nicaragua in the Border area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (see footnote 58 above), paras. 104, 153, 168 and 228; International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Dispute Chamber)*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at para. 131; draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 97 (reproduced in General Assembly resolution 62/68, annex, of 6 December 2007), paras. 7–18; first and second reports of the International Law Association Study Group on due diligence in international law, 7 March 2014 and July 2016, respectively; J. Kulesza, *Due Diligence in International Law* (Leiden, Brill, 2016); Société française pour le droit international, *Le standard de due diligence et la responsabilité internationale*, Paris, Pedone, 2018; S. Besson, “La due diligence en droit international”, *Collected Courses of the Hague Academy of International Law*, vol. 409 (2020), pp. 153–398.

have or are likely to have significant adverse effects. The States' obligation "to ensure" does not require the achievement of a certain result (obligation of result) but only requires the best available good faith efforts so as not to cause significant adverse effects (obligation of conduct).

(7) The obligation to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. The phrase "prevent, reduce or control" draws upon formulations contained in article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, which uses "and"⁸⁰ and article 3, paragraph 3, of the United Nations Framework Convention on Climate Change, which uses "or".⁸¹ Important in the consideration of the draft guideline is the obligation to ensure that "appropriate measures" are taken. In this context, it should be noted that the Paris Agreement, "acknowledging" in the preamble that "climate change is a common concern of humankind", states "the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity".⁸²

(8) Even though the appropriate measures to "prevent, reduce or control" apply to both atmospheric pollution and atmospheric degradation, the reference to "applicable rules of international law" signals a distinction between measures taken, bearing in mind the transboundary nature of atmospheric pollution and global nature of atmospheric degradation and the different rules that are applicable in relation thereto. In the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effects is firmly established as customary international law, as confirmed, for example, in the Commission's articles on prevention of transboundary harm from hazardous activities⁸³ and by the jurisprudence of international courts and tribunals.⁸⁴

⁸⁰ M.H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. IV (Dordrecht, Martinus Nijhoff, 1991), p. 50.

⁸¹ Article 3, paragraph 3, states that "[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect". See, for example, United Nations Convention on the Law of the Sea (Montego Bay), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 212; Vienna Convention for the Protection of the Ozone Layer, art. 2, para. 2 (b); United Nations Framework Convention on Climate Change, art. 4; Stockholm Convention on Persistent Organic Pollutants, first preambular paragraph and art. 3; and Minamata Convention on Mercury, arts. 2 and 8–9.

⁸² Eleventh and thirteenth preambular paragraphs.

⁸³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. V, sect. E, art. 3 (Prevention): "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The Commission has also dealt with the obligation of prevention in its articles on responsibility of States for internationally wrongful acts. Article 14, paragraph 3, provides that "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues" (*ibid.*, chap. IV, sect. E). According to the commentary: "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur" (*ibid.*, para. (14) of the commentary to art. 14, para. 3). The commentary illustrated "the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration" as one of the examples of the obligation of prevention (*ibid.*).

⁸⁴ The International Court of Justice has emphasized prevention as well. In the *Gabčíkovo-Nagymaros Project* case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 78, para. 140). See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)* (see footnote 58 above), para. 104. In the *Iron Rhine Railway* case, the

However, the existence of this obligation in customary international law is still somewhat unsettled for global atmospheric degradation.

(9) The International Court of Justice has stated that “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment ... of areas beyond national control is now part of the corpus of international law”,⁸⁵ and has attached great significance to respect for the environment “not only for States but also for the whole of mankind”.⁸⁶ The Tribunal in the *Iron Rhine Railway* case stated that the “duty to prevent, or at least mitigate [significant harm to the environment] ... has now become a principle of general international law”.⁸⁷ These pronouncements are instructive and relevant to the protection of the atmosphere.

Guideline 4

Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Commentary

(1) Draft guideline 4 deals with environmental impact assessment. This is the first of three draft guidelines that flow from the overarching draft guideline 3. The draft guideline is formulated in the passive in order to signal that this is an obligation of conduct and because, given the variety of economic actors, the obligation does not necessarily require the State itself to perform the assessment. What is required is that the State put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities. Procedural safeguards such as notification and consultations are also key to such an assessment. It may be noted that the Kiev Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context encourages “strategic environmental assessment” of the likely environmental, including health, effects, which means any effect on the environment, including human health, flora, fauna, biodiversity, soil, climate, air, water, landscape, natural sites, material assets, cultural heritage and the interaction among other factors.⁸⁸

(2) The International Court of Justice in the *Gabčíkovo-Nagymaros Project* case alluded to the importance of environmental impact assessment.⁸⁹ In *Certain Activities Carried Out by Nicaragua in the Border area (Costa Rica v. Nicaragua)* and *Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)* in the context of due diligence obligations, the Court affirmed that “a State’s obligation to exercise due

Arbitral Tribunal also stated that “[t]oday, in international environmental law, a growing emphasis is being put on the duty of prevention” (*Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, UNRIIAA, vol. XXVII, pp. 35–125, at p. 116, para. 222).

⁸⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 241–242, para. 29.

⁸⁶ *Gabčíkovo-Nagymaros Project* (see footnote 84 above), p. 41, para. 53; the Court cited the same paragraph in *Pulp Mills on the River Uruguay* (see footnote 79 above), p. 78, para. 193.

⁸⁷ *Iron Rhine Railway* (see footnote 84 above), pp. 66–67, para. 59.

⁸⁸ Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context (Kiev, 21 May 2003), United Nations, *Treaty Series*, vol. 2685, No. 34028, p. 140, art. 2, paras. 6–7.

⁸⁹ *Gabčíkovo-Nagymaros Project* (see footnote 84 above), para. 140.

diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment".⁹⁰ The Court concluded that the State in question "ha[d] not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road".⁹¹ In a separate opinion, Judge Hisashi Owada noted that "an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law".⁹² In the earlier *Pulp Mills* case, the Court stated that "the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment".⁹³ Moreover, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its Advisory Opinion on the *Responsibilities and obligations of States regarding activities in the Area* held that the duty to conduct an environmental impact assessment arises not only under the United Nations Convention on the Law of the Sea, but is also a "general obligation under customary international law".⁹⁴

(3) The phrase "of proposed activities under their jurisdiction or control" is intended to indicate that the obligation of States to ensure an environment impact assessment is in respect of activities under their jurisdiction or control. Since environmental threats have no respect for borders, it is not precluded that States, as part of their global environmental responsibility, take decisions jointly regarding environmental impact assessments.

(4) The phrase "which are likely to cause significant adverse impact" establishes a threshold considered necessary to trigger an environmental impact assessment. It is drawn from the language of principle 17 of the Rio Declaration. Moreover, there are other instruments, such as the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context,⁹⁵ that use a similar threshold. In the 2010 *Pulp Mills* case, the Court indicated that an environmental impact assessment had to be undertaken where there was a risk that the proposed industrial activity may have a "significant adverse impact in a transboundary context, in particular, on a shared resource".⁹⁶

(5) By having a threshold of "likely to cause significant adverse impact", the draft guideline excludes an environmental impact assessment for an activity whose impact is likely to be minor. The impact of the potential harm must be "significant" for both "atmospheric pollution" and "atmospheric degradation". The phrase "significant deleterious effects" has been used both in subparagraphs (b) and (c) of draft guideline 1 and, as mentioned in the commentary thereto, what constitutes "significant" requires a factual rather than a legal, determination.⁹⁷

⁹⁰ *I.C.J. Reports 2015* (see footnote 58 above), para. 153.

⁹¹ *Ibid.*, para. 168.

⁹² *Ibid.*, Separate Opinion of Judge Hisashi Owada, para. 18.

⁹³ *Pulp Mills on the River Uruguay* (see footnote 79 above), para. 204.

⁹⁴ International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with Respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Dispute Chamber), Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at para. 145.

⁹⁵ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

⁹⁶ *Pulp Mills on the River Uruguay* (see footnote 79 above), para. 204.

⁹⁷ The Commission has frequently employed the term "significant" in its work, including in the articles on the prevention of transboundary harm from hazardous activities (2001). In that case, the Commission chose not to define the term, recognizing that the question of "significance"

(6) The phrase “in terms of atmospheric pollution or atmospheric degradation” relates the draft guideline once more to the two main issues of concern to the protection of the atmosphere under the present draft guidelines, namely transboundary atmospheric pollution and atmospheric degradation. While the relevant precedents for the requirement of an environmental impact assessment primarily address transboundary contexts, it is considered that there is a similar requirement for projects that are likely to have significant adverse effects on the global atmosphere, such as those activities involving intentional large-scale modification of the atmosphere.⁹⁸ In the context of atmospheric degradation, such activities may carry a more extensive risk of severe damage than even those causing transboundary harm, and therefore the same considerations should apply *a fortiori* to those activities potentially causing global atmospheric degradation.

(7) Even though procedural aspects are not dealt with in text of the draft guideline, transparency and public participation are important components in ensuring access to information and representation in undertaking an environmental impact assessment. Principle 10 of the 1992 Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. Participation includes access to information, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁹⁹ also addresses these issues. The above-mentioned Kiev Protocol on Strategic Environmental Assessment encourages the carrying out of public participation and consultations, and the taking into account of the results of the public participation and consultations in a plan or programme.¹⁰⁰

Guideline 5

Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with the protection of the atmosphere.

Commentary

(1) The atmosphere is a natural resource with limited assimilation capacity. It is often not conceived of as exploitable in the same sense as, for example, mineral or oil and gas resources are explored and exploited. In truth, however, the atmosphere, in its physical and functional components, is exploitable and exploited. The polluter exploits the atmosphere by reducing its quality and its capacity to assimilate pollutants. The draft guideline draws analogies from the concept of “shared resource”, while also recognizing that the unity of the global atmosphere requires recognition of the commonality of interests. Accordingly, this draft guideline proceeds on the premise that the atmosphere is a natural resource with limited assimilation capacity, the ability of which to sustain life

requires a factual determination rather than a legal one (see the general commentary, para. (4), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. V, sect. E). See, for example, paras. (4) and (7) of the commentary to art. 2 of the articles on the prevention of transboundary harm from hazardous activities (*ibid.*). See also the commentary to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (commentary to principle 2, paras. (1)–(3), *Yearbook ... 2006*, vol. II (Part Two), chap. V, sect. E).

⁹⁸ See draft guideline 7 below.

⁹⁹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 28 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.

¹⁰⁰ Art. 2, paras. 6–7.

on Earth is impacted by anthropogenic activities. In order to secure its protection, it is important to see the atmosphere as a natural resource subject to the principles of conservation and sustainable use.

(2) Paragraph 1 acknowledges that the atmosphere is a “natural resource with a limited assimilation capacity”. The second part of paragraph 1 seeks to integrate conservation and development so as to ensure that modifications to the planet continue to enable the survival and wellbeing of organisms on Earth. It does so by reference to the proposition that the utilization of the atmosphere should be undertaken in a sustainable manner. This is inspired by the Commission’s formulations as reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses,¹⁰¹ and the articles on the law of transboundary aquifers.¹⁰²

(3) The term “utilization” is used broadly and in general terms evoking notions beyond actual exploitation. The atmosphere has been utilized in several ways. Likely, most of these activities that have been carried out so far are those conducted without a clear or concrete intention to affect atmospheric conditions. However, there have been certain activities the very purpose of which is to alter atmospheric conditions, such as weather modification. Some of the proposed technologies for intentional, large-scale modification of the atmosphere¹⁰³ are examples of the utilization of the atmosphere.

(4) The phrase “its utilization should be undertaken in a sustainable manner” in paragraph 1 is intended to be simple and reflects a paradigmatic shift towards viewing the atmosphere as a natural resource that ought to be utilized in a sustainable manner.

(5) Paragraph 2 builds upon the language of the International Court of Justice in its judgment in the *Gabčíkovo-Nagymaros Project* case, in which it referred to the “need to reconcile environmental protection and economic development”.¹⁰⁴ There are other relevant cases.¹⁰⁵ The reference to “protection of the atmosphere” as opposed to

¹⁰¹ Arts. 5–6. For the articles and commentaries thereto adopted by the Commission, see *Yearbook ... 1994*, vol. II (Part Two), chap. III, sect. E.

¹⁰² General Assembly resolution 63/124 of 11 December 2008, annex, arts. 4–5. For the articles and commentaries thereto adopted by the Commission, see *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

¹⁰³ See draft guideline 7 below.

¹⁰⁴ *Gabčíkovo-Nagymaros Project* (see footnote 84 above), p. 78, para. 140.

¹⁰⁵ In the 2006 order of the *Pulp Mills* case, the International Court of Justice highlighted “the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, *I.C.J. Reports 2006*, p. 113, at p. 133, para. 80); the 1998 WTO Appellate Body decision on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* stated that, “recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that article XX(g) of the [General Agreement on Tariffs and Trade] may be read as referring only to the conservation of exhaustible mineral or other non-living resources” (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 131, see also paras. 129 and 153); in the 2005 arbitral case of the *Iron Rhine Railway*, the Tribunal held as follows: “[t]here is considerable debate as to what, within the field of environmental law, constitutes ‘rules’ or ‘principles’: what is ‘soft’ law; and which environmental treaty law or principles have contributed to the development of customary international law. ... The emerging principles, whatever their current status, make reference to ... sustainable development. ... Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause signify harm to the environment there is a duty to prevent, or at least mitigate such harm. ... This duty, in the opinion of the Tribunal, has now become a principle of general international law”, *Iron Rhine*

“environmental protection” seeks to focus the paragraph on the subject matter of the present topic, which is the protection of the atmosphere.

Guideline 6

Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking fully into account the interests of present and future generations.

Commentary

(1) Although equitable and reasonable utilization of the atmosphere is an important element of sustainability, as reflected in draft guideline 5, it is considered important to state it as an autonomous principle. Like draft guideline 5, the present draft guideline is formulated at a broad level of abstraction and generality.

(2) The draft guideline is stated in general terms so as to apply the principle of equity¹⁰⁶ to the protection of the atmosphere as a natural resource that is to be shared by all. The first part of the sentence deals with “equitable and reasonable” utilization. The formulation that the “atmosphere should be utilized in an equitable and reasonable manner” draws, in part, upon article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 4 of the articles on the law of transboundary aquifers. It indicates a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation.

(3) The second part of the draft guideline addresses aspects of intra- and intergenerational equity.¹⁰⁷ In order to draw out the link between these two aspects, the phrase “taking fully into account the interests of” has been preferred to “for the benefit

Railway (see footnote 84 above), paras. 58–59; the 2013 Partial Award of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* states: “[t]here is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international ... arbitral decisions have addressed the need to manage natural resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of ‘sustainable development’ in *Gabčíkovo-Nagymaros*, referring to the ‘need to reconcile economic development with protection of the environment’; Permanent Court of Arbitration Award Series, *Indus Waters Kishenganga Arbitration (Pakistan v. India): Record of Proceedings 2010-2013*, Partial Award of 18 February 2013, para. 449. This was confirmed by the Final Award of 20 December 2013, para. 111.

¹⁰⁶ See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports* 1982, p. 18, at para. 71. On equity and its use in international law generally, see *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, *I.C.J. Reports* 1986, p. 554, at paras. 27–28 and 149; *North Sea Continental Shelf*, Judgment, *I.C.J. Reports* 1969, p. 3, at para. 85; J. Kokott, “Equity in international law”, in F.L. Toth, ed., *Fair Weather? Equity Concerns in Climate Change* (Abingdon and New York, Routledge, 2014), pp. 173–192; P. Weil, “L’équité dans la jurisprudence de la Cour internationale de Justice: Un mystère en voie de dissipation?”, in V. Lowe and M. Fitzmaurice, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, (Cambridge, Cambridge University Press, 1996), pp. 121–144; F. Francioni, “Equity in international law,” in R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. III (Oxford, Oxford University Press, 2013), pp. 632–642.

¹⁰⁷ C. Redgwell, “Principles and emerging norms in international law: intra- and inter-generational equity”, in C.P. Carlsone *et al.*, eds., *The Oxford Handbook on International Climate Change Law*, (Oxford, Oxford University Press, 2016), pp. 185–201; D. Shelton, “Equity” in Bodansky *et al.*, eds., *Oxford Handbook of International Environmental Law* (footnote 21 above), pp. 639–662; and E. Brown Weiss, “Intergenerational equity” in *Max Planck Encyclopaedia of Public International Law* (updated 2021), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>.

of” present and future generations of humankind. The words “the interests of”, and not “the benefit of”, have been used to signal the integrated nature of the atmosphere, the “exploitation” of which needs to take into account a balancing of interests to ensure sustenance for the Earth’s living organisms. The word “fully” seeks to demonstrate the importance of taking various factors and considerations into account, and it should be read with the seventh preambular paragraph, which recognizes that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account.

Guideline 7

Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should only be conducted with prudence and caution, and subject to any applicable rules of international law, including those relating to environmental impact assessment.

Commentary

- (1) Draft guideline 7 deals with activities the purpose of which is to alter atmospheric conditions. As the title of the draft guideline signals, it addresses only intentional modification on a large scale.
- (2) The term “activities aimed at intentional large-scale modification of the atmosphere” is taken in part from the definition of “environmental modification techniques” in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,¹⁰⁸ which refers to techniques for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.
- (3) These activities include what is commonly understood as “geo-engineering”, the methods and technologies of which encompass carbon dioxide removal and solar radiation management.¹⁰⁹ Activities related to carbon dioxide removal involve the ocean, land and technical systems and seek to remove carbon dioxide from the atmosphere through natural sinks or through chemical engineering. Proposed techniques for carbon dioxide removal include: soil carbon sequestration; carbon capture and sequestration; ambient air capture; ocean fertilization; ocean alkalinity enhancement; and enhanced weathering.
- (4) According to scientific experts, solar radiation management is designed to mitigate the negative impacts of climate change by intentionally lowering the surface temperatures of the Earth. Proposed activities here include: “albedo enhancement”, a method that involves increasing the reflectiveness of clouds or the surface of the Earth, so that more

¹⁰⁸ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

¹⁰⁹ IPCC, IPCC Expert Meeting on Geoengineering, Lima, Peru, 20-22 June 2011, Meeting Report. See, generally, the Oxford Geo-engineering Programme, “What is geoengineering?”, available at www.geoengineering.ox.ac.uk/what-is-geoengineering/what-is-geoengineering/; K. N. Scott, “International law in the anthropocene: responding to the geoengineering challenge”, *Michigan Journal of International Law*, vol. 34, No. 2 (2013), pp. 309-358, at p. 322; Steve Rayner, *et al.*, “The Oxford principles”, Climate Geoengineering Governance Working Paper No. 1 (University of Oxford, 2013), available from www.geoengineering-governance-research.org/perch/resources/workingpaper1rayneretaltheoxfordprinciples.pdf. See also, C. Armani, “Global experimental governance, international law and climate change technologies”, *International and Comparative Law Quarterly*, vol. 64, No. 4 (2015), pp. 875-904.

of the heat of the sun is reflected back into space; stratospheric aerosols, a technique that involves the introduction of small, reflective particles into the upper atmosphere to reflect sunlight before it reaches the surface of the Earth; and space reflectors, which entail blocking a small proportion of sunlight before it reaches the Earth.

(5) The term “activities” is broadly understood. However, there are certain other activities that are prohibited by international law, which are not covered by the present draft guideline, such as those prohibited by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques¹¹⁰ and Protocol I to the Geneva Conventions of 1949.¹¹¹ Accordingly, the present draft guideline applies only to “non-military” activities. Military activities involving deliberate modifications of the atmosphere are outside the scope of the present draft guideline.

(6) Likewise, other activities are governed by various regimes. For example, afforestation has been incorporated in the Kyoto Protocol to the United Nations Framework Convention on Climate Change¹¹² regime and in the Paris Agreement (art. 5, para. 2). Under some international legal instruments, measures have been adopted for regulating carbon capture and storage. The 1996 Protocol (London Protocol)¹¹³ to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter¹¹⁴ now includes an amended provision and annex, as well as new guidelines for controlling the dumping of wastes and other matter. To the extent that “ocean iron fertilization” and “ocean alkalinity enhancement” relate to questions of ocean dumping, the 1972 Convention and the London Protocol thereto are relevant.

(7) Activities aimed at intentional large-scale modification of the atmosphere have a significant potential for preventing, diverting, moderating or ameliorating the adverse effects of disasters and hazards, including drought, hurricanes, tornadoes, and enhancing crop production and the availability of water. At the same time, it is also recognized that they may have long-range and unexpected effects on existing climatic patterns that are not confined by national boundaries. As noted by the World Meteorological Organization with respect to weather modification: “The complexity of the atmospheric processes is such that a change in the weather induced artificially in one part of the world will necessarily have repercussions elsewhere ... Before undertaking an experiment on large-scale weather modification, the possible and desirable consequences must be carefully evaluated, and satisfactory international arrangements must be reached.”¹¹⁵

¹¹⁰ See art. 1.

¹¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, arts. 35, para. 3, and 55; see also Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (b) (iv).

¹¹² Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162.

¹¹³ 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996), *International Legal Materials*, vol. 36 (1997), p. 7.

¹¹⁴ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, D.C., 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 138.

¹¹⁵ See *Second Report on the Advancement of Atmospheric Science and Their Application in the Light of the Developments in Outer Space* (Geneva, World Meteorological Organization, 1963); see also Decision 8/7 (Earthwatch: assessment of outer limits) of the Governing Council of the United Nations Environment Programme, Part A (Provisions for co-operation between States in weather modification) of 29 April 1980.

(8) It is not the intention of the present draft guideline to stifle innovation and scientific advancement. Principles 7 and 9 of the Rio Declaration acknowledge the importance of new and innovative technologies and cooperation in these areas. At the same time, this does not mean that those activities always have positive effects.

(9) Accordingly, the draft guideline does not seek either to authorize or to prohibit such activities unless there is agreement among States to take such a course of action. It simply sets out the principle that such activities, if undertaken, should only be conducted with prudence and caution. The word “only” is intended to further enhance the prudent and cautious manner in which activities aimed at intentional large-scale modification may be undertaken, while the latter part of the draft guideline makes it clear that such activities are conducted subject to any applicable rules of international law.

(10) The reference to “prudence and caution” is inspired by the language of the International Tribunal for the Law of the Sea in the *Southern Blue Fin Tuna Case*,¹¹⁶ the *MOX Plant Case*,¹¹⁷ and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.¹¹⁸ The Tribunal stated in the *Land Reclamation* case: “Considering that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned.” The draft guideline is cast in hortatory language, aimed at encouraging the development of rules to govern such activities, within the regimes competent in the various fields relevant to atmospheric pollution and atmospheric degradation.

(11) The phrase “including those relating to environmental impact assessment” at the end of the draft guideline adds emphasis, to acknowledge the importance of an environmental impact assessment, as reflected in draft guideline 4. Activities aimed at intentional large-scale modification of the atmosphere should be conducted with full disclosure and in a transparent manner, and an environmental impact assessment provided for in draft guideline 4 may be required for that purpose. It is considered that a project involving intentional large-scale modification of the atmosphere may cause significant adverse impact, in which case an assessment is necessary for such an activity.

Guideline 8

International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and

¹¹⁶ *Southern Blue Fin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at para. 77. The Tribunal stated that “[c]onsidering that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”.

¹¹⁷ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at para. 84 (“[c]onsidering that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate”).

¹¹⁸ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at para. 99.

atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Commentary

(1) International cooperation is at the core of the whole set of the present draft guidelines. The concept of international cooperation has undergone a significant change in international law,¹¹⁹ and today is to a large extent built on the notion of common interests of the international community as a whole.¹²⁰ In this connection, it is recalled that the third preambular paragraph of the present draft guidelines considers that atmospheric pollution and atmospheric degradation are a common concern of humankind.

(2) Paragraph 1 of the present draft guideline provides the obligation of States to cooperate, as appropriate. In concrete terms, such cooperation is with other States and with relevant international organizations. The phrase “as appropriate” denotes a certain flexibility for States in carrying out the obligation to cooperate depending on the nature and subject matter required for cooperation, and on the applicable rules of international law. The forms in which such cooperation may occur may also vary depending on the situation and allow for the exercise of a certain margin of appreciation of States in accordance with the applicable rules of international law. It may be at the bilateral, regional or multilateral levels. States may also individually take appropriate action.

(3) In the *Pulp Mills* case, the International Court of Justice emphasized linkages attendant to the obligation to cooperate between the parties and the obligation of prevention. The Court noted that, “it is by cooperating that the States concerned can jointly manage the risks of damage to the environment ... so as to prevent the damage in question”.¹²¹

(4) International cooperation is found in several multilateral instruments relevant to the protection of the environment. Both the Stockholm Declaration and the Rio Declaration, in principle 24 and principle 27, respectively, stress the importance of cooperation, entailing good faith and a spirit of partnership.¹²² In addition, among some

¹¹⁹ W. Friedmann, *The Changing Structure of International Law* (London, Stevens & Sons, 1964), pp. 60–71; C. Leben, “The changing structure of international law revisited by way of introduction”, *European Journal of International Law*, vol. 3 (1997), pp. 399–408. See also, J. Delbrück, “The international obligation to cooperate – an empty shell or a hard law principle of international law? – a critical look at a much debated paradigm of modern international law”, H.P. Hestermeyer *et al.*, eds., *Coexistence, Cooperation and Solidarity* (Liber Amicorum Rüdiger Wolfrum), vol. 1 (Leiden, Martinus Nijhoff, 2012), pp. 3–16.

¹²⁰ B. Simma, “From bilateralism to community interests in international law”, *Collected Courses of The Hague Academy of International Law, 1994–VI*, vol. 250, pp. 217–384; Naoya Okuwaki, “On compliance with the obligation to cooperate: new developments of ‘international law for cooperation’”, in J. Eto, ed., *Aspects of International Law Studies* (Festschrift for Shinya Murase), (Tokyo, Shinzansha, 2015), pp. 5–46, at pp. 16–17 (in Japanese).

¹²¹ *Pulp Mills on the River Uruguay* (see footnote 79 above), p. 49, para. 77.

¹²² Principle 24 of the Stockholm Declaration states:

“International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.”

Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972 (see footnote 11 above).

Principle 27 of the Rio Declaration states:

of the existing treaties, the Vienna Convention for the Protection of the Ozone Layer provides, in its preamble, that the Parties to this Convention are “[a]ware that measures to protect the ozone layer from modifications due to human activities require international co-operation and action”. Furthermore, the preamble of the United Nations Framework Convention on Climate Change acknowledges that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response ...”, while reaffirming “the principle of sovereignty of States in international cooperation to address climate change”.¹²³ Under article 7 of the Paris Agreement, parties “recognize the importance and support and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change”.¹²⁴ The preamble of the Paris Agreement in turn affirms the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in the Agreement.¹²⁵

(5) In its work, the Commission has also recognized the importance of cooperation.¹²⁶ Cooperation could take a variety of forms. Paragraph 2 of the draft guideline stresses, in

“States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.”

Report of the United Nations Conference on the Human Environment, Rio de Janeiro, 3–14 June 1992, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No.

E.93.I.8 and corrigenda), resolution 1, annex I, chap. I.

¹²³ See also section 2 of Part XII of the United Nations Convention on the Law of the Sea, which provides for “Global and Regional Cooperation”, setting out “Cooperation on a global or regional basis” (art. 197), “Notification of imminent or actual damage” (art. 198), “Contingency plans against pollution” (art. 199), “Studies, research programmes and exchange of information and data” (art. 200) and “Scientific criteria for regulations” (art. 201). Section 2 of Part XIII on Marine Scientific Research of the United Nations Convention on the Law of the Sea provides for “International Cooperation”, setting out “Promotion of international cooperation” (art. 242), “Creation of favourable conditions” (art. 243) and “Publication and dissemination of information and knowledge” (art. 244).

¹²⁴ See art. 7, para. 6. See also arts. 6, para. 1, 7, para. 7, 8, para. 4, and 14, para. 3.

¹²⁵ Preamble, fourteenth para. See also paragraph 1 of article 8 of the Convention on the Law of the Non-navigational Uses of International Watercourses, on the general obligation to cooperate, which provides that:

“[W]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.”

¹²⁶ The articles on prevention of transboundary harm from hazardous activities (2001) provide in article 4, on cooperation, that:

“States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.”

Further, the articles on the law of transboundary aquifers (2008) provide in article 7, entitled “General obligation to cooperate”, that:

“1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.”

particular, the importance of cooperation in enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph 2 also highlights the exchange of information and joint monitoring.

(6) The Vienna Convention for the Protection of the Ozone Layer provides, in its preamble, that international cooperation and action should be “based on relevant scientific and technical considerations”, and in article 4, paragraph 1, on cooperation in the legal, scientific and technical fields, there is provision that:

The Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II. Such information shall be supplied to bodies agreed upon by the Parties.

Annex II to the Convention gives a detailed set of items for information exchange. Article 4, paragraph 2, provides for cooperation in the technical fields, taking into account the needs of developing countries.

(7) Article 4, paragraph 1, of the United Nations Framework Convention on Climate Change, regarding commitments, provides that:

All Parties ... shall (e) cooperate in preparing for adaptation to the impacts of climate change; ... (g) promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies; (h) promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies; (i) promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations.

(8) In this context, the obligation to cooperate includes, *inter alia* and as appropriate, exchange of information. In this respect, it may also be noted that article 9 of the Convention on the Law of the Non-navigational Uses of International Watercourses has a detailed set of provisions on exchange of data and information. Moreover, the Convention on Long-Range Transboundary Air Pollution provides in article 4 that the Contracting Parties “shall exchange information on and review their policies, scientific activities and technical measures aimed at combating, as far as possible, the discharge of air pollutants which may have adverse effects, thereby contributing to the reduction of air pollution including long-range transboundary air pollution”. The Convention also has detailed provisions on cooperation in the fields of research and development (art. 7); exchange of information (art. 8); and implementation and further development of the cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe (art. 9). Similarly, at the regional level, the Eastern Africa

Moreover, the draft articles on the protection of persons in the event of disasters (2016) provide, in draft article 7, a duty to cooperate. Draft article 7 provides that:

“In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.”

Regional Framework Agreement on Air Pollution (Nairobi Agreement, 2008)¹²⁷ and the West and Central Africa Regional Framework Agreement on Air Pollution (Abidjan Agreement, 2009)¹²⁸ have identical provisions on international cooperation. The parties agree to:

1.2 Consider the synergies and co-benefits of taking joint measures against the emission of air pollutants and greenhouse gases;

...

1.4 Promote the exchange of educational and research information on air quality management;

1.5 Promote regional cooperation to strengthen the regulatory institutions.

(9) In its work, the Commission has also recognized the importance of scientific and technical knowledge.¹²⁹ In the context of protecting the atmosphere, enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation is key. For addressing the adverse effects of climate change, the Paris Agreement recognizes the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change and envisages cooperation in such areas as (a) early warning systems; (b) emergency preparedness; (c) slow onset events; (d) events that may involve irreversible and permanent loss and damage; (e) comprehensive risk assessment and management; (f) risk insurance facilities, climate risk pooling and other insurance solutions; (g) non-economic losses; and (h) resilience of communities, livelihoods and ecosystems.¹³⁰

Guideline 9

Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

¹²⁷ Available at

https://web.archive.org/web/20111226174901/http://www.unep.org/urban_environment/PDFs/EA_BAQ2008-AirPollutionAgreement.pdf.

¹²⁸ Available at

https://web.archive.org/web/20111224143143/http://www.unep.org/urban_environment/PDFs/BAQ09_AgreementEn.Pdf.

¹²⁹ The second sentence of article 17, paragraph 4, of the articles on the law of transboundary aquifers provides that: "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance". In turn, the draft articles on the protection of persons in the event of disaster, provides in draft article 9, that "[f]or the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources". Further, draft article 10 (Cooperation for risk reduction) provides that "[c]ooperation shall extend to the taking of measures intended to reduce the risk of disasters".

¹³⁰ Art. 8.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Commentary

(1) Draft guideline 9 addresses “interrelationship among relevant rules”¹³¹ and seeks to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 are general in nature, while paragraph 3 places emphasis on the protection of groups that are particularly vulnerable to atmospheric pollution and atmospheric degradation. Atmospheric pollution and atmospheric degradation are defined in draft guideline 1 on the use of terms. Those terms focus on pollution and degradation caused “by humans”. That necessarily means that human activities governed by other fields of law have a bearing on the atmosphere and its protection. It is therefore important that conflicts and tensions between rules relating to the protection of the atmosphere and rules relating to other fields of international law are to the extent possible avoided. Accordingly, draft guideline 9 highlights the various techniques in international law for addressing tensions between legal rules and principles, whether they relate to a matter of interpretation or a matter of conflict. The formulation of draft guideline 9 draws upon the conclusions reached by the Commission’s Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law.¹³²

(2) Paragraph 1 addresses three kinds of legal processes, namely the identification of the relevant rules, their interpretation and their application. The phrase “and with a view to avoiding conflicts” at the end of the first sentence of the paragraph signals that “avoiding conflicts” is one of the principal purposes of the paragraph. It is, however, not the exclusive purpose of the draft guideline. The paragraph is formulated in the passive form, in recognition of the fact that the process of identification, interpretation and application involves not only States but also others including international organizations, as appropriate.

(3) The phrase “should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations” draws upon the Commission’s Study Group conclusions on fragmentation. The term “identified” is particularly relevant in relation to rules arising from treaty obligations and other sources of international law. In coordinating rules, certain preliminary steps need to be taken that pertain to identification, for example, a determination of whether two rules address “the

¹³¹ See draft article 10 (on interrelationship) of resolution 2/2014 on the declaration of legal principles relating to climate change of the International Law Association, *Report of the Seventy-sixth Conference held in Washington D.C., August 2014*, p. 26; S. Murase (Chair) and L. Rajamani (Rapporteur), Report of the Committee on the Legal Principles Relating to Climate Change, *ibid.*, pp. 330–378, at pp. 368–377.

¹³² *Yearbook ... 2006*, vol. II (Part Two), para. 251. See conclusion (2) on “relationships of interpretation” and “relationships of conflict”. See, for the analytical study, “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1).

same subject matter”, and which rule should be considered *lex generalis* or *lex specialis* and *lex anterior* or *lex posterior*, and whether the *pacta tertiis* rule applies.

(4) The first sentence makes specific reference to the principles of “harmonization and systemic integration”, which were accorded particular attention in the conclusions of the work of the Study Group on fragmentation. As noted in conclusion (4) on harmonization, 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”. Moreover, under conclusion (17), systemic integration denotes that “whatever their subject matter, treaties are a creation of the international legal system”. They should thus be interpreted taking into account other international rules and principles.

(5) The second sentence of paragraph 1 seeks to locate the paragraph within the relevant rules set forth in the 1969 Vienna Convention on the Law of Treaties,¹³³ including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law. Article 31, paragraph 3 (c), of the 1969 Convention, is intended to guarantee a “systemic interpretation”, requiring “any relevant rules of international law applicable in the relations between the parties” to be taken into account.¹³⁴ 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”.¹³⁵ Article 30 of the 1969 Convention provides rules to resolve a conflict, if the above principle of systemic integration does not work effectively in a given circumstance. Article 30 provides for conflict rules of *lex specialis* (para. 2), of *lex posterior* (para. 3) and of *pacta tertiis* (para. 4).¹³⁶ The phrase “principles and rules of customary international law” in the second sentence of paragraph 1 covers such principles and rules of customary international law as are relevant to the identification, interpretation and application of relevant rules.¹³⁷ While the last sentence of paragraph 1 refers to “principles” as well as “rules” of customary international law, it is without prejudice to the relevance that “general principles of law” might have in relation to the draft guidelines.

(6) The reference to “including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law” highlights the practical importance of these three areas in their relation to the protection of the atmosphere. The specified areas have close connection with the rules of international law relating to the protection of the atmosphere in terms of treaty practice, jurisprudence and doctrine.¹³⁸ Other fields of law, which might be equally relevant, have not been

¹³³ United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

¹³⁴ See, e.g., WTO, Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 158. See also *Al-Adsani v. the United Kingdom*, Application No. 35763/97, ECHR 2001-XI, para. 55.

¹³⁵ P. Sands, “Treaty, custom and the cross-fertilization of international law”, *Yale Human Rights and Development Law Journal*, vol. 1 (1998), p. 95, para. 25; C. McLachlan, “The principle of systemic integration and article 31 (3) (c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279; O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1 (Oxford, Oxford University Press, 2011), pp. 828–829.

¹³⁶ *Ibid.*, pp. 791–798.

¹³⁷ It may be noted that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh Agreement establishing the World Trade Organization, United Nations, *Treaty Series*, vol. 1869, No. 31874, p. 3, annex 2, p. 401) provides in article 3, paragraph 2, that “[t]he dispute settlement system of the WTO ... serves ... to clarify the existing provisions of those [covered] agreements in accordance with *customary* rules of interpretation of public international law” (emphasis added).

¹³⁸ See International Law Association, resolution 2/2014 on the declaration of legal principles relating to climate change, draft article 10 (on interrelationship) (footnote 131 above); A. Boyle, “Relationship between international environmental law and other branches of international law”,

overlooked and the list of relevant fields of law is not intended to be exhaustive. Furthermore, nothing in draft guideline 9 should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere or vice versa.

(7) With respect to international trade law, the concept of mutual supportiveness has emerged to help reconcile that law and international environmental law, which relates in part to the protection of the atmosphere. The 1994 Marrakesh Agreement establishing the World Trade Organization¹³⁹ provides, in its preamble, that its aim is to reconcile trade and development goals with environmental needs “in accordance with the objective of sustainable development”.¹⁴⁰ The WTO Committee on Trade and Environment began pursuing its activities “with the aim of making international trade and environmental policies mutually supportive”,¹⁴¹ and in its 1996 report to the Singapore Ministerial Conference, the Committee reiterated its position 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”.¹⁴² As the concept of “mutual supportiveness” has become gradually regarded as “a legal standard internal to the WTO”,¹⁴³ the 2001 Doha Ministerial Declaration expresses the conviction of States that “acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive”.¹⁴⁴ Mutual supportiveness is considered in international trade law as part of the principle of harmonization in interpreting conflicting rules of different treaties. Among a number of relevant WTO dispute settlement cases, the *United States – Standards for Reformulated and Conventional Gasoline* case in 1996 is most notable in that the Appellate Body refused to separate the rules of the General Agreement on Tariffs and Trade from other rules of interpretation in public international law, by stating that “the *General Agreement* is not to be read in clinical isolation from public international law” (emphasis added).¹⁴⁵

in Bodansky *et al.*, *The Oxford Handbook of International Environmental Law* (footnote 21 above), pp. 126–146.

¹³⁹ United Nations, *Treaty Series*, vols. 1867–1869, No. 31874.

¹⁴⁰ *Ibid.*, vol. 1867, No. 31874, p. 154.

¹⁴¹ Trade Negotiations Committee, decision of 14 April 1994, MTN.TNC/45(MIN), annex II, p. 17.

¹⁴² WTO, Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 November 1996), para. 167.

¹⁴³ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003); R. Pavoni, “Mutual supportiveness as a principle of interpretation and law-making: a watershed for the ‘WTO-and-competing regimes’ debate?”, *European Journal of International Law*, vol. 21 (2010), pp. 651–652. See also S. Murase, “Perspectives from international economic law on transnational environmental issues”, *Collected Courses of The Hague Academy of International Law*, vol. 253 (Leiden, Martinus Nijhoff, 1996), pp. 283–431, reproduced in S. Murase, *International Law: An Integrative Perspective on Transboundary Issues* (Tokyo, Sophia University Press, 2011), pp. 1–127; and S. Murase, “Conflict of international regimes: trade and the environment”, *ibid.*, pp. 130–166.

¹⁴⁴ Adopted on 14 November 2001 at the fourth session of the WTO Ministerial Conference in Doha, WT/MIN(01)/DEC/1, para. 6. The Hong Kong Ministerial Declaration of 2005 reaffirmed that “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. 31).

¹⁴⁵ WTO, Appellate Body report, *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17. See also S. Murase, “Unilateral measures and the WTO dispute settlement” (discussing the *Gasoline* case), in S.C. Tay and D.C. Esty, eds., *Asian Dragons and Green Trade: Environment, Economics and International Law* (Singapore, Times Academic Press, 1996), pp. 137–144.

(8) Similar trends and approaches appear in international investment law. Free trade agreements, which contain a number of investment clauses,¹⁴⁶ and numerous bilateral investment treaties¹⁴⁷ also contain standards relating to the environment, which have been confirmed by the jurisprudence of the relevant dispute settlement bodies. Some investment tribunals have emphasized that investment treaties “cannot be read and interpreted in isolation from public international law”.¹⁴⁸

(9) The same is the case with the law of the sea. The protection of the atmosphere is intrinsically linked to the oceans and the law of the sea owing to the close physical interaction between the atmosphere and the oceans. The Paris Agreement notes in its preamble “the importance of ensuring the integrity of all ecosystems, including oceans”. This link is also borne out by the United Nations Convention on the Law of the Sea,¹⁴⁹ which defines the “pollution of the marine environment”, in article 1, paragraph 1 (4), in such a way as to include all sources of marine pollution, including atmospheric pollution from land-based sources and vessels.¹⁵⁰ It offers detailed provisions on the protection and preservation of the marine environment through Part XII, in particular articles 192, 194, 207, 211 and 212. There are a number of regional conventions regulating marine pollution from land-based sources.¹⁵¹ IMO has sought to regulate vessel-source pollution in its efforts to supplement the provisions of the Convention¹⁵² and to combat climate

¹⁴⁶ See, for example, Agreement Between Canada, the United Mexican States, and the United States of America, 1 July 2020, art. 1.3 and chap. 14 (“Investment”), available from the website of the Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

¹⁴⁷ There are various model bilateral investment treaties (BITs), such as: Canada Model BIT of 2004, available from www.italaw.com; Colombia Model BIT of 2007, available from www.italaw.com; United States Model BIT of 2012, available from www.italaw.com; Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (IISD) of 2005, in H. Mann *et al.*, *IISD Model International Agreement on Investment for Sustainable Development*, 2nd ed. (Winnipeg, 2005), art. 34. See also United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2015), pp. 91–121, available at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf; P. Muchlinski, “Negotiating new generation international investment agreements: new sustainable development-oriented initiatives”, in S. Hindelang and M. Krajewski, eds., *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, (Oxford, Oxford University Press, 2016), pp. 41–64.

¹⁴⁸ *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, award, 15 April 2009, para. 78.

¹⁴⁹ Prior to the Convention, the only international instrument of significance was the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Moscow, 5 August 1963, United Nations, *Treaty Series*, vol. 480, No. 6964, p. 43).

¹⁵⁰ M.H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Dordrecht, Martinus Nijhoff, 1991), pp. 41–42.

¹⁵¹ For example, the Convention for the Protection of the Marine Environment of the North-East Atlantic (United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, at p. 71, art. 1 (e)); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992, *ibid.*, vol. 1507, No. 25986, p. 166, at p. 169, art. 2, para. 2); the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (*ibid.*, vol. 1328, No. 22281, p. 105, at p. 121, art. 4, para. 1 (b)); the Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources (Quito, 22 July 1983, *ibid.*, vol. 1648, No. 28327, p. 73, at p. 90, art. II (c)); and the Protocol for the Protection of the Marine Environment against Pollution from Land-based Sources to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 21 February 1990, *ibid.*, vol. 2399, No. 17898, p. 3, at p. 40, art. III).

¹⁵² 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

change.¹⁵³ The effective implementation of the applicable rules of the law of the sea could help to protect the atmosphere. Similarly, the effective implementation of the rules on the protection of the environment could protect the oceans.

(10) As for international human rights law, environmental degradation, including air pollution, climate change and ozone layer depletion, “has the potential to affect the realization of human rights”.¹⁵⁴ The link between human rights and the environment, including the atmosphere, is acknowledged in practice. The Stockholm Declaration recognizes, in its principle 1, that everyone “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”.¹⁵⁵ The Rio Declaration of 1992 outlines, 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”.¹⁵⁶ 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” and provides that the parties are determined “to protect man and his environment against air pollution” of a certain magnitude.¹⁵⁷ 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” in accordance with the Convention and Protocols to which they are a party.¹⁵⁸ Similarly, 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”.¹⁵⁹

Pollution from Ships (*ibid.*, vol. 1340, No. 22484, p. 61), which regulates, *inter alia*, emissions of SO_x and NO_x. 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 on 31 December 1988); and annex VI on regulations for the prevention of air pollution from ships (entry into force on 19 May 2005).

¹⁵³ S. Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (Dordrecht, Springer, 2015), pp. 107–126; S. Karim and S. Alam, “Climate change and reduction of emissions of greenhouse gases from ships: an appraisal”, *Asian Journal of International Law*, vol. 1 (2011), pp. 131–148; Y. Shi, “Are greenhouse gas emissions from international shipping a type of marine pollution?” *Marine Pollution Bulletin*, vol. 113 (2016), pp. 187–192; J. Harrison, “Recent developments and continuing challenges in the regulation of greenhouse gas emissions from international shipping” (2012), Edinburgh School of Law Research Paper No. 2012/12, p. 20. Available from <https://ssrn.com/abstract=2037038>.

¹⁵⁴ 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), para. 15. See also Human Rights Council resolution 19/10 of 19 April 2012 on human rights and the environment.

¹⁵⁵ See L.B. Sohn, “The Stockholm Declaration on the Human Environment” (footnote 23 above), pp. 451–455.

¹⁵⁶ F. Francioni, “Principle 1: human beings and the environment”, in J.E. Viñuales, ed., *The Rio Declaration on Environment and Development: A Commentary* (Oxford, Oxford University Press, 2015), pp. 93–106, at pp. 97–98.

¹⁵⁷ United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, at p. 219, arts. 1 and 2.

¹⁵⁸ *Ibid.*, vol. 1513, No. 26164, p. 293, at p. 326, art. 2.

¹⁵⁹ Art. 1.

(11) In this regard, relevant human rights include “the right to life”,¹⁶⁰ “the right to private and family life”¹⁶¹ and “the right to property”,¹⁶² as well as the other rights listed in the eleventh preambular paragraph of the Paris Agreement:

[C]limate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

(12) Where a specific right to environment exists in human rights conventions, the relevant courts and treaty bodies apply them, including the right to health. In order for international human rights law to contribute to the protection of the atmosphere, however, certain core requirements must be fulfilled.¹⁶³ First, as international human rights law remains “a personal-injury-based legal system”,¹⁶⁴ a direct link between atmospheric pollution or degradation that impairs the protected right and an impairment of a protected right must be established. Second, the adverse effects of atmospheric pollution or degradation must attain a certain threshold if they are to fall within the scope of international human rights law. The assessment of such minimum standards 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 the causal link between an action or omission of a State, on the one hand, and atmospheric pollution or degradation, on the other hand.

(13) One of the difficulties in the relationship between the rules of international law relating to the atmosphere and human rights law is the “disconnect” in their application *ratione personae*. While the rules of international law relating to the atmosphere apply 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.¹⁶⁵ Thus, where an environmentally harmful activity in one State affects

¹⁶⁰ Art. 6 of the International Covenant on Civil and Political Rights of 1966 (New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171); art. 6 of the Convention on the Rights of the Child of 1989 (New York, 20 December 1989, *ibid.*, vol. 1577, No. 27531, p. 3); art. 10 of the Convention on the Rights of Persons with Disabilities of 2006 (New York, 20 December 2006, *ibid.*, vol. 2515, No. 44910, p. 3); art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Rome, 4 November 1950, *ibid.*, vol. 213, No. 2889, p. 221, hereinafter, “European Convention on Human Rights”); art. 4 of the American Convention on Human Rights of 1969 (San José, 22 November 1969, *ibid.*, vol. 1144, No. 14668, p. 171); and art. 4 of the African Charter on Human and Peoples’ Rights of 1981 (Nairobi, 27 June 1981, *ibid.*, vol. 1520, No. 26363, p. 217).

¹⁶¹ 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.

¹⁶² Art. 1 of Protocol No. 1 to the European Convention on Human Rights (*ibid.*, vol. 213, No. 2889, p. 221); art. 21 of the American Convention on Human Rights; and art. 14 of the African Charter on Human and Peoples’ Rights. See D. Shelton, “Human rights and the environment: substantive rights” in Fitzmaurice, Ong and Merkouris, eds., *Research Handbook on International Environmental Law*, (footnote 21 above), pp. 265–283, at pp. 265, 269–278.

¹⁶³ P.-M. Dupuy and J.E. Viñuales, *International Environmental Law* (Cambridge, Cambridge University Press, 2015), pp. 320–329.

¹⁶⁴ *Ibid.*, pp. 308–309.

¹⁶⁵ 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. See A.

persons in another State, the question of the interpretation of “jurisdiction” in the context of human rights obligations arises. In interpreting and applying the notion, regard may be had to the object and purpose of human rights treaties. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice said, when addressing the issue of extraterritorial jurisdiction, “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”.¹⁶⁶

(14) One possible consideration is the relevance of the principle of non-discrimination. Some authors maintain that it may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intra-boundary pollution. They maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution.¹⁶⁷ Furthermore, if and insofar as the relevant human rights norms have extraterritorial effect,¹⁶⁸ they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner.

(15) In contrast to paragraph 1, which addresses identification, interpretation and application, paragraph 2 deals with the situation in which States wish to develop new rules. The paragraph signals a general desire to encourage States, when engaged in negotiations involving the creation of new rules, to take into account the systemic relationships that exist between rules of international law relating to the atmosphere and rules in other legal fields.

(16) Paragraph 3 highlights the plight of those in vulnerable situations because of atmospheric pollution and atmospheric degradation. It has been formulated to make a direct reference to atmospheric pollution and atmospheric degradation. The reference to paragraphs 1 and 2 captures both the aspects of “identification, interpretation and application”, on the one hand, and “development”, on the other hand. The phrase “special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation” underlines the broad scope of the consideration to be given to the situation of vulnerable persons and groups, covering both aspects of the present topic, namely “atmospheric pollution” and “atmospheric

Boyle, “Human rights and the environment: where next?”, *European Journal of International Law*, vol. 23 (2012), pp. 613–642, at pp. 633–641.

¹⁶⁶ *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.

¹⁶⁷ Boyle, “Human rights and the environment” (see footnote 165 above), pp. 639–640.

¹⁶⁸ B. Simma and P. Alston, “Sources of human rights law: custom, *jus cogens* and general principles”, *Australian Year Book of International Law*, vol. 12 (1988), pp. 82–108; V. Dimitrijevic, “Customary law as an instrument for the protection of human rights”, Working Paper, No. 7 (Milan, Istituto Per Gli Studi Di Politica Internazionale (ISPI), 2006), pp. 3–30; B. Simma, “Human rights in the International Court of Justice: are we witnessing a sea change?”, in D. Alland et al., eds., *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden, Martinus Nijhoff, 2014), pp. 711–737; and H. Thirlway, “International law and practice: human rights in customary law: an attempt to define some of the issues,” *Leiden Journal of International Law*, vol. 28 (2015), pp. 495–506.

degradation”. It was not considered useful to refer in the text to “human rights”, or even to “rights” or “legally protected interests”.

(17) The second sentence of paragraph 3 gives examples of groups that may be found in vulnerable situations in the context of atmospheric pollution and atmospheric degradation. The World Health Organization has noted that: “[a]ll 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.”¹⁶⁹ In the Sustainable Development Goals adopted by the General Assembly in its 2030 Agenda for Sustainable Development, atmospheric pollution is addressed in Goals 3.9 and 11.6, which call, in particular, for a substantial reduction in the number of deaths and illnesses from air pollution, and for special attention to ambient air quality in cities.¹⁷⁰

(18) The phrase in the second sentence of paragraph 3 “may include, *inter alia*” denotes that the examples given are not necessarily exhaustive. Indigenous peoples are, as was declared in the Report of the Indigenous Peoples’ Global Summit on Climate Change, “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”.¹⁷¹ People of the least developed countries are also placed in a particularly vulnerable situation as they often live in extreme poverty, without access to basic infrastructure services and to adequate medical and social protection.¹⁷² People of low-lying areas and small-island developing States affected by sea-level rise are subject to the potential loss of land, leading to displacement and, in some cases, forced migration. Inspired by the preamble of the Paris Agreement, in addition to the groups specifically indicated in paragraph 3 of draft guideline 9, other groups of potentially particularly vulnerable people include local communities, migrants, women, children, persons with disabilities and also the elderly, who are often seriously affected by atmospheric pollution and atmospheric degradation.¹⁷³

¹⁶⁹ World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (Geneva, 2009), p. 2.

¹⁷⁰ See B. Lode, P. Schönberger and P. Toussaint, “Clean air for all by 2030? Air quality in the 2030 Agenda and in international law”, *Review of European, Comparative and International Environmental Law*, vol. 25 (2016), pp. 27–38. 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).

¹⁷¹ “Report of the Indigenous Peoples’ Global Summit on Climate Change, 20–24 April 2009, Anchorage, Alaska”, p. 12. See R.L. Barsh, “Indigenous peoples”, in Bodansky *et al.*, *The Oxford Handbook of International Environmental Law*, (footnote 21 above), pp. 829–852; B. Kingsbury, “Indigenous peoples”, in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2012), vol. V, pp. 116–133; and H.A. Strydom, “Environment and indigenous peoples”, in *ibid.*, vol. III, pp. 455–461.

¹⁷² World Bank Group Climate Change Action Plan, 7 April 2016, para. 104, available from <http://pubdocs.worldbank.org/en/677331460056382875/WBG-Climate-Change-Action-Plan-public-version.pdf>.

¹⁷³ The Committee on the Elimination of Discrimination against Women has a general recommendation on “gender-related dimensions of disaster risk reduction and climate change”; see <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx>. Along with women and children, the elderly and persons with disabilities are usually mentioned as vulnerable people. See World Health Organization, *Protecting Health from Climate Change ...* (footnote 169 above) and the World Bank Group Climate Change Action Plan (footnote 172 above). The Inter-American Convention on Protecting the Human Rights of Older Persons of 2015 (*General Assembly of the Organization of American States, Forty-fifth Regular Session, Proceedings*, vol. I (OEA/Ser.P/XLV-O.2), pp. 11–38) provides, in article 25 (right to a healthy environment), that:

Guideline 10

Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.
2. States should endeavour to give effect to the recommendations contained in the present draft guidelines.

Commentary

(1) Draft guideline 10 deals with national implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. Compliance at the international level is the subject of draft guideline 11. These two draft guidelines are interrelated. The term “implementation” is used in the present draft guideline to refer to measures that States may take to make treaty provisions effective at the national level, including implementation in their national laws.¹⁷⁴

(2) The two paragraphs of the draft guideline address, on one hand, existing obligations under international law and, on the other hand, recommendations contained in the draft guidelines.

(3) The term “[n]ational implementation” denotes the measures that parties may take to make international obligations operative at the national level, pursuant to the national constitution and legal system of each State.¹⁷⁵ National implementation may take many forms, including “legislative, administrative, judicial and other actions”. The word “may” reflects the discretionary nature of the provision. The reference to “administrative” actions is used, rather than “executive” actions, as it is more encompassing. It covers possible implementation at lower levels of governmental administration. The term “other actions” is a residual category covering all other forms of national implementation. The term “national implementation” also applies to obligations of regional organizations such as the European Union.¹⁷⁶

(4) The use of the term “obligations” in paragraph 1 does not refer to new obligations for States, but rather refers to existing obligations that States already have under international law. Thus, the phrase “including those [obligations] referred to in the present draft guidelines” was chosen, and the expression “referred to” highlights the fact that the

“Older persons have the right to live in a healthy environment with access to basic public services. To that end, States Parties shall adopt appropriate measures to safeguard and promote the exercise of this right, inter alia: a. To foster the development of older persons to their full potential in harmony with nature; b. To ensure access for older persons, on an equal with others, to basic public drinking water and sanitation services, among others.”

¹⁷⁴ See generally, P. Sands and J. Peel, with A. Fabra and R. MacKenzie, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), pp. 144–196; E. Brown Weiss and H.K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords*, (Cambridge, Massachusetts, MIT Press, 1998), see “A framework for analysis”, pp. 1–18, at p. 4.

¹⁷⁵ C. Redgwell, “National implementation”, in Bodansky *et al.*, *The Oxford Handbook of International Environmental Law* (footnote 21 above), pp. 923–947.

¹⁷⁶ See L. Krämer, “Regional economic integration organizations: the European Union as an example”, in Bodansky *et al.*, *The Oxford Handbook of International Environmental Law* (footnote 21 above), pp. 854–877 (on implementation, pp. 868–870).

draft guidelines do not as such create new obligations and are not dealing comprehensively with the various issues related to the topic.

(5) The draft guidelines refer to obligations of States under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, namely, the obligation to protect the atmosphere (draft guideline 3), the obligation to ensure that an environmental impact assessment is carried out (draft guideline 4) and the obligation to cooperate (draft guideline 8).¹⁷⁷ Given that States have these obligations, it is clear that they need to be faithfully implemented.

(6) The reference to “the recommendations contained in the present draft guidelines” in paragraph 2 is intended to distinguish such recommendations from “obligations” as referred to in paragraph 1. The expression “recommendations” was considered appropriate as it would be consistent with the draft guidelines, which use the term “should”.¹⁷⁸ This is without prejudice to any normative content that the draft guidelines have under international law. Paragraph 2 provides that States should endeavour to give effect to the recommended practices contained in the draft guidelines.

(7) Moreover, even though States sometimes resort to extraterritorial application of national law to the extent permissible under international law,¹⁷⁹ it was not considered necessary to address the matter for the purposes of the present draft guidelines.¹⁸⁰ It was considered that the matter of extraterritorial application of national law by a State raised a host of complex questions with far-reaching implications for other States and for their relations with each other.

Guideline 11 Compliance

1. States are required to abide by their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used as appropriate, in accordance with the relevant agreements:

¹⁷⁷ Even the obligation to cooperate sometimes requires national implementation. According to draft guideline 8, paragraph 2, “[c]ooperation could include exchange of information and joint monitoring”, which normally require national implementing legislation.

¹⁷⁸ See, for example, draft guidelines 5, 6, 7, 9, and 12, para. 2.

¹⁷⁹ The relevant precedents of extraterritorial application of national law include: (a) *Tuna-Dolphin* cases under the General Agreement on Tariffs and Trade (The “extra-jurisdictional application” of the United States Marine Mammal Protection Act not being consistent with article XX of the General Agreement, Panel report, *United States – Restrictions on Imports of Tuna*, DS21/R-39S/155, 3 September 1991 (Tuna-Dolphin-I, not adopted), paras. 5.27–5.29; 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), para. 5.32); (b) WTO *Gasoline* case (On the extraterritorial application of the United States Clean Air Act, WTO, Appellate Body report, *United States – Standards of Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 22 April 1996); (c) European Court of Justice judgment, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate*, 21 December 2011 (On the extraterritorial application of the European Union Aviation Directive 2008/101/EC); and (d) Singapore Transboundary Haze Pollution Act of 2014, providing for extraterritorial jurisdiction based on the “objective territorial principle” (Parliament of Singapore, *Official Reports*, No. 12, Session 2, 4 August 2014, paras. 5–6). See Murase, “Perspectives from international economic law on transnational environmental issues” (footnote 143 above), pp. 349–372.

¹⁸⁰ See the Special Rapporteur’s fifth report (A/CN.4/711), para. 31.

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Commentary

(1) Draft guideline 11, which complements draft guideline 10 on national implementation, refers to compliance at the international level. The use of the term “compliance” is not necessarily uniform in agreements, or in the literature. The term “compliance” is used in the present draft guideline to refer to mechanisms or procedures at the international level that verify whether States in fact adhere to the obligations of an agreement or other rules of international law.

(2) Paragraph 1 reflects, in particular, the principle *pacta sunt servanda*. The purpose of the formulation “obligations under international law” relating to the protection of the atmosphere is to harmonize the language used, in paragraph 1, with the language used throughout the draft guidelines. The broad nature of the formulation “obligations under international law” was considered to also better account for the fact that treaty rules constituting obligations may, in some cases, be binding only on the parties to the relevant agreements, while others may codify or lead to the crystallization of rules of international law, or give rise to a general practice that is accepted as law,¹⁸¹ thus generating a new rule of customary international law, with consequent legal effects for non-parties. The phrase “relevant agreements” to which the States are parties has been used to avoid narrowing the scope of the provision only to multilateral environmental agreements, when such obligations can exist in other agreements.¹⁸² The general character of paragraph 1 also appropriately serves as an introduction to paragraph 2.

(3) Paragraph 2 deals with the facilitative or enforcement procedures that may be used by compliance mechanisms.¹⁸³ The wording of the opening phrase of the chapeau “[t]o

¹⁸¹ See conclusion 11 of the conclusions on the identification of customary international law and commentary thereto, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chap. V, pp. 143-146.

¹⁸² This reflection of State practice would include multilateral or regional or other trade agreements, for example, that may also contemplate environmental protection provisions including exceptions such as those under article XX of the General Agreement on Tariffs and Trade or even so-called environmental “side agreements”, such as the North American Agreement on Environmental Cooperation.

¹⁸³ Non-compliance procedures have been widely adopted in multilateral environmental agreements relating to the protection of the atmosphere, including the following: (a) Convention on Long-Range Transboundary Air Pollution and its subsequent Protocols: see E. Milano, “Procedures and mechanisms for review of compliance under the 1979 Long-Range Transboundary Air Pollution Convention and its Protocols”, in T. Treves *et al.*, eds., *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague, T.M.C. Asser Press, 2009), pp. 169–180; (b) the Montreal Protocol on the Substances that Deplete the Ozone Layer (United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3, and [UNEP/OzL.Pro.4/15](#)); F. Lesniewska, “Filling the holes: the Montreal Protocol’s non-compliance mechanisms”, in Fitzmaurice, Ong and Merkouris, eds., *Research Handbook on International Environmental Law* (footnote 21 above), pp. 471–489; (c) Convention on Environmental Impact Assessment in a Transboundary Context; (d) Kyoto Protocol to the United Nations Framework Convention on Climate Change, and decision 24/CP.7 ([FCCC/CP/2001/13/Add.3](#)); J. Brunnée, “Climate change and compliance and enforcement processes”, in R. Rayfuse and S.V. Scott, eds.,

achieve compliance” is aligned with formulations in existing agreements addressing compliance mechanisms. The phrase “may be used as appropriate” emphasizes the differing circumstances and contexts in which facilitative or enforcement procedures could be deployed to help foster compliance. The disjunctive word “or” indicates that facilitative or enforcement procedures may be considered as alternatives by the competent organ established under the agreement concerned. The phrase “in accordance with the relevant agreements” is used at the end of the chapeau, so as to emphasize that facilitative or enforcement procedures are those provided for under agreements to which States are parties, and that these procedures will operate in accordance with such agreements.

(4) Besides the chapeau, paragraph 2 comprises two subparagraphs, (a) and (b). In both subparagraphs, the word “may” has been used before “include” to provide States and the competent organ established under the agreement concerned with flexibility to use existing facilitative or enforcement procedures.

(5) Subparagraph (a) employs the phrase “in cases of non-compliance”¹⁸⁴ and refers to “the States concerned”, avoiding the expression “non-complying States”. Facilitative procedures may include providing “assistance” to States, since some States may be willing to comply but unable to do so for lack of capacity. Thus, facilitative measures are provided in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned are assisted to comply with their obligations under international law.¹⁸⁵ The last part of that sentence, which references “taking into account their capabilities and special conditions”, was considered necessary, in recognition of the specific challenges that developing and least developed countries often face in the discharge of obligations relating to environmental protection. This is due to, most notably, a general lack of capacity, which can sometimes be mitigated through the receipt of external support enabling capacity-building to facilitate compliance with their obligations under international law.

(6) Subparagraph (b) speaks of enforcement procedures, which may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.¹⁸⁶ Enforcement procedures, in

International Law in the Era of Climate Change (Cheltenham: Edward Elgar, 2012), pp. 290–320; (e) the Paris Agreement; D. Bodansky, “The Paris Climate Change Agreement: a new hope?”, *American Journal of International Law*, vol. 110 (2016), pp. 288–319.

¹⁸⁴ This is based on the Montreal Protocol on Substances that Deplete the Ozone Layer, which in art. 8 uses the phrase “Parties found to be in non-compliance” (United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 40).

¹⁸⁵ M. Koskenniemi, “Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol”, *Yearbook of International Environmental Law*, vol. 3 (1992), pp. 123–162; D.G. Victor, “The operation and effectiveness of the Montreal Protocol’s non-compliance procedure”, in Victor, K. Raustiala and E. B. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, Massachusetts, MIT Press, 1998), pp. 137–176; O. Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer* (The Hague, Kluwer Law International, 2001), pp. 178–179; Dupuy and Viñuales, *International Environmental Law* (footnote 163 above), p. 285 *et seq.*

¹⁸⁶ G. Ulfstein and J. Werksman, “The Kyoto compliance system: towards hard enforcement”, in O. Schram Stokke, J. Hovi and G. Ulfstein, eds., *Implementing the Climate Change Regime: International Compliance* (London, Earthscan, 2005), pp. 39–62; S. Urbinati, “Procedures and mechanisms relating to compliance under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change”, in Treves *et al.*, *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (footnote 183 above), pp. 63–84; S. Murase, “International lawmaking for the future framework on climate change: a WTO/GATT Model”, in Murase, *International Law: An Integrative Perspective on Transboundary Issues* (footnote 143 above), pp. 173–174.

contrast to facilitative procedures, aim to achieve compliance by imposing a penalty on the State concerned in case of non-compliance. At the end of the sentence, the term “enforcement measures” was employed rather than the term “sanctions” in order to avoid any confusion with the possible negative connotation associated with the term “sanctions”. The enforcement procedures referred to in subparagraph (b) should be distinguished from any invocation of international responsibility of States, hence these procedures should be adopted only for the purpose of leading the States concerned to return to compliance in accordance with the relevant agreements to which they are party as referred to in the chapeau.¹⁸⁷

Guideline 12

Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.
2. Since such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of scientific and technical experts.

Commentary

(1) Draft guideline 12 concerns dispute settlement. Paragraph 1 describes the general obligation of States to settle their disputes by peaceful means. The expression “between States” clarifies that the disputes being referred to in the paragraph are inter-State in nature. The paragraph does not refer to Article 33, paragraph 1, of the Charter of the United Nations, but the intent is not to downplay the significance of the various pacific means of settlement mentioned in that provision, such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to other peaceful means that may be preferred by the States concerned, nor the principle of choice of means.¹⁸⁸ Paragraph 1 is not intended to interfere with or displace existing dispute settlement provisions in treaty regimes, which will continue to operate in their own terms. The main purpose of the present paragraph is to reaffirm the principle of peaceful settlement of disputes¹⁸⁹ and to serve as a basis for paragraph 2.

(2) The first part of paragraph 2 recognizes that disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation would be “fact-intensive” and “science-dependent”. As scientific input has been emphasized in the process of progressive development of international law relating to the protection of the atmosphere,¹⁹⁰ likewise, more complicated scientific and technical issues have been

¹⁸⁷ G. Loibl, “Compliance procedures and mechanisms”, in Fitzmaurice, Ong and Merkouris, eds., *Research Handbook on International Environmental Law* (footnote 21 above), pp. 426–449, at pp. 437–439.

¹⁸⁸ C. Tomuschat, “Article 33”, in B. Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 3rd ed., vol. 1 (Oxford, Oxford University Press, 2012), pp. 1069–1085; H. Ascensio, “Article 33”, in J.-P. Cot, A. Pellet, M. Forteau, eds., *La Charte des Nations Unies*, 3rd ed. (Economica, 2005), pp. 1047–1060.

¹⁸⁹ N. Klein, “Settlement of international environmental law disputes”, in Fitzmaurice, Ong and Merkouris, eds., *Research Handbook on International Environmental Law* (footnote 21 above), pp. 379–400; C.P.R. Romano, “International dispute settlement”, in Bodansky *et al.*, *The Oxford Handbook of International Environmental Law* (footnote 21 above), pp. 1037–1056.

¹⁹⁰ See S. Murase, “Scientific knowledge and the progressive development of international law: with reference to the ILC topic on the protection of the atmosphere”, in J. Crawford *et al.*, eds., *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Leiden, Brill Nijhoff, 2017), pp. 41–52.

raised in the process of international dispute settlement in recent years. Thus, the cases brought before international courts and tribunals have increasingly focused on highly technical and scientific evidence.¹⁹¹ Thus, those elements, evident from the experience with inter-State environment disputes, typically require specialized expertise to contextualize or fully grasp the issues in dispute.

(3) Recent cases before the International Court of Justice involving the science-dependent issues of international environmental law¹⁹² illustrate, directly or indirectly, specific features of the settlement of disputes relating to the protection of the atmosphere. For this reason, it is necessary that, as underlined in paragraph 2, “due consideration” be given to the use of technical and scientific experts.¹⁹³ The essential aspect in this

¹⁹¹ See the speech of the President of the International Court of Justice, Judge Abraham, before the Sixth Committee on 28 October 2016 (on international environmental law cases before the International Court of Justice) (available from www.icj-cij.org/en/statements-by-the-president); and President Peter Tomka, “The ICJ in the service of peace and justice – words of welcome by President Tomka”, 27 September 2013 (available from <https://www.icj-cij.org/en/statements-by-the-president>). See also E. Valencia-Ospina, “Evidence before the International Court of Justice”, *International Law Forum du droit international*, vol. 1 (1999), pp. 202–207; A. Riddell, “Scientific evidence in the International Court of Justice – problems and possibilities”, *Finnish Yearbook of International Law*, vol. 20 (2009), pp. 229–258; B. Simma, “The International Court of Justice and scientific expertise”, *American Society of International Law Proceedings*, vol. 106 (2012), pp. 230–233; A. Riddell and B. Plant, *Evidence Before the International Court of Justice* (London, British Institute of International and Comparative Law, 2009), chap. 9; G. Niyungeko, *La preuve devant les juridictions internationales* (Brussels, Bruylant, 2005).

¹⁹² In the 1997 *Gabčíkovo-Nagymaros Project* (see footnote 84 above) and the 2010 *Pulp Mills* (see footnote 79 above) cases, the parties followed the traditional method of presenting the evidence, that is, by expert-counsel, though they were scientists and not lawyers. Their scientific findings were treated as the parties’ assertions, but this met some criticisms by some of the individual judges of the Court (*Pulp Mills on the River Uruguay*, Judgment, separate opinion of Judge Greenwood, paras. 27–28, and joint dissenting opinion of Judges Al-Khasawneh and Simma, para. 6), as well as by commentators. In the *Aerial Herbicide Spraying* (withdrawn in 2013) (*Aerial Herbicide Spraying (Ecuador v. Colombia)*, Order of 13 September 2013, *I.C.J. Reports 2013*, p. 278), in the 2014 *Whaling in the Antarctica* (*Whaling in the Antarctica (Australia v. Japan: New Zealand intervening)*, Judgment, *I.C.J. Reports 2014*, p. 226) and in the 2015 *Construction of a Road* (see footnote 58 above) cases, the parties appointed independent experts, who were, in the latter two cases, cross-examined and were treated with more weight than the statements of expert-counsel. In all of these cases, the Court did not appoint its own experts in accordance with Article 50 of its Statute, but it did so in the *Maritime Delimitation* case, although the latter was not *per se* an environmental law dispute (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2018*, p. 139). With regard to the issue of the standard of proof, the International Court of Justice tends to avoid extensive elaboration on the question, though the Court occasionally refers to it in abstract terms, leaving the matter for the discretion of the Court. In case of fact-intensive/technical cases such as environmental disputes, the Court might be viewed as lowering the standard of proof if needed, and simply weigh the respective evidence submitted by the parties in order to reach a conclusion. See, for example, Judge Greenwood’s separate opinion in the *Pulp Mills on the River Uruguay* case judgment (para. 26), concluding that, in such cases, the party that bears the burden of proof needs to establish the facts only “on the balance of probabilities (or, the balance of the evidence)”. See also K. Del Mar, “The International Court of Justice and standards of proof”, in K. Bannelier, T. Christakis and S. Heathcote, eds., *The ICJ and the Evolution of International Law: the enduring impact of the Corfu Channel case* (Abingdon, Routledge, 2012), pp. 98–123, at pp. 99–100; A. Rajput, “Standard of proof” in *Max Planck Encyclopedia of Public International Law* (updated in 2021).

¹⁹³ See D. Peat, “The use of court-appointed experts by the International Court of Justice”, *British Yearbook of International Law*, vol. 84 (2014), pp. 271–303; J.G. Devaney, *Fact-finding before the International Court of Justice* (Cambridge, Cambridge University Press, 2016); C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence*,

paragraph is to emphasize the use of technical and scientific experts in the settlement of inter-State disputes whether by judicial or other means.¹⁹⁴

(4) The Commission decided to maintain a simple formulation for this draft guideline and not to address other issues that may be relevant, such as *jura novit curia* (the court knows the law) and *non ultra petita* (not beyond the parties' request).¹⁹⁵

Burden of Proof and Finality (Cambridge, Cambridge University Press, 2011), pp. 77–135; Special edition on courts and tribunals and the treatment of scientific issues, *Journal of International Dispute Settlement*, vol. 3 (2012); C. Tams, “Article 50” and “Article 51”, in A. Zimmermann *et al.*, eds., *The Statute of the International Court of Justice: A Commentary* (Oxford, Oxford University Press, 2012), pp. 1287–1311; C.E. Foster, “New clothes for the emperor? Consultation of experts by the International Court of Justice”, *Journal of International Dispute Settlement*, vol. 5 (2014), pp. 139–173; J.E. Viñuales, “Legal techniques for dealing with scientific uncertainty in environmental law”, *Vanderbilt Journal of Transnational Law*, vol. 43 (2010), pp. 437–504, at pp. 476–480; G. Gaja, “Assessing expert evidence in the ICJ”, *The Law and Practice of International Courts and Tribunals*, vol. 15 (2016), pp. 409–418.

¹⁹⁴ It should be recalled that there are close interactions between non-judicial and judicial means of settling disputes. In the context of disputes relating to the environment and to the protection of the atmosphere, in particular, even at the stage of initial negotiations, States are often required to be well equipped with scientific evidence on which their claims are based, and accordingly the distance between negotiation and judicial settlement may not be very distant.

¹⁹⁵ Based on *jura novit curia*, the Court can in principle apply any applicable law to any fact. In addition, it can evaluate evidence and draw conclusions as it sees appropriate (as long as it complies with the *non ultra petita* rule). Given its judicial function, the Court needs to sufficiently understand the meaning of each related technical fact in the case at hand. See the statement by the President of International Court of Justice, Judge Yusuf, on “Le recours à des experts désignés par la Cour en vertu de l’article 50 du Statut”, made before the Sixth Committee of the General Assembly on 26 October 2018, available from www.icj-cij.org/en/statements-by-the-president. The line between “fact” and “law” is often obscured (M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, Kluwer Law International, 1996), pp. 42–49). Scientific issues are described by commentators as “mixed questions of fact and law” (e.g., C.F. Amerasinghe, *Evidence in International Litigation*, (Leiden, Martinus Nijhoff Publishers, 2005), p. 58), which cannot be easily categorized into either a matter of law or fact. Judge Yusuf stated in his declaration in the *Pulp Mills* case that the experts’ role was to elucidate facts and to clarify the scientific validity of the methods used to establish facts or to collect data; whereas it is for the Court to weigh the probative value of the facts (*Pulp Mills* (see footnote 79 above), Declaration of Judge Yusuf, para. 10). See also Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (see footnote 193 above), pp. 145–147.

Chapter V

Provisional application of treaties

A. Introduction

41. At its sixty-fourth session (2012), the Commission decided to include the topic “Provisional application of treaties” in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.¹⁹⁶ In its resolution 67/92 of 14 December 2012, the General Assembly subsequently noted with appreciation the decision of the Commission to include the topic in its programme of work.

42. The Commission considered the first report of the Special Rapporteur at its sixty-fifth session (2013); the second report at its sixty-sixth session (2014); the third report at its sixty-seventh session (2015); the fourth report at its sixty-eighth session (2016); and the fifth report at its seventieth session (2018).¹⁹⁷ The Commission also had before it three memorandums, prepared by the Secretariat, which were submitted at the sixty-fifth (2013), sixty-seventh (2015) and sixth-ninth sessions (2017).¹⁹⁸ At its seventieth session, on the basis of the draft guidelines proposed by the Special Rapporteur in the third, fourth and fifth reports, the Commission provisionally adopted 12 draft guidelines as the draft Guide to Provisional Application of Treaties, together with commentaries thereto, on first reading.¹⁹⁹

B. Consideration of the topic at the present session

43. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/738), as well as comments and observations received from Governments and international organizations (A/CN.4/737). The Special Rapporteur, in his report, examined the comments and observations received from governments and international organizations on the draft Guide, as adopted on first reading, and on several draft model clauses, which he had proposed to Commission at its seventy-first session (2019).²⁰⁰ He made proposals for consideration on second reading, in the light of the comments and observations, and proposed a recommendation to the General Assembly.

44. At its 3514th meeting and its 3516th to 3522nd meetings, held from 4 to 14 May 2021, the Commission considered the sixth report of the Special Rapporteur.

45. Following its debate on the report, the Commission, at its 3522nd meeting, held on 14 May 2021, decided to refer draft guidelines 1 to 12, together with five draft model clauses, as contained in the Special Rapporteur’s sixth report, to the Drafting Committee, taking into account the debate in the Commission.

46. At its 3530th meeting, held on 3 June 2021, the Commission considered an interim report of the Drafting Committee. At its 3549th meeting, held on 26 July 2021, the Commission considered the final report of the Drafting Committee (A/CN.4/L.952/Rev.1), and adopted the Guide to Provisional Application of Treaties,

¹⁹⁶ *Yearbook ... 2012*, vol. II (Part Two), para. 267.

¹⁹⁷ A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), A/CN.4/699 and Add.1 (fourth report), and A/CN.4/718 and Add.1 (fifth report).

¹⁹⁸ A/CN.4/658, A/CN.4/676 and A/CN.4/707, respectively. The consideration of document A/CN.4/707 was postponed to the seventieth session.

¹⁹⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 85–86 and 89–90.

²⁰⁰ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), annex A.

including the draft guidelines and a draft annex containing examples of provisions on provisional application (see sect. E.1 below).

47. At its 3554th to 3557th meetings, held from 29 July to 3 August 2021, the Commission adopted the commentaries to the Guide (see sect. E.2 below).

48. In accordance with its statute, the Commission submits the Guide to the General Assembly, with the recommendation set out below (see sect. C below).

C. Recommendation of the Commission

49. At its 3557th meeting, held on 3 August 2021, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note of the Guide to Provisional Application of Treaties of the International Law Commission in a resolution, and encourage its widest possible dissemination;

(b) commend the Guide, and the commentaries thereto, to the attention of States and international organizations;

(c) request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

D. Tribute to the Special Rapporteur

50. At its 3557th meeting, held on 3 August 2021, the Commission, after adopting the Guide to Provisional Application of Treaties, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the Guide to Provisional Application of Treaties,

Expresses to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the Guide through his tireless efforts and devoted work, and for the results achieved in the elaboration of the Guide to Provisional Application of Treaties.”

E. Text of the Guide to Provisional Application of Treaties

1. Text of the draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties

51. The text of the Guide to Provisional Application of Treaties adopted by the Commission, on second reading, at its seventy-second session is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1

Scope

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Guideline 3

General rule

A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

- (a) a separate treaty;
- (b) any other means or arrangements, including:
 - (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;
 - (ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned.

Guideline 5

Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Guideline 6

Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 7

Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Guideline 8

Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.

Guideline 9

Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.
3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.
4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Guideline 10

Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11

Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Annex

Examples of provisions on provisional application of treaties

The following examples of provisions are intended to assist States and international organizations in drafting an agreement to apply provisionally a treaty or a part of a treaty. They do not cover all possible situations and are not intended to prescribe any specific formulation. These examples providing for the provisional application of treaties, found in both bilateral and multilateral treaties,²⁰¹ are organized according to certain issues that typically arise, as set out in sections A to E. The examples listed come from recent practice,²⁰² and, to the extent possible, they reflect regional diversity. They are, however, not exhaustive.²⁰³

A. Commencement of provisional application

The examples of provisions on commencement of provisional application are as follow below.

1. From the date of signature

(a) Bilateral treaties

1. Undertaking between the Kingdom of the Netherlands and the Republic of the Philippines on the recognition of certificates under regulation 1/10 of the STCW 1978 Convention [Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978] (Manila, 31 May 2001):²⁰⁴

Article 11

Without prejudice to Article 9, this Undertaking shall apply provisionally from the date of its signature and shall enter into force on the first date of the second month after both Parties have notified each other in writing that the

²⁰¹ For purposes of the present draft annex, so-called “mixed agreements”, which are concluded between the European Union and its Member States, on the one part, and a third party, on the other part, are categorized as bilateral treaties.

²⁰² See, in particular, the memorandum by the Secretariat on provisional application of treaties, A/CN.4/707.

²⁰³ Non-inclusion of any example should not be interpreted as reflecting any position of the Commission with respect to said example.

²⁰⁴ United Nations, *Treaty Series*, vol. 2385, No. 43056, p. 403.

procedures required for the entry into force of the Undertaking in their respective countries have been complied with.

2. Agreement between the Government of the Kingdom of Denmark and the Council of Ministers of Serbia and Montenegro on the Succession to the Treaties Concluded between the Kingdom of Denmark and the Socialist Federal Republic of Yugoslavia (Copenhagen, 18 July 2003):²⁰⁵

Article 3

...

(b) The provisions of this Agreement shall apply provisionally from the date of the signature of the Agreement.

3. Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals (Dar es Salaam, 26 November 2013):²⁰⁶

Article 48

Entry into force

1. The provisions of this Agreement shall be applied provisionally as from the date of signature.

(b) *Multilateral treaties*

4. Agreement between the Government of the Federal Republic of Germany, the United Nations and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals concerning the Headquarters of the Convention Secretariat (Bonn, 18 September 2002):²⁰⁷

Article 7

Final Provisions

....

(7) The provisions of this Agreement shall be applied provisionally, as from the date of signature, as appropriate, until its entry into force referred to in paragraph 9 below.

5. 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):²⁰⁸

Article 3

...

5. This Agreement shall be provisionally applied from the date of its signature.

6. Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization (Moscow, 14 June 2009):²⁰⁹

Article 17

²⁰⁵ *Ibid.*, vol. 2420, No. 43679, p. 359.

²⁰⁶ *Ibid.*, vol. 2968, No. 51602, p. 237.

²⁰⁷ *Ibid.*, vol. 2306, No. 41136, p. 469.

²⁰⁸ *Ibid.*, vol. 2367, No. 42662, p. 697.

²⁰⁹ *Ibid.*, vol. 2898, No. 50541, p. 277.

This Agreement shall provisionally apply as of the date of signature, unless it contravenes the national laws of the Parties, and shall enter into force on the date of receipt by the depositary of the fourth notification of the completion of the internal procedures necessary for its entry into force by the Parties that have signed it. ...

2. From a date other than the date of signature

(a) Bilateral treaties

7. Exchange of notes constituting an agreement on the abolition of visas for holders of diplomatic passports (Sofia, 16 December 1996):²¹⁰

Note from Bulgaria

...

6. This Agreement shall enter into force 30 days after the last notification through the diplomatic channel that the relevant internal legal requirements have been met. Its provisional application shall begin 10 days after the date of exchange of these Notes.

...

Note from Spain

...

The Embassy of the Kingdom of Spain in Sofia has the honour to inform the Ministry of Foreign Affairs of the Republic of Bulgaria that the Government of the Kingdom of Spain accepts the proposal of the Government of Bulgaria and agrees that the aforementioned Note and this reply shall constitute an Agreement between the Governments, which shall enter into force and be applied provisionally in accordance with the provisions of paragraph 6.

...

8. Treaty between the Federal Republic of Germany and the Kingdom of 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):²¹¹

Article 16

Ratification, entry into force, provisional application

...

3. This Treaty shall be applied provisionally with effect from 1 May 2003. ...
9. Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part, to Take Account of the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of

²¹⁰ *Ibid.*, vol. 1996, No. 34151, p. 33.

²¹¹ *Ibid.*, vol. 2389, No. 43165, p. 117

Poland, the Republic of Slovenia, and the Slovak Republic to the European Union (Brussels, 30 April 2004):²¹²

Article 5

...

3. Where not all the instruments of approval of this Protocol have been deposited before 1 May 2004, this Protocol shall apply provisionally with effect from 1 May 2004.

10. Framework Agreement on Cooperation in the Field of Immigration between the Kingdom of Spain and the Republic of Mali (Madrid, 23 January 2007):²¹³

Article 16

...

2. This Framework Agreement shall apply provisionally after a period of thirty days from its signature.

11. Agreement between the Kingdom of the Netherlands and the Argentine Republic on Mutual Administrative Assistance in Customs Matters (Buenos Aires, 26 September 2012):²¹⁴

Article 23

Entry into force

...

2. This Agreement shall be applied provisionally from the first day of the second month after its signature.

(b) Multilateral treaties

12. Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990 (Vienna, 31 May 1996):²¹⁵

VI

1. 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.

3. Upon conclusion or notification

(a) Bilateral treaties

13. Exchange of notes constituting an agreement concerning the abolition of visas for holders of diplomatic passports (Madrid, 27 December 1996):²¹⁶

Note from Spain

...

²¹² *Ibid.*, vol. 2570, No. 45792, p. 254.

²¹³ *Ibid.*, vol. 2635, No. 46921, p. 3.

²¹⁴ *Ibid.*, vol. 2967, No. 51580, p. 123.

²¹⁵ *Ibid.*, vol. 2980, No. 44001, p. 195.

²¹⁶ *Ibid.*, vol. 1996, No. 34152, p. 45.

Should the Government of Tunisia accept the foregoing proposal, on the basis of reciprocity, this Note and the reply to it from the Embassy of Tunisia shall constitute an Agreement between the Kingdom of Spain and the Republic of Tunisia, which shall be applied provisionally from the date of exchange of these Notes and shall enter into force on the date of the last notification of completion of the respective domestic requirements.

...

Note from Tunisia

...

The Embassy of the Republic of Tunisia in Madrid has the honour to inform the Ministry of Foreign Affairs that the Government of the Republic of Tunisia accepts the proposal of the Government of the Kingdom of Spain and agrees that the aforementioned Note and this reply should constitute an Agreement.

...

14. Exchange of notes constituting an agreement amending the Agreement between the Kingdom of the Netherlands and the International Criminal Tribunal for the former Yugoslavia concerning the position of ICTY trainees in the Netherlands (The Hague, 14 July 2010):²¹⁷

Note from the Netherlands

...

If the abovementioned proposal is acceptable to the UN-ICTY, the Ministry has the honour to propose that this Note and the affirmative Note in reply of the UN-ICTY shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of the affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

...

Note from the International Criminal Tribunal for the former Yugoslavia (UN-ICTY)

...

The UN-ICTY has further the honour to inform the Ministry that the proposals set forth in the Ministry's note are acceptable to the UN-ICTY and to confirm that the Ministry's note and this note shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of this affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

...

15. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (Brussels, 6 October 2010):²¹⁸

Article 15.10
Entry into force

²¹⁷ *Ibid.*, vol. 2689, No. 41714, p. 93.

²¹⁸ *Official Journal of the European Union*, vol. 54, L 127, 14 May 2011, p. 6.

...

5. (a) This Agreement shall be provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures.

...

(b) *Multilateral treaties*

16. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995):²¹⁹

Article 41

Provisional application

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.
17. International Cocoa Agreement, 2001 (Geneva, 2 March 2001):²²⁰

Article 57

Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member.
2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.
18. Convention on Cluster Munitions (Dublin, 30 May 2008):²²¹

Article 18

Provisional application

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.

19. Arms Trade Treaty (New York, 2 April 2013):²²²

Article 23

²¹⁹ United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.

²²⁰ *Ibid.*, vol. 2229, No. 39640, p. 2.

²²¹ *Ibid.*, vol. 2688, No. 47713, p. 39.

²²² *Ibid.*, vol. 3013, No. 52373, [not yet published].

Provisional Application

Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

B. Form of agreement on provisional application

The examples concerning forms of agreement for provisional application are as follow below.

(a) Bilateral treaties

20. Agreement on the Taxation of Savings Income and the Provisional Application Thereof (Brussels, 26 May 2004, and The Hague, 9 November 2004):²²³

Letter from Germany

...

Pending the completion of these internal procedures and the entry into force of this "Convention concerning the automatic exchange of information regarding savings income in the form of interest payments", I have the honour to propose to you that the Federal Republic of Germany and the Kingdom of the Netherlands in respect of Aruba apply this Convention 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.

...

Letter from the Netherlands in respect of Aruba

...

I am able to confirm that the Kingdom of the Netherlands in respect of Aruba is in agreement with the contents of your letter.

...

(b) Multilateral treaties

21. Protocol on the Provisional application of the Agreement Establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002):²²⁴

Recalling that Article 37 of the Agreement Establishing the Caribbean Community Climate Change Centre (CCCCC) provided for its entry into force upon the deposit of the seventh Instrument of Ratification with the Government of the host country,

Desiring to provide for the expeditious operationalisation of the Caribbean Community Climate Change Centre (CCCCC),

Have agreed as follows:

Article I

²²³ *Ibid.*, vol. 2821, No. 49430, p. 3.

²²⁴ *Ibid.*, vol. 2953, No. 51181, p. 181.

Provisional Application of the Agreement Establishing the Caribbean Community Climate Change Centre

The signatories of the Agreement Establishing the Caribbean Community Climate Change Centre have agreed, to apply the said Agreement among themselves provisionally, pending its definitive entry into force in accordance with Article 37 thereof.

22. Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] Pending its Entry into Force (Madrid, 12 May 2009):²²⁵

...

(b) 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;

23. Resolution 365 (XII) of the General Assembly of the United Nations World Tourism Organization entitled "Future of the Organization":²²⁶

...

Noting with regret that the amendment to Article 14 of the Statutes which it adopted by resolution 134(V), aimed at conferring on the host State a permanent seat on the Executive Council, together with the right to vote and not subject to the principle of geographical distribution of Council seats, has not yet received approval from the requisite number of States,

2. Decides that this amendment will be applied provisionally pending its ratification.

C. Opt in/Opt out of provisional application

The examples of provisions on opt in/ opt out of provisional application are as follow below.

24. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994):²²⁷

Article 7

Provisional application

1. 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

²²⁵ Council of Europe, *Treaty Series*, No. 194.

²²⁶ United Nations World Tourism Organization, General Assembly resolution 365 (XII), adopted at its twelfth session in Istanbul, October 1997.

²²⁷ United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

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.

25. Arms Trade Treaty (New York, 2 April 2013):²²⁸

Article 23

Provisional application

Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

D. Limitations to provisional application deriving from internal law of States or rules of international organizations

The examples of provisions on limitations to provisional application deriving from internal law of the States or rules of international organizations are as follow below.

(a) Bilateral treaties

26. Agreement between the Kingdom of Spain and the Republic of El Salvador on Air Transport (Madrid, 10 March 1997):²²⁹

Article XXIV

Entry into Force and Denunciation

1. 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. This Agreement shall enter into force when both Contracting Parties have notified each other through an exchange of diplomatic notes of the completion of their respective constitutional formalities.

27. Agreement between the Government of the Kingdom of the Netherlands and the Cabinet of Ministers of Ukraine concerning Technical and Financial Cooperation (Kiev, 11 May 1998):²³⁰

Article 7

Final Clauses

...

7.2. This Agreement shall be provisionally applied from the date of signing insofar as it does not contradict with existing legislation of both Parties.

28. Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress

²²⁸ See footnote 222 above.

²²⁹ United Nations, *Treaty Series*, vol. 2023, No. 34927, p. 341.

²³⁰ *Ibid.*, vol. 2386, No. 43066, p. 3.

the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004):²³¹

Article 17

Entry into Force and Duration

...

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 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.

29. Agreement between the Government of the Federal Republic of Germany and the Council of Ministers of Serbia and Montenegro regarding Technical Cooperation (Belgrade, 13 October 2004):²³²

Article 7

...

3. After signature, this Agreement shall be provisionally implemented in accordance with the appropriate domestic law.

30. Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part (Brussels, 12 December 2006):²³³

Article 30

Entry into force

1. This Agreement shall be applied provisionally, in accordance with the national laws of the Contracting Parties, from the date of signature.

31. Agreement between the United States of America and the Kingdom of Spain on Cooperation in Science and Technology for Homeland Security Matters (Madrid, 30 June 2011):²³⁴

Article 21

Entry into Force, Amendment, Duration and Termination

1. This Agreement shall apply provisionally upon signature of both Parties, consistent with each Party's domestic law. ...

(b) *Multilateral treaties*

32. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994):²³⁵

Article 7

Provisional application

...

²³¹ *Ibid.*, vol. 2962, No. 51490, p. 339.

²³² *Ibid.*, vol. 2424, No. 43752, p. 167.

²³³ *Official Journal of the European Union*, vol. 49, L 386, 29 December 2006, p. 57.

²³⁴ United Nations, *Treaty Series*, vol. 2951, No. 51275, p. 3.

²³⁵ See footnote 227 above.

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.

33. Grains Trade Convention, 1995 (London, 7 December 1994):²³⁶

Article 26

Provisional application

Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. 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.

34. ECOWAS [Economic Community of West African States] Energy Protocol (Dakar, 31 January 2003):²³⁷

Article 40

Provisional Application

(1) Each signatory agrees to apply this Protocol provisionally pending its entry into force for such signatory in accordance with Article 39, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

E. Termination of provisional application

The examples of provisions on termination of provisional application are as follow below.

1. Upon entry into force

(a) Bilateral treaties

35. Free Trade Agreement between the Government of the Republic of Latvia and the Government of the Czech Republic (Riga, 15 April 1996):²³⁸

Article 41

Provisional Application

Pending the entry into force of this Agreement according to Article 40, the Czech Republic shall apply this Agreement provisionally from 1 July 1996, provided that the Republic of Latvia shall notify prior to 15 June 1996, that its internal legal requirements for entry into force of this Agreement are fulfilled and that the Republic of Latvia shall apply this Agreement from 1 July 1996.

36. Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of 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 (Ljubljana, 18 December 2000):²³⁹

²³⁶ United Nations, *Treaty Series*, vol. 1882, No. 32022, p. 195.

²³⁷ A/P4/1/03.

²³⁸ United Nations, *Treaty Series*, vol. 2069, No. 35853, p. 225.

²³⁹ *Ibid.*, vol. 2169, No. 38039, p. 287.

Article 8

...

2. This Agreement shall be applied provisionally from the date of signature until its entry into force.

37. Air Transport Agreement between the Government of the Republic of Paraguay and the Government of the United States of America (Asunción, 2 May 2005):²⁴⁰

Article 17

Entry into Force

This Agreement and its Annexes shall be provisionally applied from the date of signature and shall enter into force on the date of the later note in an exchange of diplomatic notes between the Parties confirming that each Party has completed the necessary internal procedures for entry into force of this Agreement. ...

38. Agreement between the Kingdom of Spain and the International Air Transport Association (IATA) on the status of the IATA in Spain (Madrid, 5 May 2009):²⁴¹

Article 12

Entry into force

1. This Agreement shall apply provisionally from the time of its signature, pending its ratification by Spain and its approval by the IATA.

39. Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei (New York, 1 October 2012):²⁴²

XI

Miscellaneous Provisions

...

62. The present Agreement shall enter into force and shall be applied provisionally by the Government upon signature, pending the Government's notification that it has completed internal ratification procedures under the Constitution of Sudan.

(b) *Multilateral treaties*

40. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994):²⁴³

Article 7

Provisional application

...

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

²⁴⁰ *Ibid.*, vol. 2429, No. 43807, p. 301.

²⁴¹ *Ibid.*, vol. 2643, No. 47110, p. 91.

²⁴² *Ibid.*, vol. 2873, No. 50146, p. 125.

²⁴³ See footnote 227 above.

five must be developed States) referred to in paragraph 1 (a) of resolution II has not been fulfilled.

41. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997):²⁴⁴

Article 18
Provisional Application

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.

2. Upon notification not to become a party to the treaty

(a) Bilateral treaties

42. Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000):²⁴⁵

Note from Spain

...

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 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.

...

Note from the International Oil Pollution Compensation Fund 1992

...

With regard to the Agreement signed by Spain and the Fund and your letter of today's date, I have the honour to inform you that the Fund is in agreement with the content of your letter, which should be considered as an instrument formulated by the two parties establishing the only possible interpretation of the Agreement.

...

43. Treaty between the Federal Republic of Germany and the Kingdom of 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):²⁴⁶

Article 16
Ratification, entry into force, provisional application

...

3. 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.

²⁴⁴ United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

²⁴⁵ *Ibid.*, vol. 2161, No. 37756, p. 45.

²⁴⁶ *Ibid.*, vol. 2389, No. 43165, p. 117.

44. Agreement between the European Community and the Hashemite Kingdom of Jordan on Scientific and Technological Cooperation (Brussels, 30 November 2009):²⁴⁷

Article 7

Final provisions

...

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.

(b) Multilateral treaties

45. ECOWAS Energy Protocol (Dakar, 31 January 2003):²⁴⁸

Article 40

Provisional Application

...

(3) (a) Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

3. Other grounds

(a) Bilateral treaties

46. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Washington, 11 February 2004):²⁴⁹

Article 17

Entry into Force and Duration

...

2. Provisional Application. Beginning on the date of signature of this Agreement, the Parties shall, to the extent permitted by their respective national laws and regulations, apply it provisionally. Either Party may discontinue provisional application at any time. Each Party shall notify 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.

²⁴⁷ *Ibid.*, vol. 2907, No. 50651, p. 51.

²⁴⁸ See footnote 237 above.

²⁴⁹ United Nations, *Treaty Series*, vol. 2963, No. 51492, p. 23.

47. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (Brussels, 6 October 2010):²⁵⁰

Article 15.10

Entry into force

5. ...

(c) A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification.

48. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014):²⁵¹

Article 486

Entry into force and provisional application

...

7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. ...

(b) Multilateral treaties

49. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995):²⁵²

Article 41

Provisional Application

...

2. 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.

50. Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] Pending its Entry into Force (Madrid, 12 May 2009):²⁵³

(e) 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.

2. Text of the draft guidelines of the Guide to Provisional Application of Treaties and commentaries thereto

52. The text of the draft guidelines of the Guide to Provisional Application of Treaties, adopted by the Commission on second reading, together with commentaries thereto, is reproduced below.

²⁵⁰ See footnote 218 above.

²⁵¹ *Official Journal of the European Union*, vol. 57, L 161, 29 May 2014, p. 3.

²⁵² See footnote 219 above.

²⁵³ Council of Europe, *Treaty Series*, No. 194.

Guide to Provisional Application of Treaties

General commentary

(1) The purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. States, international organizations and other users may encounter difficulties regarding, *inter alia*, the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice. As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

(2) Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force.²⁵⁴ Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust in advance of entry into force,²⁵⁵ among other objectives.²⁵⁶ More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes a voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

(3) Although the Guide is not legally binding, it seeks to describe and clarify existing rules of international law in the light of contemporary practice. The Guide takes as a point of departure article 25 of both the Vienna Convention on the Law of Treaties of 1969 (hereinafter, "1969 Vienna Convention")²⁵⁷ and the Vienna Convention on the Law of

²⁵⁴ See D. Mathy, "Article 25", in O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, (Oxford, Oxford University Press, 2011), p. 640; and A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012). The concept has been defined by writers as "the application of and binding adherence to a treaty's terms before its entry into force" (R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1) or as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time" (M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354).

²⁵⁵ See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

²⁵⁶ See first report of the Special Rapporteur on the provisional application of treaties, *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664, paras. 25–35.

²⁵⁷ Article 25 of the 1969 Vienna Convention reads as follows:

Provisional application

1. 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.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

(United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, at pp. 338–339.)

Treaties between States and International Organizations or between International Organizations of 1986 (hereinafter, “1986 Vienna Convention”),²⁵⁸ which it tries to clarify and explain, and on the practice of States and international organizations on the matter. The terms defined in article 2 of the 1969 and 1986 Vienna Conventions are used in the present Guide with the meaning given in those provisions. While the Guide is without prejudice to the application of other rules of the law of treaties, it relies on relevant provisions in the 1969 and 1986 Vienna Conventions where appropriate, without being intended to cover every possible application of all provisions of both Vienna Conventions, particularly where practice has not yet developed. In general, the Guide reflects the current *lex lata*, although some aspects of it are more recommendatory in nature. The Guide is thus a *vade mecum* in which practitioners should find answers to questions raised by the provisional application of treaties. It is to be underscored, however, that it is in no way claimed that the Guide creates any kind of presumption in favour of resorting to the provisional application of treaties. Provisional application is neither a substitute for securing entry into force of treaties, which remains the natural vocation of treaties, nor a means of bypassing domestic procedures.

(4) It is of course impossible to address all the questions that may arise in practice or to cover the myriad of situations that may be faced by States and international organizations. Yet, a general approach is consistent with one of the main aims of the present Guide, which is to acknowledge the flexible nature of the provisional application of treaties²⁵⁹ and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide recognizes that States and international organizations may agree on solutions not identified in the Guide that they consider more appropriate to the purposes of a given treaty. Another essential character of provisional application is its capacity to adapt to varying circumstances.²⁶⁰

²⁵⁸ Article 25 of the 1986 Vienna Convention reads as follows:

Provisional application

1. 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 and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty. (A/CONF.129/15 (not yet in force).)

²⁵⁹ See first report of the Special Rapporteur (A/CN.4/664), paras. 28–30.

²⁶⁰ For example, provisional application was used recently in connection with the United Kingdom’s withdrawal from the European Union. Three European Union-United Kingdom treaties were provisionally applied: the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Brussels and London, 30 December 2020, *Official Journal of the European Union*, L 444, p. 14; the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, Brussels and London, 30 December 2020, *ibid.*, L 149, p. 2540; and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, Brussels and London, 30 December 2020, *ibid.*, L 150, p. 1. These were provisionally applied from 1 January 2021 to 30 April 2021, which dates included an extension agreed at the end of February 2021. The United Kingdom has also made use of provisional application in respect of other treaties in the context of withdrawal from the

(5) To provide additional assistance to States and international organizations in provisional application, the Guide also includes examples of provisions on the subject found in bilateral and multilateral treaties, which are reproduced in the draft annex hereto. Their inclusion is in no way intended to limit the flexible and voluntary nature of provisional application of treaties, and the examples do not seek to address the whole range of situations that may arise, nor are they characterized as anything more than examples.

Guideline 1 **Scope**

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the Guide. The provision should be read together with draft guideline 2, which sets out the purpose of the Guide.

(2) The Guide consistently uses the term “provisional application of treaties”. In practice, the extensive use of other terms, such as “provisional entry into force” as opposed to *definitive* entry into force, has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties.²⁶¹ In the same vein, quite frequently, treaties do not use the adjective “provisional”, but speak instead of “temporary” or “interim” application.²⁶² Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while constituting the legal basis for the exercise of provisional application,²⁶³ lacks detail and precision and can thus benefit from further

European Union, both bilateral and plurilateral (see, for example, www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries).

The flexibility provided in article 25, paragraph 1 (b), of the 1969 Vienna Convention was illustrated, for instance, by the fact that the treaty partners agreed, on some occasions, to provisional application by an exchange of notes: for example, the exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, *ibid.*, L 445, p. 23).

²⁶¹ In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975–2010* (Abuja, Ministry of Foreign Affairs of Nigeria, 2011), which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see [A/CN.4/699](#), paras. 168–174).

²⁶² See paragraph 33 of the letter from the Federal Republic of Yugoslavia in 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 (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (*ibid.*, vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (*Yearbook ... 2013*, vol. II (Part One), document [A/CN.4/658](#), and [A/CN.4/676](#)), and the memorandum by the Secretariat on the practice of States and international organizations in respect of treaties that provide for provisional application ([A/CN.4/707](#)).

²⁶³ See Mertsch, *Provisionally Applied Treaties ...* (see footnote 254 above), p. 22.

clarification.²⁶⁴ The intention of the Guide is accordingly to provide greater clarity to the interpretation of article 25 of both Vienna Conventions.

(3) The Guide concerns the provisional application of treaties “by States or by international organizations”. The reference to “States” and “international organizations”, which is employed in a number of the draft guidelines, should not be understood as implying that the scope of the draft guidelines is limited to treaties concluded between States, between States and international organizations or between international organizations.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Commentary

(1) Draft guideline 2 sets forth the purpose of the Guide to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) The draft guideline seeks to emphasize that the Guide is based on the 1969 Vienna Convention and other relevant rules of international law, including the 1986 Vienna Convention. The reference to “and other relevant rules of international law” is primarily meant to extend the scope of the provision to the provisional application of treaties by international organizations. It acknowledges that the 1986 Vienna Convention has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the Guide, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not reflect all aspects of contemporary practice on the provisional application of treaties. This is implicit in the reference to both “the law and practice” on the provisional application of treaties. Such an approach is further referred to in the reference to “other relevant rules of international law”, which signifies that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the Guide recognizes the central importance of article 25 of the 1969 and 1986 Vienna Conventions. The reference to “on the basis of”, in conjunction with the express reference to article 25, is intended to indicate that this article serves as the point of departure of the Guide, even if it is to be supplemented by other rules of international law in order fully to reflect the law applicable to the provisional application of treaties.

Guideline 3

General rule

A treaty or a part of a treaty is applied provisionally, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

²⁶⁴ See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111; M.A. Rogoff and B.E. Gauditz, “The provisional application of international agreements”, *Maine Law Review*, vol. 39 (1987), p. 41.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. The text of the draft guideline follows the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the Guide is article 25. That premise is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be applied provisionally. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions.

(3) The distinction between provisional application of the entire treaty, as opposed to a “part” thereof, originates in article 25. The Commission, in its prior work on the law of treaties, specifically envisaged the possibility of what became referred to as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the “same rule” applied to “part of a treaty”.²⁶⁵ In the corresponding commentary, it was explained that: “[n]o less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation”.²⁶⁶ The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms that may exercise their functions during the stage of provisional application. Furthermore, parts of treaties containing trade provisions are frequently subject to provisional application.²⁶⁷ The provisional application of a part of a treaty is accordingly reflected in the formula “provisional application of a treaty or a part of a treaty”, which is used throughout the Guide.²⁶⁸

²⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 177 ff., para. 38.

²⁶⁶ Paragraph (3) of the commentary to draft article 22, *ibid.*

²⁶⁷ The provisional application of part of a treaty is also common in mixed agreements concluded between the European Union and its member States, on the one part, and a third party, on the other part, as a result of a distribution of competence between the European Union and its member States. See comments and observations received from Governments and international organizations ([A/CN.4/737](#)), comments of Germany on draft guideline 3, p. 14. See also M. Chamon, “Provisional application of treaties: the EU’s contribution to the development of international law”, *European Journal of International Law*, vol. 31, No. 3 (August 2020), pp. 883–915, and F. Castillo de la Torre, “El Tribunal de Justicia y las relaciones exteriores tras el Tratado de Lisboa”, *Revista de Derecho Comunitario Europeo*, No. 60 (May–August 2018), pp. 491–512.

²⁶⁸ An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (United Nations, *Treaty Series*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part of a treaty from provisional application can be found in the Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); Convention on Cluster Munitions, (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); Arms Trade Treaty (United Nations, *Treaty Series*, vol. 3013, No. 52373) (art. 23); and the Document agreed among the States Parties to the Treaty on

(4) The second phrase, namely “pending its entry into force between the States or international organizations concerned”, is based on the chapeau of article 25. The reference to “pending its entry into force” underscores the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives. While the expression could be read as referring to the entry into force of a treaty itself,²⁶⁹ in the case of multilateral treaties provisional application normally continues for States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations.²⁷⁰ The reference to “entry into force” in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned, i.e., those States or international organizations that had assumed rights and obligations pursuant to provisional application. The inclusion of the phrase “between the States or international organizations concerned” in the present draft guideline reflects the fact that provisional application may continue for those States or international organizations for which the treaty has not yet entered into force, after entry into force of the treaty itself.

(5) The third and fourth phrases “if the treaty itself so provides, or if in some other manner it has been so agreed” reflect the two possible bases for provisional application recognized in paragraph 1 (a) and (b) of article 25. The possibility of provisional application on the basis of a provision in the treaty in question is well established,²⁷¹ and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

Conventional Armed Forces in Europe (*International Legal Materials*, vol. 36, p. 866, sect. VI, para. 1). Similarly, the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the Trans-Pacific Strategic Economic Partnership Agreement (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement, namely Brunei Darussalam, according to article 20.5 of that Agreement.

²⁶⁹ As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid.*, vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,] Pending its Entry into Force (Madrid, 12 May 2009, Council of Europe, *Treaty Series*, No. 194).

²⁷⁰ For example, the Arms Trade Treaty.

²⁷¹ Examples in the bilateral sphere include: Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports (United Nations, *Treaty Series*, vol. 2957, No. 51407, p. 213), art. 8; Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste (*ibid.*, vol. 2881, No. 50313, p. 165), art. 13; Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7; 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 (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13–14), art. 18, para. 7, and its

(6) Unlike in article 25 of the 1969 and 1986 Vienna Conventions, which refers, in paragraph 1 (b), to an agreement to apply provisionally a treaty or a part of a treaty among “negotiating States” or “negotiating States and negotiating organizations”, draft guideline 3 does not use this formulation. In contemporary practice, provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question but that have subsequently consented to provisional application of the treaty. Relevant practice may be identified by examining certain commodity agreements that had never entered into force but whose provisional application was extended beyond their termination date.²⁷² In those cases, such an extension may be understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement. Furthermore, the need to distinguish between different groups of States or international organizations, by reference to their participation in the negotiation of the treaty, is less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that have been applied provisionally. For these reasons, the draft guideline simply restates the basic rule without reference to “negotiating States” or “negotiating States and negotiating organizations”.

(7) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby explaining the meaning of the agreement “in some other manner”.

Guideline 4 **Form of agreement**

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

- (a) a separate treaty;
- (b) any other means or arrangements, including:
 - (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;

corresponding Protocol on Claims, Legal Proceedings and Indemnification (*ibid.*, p. 35), art. 4, para. 8; Statutes of the Community of Portuguese-Speaking Countries (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and Agreement establishing the “Karanta” Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

²⁷² See, for example, the International Tropical Timber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30–37.

- (ii) a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be applied provisionally, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might itself provide for provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations have “in some other manner” so agreed, which typically occurs when the treaty is silent on the point.

(2) The first possibility is where the treaty being applied provisionally itself addresses provisional application, in which case the treaty may do so in different ways. For example, the treaty may require that the negotiating or signatory States apply the treaty provisionally. Alternatively, the treaty may allow such States, for example by filing a declaration or through notification to the depositary of the treaty, to opt into or opt out of provisional application.²⁷³

(3) The second possibility of States agreeing on provisional application in a manner other than that specified in the treaty itself is confirmed by the opening phrase “[i]n addition to the case where the treaty so provides”, which is a direct reference to the phrase “if the treaty itself so provides” in draft guideline 3. That follows the formulation of article 25. The reference to “between the States or international organizations concerned” has the same meaning as in draft guideline 3. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(4) Subparagraph (a) envisages the possibility of provisional application by means of a separate treaty, which is distinct from the treaty that is provisionally applied.²⁷⁴ As is the case for the first possibility, and in accordance with article 2, paragraph 1 (a), of the 1969 and 1986 Vienna Conventions, the term “treaty” is to be interpreted as covering all instruments concluded under the law of treaties that constitute an agreement between States or international organizations, whatever the particular designation of that

²⁷³ See, for instance, article 23 of the Arms Trade Treaty. Another example of consent to be bound by the provisional application of a part of a treaty by means of a declaration, but which is expressly provided for in a parallel agreement to the treaty, is contained in the Protocol to the Agreement on a Unified Patent Court on Provisional Application (Brussels, 1 October 2015, see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf). See also article 37, paragraph 2, of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 10 October 2018, Council of Europe, *Treaty Series*, No. 223).

²⁷⁴ Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany (*ibid.*, vol. 2821, No. 49430, p. 3) and the Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar (*ibid.*, vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (*ibid.*, vol. 2953, No. 51181, p. 181); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas; and the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force).

instrument may be. Such instruments may include exchanges of letters or notes, memorandums of understanding, declarations of intent, or protocols.²⁷⁵

(5) Subparagraph (b) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through “any other means or arrangements”, which broadens the range of possibilities for reaching agreement on provisional application. Instruments not covered under subparagraph (a) may thus be included under subparagraph (b). This approach is in accordance with the inherently flexible nature of provisional application.²⁷⁶ By way of providing further guidance, reference is made to two examples of such “means or arrangements” in subparagraph (b) (i) and (ii), which are not intended to constitute an exhaustive list.

(6) Subparagraph (b) (i) envisages the scenario of provisional application being agreed on by means of “a resolution, decision or other act adopted by an international organization or at an intergovernmental conference”. The term “intergovernmental conference” is to be understood broadly and may include the diplomatic conference of plenipotentiaries convened to negotiate, or a meeting of the States parties to, a multilateral treaty. The phrase “reflecting the agreement of the States or international organizations concerned” refers to the “resolution, decision or other act” that was adopted by the international organization or conference providing for the possibility of provisional application of the treaty. The reference to “agreement” is intended to emphasize that the States or international organizations concerned must consent to provisional application. The mode of expressing agreement to provisional application of a treaty depends on the rules of the organization or the conference, which is made clear by the phrase “in accordance with the rules of such organization or conference”. The phrase is to be understood in accordance with article 2, subparagraph (b), of the 2011 articles on responsibility of organizations, which provides that the term “rules of the organization”:

means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.²⁷⁷

(7) Subparagraph (b) (ii) refers to the exceptional possibility of a State or an international organization making a declaration that it will apply provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise

²⁷⁵ See para. (2) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed. (Berlin, Springer, 2018), pp. 449–450; Mathy, “Article 25” (see footnote 254 above), pp. 649–651.

²⁷⁶ In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (*ibid.*, vol. 2967, No. 51578, p. 79); Agreement between the Government of Latvia and the Government of the Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (*ibid.*, vol. 2461, No. 44230, p. 205); and Agreement between the United Nations and the Government of the Republic of 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 (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, “The provisional application of treaties”, in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nijhoff, 1998), p. 81.

²⁷⁷ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.

agreed.²⁷⁸ However, the declaration must be expressly accepted by the other States or international organizations concerned, as opposed to mere non-objection, for the treaty to become provisionally applicable in relation to those States or international organizations. Such acceptance of provisional application should be in written form, but the draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that such acceptance is express. The term “declaration” is not meant to refer to the legal regime concerning unilateral declarations of States, which does not deal with the provisional application of treaties.²⁷⁹

Guideline 5

Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Commentary

- (1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.
- (2) The first clause reflects the approach taken in the Guide of referring to the provisional application of the entire treaty or a part of a treaty. The phrase “takes effect on such date, and in accordance with such conditions and procedures” specifies the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which uses “takes effect”. The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally.
- (3) The reference to “on such date, and in accordance with such conditions and procedures” covers the various modes of commencement of provisional application of treaties as reflected in contemporary practice.²⁸⁰ Such modes include commencement upon signature, on a certain date, upon notification, or, in the case of multilateral treaties, with adoption of a decision by an international organization.
- (4) The concluding phrase “as the treaty provides or as are otherwise agreed” confirms that the agreement to apply provisionally a treaty or a part of a treaty is based on a provision set forth in the treaty that is applied provisionally, on a separate treaty, whatever its particular designation, or some other means or arrangements that establish an

²⁷⁸ An example is the declaration by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (United Nations, *Treaty Series*, vol. 1974, No. 33757). When the Syrian Arab Republic unilaterally declared that it would provisionally apply the Convention, the Director-General of the Organization for the Prohibition of Chemical Weapons replied, informing the Syrian Arab Republic that its “request” to provisionally apply the Convention would be forwarded to the States parties through the Depositary. The Convention does not provide for provisional application of the Convention and such possibility was not discussed during its negotiation. Neither the States parties nor the Organization for the Prohibition of Chemical Weapons objected to the provisional application by the Syrian Arab Republic of the Convention, as expressed in its unilateral declaration (see the second report by the Special Rapporteur (A/CN.4/675), para. 35 (c), and the third report by the Special Rapporteur (A/CN.4/687), para. 120).

²⁷⁹ *Yearbook ... 2006*, vol. II (Part Two), paras. 173–177.

²⁸⁰ See A/CN.4/707, para. 104, subparas. (d)–(g).

agreement for provisional application, as contemplated in draft guideline 4, and is subject to the conditions and procedures established in such instruments or processes.

(5) Draft guideline 5 is without prejudice to article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions, which stipulates that certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of its text. Such matters include the authentication of the text of the treaty, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, or the functions of the depositary. Those provisions thus apply automatically without the need to agree specifically on their provisional application and might be relevant to the commencement of the provisional application of a treaty.

Guideline 6

Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty provides otherwise or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Commentary

(1) Draft guideline 6 deals with the legal effect of provisional application. Two types of “legal effect” might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being applied provisionally.

(2) The first sentence of the draft guideline confirms that the legal effect of provisional application of a treaty or a part of a treaty is to produce a legally binding obligation to apply the treaty or part thereof between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is applied provisionally is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced between them. Such legal effect is derived from the agreement to provisionally apply the treaty (or acceptance thereof) by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effect of provisional application, which is common, the draft guideline clarifies that the legal effect of the provisional application is a legally binding obligation to apply the treaty or part thereof.²⁸¹

(3) The opening phrase “[t]he provisional application of a treaty or a part of a treaty” follows draft guideline 5. The phrase “a legally binding obligation to apply the treaty or part thereof”, which is central to the draft guideline, refers to the legal effect that the treaty produces for the State or the international organization concerned and to the conduct that is expected from States or international organizations that agree to resort to provisional application. The reference to “between the States or international organizations concerned” specifies between whom the obligation to apply the treaty or part thereof applies. This may include not only other States or international organizations applying the treaty provisionally, but also States or international organizations for whom the treaty has entered into force in their relations with those who are still provisionally applying the treaty.

(4) The concluding phrase “except to the extent that the treaty provides otherwise or it is otherwise agreed” confirms that the basic rule is subject to the treaty or another

²⁸¹ See Mathy, “Article 25” (see footnote 254 above), p. 651.

agreement, which may provide an alternative legal outcome. Such an understanding, namely a presumption in favour of the creation of a legally binding obligation to apply the treaty or a part of the treaty, subject to the possibility that the parties may agree otherwise, is confirmed by State practice.²⁸²

(5) The second sentence of draft guideline 6 confirms that the treaty being applied provisionally must be performed in good faith. This sentence reflects the good faith obligation (*pacta sunt servanda*) stipulated in article 26 of the 1969 and 1986 Vienna Conventions. Article 26 of the Vienna Conventions refers to several legal effects. The first legal effect corresponds to the first sentence of draft guideline 6, i.e., the binding obligation produced by provisional application. The second legal effect is that the treaty in force “must be performed in good faith”. The word “[s]uch” in the draft guideline establishes the link between the first sentence (the legal effect of the binding obligation arising as a consequence of provisional application) and the second sentence (the legal effect arising from the requirement of performance in good faith), thereby confirming that both legal effects pertain to the same treaty.

(6) Nonetheless, an important distinction between provisional application and entry into force must be made. Provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application “produces a legally binding obligation to apply the treaty or a part thereof” does not imply that provisional application has exactly the same legal effect as entry into force. The reference to “a legally binding obligation” is intended to add more precision to the depiction of the legal effect of provisional application and avoid any interpretation aimed at equating provisional application with entry into force.²⁸³

(7) Implicit in the draft guideline is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.²⁸⁴ Likewise, provisional application of a treaty cannot result in the modification of the treaty’s content. This is because provisional application is limited to the obligation to apply the treaty or part thereof. Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is applied provisionally, in accordance with Part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7

Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

²⁸² See the examples of the practice of the European Free Trade Association (EFTA) referred to in the fifth report by the Special Rapporteur (A/CN.4/718).

²⁸³ See para. (1) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210, and *Yearbook ... 2013*, vol. II (Part One), the memorandum by the Secretariat on provisional application of treaties (A/CN.4/658), paras. 44–55. See also the first report of the Special Rapporteur (A/CN.4/664).

²⁸⁴ However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See chapter IV of A/73/10 on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Commentary

(1) Draft guideline 7 concerns the possibility of the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application, either totally or partially.

(2) The reference to “any question concerning reservations relating to the provisional application of a treaty or a part of a treaty” includes, but is not limited to, questions regarding the provisions of Part II, Section 2, of the 1969 Vienna Convention.

(3) The draft guideline takes the form of a “without prejudice” clause. Given the lack of significant practice, and in the light of the comments and observations by States, it is not the purpose of the draft guidelines or this commentary to deal in any detail with the questions that may arise.²⁸⁵ The Commission’s Guide to Practice on Reservations to Treaties, while not expressly addressing reservations formulated in connection with provisional application, may nevertheless provide guidance.²⁸⁶

(4) As a matter of principle, the formulation of reservations related to provisional application is not excluded. Article 19 of the 1969 and 1986 Vienna Conventions allows States and international organizations to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. The decision to apply the treaty provisionally may take place at the moment of signature (prior to the entry into force of the treaty for the State or international organization in question) or during the period up to and including the time of ratification, acceptance, approval or accession (in cases where the treaty itself is not yet in force).

(5) As indicated above, the draft guideline is formulated as a “without prejudice” clause in recognition of the lack of significant practice concerning reservations relating to provisional application. In the case of a bilateral treaty, a unilateral statement, formulated by a State or an international organization after initialling or signing but prior to entry into force, by which that State or organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation.²⁸⁷ In the case of multilateral treaties, although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations as well as declarations to opt out of provisional application must be distinguished from reservations,²⁸⁸ in the sense of the law of treaties.²⁸⁹ However, it remains to be ascertained in a given case to what extent such declarations or unilateral statements are comparable in their legal effect to that of reservations. It may also be relevant to distinguish between the case where a State or an international organization formulates a reservation limited to the phase of the provisional application, or formulates one or more reservations intended to produce their consequences beyond such phase.

Guideline 8 Responsibility for breach

²⁸⁵ See comments and observations received from Governments and international organizations (A/CN.4/737).

²⁸⁶ *Yearbook ... 2011*, vol. II (Part Three).

²⁸⁷ See guideline 1.6.1 of the Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol. II (Part Three), paras. 1–2.

²⁸⁸ See, in particular, guideline 1.3 of the Guide to Practice on Reservations to Treaties, *ibid.*

²⁸⁹ See e.g. art. 45, para. 2 (a), of the Energy Charter Treaty (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95); and art. 7, para. 1 (a), of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

The breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.

Commentary

(1) Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being applied provisionally. It follows from the legal effect of provisional application described in draft guideline 6, including with respect to *pacta sunt servanda*. Since the treaty or a part of a treaty being applied provisionally produces a legally binding obligation, then a breach of an obligation arising under the treaty or a part of a treaty being applied provisionally constitutes an internationally wrongful act giving rise to international responsibility. The State or international organization violating its obligation towards the other States or international organizations concerned incurs international responsibility. The inclusion of the present draft guideline was deemed necessary since it deals with a key legal consequence of the provisional application of a treaty or a part of a treaty. Article 73 of the 1969 Vienna Convention states that its provisions shall not prejudice any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the Guide is not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

(2) The draft guideline should be read together with the articles on responsibility of States for internationally wrongful acts of 2001²⁹⁰ and with the articles on responsibility of international organizations for internationally wrongful acts of 2011,²⁹¹ to the extent that they reflect customary international law. Accordingly, the reference to “an obligation arising under” and the word “entails” were consciously drawn from those articles. Likewise, the concluding phrase “in accordance with the applicable rules of international law” is intended as a reference, *inter alia*, to the applicable rules reflected in those articles.

Guideline 9 Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.
3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.
4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

²⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

²⁹¹ *Yearbook ... 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.

Commentary

(1) Draft guideline 9 concerns the termination of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, to the extent that the treaty enters into force between the States or international organizations concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally. This does not exclude the possibility that the termination of provisional application may be invoked, by a State or an international organization, on other grounds.

(2) Paragraph 1 addresses termination of provisional application upon entry into force. Entry into force is the most frequent way in which provisional application is terminated.²⁹² That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty between the States and international organizations concerned is implicit in the reference in draft guideline 3 to “pending its entry into force”, which is based on article 25 of the 1969 and 1986 Vienna Conventions.²⁹³ In accordance with draft guideline 5, provisional application continues in respect of two or more States or international organizations applying the treaty or a part of a treaty provisionally until the treaty enters into force between them.²⁹⁴

(3) The phrase “in the relations between the States or international organizations concerned” seeks to distinguish the entry into force of the treaty from the provisional application by one or more parties to the treaty. This is particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continues to be applied only provisionally in respect of others. This phrase is thus intended to capture all the possible legal situations that may exist in that regard.

(4) Paragraph 2 reflects the second instance mentioned in paragraph (1) of the commentary to the present draft guideline, namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty. It

²⁹² See the memorandum by the Secretariat on provisional application of treaties ([A/CN.4/707](#)), para. 88.

²⁹³ Most bilateral treaties state that the treaty shall be provisionally applied “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 Governments ... 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” (see [A/CN.4/707](#), para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force), which provides in paragraph (d) that: “Such a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned.”

²⁹⁴ See, e.g., the Agreement between the Federal Republic of Germany and the Government of the Republic of 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 (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333–334).

follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions.

(5) The opening phrase of paragraph 2 “[u]nless the treaty otherwise provides or it is otherwise agreed” avoids the reference to such an alternative agreement only being concluded between the “negotiating” States and international organizations, found in the 1969 and 1986 Vienna Conventions. The formulation “or it is otherwise agreed” also refers to the States or international organizations that had negotiated the treaty, but may also include States and international organizations that were not involved in the negotiation of the treaty but that are nevertheless participating in its provisional application. Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language of both Vienna Conventions, in terms of treating all States or international organizations concerned as being on the same legal footing in relation to provisional application, out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.²⁹⁵

(6) The final phrase in paragraph 2, “notifies the other States or international organizations concerned”,²⁹⁶ is a reference to the States and international organizations between which a treaty or part of a treaty is being, or can be, provisionally applied, as well as all States that have expressed their consent to be bound to the treaty.

(7) The agreement on provisional application may provide for advance notice to facilitate termination of provisional application in an orderly manner. The Commission decided, however, not to introduce *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period, or alternatively a “reasonable period”, for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

²⁹⁵ Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraph (6) of the commentary to draft guideline 3, above.

²⁹⁶ A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (United Nations, *Treaty Series*, vol. 2962, No. 51490, p. 339), art. 17. Other examples include: Treaty between the Federal Republic of Germany and the Kingdom of 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 (*ibid.*, vol. 2389, No. 43165, p. 117, at p. 173); Agreement between Spain and the International Oil Pollution Compensation Fund (*ibid.*, vol. 2161, No. 37756, p. 45, at p. 50); and Treaty between the Kingdom of 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 (*ibid.*, vol. 2156, No. 37662, p. 139, at p. 155). As for the termination of provisional application 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 (*ibid.*, vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with the International Agreement on Olive Oil and Table Olives.

(8) Paragraph 3 recognizes the possibility that grounds other than that anticipated in paragraph 2 may also be invoked by a State or an international organization for the termination of provisional application. Such additional possibility is implicit in the flexible nature of the termination of provisional application provided for in article 25, paragraph 2. For example, a State or international organization may seek to terminate provisional application of a multilateral treaty while still maintaining its intention to become a party to the treaty. Another scenario is that in situations of material breach, a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied.

(9) The same considerations with the regard to the opening phrase “[u]nless the treaty otherwise provides or it is otherwise agreed” apply with regard to paragraph 3 as those described above in relation to paragraph 2. The phrase “may invoke” serves to confirm the optional nature of the invocation of other grounds as a basis for terminating provisional application, while conveying the need to specify the grounds on which termination of provisional application is said to be taking place. In addition, the State or international organization invoking such grounds would be required (“shall”) to notify the other States or international organizations concerned, as they are understood under the present Guide. Given the variety of circumstances under which the termination of provisional application may occur, no general requirement on the timeframe for notification would be feasible. Nonetheless, the termination of the provisional application of some treaties, for example, those establishing institutional arrangements, warrants sufficient advance notice. In other situations, termination of provisional application may take place immediately upon receipt of notification, as indicated in paragraph (7) of the present commentary.

(10) The procedural requirements stipulated in the 1969 Vienna Convention for the termination of treaties already in force do not apply generally to the termination of provisional application.²⁹⁷ However, to ensure legal certainty, paragraph 4 of the draft guideline contains a saving clause that seeks to confirm that, in principle, the termination of the provisional application of a treaty does not affect any right, obligation or legal situation created through the execution of provisional application prior to its termination. The provision was modelled on article 70, paragraph 1 (b), of the 1969 Vienna Convention.

Guideline 10

Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

²⁹⁷ See S. Talmon and A. Quast Mertsch, “Germany’s position and practice on provisional application of treaties”, GPIL – German Practice in International Law, 2021.

Commentary

(1) Draft guideline 10 deals with the observance of provisionally applied treaties and their relation to the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969²⁹⁸ and 1986²⁹⁹ Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like article 27,³⁰⁰ draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as a justification for its failure to perform an obligation arising under such provisional application. Likewise, such provisions or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.³⁰¹ However, as indicated in draft guideline 12, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

(4) While each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,³⁰² once a treaty or a part of a treaty is applied provisionally, an inconsistency with the internal law of a State or with the rules of an international organization cannot justify a failure to apply provisionally such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to apply provisionally a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that

²⁹⁸ Article 27 of the 1969 Vienna Convention provides as follows:

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

²⁹⁹ Article 27 of the 1986 Vienna Convention provides as follows:

Internal law of states, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.
2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.
3. The rules contained in the preceding paragraphs are without prejudice to article 46.

³⁰⁰ See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in Corten and Klein *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I (see footnote 254 above), pp. 688–701, at p. 689.

³⁰¹ See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 43).

³⁰² See Mertsch, *Provisionally Applied Treaties ...* (see footnote 254 above), p. 64.

State or international organization, in accordance with draft guideline 8.³⁰³ Any other view would be contrary to the law on international responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law of a State or rules of an international organization.³⁰⁴

(6) The reference to the “internal law of States and rules of international organizations” includes any provision of such nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase “obligation arising under such provisional application”, in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to apply provisionally the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 11

Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 11 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 11 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,³⁰⁵ and the second,

³⁰³ See Mathy, “Article 25” (see footnote 254 above), p. 646.

³⁰⁴ See article 3 of the articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and article 5 of the articles on responsibility of international organizations of 2011 (*Yearbook ... 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

³⁰⁵ Article 46 of the 1969 Vienna Convention provides as follows:

Provisions of internal law regarding competence to conclude treaties

paragraph 2 of article 46 of the 1986 Vienna Convention.³⁰⁶ Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

(3) Draft guideline 11 provides that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation is “manifest” if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.³⁰⁷

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Commentary

(1) Draft guideline 12 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. Such limitations may be substantive or procedural, such as those for the expression of consent to be bound by a treaty, or a combination of both. States and international organizations may agree to provisional application subject to limitations that derive from internal law or rules of the organizations, which may be reflected in their consent to apply provisionally a treaty or a part of a treaty.

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

³⁰⁶ Article 46 of the 1986 Vienna Convention provides as follows:

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

³⁰⁷ According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

(2) The present draft guideline recognizes the right of States or international organizations to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization and make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.³⁰⁸

(3) The title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.³⁰⁹

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the States or the rules of the international organizations concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to apply provisionally a treaty or a part of a treaty.

Annex to chapter V

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³⁰⁸ See, for example, article 45 of the Energy Charter Treaty.

³⁰⁹ See the several examples of Free Trade Agreements between the EFTA States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: “if its constitutional requirements permit”, “if its respective legal requirements permit” or “if their domestic requirements permit” (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom Union States, reads as follows:

Article 43 (Entry into force)

[...]

2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depository.

See also article 22 of the General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949, *European Treaty Series*, No.2) and article 17 of the Convention on the Elaboration of a European Pharmacopoeia (Strasbourg, 22 July 1964, *ibid.*, No. 50).

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Chapter VI

Immunity of State officials from foreign criminal jurisdiction

A. Introduction

53. The Commission, at its fifty-ninth session (2007), decided to include the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.³¹⁰ At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).³¹¹

54. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).³¹² The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.³¹³

55. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.³¹⁴ The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, and her seventh report during the seventy-first session (2019).³¹⁵ On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has provisionally adopted seven draft articles and commentaries thereto. Draft article 2 on definitions is still being developed.³¹⁶

³¹⁰ At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 257).

³¹¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 386. For the memorandum prepared by the Secretariat, see [A/CN.4/596](#) and [Corr.1](#).

³¹² [A/CN.4/601](#), [A/CN.4/631](#) and [A/CN.4/646](#), respectively.

³¹³ See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 343.

³¹⁴ *Ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 266.

³¹⁵ [A/CN.4/654](#), [A/CN.4/661](#), [A/CN.4/673](#), [A/CN.4/686](#), [A/CN.4/701](#), [A/CN.4/722](#), and [A/CN.4/729](#), respectively.

³¹⁶ See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd

B. Consideration of the topic at the present session

56. The Commission had before it the eighth report ([A/CN.4/739](#)) of the Special Rapporteur. The report examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; considered a mechanism for the settlement of disputes between the forum State and the State of the official; and considered the issue of good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity. In the light of the treatment of the issues in the report, proposals for draft articles 17 and 18 were also presented.

57. The Commission considered the eighth report at its 3520th, 3521st and 3523rd to 3528th meetings, from 12 to 21 May 2021.

58. Following its debate on the report, the Commission, at its 3528th meeting, on 21 May 2021, decided to refer draft articles 17 and 18, as contained in the Special Rapporteur's eighth report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

59. At its 3530th and 3549th meetings, on 3 June and 26 July 2021, the Commission received and considered the reports of the Drafting Committee ([A/CN.4/L.940](#), [A/CN.4/L.953](#) and [Add.1](#)), and provisionally adopted draft articles 8 *ante*, 8, 9, 10, 11 and 12 (see sect. C.1 below).

60. At its 3557th to 3561st meetings, from 3 to 5 August 2021, the Commission adopted the commentaries to draft articles 8 *ante*, 8, 9, 10, 11 and 12 (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the eighth report

61. The Special Rapporteur recalled that, in the seventh report, which had been submitted for the consideration of the Commission at its seventy-first session, she had completed her consideration of the questions set forth in the workplan submitted to the Commission in 2012. However, in chapter V of the seventh report, particular attention had been drawn to three general issues that warranted examination by the Commission before the conclusion of the first reading, namely the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the possibility of establishing a mechanism for the settlement of disputes and the possible

meetings, on 6 and 7 August 2014, it adopted the commentaries thereto (*ibid.*, *Sixty-ninth Session, Supplement No. 10* ([A/69/10](#)), paras. 130–132).

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid.*, *Seventy-first Session, Supplement No. 10* ([A/71/10](#)), paras. 194–195 and 250).

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-second Session, Supplement No. 10* ([A/72/10](#)), paras. 74, 76 and 140–141).

At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on “Immunity of State officials from foreign criminal jurisdiction”, containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session ([A/CN.4/L.940](#)). The Commission took note of the interim report of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only (*ibid.*, *Seventy-fourth Session, Supplement No. 10* ([A/74/10](#)), para. 125 and footnote 1469).

inclusion of recommendations of good practices in the draft articles. Those questions were the subject of consideration in the eighth report.

62. The Special Rapporteur explained that the eighth report was divided into an introduction and four chapters. The purpose of the introduction was to describe the treatment of the topic by the Commission. Chapter I examined the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. Chapter II considered the problems related to the settlement of disputes and proposed the establishment of a specific mechanism for that purpose. Chapter III addressed the issue of recommended good practices. Chapter IV concerned the future workplan.

63. Regarding the draft articles that the Drafting Committee had yet to examine, the Special Rapporteur stated that she had held two rounds of informal consultations before the start of the present session to review the current status of the Commission's work and to formulate proposals that would allow the Drafting Committee to make progress in the light of the difficult circumstances of the COVID-19 pandemic and the methods of work adopted for the current session. She thanked the members who had participated in the consultations.

64. Concerning the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the Special Rapporteur recalled that, in the sixth report, she had referred to the need to address in a subsequent report the possible effect that the obligation to cooperate with international criminal tribunals might have on the immunity of State officials from foreign criminal jurisdiction.³¹⁷ Two events had led her not to address the issue in the seventh report. The first was the fact that the question of the relationship between immunity and the obligation to cooperate had been raised before the International Criminal Court in the *Jordan Referral re Al-Bashir* case, which was *sub judice* at the time. The second was that, when the report had been completed, an item had been on the agenda of the General Assembly concerning a potential request for an advisory opinion of the International Court of Justice on the issue of immunity of heads of State and the relationship thereof to the duty to cooperate with the International Criminal Court.³¹⁸ The Special Rapporteur noted that the demand for an advisory opinion appeared to have waned and that the International Criminal Court had issued its judgment in the aforementioned case on 6 May 2019.³¹⁹ The current state of affairs therefore allowed the Commission to address the relationship of immunity of State officials from foreign criminal jurisdiction and international criminal tribunals from a general perspective.

65. The question of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been analysed by both the Special Rapporteurs who had dealt with the present topic. It was closely linked to the scope of the draft articles, which had been defined in draft article 1 as adopted by the Commission. It was clear that the topic did not deal with immunities before international criminal tribunals. Nor it could be denied, however, that the discussion of immunity of State officials from foreign criminal jurisdiction could not proceed in the abstract and without regard to the existence of international criminal tribunals created to consider

³¹⁷ A/CN.4/722, para. 43.

³¹⁸ Agenda item 89, entitled "Request for an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials" (A/73/251 and Add.1)

³¹⁹ *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal*, judgment of the Appeals Chamber of 6 May 2019 (ICC-02/05-01/09-397-Corr).

crimes of concern to the international community. Given that international crimes could be committed by State officials, who might then be subject to prosecution before both national and international criminal courts, it seemed impossible to deny that a relationship existed between the present topic and international criminal jurisdiction. The relationship was also closely linked to the principle of accountability and the efforts against impunity for crimes under international law, which had been recurrent themes in the Commission's debates.

66. Specific questions relating to the relationship between international criminal tribunals and the present topic had arisen in two areas. The first was the possible definition of an exception to immunity derived from the obligation to cooperate with an international criminal tribunal. The second was the standing of foreign criminal jurisdiction in the light of the same obligation to cooperate. The Commission had addressed the first question in 2016 and 2017, deciding not to retain such an exception in draft article 7. The second question was addressed by the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, in which the Court affirmed that, when a State party to the Rome Statute³²⁰ acts pursuant to a request for assistance by the Court, the State assists the Court in exercising its jurisdiction, rather than exercising national criminal jurisdiction.³²¹

67. The Special Rapporteur reiterated her view, expressed orally at the seventy-first session and in her eighth report, that it would neither be useful nor necessary for the Commission to examine the judgment of the International Criminal Court for the purposes of its work. The judgment had to be understood in the context of the specific legal regime established by the Rome Statute, and it did not seem possible to extrapolate it to the topic before the Commission, which had a general scope and should be applicable to any State with respect to whose criminal jurisdiction a question of immunity might arise.

68. Nevertheless, the Special Rapporteur considered that it did not seem reasonable for the Commission to ignore the existence of international criminal tribunals when considering an issue that bore a certain relationship to those tribunals. While the topic was limited in scope to immunity from foreign criminal jurisdiction, a number of both members of the Commission and States had stated that the ongoing work of the Commission should not ignore the achievements of the international community in the field of international criminal law and that its work should neither alter nor damage the substantive and institutional norms of international criminal law.

69. Draft article 18,³²² proposed for the consideration of the Commission, responded thereto. It was formulated as a without prejudice clause that would safeguard both the separation and the independence of the regimes applicable to immunity before national criminal courts and international criminal tribunals and preserve the special norms that govern the functioning of international criminal tribunals. The Special Rapporteur also noted similarity between draft article 18 and draft article 1, paragraph 2, as without prejudice clauses and proposed that the former might be incorporated as paragraph 3 of draft article 1.

70. Turning to the question of the settlement of disputes, the Special Rapporteur noted, as indicated in the eighth report, that the procedural provisions proposed in the sixth and seventh reports were intended to help build trust between the State of the official and the

³²⁰ Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

³²¹ See footnote 319 above.

³²² The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 18

The present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals.”

forum State, thereby facilitating the settlement of disputes that could arise in the process of determining and applying immunity. Nevertheless, it remained possible that a divergence of legal positions between the States involved could give rise to a dispute that could only be resolved through the peaceful means applicable in contemporary international law. In the opinion of the Special Rapporteur, it was therefore necessary to include a specific provision on the settlement of disputes in the present draft articles.

71. It was clear that any dispute that might arise between the forum State and the State of the official could be submitted to a dispute settlement mechanism accepted by States, as had indeed happened in practice. However, those traditional dispute resolution mechanisms had often functioned in an *ex post facto* manner, operating as a last resort for the restoration of international lawfulness. They had not offered States the opportunity to resolve the controversy at an early stage, avoiding a *fait accompli* that would be difficult to reverse later.

72. The consultation mechanism proposed in draft article 15 and the information exchange system provided for in draft article 13 (renumbered as draft article 12) were both intended to facilitate the early resolution of disputes. However, in case neither worked, it could also be appropriate to establish a mechanism to submit the dispute to a neutral and impartial third party. The Special Rapporteur explained that, to be useful, the mechanism should be structured around two basic elements: linking the submission to third-party dispute settlement to the suspension of the exercise of criminal jurisdiction by the forum State; and the binding effect of the decision taken by the third party.

73. The proposal submitted to the Commission opted for arbitration or the International Court of Justice to avoid the long negotiation process necessary to establish an *ad hoc* body. It was considered that both the mechanisms and their procedural rules were well known to States. The status of the International Court of Justice as a common court of international law would also make the Court particularly suitable to rule on the complex questions that might arise in cases relating to immunity from foreign criminal jurisdiction.

74. Based on those considerations, the proposed draft article 17³²³ submitted to the Commission for its consideration established a system for the settlement of disputes divided into three consecutive phases: consultations, negotiations (both understood as mandatory mechanisms), and recourse to arbitration or the International Court of Justice (as alternative mechanisms of a voluntary nature). That model, which would be subject to the general rules on dispute settlement in force in contemporary international law, would give States a useful instrument for the defence of their respective rights and interests, avoiding situations of *fait accompli*.

75. The Special Rapporteur noted that the Commission had included provisions on the settlement of disputes in much of its recent work, including in projects that did not follow the traditional model of draft articles, for example the work on peremptory norms of

³²³ The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 17
Settlement of disputes

1. If, following consultations between the forum State and the State of the official, there remain differences with regard to the determination and application of immunity, the two States shall endeavour to settle the dispute as soon as possible through negotiations.
2. If no negotiated solution is reached within a reasonable period of time, which may not exceed [6] [12] months, either the forum State or the State of the official may suggest to the other party that the dispute be referred to arbitration or to the International Court of Justice.
3. If the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling.”

general international law (*jus cogens*). However, she acknowledged that dispute settlement mechanisms were especially linked to instruments of a normative nature and that the Commission had not yet decided whether it would recommend to the General Assembly that the draft articles become a treaty. Even if not, draft article 17 would be fully justified in the context of Part Four of the draft articles, which was dedicated to procedural provisions and safeguards.

76. Concerning good practices, the Special Rapporteur recalled that, in the seventh report, she had raised the possibility of incorporating into the draft articles some references to good practices, the adoption of which could be recommended to States. The practices included, in particular, a high-level national authority taking the decisions regarding the determination and application of immunity and States drafting manuals or guides for the use of State bodies involved in the process of determining and applying immunity. The Special Rapporteur explained that that approach was due to the finding that, in a number of cases, the competent State authorities were not familiar with the special problems raised by immunity in international law, its relationship with the fundamental principles of international law, or the influence that decisions on the immunity of a foreign State official might have on the international relations of the forum State.

77. In the debate in the Commission at its seventy-first session, several members had addressed the issue of good practices, and the Special Rapporteur recalled that the opinions expressed differed widely. One proposal had been to transform Part Four of the draft articles into an annex that could be recommended to States as good practices. The Special Rapporteur did not consider that form appropriate. Other members had expressed the view that the inclusion of good practices in the draft articles would not be useful. A third group had considered that, while the inclusion of good practices could be useful, it would take a long time to be drafted and would delay the completion of the work of the Commission on the topic.

78. The Special Rapporteur also noted that only one State had replied to the request in the report of the Commission on the work of its seventy-first session for information “on the existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State.”³²⁴ The reply of that State had been that it had no such guide.

79. In view of the considerations expressed, the Special Rapporteur explained that the eighth report contained no specific proposal on recommended good practices. This did not, however, prevent the practices she had identified from being included in the draft articles, either in Part Four, or in the general commentary.

2. Summary of the debate

(a) General comments

80. Members commended the Special Rapporteur for her extensive work on the eighth report, which they considered provided a clear, well-researched, succinct and comprehensive treatment of the questions of the relationship between the topic and international criminal jurisdiction, the possibility of adding a dispute settlement clause and recommended good practices. Members expressed appreciation for her organization of several rounds of informal consultations, both before and during the session. It was

³²⁴ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 29.

noted that the informal consultations had enabled the Drafting Committee to progress in its work at the current session.

81. It was recalled that the Special Rapporteur had now completed her plan of work on the topic, including the additional questions dealt with in the eighth report. A number of members expressed the hope that the Commission would complete its first reading either at the present session or during the quinquennium. The importance of giving States an opportunity to comment on a full set of draft articles at the conclusion of the first reading was emphasized. It was also noted that the topic had been on the current programme of work of the Commission since 2007, making it one of the longest-running topics before the Commission. It was considered that the time that the Commission had taken to work on the topic reflected its complexities and the controversial nature of some of its fundamental aspects. In that respect, it was noted that States had called upon the Commission to come together on a way forward on the topic. In that connection, a number of members suggested that the Commission would need to overcome the divergent views of its members on draft article 7 before completing its first reading on the topic. The need to consider the question of inviolability and the outstanding definitions in draft article 2 (formerly draft article 3) was also recalled.

(b) Specific comments

Draft article 18

82. Members agreed that any question of immunity before international criminal tribunals was outside the scope of the present topic. Several members noted that immunity before a particular international criminal tribunal was governed by the instrument establishing its respective legal regime. Nevertheless, a number of members considered it important for the Commission to address the relationship specifically in the draft articles. It was noted that the two fields of law shared the important goals of promoting accountability and preventing impunity for the most serious crimes under international law. The point was made that international criminal courts must often rely on States to exercise their jurisdiction. Several members expressed the importance of avoiding casting a shadow on the interpretation and application of the substantive and institutional norms of international criminal law. In particular, the importance of the obligation of States parties to the Rome Statute to cooperate with the International Criminal Court and the cooperation obligations of States under Security Council resolutions 955 (1994) and 827 (1993) was recalled. It was also noted by some members that, in its past practice, the Security Council, acting under Chapter VII of the Charter of the United Nations, had created horizontal obligations for States to assist in criminal investigations by other States. However, a number of members also emphasized the importance that the draft article be written in a way that would apply equally to States parties and non-parties to the Rome Statute of the International Criminal Court.

83. Several members supported the inclusion of draft article 18, sharing the view of the Special Rapporteur that a without prejudice clause would be useful to address the relationship of the draft articles with the rules governing the functioning of international criminal tribunals. It was considered that the draft articles made clear that they neither applied to nor addressed the autonomous regimes of international criminal tribunals. It was suggested that draft article 18 would clarify to States that the draft articles did not impact any other obligations that States could have previously accepted or undertaken. It was also noted that the Commission had frequently used without prejudice clauses in its previous work, and that they had served to delimit the scope of a topic rather than create hierarchical relationships.

84. A number of other members opposed the adoption of draft article 18. The view was expressed that the potential overlap between national and international jurisdictions

was not sufficient to create a relationship between them. Some members considered that the relationship between the topic and international criminal tribunals had been made clear in draft article 1, paragraph 1, and in the commentary. A number of members also doubted that the draft articles, if adopted without draft article 18, could undermine developments in international criminal law. Concern was expressed that a without prejudice clause could be interpreted as creating a hierarchical relationship between the norms governing international criminal tribunals and the law of immunity of State officials from national courts. It was also noted that to give precedence to the jurisdiction of the International Criminal Court over the jurisdictions of national courts would be contrary to the principle of complementarity. It was emphasized that a provision on the relationship between the topic and international criminal tribunals should not create an exception to immunity that did not exist under customary international law. A number of members emphasized that, while States could agree in their relations with each other not to recognize immunities, those States could not extend those rules to other States. With respect to authorizations by the Security Council, the need for close attention to the text of such authorizations to determine their content was recalled. It was noted that previous instruments relating to national jurisdiction over international crimes, including the draft articles on prevention and punishment of crimes against humanity and the International Convention for the Protection of All Persons from Enforced Disappearance,³²⁵ did not contain similar without prejudice clauses. Additionally, a number of members suggested that the complexities of the consideration of draft article 18 could cause unnecessary delays to the completion of the first reading on the topic.

85. Several members addressed the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case. Some members noted that the judgment had been badly reasoned and controversial. Accordingly, it was suggested by these members that it was important that a without prejudice clause should not be drafted in such a way as to endorse the judgment, adding that no link should be made between the judgment and draft article 18 in the commentary. On the contrary, some members did not agree with this characterization. A view was expressed that it was not for the Commission to sit in judgement over the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case ruling in relation to a legal matter that the Chamber solely had the statutory competence to address. In any event, members generally agreed that the Commission does not need to and should not discuss the judgment in its work on the present topic.

86. With respect to the text of draft article 18, several specific proposals were made. To accommodate the existence of hybrid tribunals, which were neither entirely national nor entirely international in character, several members supported a proposal to refer to “internationalized criminal tribunals” instead of “international criminal tribunals”. It was also proposed the reference to “the rules governing ... international criminal tribunals” be supplemented with “and practices”, drawing on the texts of savings clauses in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³²⁶ Support was also voiced for an explicit reference to obligations resulting from decisions of the Security Council. Some members expressed concerns that the scope of the rules covered by draft article 18 was too broad or otherwise unclear. It was noted that the without prejudice clause proposed in draft article 18 had a larger scope than the relevant commentary to draft article 1, as the former referred to the “functioning” of international criminal tribunals and the latter referred to immunities before them. A proposal was made to refine the text to read: “[t]he present draft articles are without prejudice to the applicability of immunity before international criminal tribunals under

³²⁵ New York, 20 December 2006, United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

³²⁶ Vienna, 18 April 1961, *ibid.*, vol. 500, No. 7310, p. 95, and Vienna, 24 April 1963, *ibid.*, vol. 596, No. 8638, p. 261, respectively.

the relevant constituent instruments establishing such international criminal tribunals.” Another proposal was to make reference to States’ pre-existing obligations under international law. Other members proposed that “jurisdiction” would be the appropriate term, considering that immunities did not exist before international criminal tribunals. In that regard, it was highlighted that the existence of multiple such jurisdictions should be accommodated in the text. It was also suggested that a clause providing that the draft articles “do not deal with” the question of international criminal tribunals would be preferable.

87. Regarding the placement of the proposed text, several members expressed their preference that the provision be included as a new paragraph 3 of draft article 1. That would, in the view of some members, highlight the relationship between the without prejudice clause already contained in draft article 1, paragraph 2, and draft article 18. Other members considered that either placement for the provision would be acceptable. It was emphasized that, in any event, the two provisions would have to be read together.

88. As the Special Rapporteur had not proposed a title for draft article 18, it was suggested that “Relationship with internationalized tribunals” could be adopted if the provision was retained as a standalone draft article. Other suggested titles included “Without prejudice”, “Relationship to specialized treaty regimes”, “Cases outside the scope of the present draft articles” and “Relationship between the present draft articles and instruments establishing international criminal tribunals.”

Draft article 17 (Settlement of disputes)

89. Several members agreed with the inclusion of a draft article relating to the settlement of disputes. It was noted that a dispute resolution clause could be seen as a final procedural safeguard, building on draft articles 8 to 16. The procedural mechanisms proposed in the draft articles could be seen as a whole, intended to finely balance the interests of the forum State and the State of the official. It was noted that the inclusion of such a clause might be welcomed by States, some of which had been contemplating the establishment of an international mechanism to resolve disputes relating to immunity of State officials. Furthermore, on a practical level, several members noted that the inclusion of a dispute settlement clause on first reading would invite potentially useful comments from States. However, the view was also expressed that a dispute resolution clause would be an inappropriate addition to the draft articles in general. In particular, it was suggested that States might be hesitant to commit to a mechanism that could be seen as a restriction of their respective exercise of national criminal jurisdiction.

90. A number of members expressed the view that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty. Some members considered that the inclusion of a dispute resolution clause did not depend on the nature of the final outcome of the work of the Commission. It was pointed out that it could not yet be ruled out that the draft articles might become a treaty, and it was therefore suggested that a dispute resolution clause would be appropriate. Several members saw a need for more clarity on the intended purpose of the provision, so as to determine its appropriate formulation. In the view of some members, a typical compromissory clause would be more appropriate were the draft articles to become a treaty. If the draft articles were not intended to become a treaty, however, a more general clause regarding procedural recommendations would be appropriate.

91. A number of members considered that provisions relating to dispute settlement adopted by the Commission in its recent work on other topics could serve as models for that provision. In particular, draft conclusion 21 of the draft conclusions on peremptory

norms of general international law (*jus cogens*)³²⁷ and draft article 15 of the draft articles on prevention and punishment of crimes against humanity³²⁸ were cited: the former was noted as a potential model for procedural recommendations to States; the latter as a good model of an effective compromissory clause. However, a number of members recommended the omission under the present draft articles of paragraphs 3 and 4 of draft article 15 of the draft articles on prevention and punishment of crimes against humanity, concerning reservations to dispute settlement. The view was also expressed that draft conclusion 21 would not be an appropriate model as the work of the Commission on peremptory norms of general international law (*jus cogens*) had not yet been finalized. It was also recalled that draft conclusion 21 had been motivated by the particular negotiating history of article 53 of the Vienna Convention on the Law of Treaties,³²⁹ which did not apply to the present topic.

92. Several members expressed views concerning the means of dispute settlement contained in draft article 17. It was noted that the draft article focuses on negotiation, arbitration and judicial settlement, without reference to the other means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations. A number of members supported adding additional means to the draft article. It was suggested that expanding the choice of means would enable closer alignment of the provision with State practice. Part XV of the United Nations Convention on the Law of the Sea³³⁰ was cited as a potential model.

93. The importance was also emphasized of highlighting the obligation of all States under Articles 2, paragraph 3, and 33 of the Charter to settle any differences between them by peaceful means. A number of members highlighted the importance of the freedom of States to choose the means of dispute resolution. It was suggested that either an additional paragraph making express reference to the principle could be incorporated in the draft article or that the point could be explained in the commentary. It was also noted that, rather than being contrary to the principle of free choice of means, draft article 17 could be seen as an exercise of such freedom.

94. With respect to paragraph 1, some members requested further clarification about the distinction between consultations and negotiations. It was proposed that paragraph 1 could be amended to add “through any other means of their own choosing” to “negotiations”. It was suggested to change “as soon as possible” to “as soon as practicable”, to allow States an appropriate degree of flexibility. Alternatively, the addition of time limits for consultations and negotiations was proposed, in order to facilitate the resolution of disputes.

95. Regarding paragraph 2, the view was expressed that it was not clear whether recourse to judicial or arbitral dispute resolution was intended to be compulsory. Some members supported using compulsory language, making draft article 17 a compromissory clause. However, others preferred the current language. It was suggested that, if the provision were to serve as a reminder to States, it should be of a general nature. Thus, some members expressed the view that including a time limit of either 6 or 12 months would only make sense if the provision were made compulsory. It was also stated that, in view of the sensitivities involved in disputes regarding immunity, even 6 months might be too long a delay. Clarification was requested as to whether a dispute could be referred to judicial or arbitral settlement before the expiration of the 6- or 12-month period, for example if negotiations had no reasonable prospect of success. A number of members

³²⁷ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 56.

³²⁸ *Ibid.*, para. 44.

³²⁹ Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

³³⁰ Montego Bay, 10 December 1982, *ibid.*, vol. 1833, No. 31363, p. 3.

suggested reference to additional judicial forums, including, where appropriate, the International Tribunal for the Law of the Sea and an eventual African Court of Justice and Human Rights. It was also proposed to add conciliation, mediation and the use of good offices to the list of available means. A number of members proposed that draft article 17 should clarify the consequences if a State did not accept another State's invitation to dispute settlement. Several members also expressed the view that the creation of a new standing body to deal with disputes regarding immunity would not be advisable.

96. A number of members supported paragraph 3 of draft article 17. However, some members expressed doubts regarding the provision. It was noted that existing treaties relating to immunities did not provide for the suspension of domestic proceedings pending inter-State dispute resolution. A view was expressed that the suspension of national proceedings pending international dispute settlement would be particularly deferential to the State of the official. Some members considered that the draft article failed to address the situation of the State official whose immunity was being examined. It was proposed that the draft article could instead proscribe the further development of the criminal procedure, leaving open the question of continued detention. Several members suggested that the question of suspension should be treated on a case-by-case basis by the court or arbitral tribunal in the context of provisional measures. It was noted that, in past cases where claims relating to the immunity of State officials had been raised before the International Court of Justice, the Court had not indicated provisional measures ordering the suspension of domestic proceedings. It was also noted that it would be necessary to ensure that domestic legal systems had provisions to give effect to any suspension. Additionally, a number of members suggested that the draft article should specify the effect for the domestic proceedings of an eventual decision of the International Court of Justice or arbitral tribunal. It was also suggested that the dispute resolution clause might establish a form of preliminary reference procedure, to allow national courts to seek guidance from a third-party dispute settlement mechanism.

97. It was noted that there was a risk that draft article 17 as proposed could interfere with existing compromissory clauses. The addition of a without prejudice clause to address that was proposed.

98. With respect to the title of the draft article, it was suggested that "procedural requirements" might be a more appropriate title for the provision, because "settlement of disputes" suggested the creation of a binding obligation on States.

Recommended good practices

99. The members generally agreed with the Special Rapporteur that there was no need to formulate new proposals with respect to recommended good practices. While a number of members supported the idea to reflect good practices in principle, some considered that such inclusion would not be consonant with the form of the draft articles. Other members also considered that to work extensively on recommended good practices would unnecessarily delay the conclusion of the Commission's first reading on the topic. The potential difficulty of developing a set of good practices that would apply easily to diverse national legal systems was also noted. Several members expressed their support for the proposal of the Special Rapporteur to address the good practices that could already be identified in the context of either those draft articles already before the Commission or, more likely, in the commentaries. It was also suggested that States' recommended good practices could be inferred from their comments, so no direct mention of the practices would be necessary in the work of the Commission.

3. Concluding remarks of the Special Rapporteur

100. The Special Rapporteur expressed her appreciation to the members for their comments on the eighth report. In her view, the comments, observations, criticisms and suggestions of members would contribute to the advancement of the work of the Commission.

101. Responding first to the concerns expressed about the development of the work on the topic, the Special Rapporteur noted that several substantive issues were pending before the Commission that would require an additional effort to successfully address before adopting the draft articles on first reading. She noted that some members had mentioned draft article 7 on exceptions to immunity *ratione materiae* in that context. She emphasized, however, that the Commission was making efficient progress in addressing a matter that gave rise to legal difficulties and political sensitivities. That progress was due to a large degree to a workplan and a methodology that had received broad support in the Commission during the current and previous quinquennia. She expressed her confidence that the Commission would be able to resolve the problems, which inevitably arise in the process of progressive development and codification of international law, in line with its characteristic spirit of collegiality.

102. With respect to the future outcome of the Commission's work on the topic, the Special Rapporteur was of the view that the topic had been developed in the form of draft articles, whose purpose was to offer States a proposal on the general regulation of the topic, in accordance with the mandate of the Commission to promote the progressive development and codification of international law. She saw no reason to change the format of the work of the Commission at the current stage, especially in the light of the normative dimension of the work, and expressed her belief that the Commission shared that opinion. For that reason, the work of the Commission on the topic would take the form of draft articles, regardless of whether the Commission recommended on second reading that the General Assembly use them as the basis for a possible treaty. In her view, the nature of the instrument being prepared and the potential recommendation to be made to the General Assembly on further treatment of the draft articles were two issues that should remain separate.

103. With respect to draft article 18, the Special Rapporteur remarked that the statements of members, while revealing diverse opinions, reflected the importance of the issue.

104. Regarding the scope of the draft articles, the Special Rapporteur recalled that a number of members considered it unnecessary for the Commission to examine the relationship between the topic and international criminal tribunals, as the issue was outside the scope of the topic. However, she also noted that the majority of members had spoken in favour of examining the issue and retaining draft article 18. The Special Rapporteur agreed with the latter approach and considered that it would be difficult to justify the purposeful exclusion of a reference to the autonomy of the regimes applicable to international criminal tribunals in the light of the evolution of international law. That was especially so considering the number of cases in practice in which the issue of immunity from foreign criminal jurisdiction had been raised in connection with the same crimes that fell within the jurisdiction of international criminal tribunals. To acknowledge that connection and to formally declare the autonomy of the legal regimes applicable to such courts would not prejudice the scope of the topic and would allow the Commission to avoid entering into the debate on immunity before national criminal courts and international criminal tribunals.

105. Concerning the judgment of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, the Special Rapporteur recalled that some members expressed opposition to draft article 18 because of concerns that it had a direct connection to the

Court's judgment and could be read as validation or support for it. The Special Rapporteur did not think such concerns were justified. While she had waited for the International Criminal Court to issue its judgment before addressing the question, she had always reserved the right to return to the question of the relationship between the topic and international criminal tribunals. As she had already indicated in 2019, it was not necessary for the Commission to consider the judgment, as it was not relevant to the topic. For that reason, her reference to the judgment in the eighth report was limited to recalling the main conclusions of the judgment and explaining why it was irrelevant to the work of the Commission. She reiterated her view that draft article 18 could not be viewed as validating, endorsing or supporting the judgment of the International Criminal Court and was confident that the Drafting Committee would take the concerns of members in mind when considering the draft article.

106. Additionally, the Special Rapporteur noted that, while several members had seized upon the phrasing in the English translation of the eighth report the reception of the judgment "has not been kind",³³¹ in her view a preferable translation would have been "has been contentious".

107. On the question of the effect of the proposed without prejudice clause, the Special Rapporteur noted the view expressed that the text proposed for draft article 18 would amount to a recognition that the rules governing the functioning of international criminal tribunals were hierarchically superior to those governing the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur shared the view that the conventional norms governing an international criminal tribunal were generally only applicable to the States parties to the relevant convention, but disagreed that draft article 18 would in any way affect that principle. She recalled that the Commission had frequently used without prejudice clauses in its work and that the Commission had not understood such clauses to give rise to hierarchical relationships. Rather, she agreed with the members who considered that draft article 18 merely separated different legal regimes whose validity and separate fields of application were intended to be preserved.

108. Concerning the placement of draft article 18, the Special Rapporteur noted that practically all of the members who supported the inclusion of draft article 18 were of the view that the provision would be best included as draft article 3, paragraph 1. That placement was more appropriate because draft article 18 was closely related to the scope of the draft articles and could complement the without prejudice clause contained in draft article 1, paragraph 2. The Special Rapporteur expressed her intention to make appropriate proposals to the Drafting Committee in that regard.

109. In response to specific drafting proposals made by members, the Special Rapporteur underscored in particular the suggestion to refer to "internationalized" rather than "international" criminal tribunals, but considered that the study of all such proposals would be more appropriately left to the Drafting Committee.

110. With respect to draft article 17, the Special Rapporteur emphasized that the proposal to include a draft article dedicated to dispute settlement had received support from a majority of Commission members. She also noted that some members had linked the inclusion of a draft article on dispute settlement to the idea that the final outcome of the work of the Commission would be a treaty. Others, however, had considered that a dispute settlement provision could also be understood as an extension of the procedural guarantees included in Part Four of the draft articles and that it would therefore be appropriate to include such a clause regardless of the final outcome of the work. Draft article 17 corresponded to the latter perspective, which also explained the placement of the provision directly after the other provisions proposed in Part Four. Nevertheless, the

³³¹ [A/CN.4/739](#), para. 23.

Special Rapporteur agreed that the final outcome of the work of the Commission could be relevant to the content of draft article 17. A traditional compromissory clause could be more appropriate for a draft treaty, and a provision offering guidance to States on how to resolve a dispute would be more appropriate if the Commission did not intend to propose a treaty. The Special Rapporteur had not intended for the draft article to become a compromissory clause but was open to discussing the observations and suggestions of members in the Drafting Committee. She also recalled that, regardless of the final decision of the Commission on the nature of its work on the topic, it would be useful to include a dispute resolution clause at first reading to allow for feedback thereon from States.

111. With respect to the means of dispute resolution included in draft article 17, the Special Rapporteur took note of proposals to include other means of dispute settlement or other judicial forums in the draft article. However, she considered that the provision was intended to provide a simple and useful model for dispute settlement. While it was obvious that States could use any other means of dispute settlement, it would not add value to reiterate that list of choice of means in the provision. The Special Rapporteur was nevertheless open to the possibility of including other specific means that would be particularly useful for the purpose pursued in draft article 17. She also considered it appropriate to limit the reference to judicial means to the International Court of Justice, in view of the general approach of the draft articles. With respect to the reference to arbitration, the Special Rapporteur explained that a general reference was appropriate to respect the principle of free choice of means, while it was obvious from the context that the reference pertained to inter-State arbitration. The Special Rapporteur also took note of the view shared by members that it would not be useful to create a specialized body.

112. Concerning the characteristics of the proposed dispute settlement mechanism and in response to a question raised in the debate, the Special Rapporteur explained that her proposal was structured in three phases: consultation, negotiation and judicial or arbitral settlement. Noting that consultations and negotiations might overlap, she clarified that the two were distinguished by the level of formality and by the particular aim of negotiation to find a solution bilaterally. The Special Rapporteur also noted the points raised by members relating to the suspension of the exercise of national jurisdiction should the States concerned decide to submit a dispute to arbitration or to the International Court of Justice. However, she explained that the provision was intended to serve as a safeguard for the State of the official against abusive or politically motivated prosecutions. She noted that it would be necessary to take into account the need to guarantee an adequate balance between the protection of the interests of the forum State and those of the State of the official, in order to avoid a *fait accompli* that could deprive the forum State of the right to exercise criminal jurisdiction or the State of the official of immunity. With respect to the issues raised concerning the legal effect of the outcome of a dispute settlement mechanism in the legal order of the forum State, the Special Rapporteur expressed her view that the issue was important and should be considered by the Drafting Committee, along with the practical consequences that might arise from the optional nature of recourse to the International Court of Justice or to arbitration.

113. Regarding the question of good practices, the Special Rapporteur noted that the members had been practically unanimous in their support of her proposal not to include a provision on the question in the draft articles. She indicated her intention, in line with the suggestion of some members, to include reference to the examples of good practices in the commentary that she would submit to the Commission.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

114. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Part One

Introduction

Article 1

Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Article 2

Definitions

For the purposes of the present draft articles:

...

(e) “State official” means any individual who represents the State or who exercises State functions;

(f) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority;

Part Two

Immunity *ratione personae**

Article 3

Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4

Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

* The Commission is considering the procedural provisions and safeguards applicable to the present draft articles in Part Four.

Part Three

Immunity *ratione materiae***

Article 5

Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6

Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7

Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
 - (a) crime of genocide;
 - (b) crimes against humanity;
 - (c) war crimes;
 - (d) crime of *apartheid*;
 - (e) torture;
 - (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Part Four***

Article 8 *ante*

Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

** The Commission is considering the procedural provisions and safeguards applicable to the present draft articles in Part Four.

*** The Commission has yet to adopt the title of this part.

Article 8**Examination of immunity by the forum State**

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
 - (a) before initiating criminal proceedings;
 - (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 9**Notification of the State of the official**

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Article 10**Invocation of immunity**

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.
3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Article 11**Waiver of immunity**

1. The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.
2. Waiver must always be express and in writing.
3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the

States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

Article 12 [13]****

Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.

2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.

3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

**** The number between square brackets indicates the original number of the draft article in the report of the Special Rapporteur.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

115. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session is reproduced below.

Article 8 *ante*

Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

Commentary

(1) Draft article 8 *ante* is the first of the draft articles in Part Four. Its purpose is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal respectively with immunity *ratione personae* and immunity *ratione materiae* of State officials, current or former, from foreign criminal jurisdiction. By referring to the links between Part Four, on one hand, and Part Two and Part Three, on the other, draft article 8 *ante* takes into account the notion of balance reflected in the previous work of the Commission, which included a footnote to the titles of Part Two and Part Three indicating that “[a]t its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles”.³³²

(2) As Part Four is an integral part of the draft articles, its provisions are intended to be generally applicable to the other provisions of the draft articles. There was nonetheless a divergence of views among the members of the Commission with regard to the scope of Part Four, in particular its relationship to draft article 7, which was provisionally adopted by the Commission at its sixty-ninth session (2017).

(3) In the view of some members, the procedural guarantees and safeguards contained in Part Four applied only when immunity might exist, which seemingly was not the case with respect to the crimes listed in draft article 7, as it was couched in absolute terms, stating that immunity *ratione materiae* “shall not apply in respect of the following crimes under international law”. On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged.

(4) In light of this divergence of views, the Commission provisionally adopted draft article 8 *ante*, which expressly states that all the procedural provisions and safeguards in Part Four of the draft articles “shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft

³³² The decision to include the footnote was taken at the Commission’s sixty-ninth session (2017), when draft article 7 was provisionally adopted. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, paras. 140–141. See, in particular, paragraph (9) of the commentary to draft article 7, which states that “in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: ‘At its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles.’”

articles”. Draft article 8 *ante* does not prejudice and is without prejudice to the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.

(5) With the phrase “including to the determination of whether immunity applies or does not apply under any of the draft articles”, the Commission has confirmed that Part Four, in its entirety, also applies to draft article 7. This is made especially clear by the reference to the determination of immunity, understood as the process for deciding whether immunity applies or does not apply, which is the subject of draft article 13, currently under consideration by the Drafting Committee. In determining the applicability of immunity *ratione materiae*, account should be taken both of the normative elements listed in draft articles 4, 5 and 6, as provisionally adopted by the Commission, and of the exceptions set out in draft article 7. In addition, under draft article 8 *ante*, all the procedural provisions and safeguards set out in Part Four must be respected in the process of determining whether exceptions are applicable.

(6) Although the Commission discussed a proposal to include an express reference to draft article 7 in draft article 8 *ante*, in order to ensure that the provisions and safeguards in Part Four would be understood to apply to it, the proposal was rejected in favour of a more general and neutral formulation referring to “the determination of whether immunity applies or does not apply under any of the draft articles”.

(7) Part Four is applicable “in relation to any criminal proceeding against a foreign State official”. The term “criminal proceeding” is used in draft article 8 *ante* to refer broadly to different steps that may be taken by the forum State in furtherance of the exercise of its criminal jurisdiction. In view of the differences in practice between States’ various legal systems and traditions, it was not considered necessary to refer specifically to the nature of these steps, which may include both acts of the executive and acts performed by judges and prosecutors. In any event, the use of the term “criminal proceeding” should be reviewed in the final revision of the draft articles before their adoption on first reading, in particular to ensure that the use of both this term and the term “exercise of criminal jurisdiction”, and their respective meanings, are consistent and systematic throughout the draft articles. Such a review should be carried out once the Commission has decided on the definition of the concept of “criminal jurisdiction”, which is currently pending in the Drafting Committee.

(8) Draft article 8 *ante* uses the phrase “against a foreign State official, current or former”. This reflects the need for there to be a connection between the foreign State official and the criminal proceeding that the forum State seeks to carry out and in respect of which immunity might be applicable. The express mention of the temporal situation in which the official may be in his or her relationship with the foreign State (current or former) is not intended to alter the temporal scope of immunity from criminal jurisdiction, since, as the Commission points out in the commentary to draft article 2 (e), this element is irrelevant to the definition of “official” and “[t]he temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles”.³³³ The words “current or former” should therefore be understood in the light of the provisions of draft article 4, for immunity *ratione personae*, and of draft article 6, for immunity *ratione materiae*. The term “foreign State official” should also be reviewed before the draft articles are adopted on first reading, in order to decide whether the term to be used consistently and systematically should be this one or the term “official of another State”, which is used in other draft articles.

³³³ *Yearbook ... 2014*, vol. II (Part Two), p. 145, para. (12) of the commentary to draft article 2 (e).

Article 8**Examination of immunity by the forum State**

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
 - (a) before initiating criminal proceedings;
 - (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Commentary

(1) Draft article 8 concerns the obligation to examine the question of immunity from criminal jurisdiction when the authorities of the forum State seek to exercise or do exercise criminal jurisdiction over an official of another State. “Examination of immunity” refers to the measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of officials of another State. Thus, “examination” of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies. Although closely related, “examination” and “determination” of immunity are distinct categories. The “determination of immunity” will be dealt with in a separate draft article that has not yet been considered by the Drafting Committee.

(2) Draft article 8 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule that would be applicable to specific situations (para. 2). In both cases the obligation to examine the question of immunity is attributed to the “competent authorities” of the forum State. The Commission decided not to specify which State organs fall into this category, since the identification of such organs will depend on the time when the question of immunity arises and on the legal system of the forum State. Since such organs may differ from one domestic legal system to another, it was considered preferable to use a term that encompasses organs of different types, including executive organs, police, prosecutors and courts. Determining which State organs fall within the category of “competent authorities” for the purposes of the present draft article is a matter to be considered on a case-by-case basis.

(3) The general rule contained in paragraph 1 defines the obligation of the competent authorities of the forum State to “examine the question of immunity without delay” when they “become aware that an official of another State may be affected by the exercise of its criminal jurisdiction”.

(4) The Commission deemed it more appropriate to use the term “official of another State” rather than “foreign official”. This term is used as an equivalent of “foreign State official”, which is used in draft article 8 *ante*, and “State official”, which is used in the title of the topic (in the plural) and whose definition is contained in draft article 2 (*e*) provisionally adopted by the Commission. This term thus covers any State official, regardless of rank, of whether he or she is covered by immunity *ratione personae* or immunity *ratione materiae*, and of whether he or she is still an official at the time when the question of immunity is to be examined. The term “official of another State” therefore includes any official who could benefit from immunity from foreign criminal jurisdiction in accordance with the provisions of Part Two and Part Three of the draft articles.

(5) The obligation to examine the question of immunity will arise only when an official of another State may be affected by the exercise of the criminal jurisdiction of the forum State. For the general rule, the Commission has used the expression “exercise of ... criminal jurisdiction”, which it considered preferable to “criminal proceeding”, an expression proposed by the Special Rapporteur that was considered too narrow. The term “exercise of criminal jurisdiction” is also used in draft articles 3, 5 and 7, although its scope is not defined in the commentaries thereto. It should be noted that the very concept of “criminal jurisdiction”, which was included in the Special Rapporteur’s second report,³³⁴ has not yet been considered by the Drafting Committee. In any event, and subject to the definition of “criminal jurisdiction” to be adopted in due course by the Commission, for the purposes of draft article 8, “exercise of criminal jurisdiction” should be understood to mean such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.

(6) However, not all acts that may fall within the generic category “exercise of criminal jurisdiction” will give rise to an obligation to examine the question of immunity. Rather, such an obligation arises only when the official of another State may be “affected” by any of the acts in this category. As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*³³⁵ and in *Certain Questions of Mutual Assistance in Criminal Matters*,³³⁶ a particular criminal procedure measure may affect immunity of a foreign official only if it hampers or prevents the exercise of the functions of that person by imposing obligations upon them. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied. The forum State is also able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.

(7) The general rule set out in paragraph 1 attaches particular importance to the time at which the competent authorities of the forum State should examine the question of immunity, emphasizing that it should be done at an early stage, since otherwise the effectiveness of the institution of immunity could be undermined. Although treaties addressing various forms of immunity of State officials from foreign criminal jurisdiction have not included specific rules in this regard, the International Court of Justice has expressly stated that the question of immunity should be examined at an early stage and considered *in limine litis*.³³⁷ With this in mind, the Commission decided to indicate

³³⁴ *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, pp. 41–42, paras. 36–42.

³³⁵ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at p. 22, paras. 54 and 55.

³³⁶ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at pp. 236–237, paras. 170 and 171.

³³⁷ This question was addressed by the International Court of Justice in the proceedings concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court elucidated the applicability of the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946, United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327) in connection with the prosecution in Malaysia of the Special Rapporteur on the independence of judges and lawyers, who had been prosecuted for statements made in an interview. In this context, the Court – at the request of the United Nations Economic and Social Council – issued an advisory opinion in which it stated that “questions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*”, and that this affirmation

explicitly the point at which examination of the question of immunity should begin, defining it as follows: “[w]hen the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction”. The phrase “[w]hen [they] become aware” follows, to some extent, the wording used by the Institute of International Law in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law,³³⁸ and is intended to emphasize that the question of immunity should be examined as soon as possible, without the need to wait until formal judicial proceedings have begun. To reinforce this idea, the phrase “without delay” has been used, contained in articles 36 and 37 of the Vienna Convention on Consular Relations.

(8) Paragraph 2 of draft article 8 sets out a special rule covering two particular cases in which the competent authorities of the forum State should examine the question of immunity. The special regime set out in this paragraph is framed as a “without prejudice” clause, in order to preserve the applicability of the general rule contained in paragraph 1. In this context, the words “without prejudice” are used to emphasize that the general rule applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2. The special rule in paragraph 2 is intended to draw the attention of the competent authorities of the forum State to their obligation to examine the question of immunity before taking any of the special measures set forth in this paragraph, if they have not done so earlier under the general rule. The use of the adverb “always” is intended to reinforce this idea.

(9) Under the special rule contained in paragraph 2, the competent authorities must always examine the question of immunity “before initiating criminal proceedings” (subparagraph (a)) and “before taking coercive measures that may affect an official of another State” (subparagraph (b)). The Commission selected these two cases as examples of acts that would always affect the official of another State and that, if they were to occur, could violate any immunity from foreign criminal jurisdiction that the official might enjoy. The use of the adverb “before” is intended to reinforce the principle that immunity must always be examined as a preliminary issue *in limine litis*.

(10) The term “criminal proceedings” refers to the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual, in this case an official of another State. This term is to be distinguished from the term “exercise of criminal jurisdiction”, which, as noted above, has a broader meaning. The Commission preferred to use the expression “initiati[on] [of] criminal proceedings” rather than the terms “prosecution”, “indictment” or “accusation”, or the expressions “commencement of the trial phase” or “commencement of the oral proceedings”, as these terms may have different meanings in different domestic legal systems. For this reason, it decided to use more general terminology encompassing any of the specific acts representing the initiation of criminal proceedings under the domestic law of the forum State. The identification of the time of “initiati[on] [of] criminal proceedings” as the moment at which, in any event, the question of immunity must be

“is a generally recognized principle of procedural law”, the purpose of which is to avoid “nullifying the essence of the immunity rule”. Accordingly, the Court concluded by 14 votes to 1 “[t]hat the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*” (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63, and p. 90, para. 67 (2) (b)).

³³⁸ Article 6 of the resolution of the Institute of International Law states that “[t]he authorities of the State shall afford to a foreign Head of State the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them” (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 747; available from the Institute’s website: www.idi-iil.org, under “Resolutions”).

examined is consistent with international practice and jurisprudence. This does not mean, however, that the question of immunity cannot also be examined at a later stage if necessary, including at the appeal stage.

(11) The phrase “coercive measures that may affect an official of another State” refers to acts of the competent authorities of the forum State that are directed at the official and that may be carried out at any time as part of the exercise of criminal jurisdiction, regardless of whether or not criminal proceedings have been initiated. These are essentially *in personam* measures that may affect, *inter alia*, the official’s freedom of movement, his or her appearance in court as a witness or his or her extradition to a third State. These measures do not necessarily imply that “criminal proceedings against the official” are taking place, but they may fall under the category “exercise of criminal jurisdiction”. Since such measures may differ from one domestic legal system to another, it was considered preferable to use the general wording “coercive measures” to refer to “act of authority”, which was used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, and is inspired by the reasoning of the Court in *Certain Questions of Mutual Assistance in Criminal Matters*.³³⁹

(12) In practice, one of the most common coercive measures is the detention of the official. The need to examine the question of immunity before detention is ordered was asserted by the Special Court for Sierra Leone in the *Charles Taylor* case. In its decision of 31 May 2004, the Appeals Chamber stated: “[t]o insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity”.³⁴⁰ The Commission therefore considered it necessary to address this issue in connection with the examination of immunity.

(13) With regard to this question, it should be noted that the scope of the draft articles is limited to immunity from foreign criminal jurisdiction and thus does not include the question of inviolability. However, while immunity from jurisdiction and inviolability are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various international treaties, such as the Vienna Convention on Diplomatic Relations,³⁴¹ which provides that “[t]he person of a diplomatic agent shall be inviolable [and] shall not be liable to any form of arrest or detention” (art. 29)³⁴² and that “[n]o measures of execution may be taken in respect of a diplomatic agent”

³³⁹ *Arrest Warrant of 11 April 2000* (see footnote 335 above), p. 22, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 336 above), pp. 236-237, para. 170.

³⁴⁰ *Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I, decision on immunity from jurisdiction, 31 May 2004, para. 30. For the text of the decision, see the website of the Special Court: www.scsldocs.org, under “Documents”, “Charles Taylor”.

³⁴¹ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

³⁴² Similar provisions can be found in the Convention on Special Missions (New York, 8 December 1969), *ibid.*, vol. 1400, No. 23431, p. 231, art. 29; and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16, arts. 28 and 58. A more nuanced reference to this idea can be found in the Vienna Convention on Consular Relations, art. 41, paras. 1–2.

(art. 31, para. 3).³⁴³ In a similar vein, reference may be made to the resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law (arts. 1 and 4).³⁴⁴

(14) The Commission also took account of the fact that the detention of an official of another State may, in certain circumstances, affect immunity from jurisdiction. This is the reason for the last phrase of paragraph 2 (b) of the draft article, which “includes” among coercive measures “those that may affect any inviolability that the official may enjoy under international law”. The phrase “that the official may enjoy under international law” is intended to draw attention to the fact that not every official of another State, by the mere fact of being an official, enjoys inviolability.

Article 9

Notification of the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Commentary

- (1) Draft article 9 concerns the notification that the forum State must provide to another State to inform it that the forum State intends to exercise criminal jurisdiction over one of that State’s officials.
- (2) Since it is generally accepted that immunity from foreign criminal jurisdiction is granted to State officials for the benefit of the State, it is for the State, not the official, to decide on the invocation and waiver of immunity, and it is also for the State of the official to decide on the means by which to claim immunity for its official. However, in order for it to be able to exercise those powers, it must be aware that the authorities of another State intend to exercise their own criminal jurisdiction over one of its officials.
- (3) The Commission has found that treaty instruments providing for some form of immunity of State officials from foreign criminal jurisdiction do not contain any rule imposing on the forum State an obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official, with the sole exception of article 42 of the Vienna Convention on Consular Relations.³⁴⁵ The Commission also took account of

³⁴³ Similar provisions can also be found in the Convention on Special Missions, art. 31, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 30 and art. 60, para. 2.

³⁴⁴ *Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), pp. 745 and 747.

³⁴⁵ Article 42 of the Convention reads as follows: “[i]n the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.” The Vienna Convention on Diplomatic Relations, the Vienna Convention on the Representation of States in Their Relations with International Organizations of

the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property³⁴⁶ assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 of the Convention specifies the means by which “service of process by writ or other document instituting a proceeding against a State” must be effected. Although this provision corresponds to a model that differs from that of immunity from foreign criminal jurisdiction, service of process is undeniably indispensable for enabling the State to invoke its immunity. The provision can thus be taken into consideration, *mutatis mutandis*, for the purposes of the present draft article. With this in mind, the Commission decided to include notification among the procedural safeguards set out in Part Four of the draft articles.

(4) Notification is an essential requirement for ensuring that the State of the official receives reliable information on the forum State’s intention to exercise criminal jurisdiction over one of its officials and, consequently, for enabling it to decide whether to invoke or waive immunity. At the same time, notification facilitates the opening of a dialogue between the forum State and the State of the official and thus becomes an equally basic requirement for ensuring the proper determination and application of the immunity of State officials from foreign criminal jurisdiction. The Commission therefore regards notification as one of the procedural safeguards set out in Part Four of the draft articles. The concepts of “notification” and “consultation” should not be conflated, since consultations take place at a later stage and are dealt with in draft article 15, which has yet to be considered by the Drafting Committee.

(5) Draft article 9 is divided into three paragraphs dealing, respectively, with the timing of the notification, the content of the notification and the means by which notification may be provided by the forum State.

(6) Paragraph 1 refers to the point in time at which notification should be provided. In view of the purpose of notification, it must be provided at an early stage, since otherwise it will not produce its full effects. However, the fact that notification may have unintended effects on the forum State’s exercise of criminal jurisdiction, particularly at the earliest stages, cannot be overlooked. It was therefore considered necessary to strike a balance between the duty to notify the State of the official and the right of the forum State to carry out activities in the context of criminal jurisdiction that may affect multiple subjects and facts but will not necessarily affect the official of another State. To address this concern, the draft article identifies the following points in time as being critical for the provision of notification: (a) the initiation of criminal proceedings; and (b) the taking of coercive measures that may affect an official of another State. Notification must be provided prior to the occurrence of either of these two circumstances. Paragraph 1 of the present draft article has thus been aligned with draft article 8, paragraph 2 (a) and (b), so that the timing of the notification to the State of the official coincides with the special cases in which the competent authorities of the forum State must examine the question of immunity if they have not done so earlier. The expressions “criminal proceedings” and “coercive measures that may affect an official of another State” should therefore be understood in the sense already described in the commentary to draft article 8.

(7) As used in the present draft article, the term “official of another State” is equivalent to “State official” and should therefore be understood in accordance with the definition contained in draft article 2 (e) provisionally adopted by the Commission. As noted in the commentary to that draft article, the use of the term “State official” does not affect the

a Universal Character and the Convention on Special Missions do not contain any similar provisions.

³⁴⁶ United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, vol. I, resolution 59/38, annex.

temporal scope of immunity,³⁴⁷ which is subject to the special rules applicable to immunity *ratione personae* and immunity *ratione materiae*.³⁴⁸ The commentary is equally relevant to the present draft article and, accordingly, the category “official of another State” includes any official of another State who may enjoy immunity in accordance with the provisions of Part Two and Part Three of the draft articles. The term “official of another State” may refer both to an official in active service at the time when the forum State seeks to exercise criminal jurisdiction and to a former official, provided that both may benefit from some form of immunity.

(8) The second sentence of paragraph 1 is addressed to States based on the understanding that some domestic systems may not have procedures in place to allow for communication between executive, judicial or prosecutorial authorities.³⁴⁹ In such cases, compliance with the obligation to notify the State of the official of the initiation of criminal proceedings or the taking of coercive measures against one of its officials may be significantly hampered, especially since, in practice, communications relating to the question of immunity of an official of another State from foreign criminal jurisdiction often take place through diplomatic channels. The Commission therefore considered it necessary to draw the attention of States to this issue by including this final sentence in paragraph 1. However, bearing in mind as well the diversity of domestic legal systems and practices, the Commission opted for non-prescriptive wording that allows States to assess whether or not the above-mentioned procedures exist in their respective legal systems and, if not, to decide on their adoption. The verb “shall consider” has been used for this purpose.

(9) Paragraph 2 refers to the content of the notification. Given the purpose of the notification, while its content may vary from one case to another, it should always include sufficient information to enable the State of the official to form a judgment as to whether the immunity from which one of its officials might benefit should be invoked or waived. Although the Commission debated whether to include this paragraph, it ultimately opted to retain it as a useful means of ensuring that the forum State provides the State of the official with at least a minimum amount of relevant information. At the same time, a margin of discretion is left to the forum State, considering that different State legal systems and practices may have different rules on the permissibility of disclosing certain elements of information that may sometimes be available only to prosecutors or judges. Accordingly, paragraph 2 is intended to strike a balance between giving the forum State sufficient discretion in the exercise of its criminal jurisdiction and ensuring that it provides the State of the official with sufficient information. This is the reason for the use of the Latin adverb “*inter alia*” before the list of elements that must be included, in all cases, in the notification referred to in draft article 9.

(10) The information that must be included in the notification is of three types: (a) the identity of the official, (b) the grounds for the exercise of criminal jurisdiction and (c) the competent authority to exercise jurisdiction. The identity of the official is a basic element for enabling the State of the official to assess whether he or she is indeed one of its officials and to decide on the invocation or waiver of immunity. With regard to the substantive information to be included in the notification to the State of the official, the Commission took the view that limiting such information to “acts of the official that may be subject to the exercise of criminal jurisdiction”, as originally proposed by the Special Rapporteur, was not sufficient. The phrase “grounds for the exercise of criminal

³⁴⁷ See *Yearbook ... 2014*, vol. II (Part Two), p. 145, para. (12) of the commentary to draft article 2 (e).

³⁴⁸ See draft article 4, paragraphs 1 and 3 (immunity *ratione personae*), and draft article 6, paragraphs 2 and 3 (immunity *ratione materiae*).

³⁴⁹ See the analysis of this issue in the Special Rapporteur’s seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), paras. 121–126.

jurisdiction” has therefore been used. This more general wording allows for the inclusion in the notification of not only factual elements relating to the official’s conduct, but also information on the law of the forum State on which the exercise of jurisdiction would be based. Finally, the Commission deemed it appropriate to include, in the list of basic items of information, an indication of the authority competent to exercise jurisdiction in the specific case referred to in the notification. This reflects the fact that the State of the official may have an interest in identifying the organs responsible for deciding on the initiation of criminal proceedings or the adoption of coercive measures so that, as the case may be, it can contact them and make such arguments on immunity as it deems appropriate. Since the organs with competence to carry out this type of action and to examine the question of immunity may differ from one domestic legal system to another, the generic term “competent authority” has been used, which may include judges, prosecutors, police or other governmental authorities of the forum State. The use of “competent authority” in the singular is explained by the fact that such an authority will already have been identified in the case to which the notification relates, but this does not mean that competence may not lie with more than one authority.

(11) Paragraph 3 deals with the means of communication that the forum State may use to transmit the notification to the State of the official. This issue has not been addressed in any of the international treaties dealing with one form or another of immunity of State officials from criminal jurisdiction. However, the United Nations Convention on Jurisdictional Immunities of States and Their Property specifies the means by which service of process by writ or other document instituting a proceeding against a State must be effected. Under article 22, paragraph 1, it “shall be effected: (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or (c) in the absence of such a convention or special arrangement: (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum”.

(12) The Commission considered it useful to indicate, in the present draft article, the means of communication that the forum State may use to effect service. To this end, paragraph 3 sets out a model that includes “diplomatic channels” and “any other means of communication accepted for that purpose by the States concerned”.

(13) Communication through diplomatic channels is the means most frequently used in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This is largely because the question of whether or not immunity from foreign criminal jurisdiction applies to a particular official of another State, which is a sensitive issue, constitutes a case of “official business” and would therefore fall under article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.³⁵⁰ For this reason, “diplomatic channels” have been mentioned first in order to highlight their more frequent use in practice. The expression “through diplomatic channels” reproduces the formulation contained in article 22, paragraph 1 (c) (i), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was used previously by the Commission in the draft articles on prevention and punishment of crimes against humanity.³⁵¹ Since that expression is not identical in all official versions of the

³⁵⁰ Under that article, “[a]ll official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed”.

³⁵¹ For the text of the draft articles adopted by the Commission and commentaries thereto, see *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 44–45.

Convention, the original terms used in the Convention have been retained in the different language versions of the present draft article 9.

(14) In addition to “diplomatic channels”, the text reflects the possibility that States may use other means of communication to provide notifications concerning immunity, some of which are mentioned in article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. This is the reason for the inclusion, in paragraph 3, of the phrase “any other means of communication accepted for that purpose by the States concerned”. This wording thus provides for an alternative, the use of which will have to be decided upon by the States concerned on a case-by-case basis; such alternatives may be reflected in either international treaties that are general in scope or any other agreements reached by the States concerned. Since the means of communication between States may be addressed in instruments dealing with a wide variety of issues, the phrase “for that purpose” has been included to emphasize that the agreements concerned should in any event be relevant to and applicable in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This does not mean, however, that such agreements must specifically address immunity or include express rules on notification in connection with immunity. Finally, it should be noted that the phrase “accepted ... by the States concerned” refers to the requirement that such other means of communication must have been accepted by both the forum State and the State of the official.

(15) The last phrase of paragraph 3 provides that the other means of communication accepted “for that purpose” by the States concerned “may include those provided for in applicable international cooperation and mutual legal assistance treaties”. The use of such means of communication, which had been suggested by the Special Rapporteur in her original proposal, generated an intense debate in which a number of questions were raised, such as the very concept of “international cooperation and mutual legal assistance treaties”, the fact that such treaties are not intended to address the question of immunity, and the possibility that, depending on the type of State authorities competent to issue and receive notification under such treaties, Ministries of Foreign Affairs and other organs responsible for international relations could be excluded from the notification process dealt with in draft article 9. However, the Commission decided to retain a reference to such means of communication between States on the understanding that they have, on occasion, been used by States and can be a useful tool for facilitating notification.

(16) For the purposes of the present draft article, “international cooperation and mutual legal assistance treaties” means multilateral or bilateral instruments concluded for the purpose of facilitating cooperation and mutual legal assistance in criminal matters between States. Multilateral treaties of this type include, but are not limited to, the European Convention on Mutual Assistance in Criminal Matters³⁵² and its two additional protocols;³⁵³ the European Convention on the Transfer of Proceedings in Criminal Matters;³⁵⁴ the European Convention on Extradition³⁵⁵ and its four additional protocols;³⁵⁶

³⁵² European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185.

³⁵³ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 6841, p. 350; and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8 November 2001), *ibid.*, vol. 2297, No. 6841, p. 22.

³⁵⁴ European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15 May 1972), *ibid.*, vol. 1137, No. 17825, p. 29.

³⁵⁵ European Convention on Extradition (Paris, 13 December 1957), *ibid.*, vol. 359, No. 5146, p. 273.

³⁵⁶ Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975), *ibid.*, vol. 1161, No. 5146, p. 450; Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 5146, p. 328; Third Additional

the Inter-American Convention on Mutual Assistance in Criminal Matters;³⁵⁷ the Inter-American Convention on Extradition;³⁵⁸ the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;³⁵⁹ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;³⁶⁰ the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries;³⁶¹ the Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries;³⁶² and the Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Matters and Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.³⁶³ Bilateral treaties of this type are so numerous that they would be impossible to list in this commentary, but reference may be made, at least, to the model treaties that have been developed by various international organizations and that form the basis for many bilateral agreements, including the Model Treaty on Mutual Assistance in Criminal Matters,³⁶⁴ the Model Treaty on the Transfer of Proceedings in Criminal Matters³⁶⁵ and the Model Treaty on Extradition.³⁶⁶ They all contain provisions relating to means of communication between States that could be used in connection with the notification dealt with in draft article 9.

(17) The means of communication provided for in international cooperation and mutual legal assistance treaties are defined in draft article 9 as a subcategory of “other means of communication” and may be used only if the treaties in question are “applicable”. This means that both the forum State and the State of the official must be parties to the treaties and that the system established therein must be capable of producing effects in cases where issues relating to the State’s immunity from foreign criminal jurisdiction may arise.

Protocol to the European Convention on Extradition (Strasbourg, 10 November 2010), *ibid.*, vol. 2838, No. 5146, p. 181; and Fourth Additional Protocol to the European Convention on Extradition (Vienna, 20 September 2012), Council of Europe, *Council of Europe Treaty Series*, No. 212.

³⁵⁷ Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75.

³⁵⁸ Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, *Treaty Series*, vol. 1752, No. 30597, p. 177.

³⁵⁹ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), *Official Journal of the European Communities*, C 197, 12 July 2000, p. 3.

³⁶⁰ *Official Journal of the European Union*, L 328, 15 December 2009, p. 42.

³⁶¹ Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635.

³⁶² Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *ibid.*, No. 178, 15 September 2008, p. 6664.

³⁶³ Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993), *The Informational Reporter of the CIS Council of Heads of State and Council of Heads of Government “Sodruzhestvo”*, No. 1 (1993); Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002), *ibid.*, No. 2 (41) (2002).

³⁶⁴ Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I).

³⁶⁵ Model Treaty on the Transfer of Proceedings in Criminal Matters, General Assembly resolution 45/118 of 14 December 1990, annex.

³⁶⁶ Model Treaty on Extradition, General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997, annex).

(18) In any event, it should be emphasized that draft article 9, paragraph 3, does not impose on States any new requirements concerning means of communication other than those already established in the applicable treaties.

(19) Finally, with respect to the form of the notification, the Commission members expressed different views as to whether notification should have to be in writing, as they appreciated both the need to avoid abuse in the notification process and the flexibility that the act of notification itself sometimes requires. It was ultimately considered unnecessary to provide expressly that notification must be made in writing. Thus, although the general view is that notification should preferably be in written form, other possibilities have not been excluded, particularly since notification – especially through diplomatic channels – is often given orally at first and later in writing, regardless of the form of such written notification (*note verbale*, letter or the like).

Article 10

Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.
3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Commentary

(1) Draft article 10 addresses the issue of invocation of immunity from a twofold perspective: recognition of the right of the State of the official to invoke immunity, on the one hand; and the procedural aspects relating to the timing, content and means of communication of the invocation of immunity, on the other. Draft article 10 also refers to the need to inform the competent authorities of the forum State that immunity has been invoked. This draft article does not deal with the effects of invocation, which will be addressed later. Accordingly, neither the paragraph 6 originally proposed by the Special Rapporteur concerning the examination *proprio motu* of the question of immunity³⁶⁷ nor a new proposal made by a member of the Drafting Committee concerning the possible suspensive effect of the invocation of immunity was included in the draft article adopted by the Commission.

(2) Paragraph 1 of draft article 10 reflects the content of paragraphs 1 and 2 of the draft article originally proposed by the Special Rapporteur. It is based on the recognition that the State of the official is entitled to invoke the immunity of its officials when another State seeks to exercise criminal jurisdiction over them. Although treaties addressing one form or another of immunity of State officials from foreign criminal jurisdiction do not expressly refer to the invocation of immunity or the corresponding right of the State of

³⁶⁷ Paragraph 6 of the draft article as originally proposed by the Special Rapporteur in her seventh report read as follows: “[i]n any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not” (A/CN.4/729, para. 69).

the official, invocation of the immunity of State officials is a common practice that is understood to be covered by international law. The invocation of immunity has a dual purpose: on the one hand, it serves as an instrument with which the State of the official may claim immunity for its official; on the other, it makes the State seeking to exercise jurisdiction aware of this circumstance and enables it to take account of the information provided by the State of the official in the process of determining immunity.

(3) The right to invoke immunity rests with the State of the official. This is easily justified by the fact that the purpose of immunity is to preserve the sovereignty of the State of the official, meaning that immunity is recognized in the interest of the State and not in the interest of the individual.³⁶⁸ It is thus for the State itself, and not for its officials, to invoke immunity and to take all decisions relating to its possible invocation. In any event, it is a right of a discretionary nature, which is why the phrase “[a] State may invoke the immunity of its official” has been used.

(4) The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Which are those authorities depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.

(5) The invocation of immunity must therefore be understood as an official act whereby the State of the official informs the State seeking to exercise criminal jurisdiction that the individual in question is its official and that, in its view, he or she enjoys immunity, with the consequences that follow from that circumstance. Therefore, the earlier immunity is invoked, the more useful it will be. This is reflected by the indication that the State of the official may invoke immunity “when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official”. The term “another State” was considered preferable to “forum State” as being broader and more comprehensive, especially since immunity may be invoked prior to the initiation of criminal proceedings in the strict sense. The phrase “when it becomes aware” reproduces the expression used in draft article 8. With regard to the way in which the State of the official may become aware of the situation, the Commission took into account, first, the relationship between “notification” and “invocation”. One of the purposes of notification

³⁶⁸ This is an uncontroversial matter that has even been reflected in various treaties, including, by way of example, the Vienna Convention on Diplomatic Relations, the preamble of which states that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States” (fourth paragraph). Virtually identical wording can be found in the preambles of the Vienna Convention on Consular Relations (fifth paragraph), the Convention on Special Missions (seventh paragraph) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (sixth paragraph). The Institute of International Law expressed the same view in the preamble of its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it states that special treatment is to be given to a Head of State or a Head of Government as a representative of that State, “not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole” (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 743, third paragraph). The two Special Rapporteurs who have dealt with this topic in the Commission have also expressed this view (see *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, p. 395, at p. 402, para. 19; *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646, p. 223, at p. 228, para. 15; and *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, p. 35, at p. 44, para. 49).

is to inform the State of the official that the competent authorities of the forum State intend to exercise criminal jurisdiction. It is therefore a primary means by which the State of the official may become aware of the situation. However, the Commission did not wish to exclude the possibility that the State of the official might become aware of the situation by another means, either through information received from its official or from any other source of information. Therefore, no reference is made to the notification dealt with in draft article 9 as being the relevant act for determining the point in time at which immunity may be invoked.

(6) Paragraph 1 provides for the possibility that the State of the official may invoke immunity when it becomes aware that “the criminal jurisdiction of another State could be or is being exercised over the official”. This alternative wording is intended to reflect the fact that in some cases the State of the official may not become aware of actions taken in respect of its official until a later stage. However, this cannot deprive the State of the official of its right to invoke immunity, especially when acts of jurisdiction that may affect the official have already been carried out.

(7) The last sentence of paragraph 1 provides that “[i]mmunity should be invoked as soon as possible”. The expression “as soon as possible” has been used in light of the fact that the State of the official will have to consider various relevant elements (legal and political) in order to decide whether immunity should be invoked and, if so, what the scope of such invocation should be. Since the State of the official will need a period of time in which to do so, which may vary from one case to another, this phrase has been preferred to “as promptly as possible” or “within a reasonable time”, the interpretation of which may be ambiguous. Moreover, the phrase “as soon as possible” draws attention to the importance of invoking immunity at an early stage.

(8) In any event, it should be borne in mind that, while the invocation of immunity constitutes a safeguard for the State of the official, which thus has an interest in invoking it “as soon as possible”, this does not preclude the State from invoking immunity at any other time. The use of the verb “may” is to be understood in this sense. Such invocation of immunity will be lawful, though it may have different effects, as the case may be.

(9) Paragraph 2 concerns the form in which immunity is to be invoked and the content of the invocation. The Commission took account of the fact that the invocation of immunity by the State of the official is intended to influence the process of determining immunity and the possible blocking of the forum State’s exercise of jurisdiction. For this reason, it was considered that immunity must be invoked in writing, regardless of the form that such writing may take. The invocation should explicitly state the identity of the official and the position held by him or her, as well as the grounds on which immunity is invoked.

(10) The words “the position held” refer to the title, rank or level of the official (such as Head of State, Minister for Foreign Affairs or legal adviser). In any event, the reference to the position held by the official should in no way be interpreted as implying that lower-level officials are not covered by immunity from foreign criminal jurisdiction, since, as the Commission itself has stated, “[g]iven that the concept of ‘State official’ rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition”.³⁶⁹

(11) The Commission took the view that the State of the official should not be required to identify the type of immunity being invoked (*ratione personae* or *ratione materiae*), since that might constitute an excessive technical requirement. The reference to the position held by the official and the grounds for invoking immunity may provide a basis

³⁶⁹ *Yearbook ... 2014*, vol. II (Part Two), p. 145, para. (14) of the commentary to draft article 2 (e).

on which the forum State can assess whether the rules contained in Part Two or Part Three of the present draft articles apply.

(12) Paragraph 3 identifies the means by which immunity may be invoked. This paragraph is modelled on paragraph 3 of draft article 9, the commentary to which may be referred to for clarification of its general meaning. It should be noted, however, that the Commission made some drafting changes to paragraph 3 of the present draft article in order to adapt it to the specific features of invocation. In particular, the wording “[i]mmunity may be invoked” has been used instead of “shall be provided” in order not to exclude the possibility that the official’s immunity from criminal jurisdiction may be invoked by other means, especially in criminal proceedings through judicial acts permitted by the law of the forum State.

(13) Paragraph 4 is intended to ensure that the invocation of immunity by the State of the official will be made known to the authorities of the other State that are competent to deal with the question of immunity and with the examination or determination of its application. The purpose of this paragraph is to prevent a situation where an invocation of immunity is ineffective simply because it has not been made before the authorities responsible for examining or deciding on immunity. The paragraph reflects the principle that the obligation to examine and determine the question of immunity rests with the State, which must take the necessary measures to comply with this obligation. It is thus defined as a procedural safeguard benefiting both the State of the official and the State seeking to exercise criminal jurisdiction. However, in view of the diversity of States’ legal systems and practices, as well as the need to respect the principle of self-organization, it was not considered necessary to identify which authorities are obliged to report and which authorities should receive notice of the invocation. This is logically predicated on the understanding that, in both cases, the authorities referred to are those of the State that intends to exercise or has exercised its criminal jurisdiction over an official of another State, and that the words “any other authorities” refer to those authorities that are competent to participate in the processes of examining or determining immunity. In both cases, it is irrelevant whether they are authorities of the executive, the judiciary or the prosecution service, or even police authorities.

Article 11

Waiver of immunity

1. The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.
2. Waiver must always be express and in writing.
3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.
5. Waiver of immunity is irrevocable.

Commentary

(1) Draft article 11 deals with the waiver of immunity from a twofold perspective: the recognition of the right of the State of the official to waive immunity, on the one hand, and the procedural aspects relating to the form that the waiver should take and the means by which it is communicated, on the other. Draft article 11 also refers to the need to inform

the competent authorities of the forum State that immunity has been waived. Although the structure of draft article 11 is modelled on that of draft article 10, the content of the two is not identical, since invocation and waiver are distinct institutions that should not be confused.

(2) In contrast to invocation, the waiver of immunity from jurisdiction has been discussed in detail by the Commission in several of its previous sets of draft articles³⁷⁰ and has been reflected in the international treaties based on those draft articles, which cover certain forms of immunity from foreign criminal jurisdiction in the case of certain State officials. These include, in particular, the Vienna Convention on Diplomatic Relations (art. 32), the Vienna Convention on Consular Relations (art. 45), the Convention on Special Missions (art. 41) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 31). It should be added that the question of the waiver of immunity has also been dealt with in private codification projects on this topic, in particular the 2001 and 2009 resolutions of the Institute of International Law.³⁷¹ The same

³⁷⁰ The Commission addressed the waiver of immunity of certain State officials in the course of its work on diplomatic relations, consular relations, special missions and the representation of States in their relations with international organizations. Article 30 of the draft articles on diplomatic intercourse and immunities is worded as follows: “*Waiver of immunity*. 1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State. 2. In criminal proceedings, waiver must always be express” (*Yearbook ... 1958*, vol. II, document A/3859, p. 99). Article 45 of the draft articles on consular relations provides as follows: “*Waiver of immunities*. 1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in articles 41, 43 and 44. 2. The waiver shall in all cases be express” (*Yearbook ... 1961*, vol. II, document A/4843, p. 118). Article 41 of the draft articles on special missions is worded as follows: “*Waiver of immunity*. 1. The sending State may waive the immunity from jurisdiction of its representatives in the special mission, of the members of its diplomatic staff, and of other persons enjoying immunity under articles 36 to 40. 2. Waiver must always be express” (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 365). Lastly, article 31 of the draft articles on the representation of States in their relations with international organizations reads as follows: “*Waiver of immunity*. 1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 may be waived by the sending State. 2. Waiver must always be express” (*Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 304).

³⁷¹ Article 7 of the Institute of International Law resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law is worded as follows: “1. The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver. 2. Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take” (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 749). Article 8 of the resolution states: “1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means” (*ibid.*). This approach remained the same in the Institute’s 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, although the resolution incorporates a new element by stipulating, in article II, paragraph 3, that “States should consider waiving immunity where international crimes are allegedly committed by their agents”. This recommendation mirrors the provisions of paragraph 2 of the same article II, according to which, “[p]ursuant to treaties and customary

is true of the waiver of State immunity, which is addressed both in the United Nations Convention on Jurisdictional Immunities of States and Their Property³⁷² and in national laws on State immunity.³⁷³

(3) The waiver of immunity by the State of the official is a formal act whereby that State waives its right to claim immunity, thus removing this obstacle to the exercise of jurisdiction by the courts of the forum State. The waiver of immunity therefore invalidates any debate on the application of immunity or on limits and exceptions to immunity. This effect of a waiver was confirmed by the judgment of the International Court of Justice in the case of the *Arrest Warrant of 11 April 2000*, in which the Court stated that officials “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”.³⁷⁴

(4) Paragraph 1 recognizes the right of the State of the official to waive immunity. This paragraph reproduces, with minor adjustments, the wording of article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations. Draft article 11, paragraph 1, indicates that “[t]he immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official”. The emphasis is thus placed on the holder of the right to waive immunity, which is the State of the official rather than the official himself or herself. This is a logical consequence of the fact that the immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official. Therefore, only that State can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials. The verb “may” is used to indicate that the waiver of immunity is a right, not an obligation, of the State of the official. This is in line with the previous practice of the Commission, which, in the various draft articles in which it has dealt with the immunity of State officials from foreign criminal jurisdiction, has reflected the view that there is no obligation to waive immunity.

(5) The power to waive immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the waiver or the authorities competent to communicate the waiver. Neither the conventions nor the national laws referred to above deal with this issue in a specific manner, instead referring to the State in abstract terms.³⁷⁵ The Commission itself, in its

international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled” (*Yearbook of the Institute of International Law*, vol. 73-I-II (Session of Naples, 2009), p. 227; available from the Institute’s website: www.idi-il.org, under “Resolutions”).

³⁷² Nonetheless, it should be borne in mind that the 2004 Convention addresses the waiver of immunity only indirectly, through the enumeration of a number of cases in which the foreign State is automatically deemed to have consented to the exercise of jurisdiction by the courts of the forum State. See, for example, articles 7 and 8 of the Convention.

³⁷³ See United States of America, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom of Great Britain and Northern Ireland, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sects. 10, 3 and 6; Canada, State Immunity Act 1985, sect. 4.2; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, art. 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5, 6 and 8.

³⁷⁴ *Arrest Warrant of 11 April 2000* (see footnote 335 above), p. 25, para. 61.

³⁷⁵ Exceptionally, some national laws refer to waivers communicated by a head of mission. See United Kingdom, State Immunity Act 1978, sect. 2.7; Singapore, State Immunity Act 1979, sect.

previous work, has already considered it preferable not to refer expressly to the State organs that are competent to waive immunity.³⁷⁶ Moreover, State practice is scant and inconclusive.³⁷⁷ Which are the competent authorities to waive immunity depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that the waiver of immunity cannot be communicated by any other person specifically mandated to do so by the State, especially in the context of court proceedings.

(6) In contrast to draft article 10 on invocation, this draft article does not include any temporal element, as the Commission found it unnecessary, given that immunity may be waived at any time.

(7) Paragraph 2 refers to the form of the waiver, stating that it “must always be express and in writing”. This wording is modelled on article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, according to which “[w]aiver must always be express”, and article 45, paragraph 2, of the Vienna Convention on Consular Relations, which provides that “[t]he waiver shall in all cases be express, except as provided in paragraph 3 of this Article [counterclaim], and shall be communicated to the receiving State in writing”. The statement that the waiver must be “express and in writing” reinforces the principle of legal certainty.

(8) The requirement that the waiver be express has been consistently reaffirmed by the Commission in previous work,³⁷⁸ and is reflected in both relevant international

4.7; Pakistan, State Immunity Ordinance 1981, sect. 4.6; South Africa, Foreign States Immunities Act 1981, sect. 3.6; and Israel, Foreign States Immunity Law 2008, sect. 9 (c).

³⁷⁶ In the draft articles on diplomatic intercourse and immunities, the Commission already considered it preferable to leave open the question of the organs competent to waive the immunity of diplomatic agents. Thus, in the text of draft article 30 adopted on second reading, it decided to amend the wording of paragraph 2 by deleting the last phrase of the paragraph adopted on first reading, which read “by the Government of the sending State”. The Commission explains this decision as follows: “The Commission decided to delete the phrase ‘by the Government of the sending State’, because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission” (*Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (2) of the commentary to article 30). In a similar vein, the Commission stated the following in relation to draft article 45 of the draft articles on consular relations: “The text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned” (*Yearbook ... 1961*, vol. II, document A/4843, p. 118, paragraph (2) of the commentary to article 45).

³⁷⁷ For example, in the United States, the waiver was formulated by the Minister of Justice of Haiti in *Paul v. Avril* (United States District Court for the Southern District of Florida, Judgment of 14 January 1993, 812 F. Supp. 207), and, in Belgium, by the Minister of Justice of Chad in the *Hissène Habré* case. In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police* (Federal Court, Judgment of 2 November 1989, ATF 115 Ib 496), the courts did not analyse which ministries were competent, but merely noted that it was sufficient that they were government bodies and therefore accepted a communication sent by the diplomatic mission of the Philippines.

³⁷⁸ See footnote 370 above.

treaties³⁷⁹ and national laws.³⁸⁰ For this reason, the Commission did not retain paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was worded as follows: “A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver”.³⁸¹ While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty,³⁸² there was some criticism of the use of the phrase “can be deduced”, which was understood by some members as recognizing a form of implicit waiver.

(9) The possibility that a waiver of immunity may be based on obligations imposed on States by treaty provisions arose, in particular, in the *Pinochet (No. 3)* case,³⁸³ although this was not the basis of the decision taken by the House of Lords. It has also arisen, albeit from a different perspective, in relation to the interpretation of articles 27 and 98 of the Rome Statute of the International Criminal Court³⁸⁴ and the duty of States parties to cooperate with the Court. However, the Commission’s view was that there are insufficient grounds for concluding that the existence of such treaty obligations can automatically and generally be understood to waive the immunity of State officials, especially since the International Court of Justice concluded as follows in its judgment in *Arrest Warrant of 11 April 2000*: “Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”³⁸⁵

(10) In addition to being express, the waiver of immunity must be formulated in writing. This does not, however, affect the precise form that such writing should take, which will depend not only on the will of the State of the official, but also on the means used to communicate the waiver and even on the framework in which it is formulated. Thus, nothing prevents the waiver from being formulated by means of a *note verbale*, letter or other non-diplomatic written communication addressed to the authorities of the forum State, by means of a procedural act or document, or even by means of any other document

³⁷⁹ See Vienna Convention on Diplomatic Relations, art. 32, para. 2; Vienna Convention on Consular Relations, art. 45, para. 2; Convention on Special Missions, art. 41, para. 2; and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 31, para. 2.

³⁸⁰ For example, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain provides for such express waiver of immunity in article 27 in relation to the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs.

³⁸¹ A/CN.4/729, para. 103.

³⁸² The Institute of International Law expressed a similar view in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stating, in article 8, paragraph 1, that “States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State” (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 338 above), p. 749).

³⁸³ *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, decision of 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; see also *International Law Reports*, vol. 119 (2002), p. 135.

³⁸⁴ Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

³⁸⁵ *Arrest Warrant of 11 April 2000* (see footnote 335 above), pp. 24–25, para. 59.

that expressly, clearly and reliably affirms the State's willingness to waive the immunity of its official from foreign criminal jurisdiction.

(11) Finally, attention is drawn to the fact that, in contrast to draft article 10, paragraph 2, this draft article contains no express reference to the content of the waiver, as the Commission did not find it necessary. Although the members' views were divided as to whether a reference to content should be included, in the end it was considered preferable to leave a margin of discretion to the State of the official. Accordingly, the words "and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains", which had appeared in the Special Rapporteur's original proposal, were deleted. In any event, the Commission wishes to note that the content of the waiver should be clear enough to enable the State before whose authorities it is submitted to identify the scope of the waiver without ambiguity.³⁸⁶ For this purpose, it is understood that the State of the official should expressly mention the name of the official whose immunity is waived, as well as, where appropriate, the substantive scope it intends to give to the waiver, especially when the State does not wish to waive immunity absolutely, but to limit it to certain acts or to exclude certain acts alleged to have been performed by the official. If the waiver of immunity is limited in scope, the State of the official may invoke immunity in respect of acts not covered by the waiver, that is, when the authorities of the other State seek to exercise or do exercise their criminal jurisdiction over the same official for acts other than those which gave rise to the waiver or which became known after the waiver was issued.

(12) Paragraph 3 concerns the means by which the State of the official may communicate the waiver of immunity of its official. As this paragraph is thus the counterpart to draft article 10, paragraph 3, it substantially reproduces the wording of that paragraph, with the sole exception of the use of the verb "communicated" in order to align draft article 11, paragraph 3, with article 45 of the Vienna Convention on Consular

³⁸⁶ Three examples of clear statements of waiver, which appear in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1 (available from the Commission's website, documents of the sixtieth session), paras. 252 and 253), are reproduced below. In *Paul v. Avril*, the Minister of Justice of Haiti stated that "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before court before and after judgment" (*Paul v. Avril* (see footnote 377 above), p. 211). In the *Ferdinand et Imelda Marcos* case, the waiver submitted by the Philippines was worded as follows: "The Government of the Philippines hereby waives all (1) State, (2) head of State or (3) diplomatic immunity that the former President of the Philippines, Ferdinand Marcos, and his wife, Imelda Marcos, might enjoy or might have enjoyed on the basis of American law or international law. ... This waiver extends to the prosecution of Ferdinand and Imelda Marcos in the above-mentioned case (the investigation conducted in the southern district of New York) and to any criminal acts or any other related matters in connection with which these persons might attempt to refer to their immunity" (*Ferdinand et Imelda Marcos c. Office fédéral de la police* (see footnote 377 above), pp. 501–502). In the proceedings conducted in Brussels against Hissène Habré, the Ministry of Justice of Chad expressly waived immunity in the following terms: "The National Sovereign Conference, held in N'djaména from 15 January to 7 April 1993, officially waived any immunity from jurisdiction with respect to Mr. Hissène Habré. This position was confirmed by Act No. 010/PR/95 of 9 June 1995, which granted amnesty to political prisoners and exiles and to persons in armed opposition, with the exception of 'the former President of the Republic, Hissène Habré, his accomplices and/or accessories'. It is therefore clear that Mr. Hissène Habré cannot claim any immunity whatsoever from the Chadian authorities since the end of the National Sovereign Conference" (letter from the Minister of Justice of Chad to the examining magistrate of the Brussels district, 7 October 2002).

Relations. In view of the parallels between this paragraph 3 and paragraph 3 of draft article 10, reference is made to the commentary to draft article 10 with regard to the question of which authorities of the State of the official are competent to decide on and to communicate the waiver of immunity. In particular, it should be noted that the use of the verb tense “may”, referring to means of communication, is intended to leave open the possibility that the waiver of immunity may be communicated directly to the courts of the forum State.

(13) Paragraph 4 provides that “[t]he authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived”. This paragraph is the equivalent of draft article 10, paragraph 4, with some drafting changes only. Since both paragraphs follow the same logic and serve the same purpose, the commentary to draft article 10 in this regard also applies to paragraph 4 of the present draft article.

(14) Paragraph 5 provides that “[w]aiver of immunity is irrevocable”. This provision is based on the premise that once immunity has been waived, its effect is projected into the future and the question of immunity ceases to act as a barrier to the exercise of criminal jurisdiction by the authorities of the forum State. Therefore, in light of the effects and the very nature of the waiver of immunity, the conclusion that it cannot be revoked seems obvious, since otherwise the institution would lose all meaning. Paragraph 5 of the present draft article nonetheless gave rise to some debate among the members of the Commission.

(15) This debate relates not to the basis for concluding that the waiver of immunity is irrevocable, but to possible exceptions to irrevocability. First, it should be noted that the members of the Commission generally agree that paragraph 5, as currently drafted, reflects a general rule that manifests the principle of good faith and addresses the need to respect legal certainty. However, some members also expressed the view that exceptions to this general rule might be warranted in some situations, such as when new facts not previously known to the State of the official come to light after immunity has been waived; when it is found in a particular case that the basic rules of due process have not been observed during the exercise of jurisdiction by the forum State; or when exceptional circumstances of a general nature arise, such as either a change of government or a change in the legal system, that could result in a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction.

(16) These considerations gave rise to a debate on the usefulness and desirability of including this paragraph in draft article 11. Some members expressed support for its deletion, particularly since neither the relevant treaties nor the domestic laws of States have expressly referred to the irrevocability of waivers of immunity, and the practice on this issue is limited.³⁸⁷ Conversely, other members considered it useful to retain paragraph 5 for reasons of legal certainty and because the Commission itself, referring to the waiver of immunity contemplated in its draft articles on diplomatic intercourse and immunities, stated that “[i]t goes without saying that proceedings, in whatever court or courts, are

³⁸⁷ On the question of the irrevocability of waivers of immunity and the possibility of subjecting it to conditions, see the following domestic laws: United States, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sects. 10, 3 and 6; Canada, State Immunity Act 1985, sect. 4.2; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, art. 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5, 6 and 8.

regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance”.³⁸⁸ However, other members pointed out that the irrevocable nature of waivers of immunity cannot be inferred from that statement.

(17) To address the issue of possible exceptions to the irrevocability of waivers of immunity, some members of the Commission suggested that the wording of paragraph 5 should be modified to introduce attenuating language such as “save in exceptional circumstances” or “in principle”. In their view, this would acknowledge that a waiver may be revoked in special circumstances such as those referred to above. Other members, on the contrary, took the view that the introduction of such language would further complicate the interpretation of paragraph 5 and that the wording should therefore remain unchanged if the paragraph was ultimately retained in draft article 11. In this connection, a view was expressed that, in the final analysis, a waiver of immunity is a unilateral act of the State, the scope of which should be defined in light of the Commission’s 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, in particular principle 10.³⁸⁹ Finally, the difficulty of identifying exceptional circumstances that could justify the revocation of a waiver of immunity was highlighted, although it was reiterated that a change of government or a change of legal system that could be prejudicial to the respect for the official’s human rights and right to a fair trial could fall into this category. On the other hand, doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in respect of facts not covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles.

(18) In view of the discussion summarized in the preceding paragraphs and the practice generally followed in similar cases where there is a divergence of views among the members during the first reading of a draft text, the Commission decided to retain paragraph 5 in draft article 11, thus enabling States to become duly aware of the debate and to provide comments.

Article 12 [13]* **Requests for information**

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.
2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.
3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned,

³⁸⁸ *Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (5) of the commentary to article 30.

³⁸⁹ Principle 10 reads as follows: “A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (a) any specific terms of the declaration relating to revocation; (b) the extent to which those to whom the obligations are owed have relied on such obligations; (c) the extent to which there has been a fundamental change in the circumstances” (*Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176).

* The number between square brackets indicates the original number of the draft article in the report of the Special Rapporteur.

which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Commentary

(1) Draft article 12 provides that both the forum State and the State of the official may request information from the other State. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 13, which has not yet been considered by the Drafting Committee. Draft article 12 consists of four paragraphs referring to the right of the States concerned to request information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State "shall consider" the request (para. 4).

(2) Paragraphs 1 and 2 indicate that both the forum State and the State of the official may request information. Although the Commission takes the view that requests for information follow the same logic regardless of whether they come from one State or the other, for the sake of clarity it preferred to address the two situations in separate paragraphs. The two paragraphs use similar wording, the only difference being the ultimate objective pursued by the requesting State, which is, for the forum State, "to decide whether immunity applies or not" and, for the State of the official, "to decide on the invocation or the waiver of immunity".

(3) The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity). This is why the expression "in order to decide" is used in both paragraphs, to show that in both cases the final decision will be the outcome of a process that may involve different phases and acts.

(4) When it adopted draft article 12, the Commission took account of the fact that, in order to determine whether or not immunity applies, the forum State will need information on the official in question (name, position within the State, scope of authority, etc.) and on the connection between the State of the official and the acts of the official that may give rise to the exercise of criminal jurisdiction. This information is important for enabling the forum State to take a decision on immunity, especially in the case of immunity *ratione materiae*, but it may be known only to the State of the official. The same is true in cases where the State of the official must decide whether to invoke or waive immunity, since that State may need to obtain information on the law or the competent organs of the forum State or on the stage reached in the activity undertaken by the forum State. Draft article 12 is intended to facilitate access to such information.

(5) The information referred to in the preceding paragraph may already be in the possession of the forum State or the State of the official, especially if the provisions of draft articles 9 (on notification), 10 (on invocation) or 11 (on waiver) have been applied prior to the request for information. In acting under those provisions, the forum State and the State of the official undoubtedly will have provided information to each other. However, it is still possible that the information received by those means may in some cases be insufficient for the purposes of the aforementioned objectives. In these circumstances, in particular, requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building confidence between them. The system for requesting information provided for in draft article 12 therefore serves as a procedural safeguard for both States.

(6) The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision concerning immunity. Given the variety of items of information that may be taken into account by States for the purpose of deciding on the application, invocation or waiver of immunity, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression “any information that it considers relevant”, in preference to “the necessary information”, as the adjective “necessary” could be understood in a narrow, literal sense, especially in English. Conversely, the use of the word “relevant” acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide on the relevant information that it wishes to request in each case, as provided in a number of international instruments.³⁹⁰

(7) Paragraph 3 refers to the channels through which information may be requested. This paragraph is modelled on paragraph 3 of draft articles 9, 10 and 11, the wording of which it reproduces *mutatis mutandis*. The commentaries to those draft articles are thus applicable to this paragraph.

(8) The Commission nonetheless wishes to draw attention to its decision not to include in draft article 12 a paragraph on internal communication between authorities of the forum State or the State of the official, similar to paragraph 4 of draft articles 10 and 11. This is because the request for information should be understood to refer essentially to information that, in many cases, will be complementary or additional to the information already in the possession of the forum State or the State of the official, and that therefore will usually be sought at a more advanced stage of the process. Thus, it is likely that the competent decision-making authority in each State will already be known to the other and that it is therefore not necessary to introduce this element, which operates as a safeguard clause. In any event, if the request for information is made at a time when the authorities are only beginning to deal with the question of immunity, there is no reason not to apply the principle that the competent authorities of the same State have an obligation to communicate with each other.

(9) Paragraph 4 replaces paragraphs 4 and 5 originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of the request and the conditions to which both the request for information and the information provided could be subject, including confidentiality.³⁹¹ The Commission considered it preferable to include in draft article 12 a simpler paragraph merely setting out the principle that any request for information must be considered in good faith by the requested State, be it the forum State or the State of the official. There are several reasons for this. First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties. Third,

³⁹⁰ See, for example, the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 3; the Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635, art. 1, paras. 1 and 2; and the Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I), art. 1, para. 2.

³⁹¹ See the seventh report of the Special Rapporteur (A/CN.4/729), annex II.

the establishment of a confidentiality rule could conflict with State rules governing confidentiality. Fourth and last but not least, the purpose of draft article 12 is to promote cooperation and the exchange of information between the forum State and the State of the official, but this purpose could be undermined or called into question if the draft article expressly listed grounds for refusal and rules of conditionality.

(10) In the Commission's view, however, the above considerations do not give grounds for ignoring the question of the criteria that States should follow in assessing requests for information. It therefore opted for wording that sets out, in a simple manner, the obligation of the requested State to consider in good faith any request that may be addressed to it. The term "requested State" reflects the terminology commonly used in international cooperation and mutual legal assistance treaties, which is familiar to States.

(11) The expression "shall consider ... in good faith" in paragraph 4 refers to the general obligation of States to act in good faith in their relations with third parties. The scope of this obligation, by its very nature, cannot be analysed in the abstract and must be determined on a case-by-case basis. Its inclusion in draft article 12 should be understood in the context defined by the draft article itself: as a procedural tool for promoting cooperation between the forum State and the State of the official to enable each of them to form a sound judgment to serve as a basis for the decisions referred to in paragraphs 1 and 2. Accordingly, the expression "shall consider ... in good faith" should be interpreted in the light of two elements operating together: first, the obligation to examine the request; and second, the requirement to do so with the intention of helping the other State to take an informed and well-founded decision on whether or not immunity applies, or on the invocation or waiver of immunity. The expression "shall consider ... in good faith" thus reflects an obligation of conduct and not an obligation of result.

(12) The requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as, *inter alia*, concerns of sovereignty, public order, security and essential public interest. In any event, the Commission did not consider it necessary to refer expressly to these elements in draft article 12, recognizing that it is for the requested State to identify the reasons justifying its decision.

(13) The Commission did not consider it necessary to refer expressly, in paragraph 4, to the possibility of attaching conditions to the provision of the requested information. However, nothing would prevent the requested State from assessing whether to formulate conditions as part of the process of "considering in good faith" a request for information, especially if this would facilitate or encourage the provision of the requested information.

Chapter VII

Succession of States in respect of State responsibility

A. Introduction

116. At its sixty-ninth session (2017), the Commission decided to include the topic “Succession of States in respect of State responsibility” in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.³⁹² The General Assembly subsequently, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

117. At the same session, the Commission considered the first report of the Special Rapporteur ([A/CN.4/708](#)), which set out the Special Rapporteur’s approach to the scope and outcome of the topic, and provided an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the first report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft articles 1 and 2, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹³

118. At its seventieth session (2018), the Commission considered the second report of the Special Rapporteur ([A/CN.4/719](#)), which discussed the legality of succession, the general rules on succession of States in respect of State responsibility, and certain special categories of State succession to the obligations arising from responsibility. Following the debate in plenary, the Commission decided to refer draft articles 5 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft article 1, paragraph 2, and draft articles 5 and 6, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹⁴

119. At its seventy-first session (2019), the Commission considered the third report of the Special Rapporteur ([A/CN.4/731](#)), which discussed reparation for injury resulting from internationally wrongful acts committed against the predecessor State and against the nationals of the predecessor State. The report also contained technical proposals in relation to the scheme of the draft articles. The Commission also had before it a memorandum by the Secretariat providing information on treaties which may be of relevance to its future work on the topic ([A/CN.4/730](#)). Following the debate in plenary, the Commission decided to refer draft articles 2, paragraph (f), X, Y, 12, 13, 14 and 15, and the titles of Part Two and Part Three, as contained in the third report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently considered a first report of the Drafting Committee on the topic³⁹⁵ and provisionally adopted draft article 1, draft article 2, paragraphs (a) to (d), and draft article 5, which had been provisionally adopted by the Drafting Committee at the sixty-ninth and seventieth sessions, with

³⁹² At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*).

³⁹³ The interim report of the Chair of the Drafting Committee is available in the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/3_5.shtml.

³⁹⁴ *Ibid.*

³⁹⁵ See A/CN.4/L.939 and interim report of the Chair of the Drafting Committee, available in the analytical guide to the work of the International Law Commission (see footnote 393 above).

commentaries thereto.³⁹⁶ The Commission also took note of the interim report of the Chair of the Drafting Committee on draft articles 7, 8 and 9, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹⁷

B. Consideration of the topic at the present session

120. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/743).

121. In his fourth report, composed of three parts, the Special Rapporteur provided an overview of the work on the topic, which included a summary of the debate in the Sixth Committee and an explanation of the methodology of the report (Part One). The Special Rapporteur then addressed questions related to the impact of succession of States on forms of responsibility, in particular different forms of reparation (restitution, compensation and satisfaction), the obligation of cessation and assurances and guarantees of non-repetition (Part Two). Lastly, the Special Rapporteur discussed the future programme of work on the topic (Part Three). Five new draft articles (draft articles 7 *bis*, 16, 17, 18 and 19) were proposed in the fourth report.³⁹⁸

³⁹⁶ See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10).

³⁹⁷ The interim report of the Chair of the Drafting Committee is available in the analytical guide to the work of the International Law Commission (see footnote 393 above).

³⁹⁸ The text of draft articles 7 *bis*, 16, 17, 18 and 19, as proposed by the Special Rapporteur in his fourth report, reads as follows:

Draft article 7 *bis*

Composite acts

1. When an internationally wrongful act is of a composite character, the international responsibility of a predecessor State and/or that of a successor State is engaged if a series of actions or omissions defined in aggregate as wrongful occurs. If the action or omission, taken with the other action or omission, is sufficient to constitute the wrongful act of either the predecessor State or the successor State, such State is responsible only for the consequences of its own act.

2. However, if an internationally wrongful act occurs only after the last action or omission by the successor State, the international responsibility of this State extends over the entire period starting with the first of the actions or omissions and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

3. Provisions of paragraphs 1 and 2 are without prejudice for any responsibility incurred by the predecessor State or the successor State on the basis of a single act if and to the extent that it constitutes a breach of any international obligation in force for that State.

Draft article 16

Restitution

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make restitution, provided and to the extent that restitution is not materially impossible or does not involve a burden out of all proportion.

2. If, due to the nature of restitution, only a successor State or one of the successor States is in a position to make such restitution or if a restitution is not possible without participation of a successor State, a State injured by an internationally wrongful act of the predecessor State may request such restitution or participation from that successor State.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

4. A successor State may request restitution from a State which committed an internationally wrongful act against the predecessor State if the injury caused by this act continues to affect the

122. At its 3528th meeting, on 21 May 2021, the Commission provisionally adopted draft articles 7, 8 and 9,³⁹⁹ which had been provisionally adopted by the Drafting Committee at the seventy-first session (2019) (see sect. C.1 below).

123. The Commission considered the fourth report of the Special Rapporteur at its 3531st to 3537th meetings, from 5 to 12 July 2021. At its 3537th meeting, on 12 July 2021, the Commission decided to refer draft articles 7 *bis*, 16, 17, 18 and 19, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the plenary debate.

124. At its 3552nd meeting, on 28 July 2021, the Chair of the Drafting Committee presented an interim report on draft articles 10, 10 *bis* and 11, provisionally adopted by the Committee at the present session. The interim report was presented for information only and is available on the website of the Commission.⁴⁰⁰

territory or persons which, after the date of succession of States, are under the jurisdiction of the successor State.

Draft article 17

Compensation

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make compensation for the damage caused by its internationally wrongful act, insofar as such damage is not made good by restitution.
2. In particular circumstances, a State injured by such internationally wrongful act may request compensation from a successor State or one of the successor States, provided that the predecessor State ceased to exist or, after the date of succession of States, that successor State continued to benefit from such act.
3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.
4. A successor State may request compensation from a State which committed an internationally wrongful act against the predecessor State, provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to bear injurious consequences of such internationally wrongful act.

Draft article 18

Satisfaction

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury is not made good by restitution or compensation.
2. Paragraph 1 is without prejudice to an appropriate satisfaction, in particular prosecution of crimes under international law, that any successor State may claim or may provide.

Draft article 19

Assurances and guarantees of non-repetition

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States.
2. Provided that the obligation breached by an internationally wrongful act remained in force after the date of succession of States between a successor State and another State concerned, and if circumstances so require:

(a) a State injured by an internationally wrongful act of the predecessor State may request appropriate assurances and guarantees of non-repetition from a successor State; and

(b) a successor State of a State injured by an internationally wrongful act of another State may request appropriate assurances and guarantees of non-repetition from this State.

³⁹⁹ As contained in the report of the Drafting Committee (A/CN.4/L.939/Add.1).

⁴⁰⁰ Available in the analytical guide to the work of the Commission (see footnote 393 above).

125. At its 3560th to 3562nd meetings, on 4 and 5 August 2021, the Commission adopted the commentaries to draft articles 7, 8 and 9 provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the fourth report

126. The Special Rapporteur first reiterated the following general considerations for the Commission's work on the topic, as outlined in Part One of his fourth report: (a) the subsidiary nature of the draft articles and the priority of agreements entered into between States concerned; (b) the importance of preserving consistency with the previous work of the Commission, in particular its articles on responsibility of States for internationally wrongful acts;⁴⁰¹ (c) the role of the concepts of equity, equitable proportion and distribution of rights and obligations; (d) the specificity of cases of succession of States that inevitably combines political and legal considerations; (e) the fact that neither the "clean slate" rule nor automatic succession were accepted as general rules; and (f) the need to combine codification with progressive development of international law.

127. The Special Rapporteur then stated that Part Two of the report concerned the impact of succession of States on forms of responsibility. Part Two dealt with forms of responsibility and legal consequences that could be applicable in situations of succession of States, while maintaining consistency with the articles on responsibility of States for internationally wrongful acts. The report and the draft articles proposed therein respected the continuing applicability of general rules of State responsibility with respect to a predecessor State, subject to the material impossibility of that State providing a specific form of reparation. Special circumstances that warranted certain forms of reparation by a successor State or States were also discussed. Additionally, the report contained an analysis of (a) situations of actual succession of States to international rights and obligations arising from State responsibility, and (b) situations when the State incurs responsibility for its own internationally wrongful acts, even in the case of succession of States.

128. With respect to the proposed draft articles, the Special Rapporteur explained that the report addressed the question of composite acts, in response to a request from members of the Drafting Committee at the seventy-first session (2019) of the Commission during the debate on draft article 7 (acts having a continuing character). Draft article 7 *bis* (composite acts) was proposed further to the Special Rapporteur's analysis in the second and fourth reports and was deemed useful in order to clarify the issue of composite acts. The Special Rapporteur considered that composite acts differed from acts having a continuing character. Draft article 7 *bis* did not purport to establish a new rule but rather built upon the application of general rules of responsibility of States in the context of succession of States.

129. Turning to the draft articles on the different forms of reparation, the Special Rapporteur explained that draft articles 16 (restitution) and 17 (compensation) followed similar structures. Both draft articles provided for the obligations of predecessor and successor States in relation to restitution and compensation, as relevant. The two draft articles also addressed apportionment of responsibility or other relevant agreements between the successor State and the predecessor State or another successor State. The Special Rapporteur further explained that draft article 16 was in line with the articles on responsibility of States for internationally wrongful acts and draft article 17 was informed

⁴⁰¹ 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.

by an analysis of practice, including decisions of the European Court of Human Rights and the United Nations Compensation Commission.

130. Moreover, the Special Rapporteur had examined satisfaction as a form of reparation for non-material injury, as proposed in draft article 18. A distinction had to be made between the traditional perspective and the modern law of State responsibility. Under the former, the nature of moral injury appeared to be linked to the bilateral relations of the States concerned and to their dignity and personality. The latter envisaged the notion of “legal injury”, which was mainly related to breaches of obligations that protected essential collective interests of a group of States or the international community of States. That included the protection of human rights or the prevention and punishment of crimes under international law. While the fourth report pointed to the examples contained in the Commission’s commentary to article 37 of the articles on responsibility of States for internationally wrongful acts, the report focused on the investigation and punishment of responsible persons as the most appropriate form of satisfaction in cases of serious violations of obligations *erga omnes*. The Special Rapporteur clarified that the report examined the case law regarding crimes under international law committed in the territory of the former Yugoslavia, as they were the most significant examples in modern practice and had been tried at the national and international levels. It was within such context that draft article 18 had been proposed. Paragraph 1 of draft article 18 stipulated that in cases of succession of States where a predecessor State continued to exist, that State was under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury was not made good by restitution or compensation. Paragraph 2 contained a without prejudice clause, which sought to reflect a cautious and flexible approach to appropriate forms of satisfaction, in particular investigation and prosecution of crimes under international law.

131. The report also provided an analysis of the obligation of cessation and assurances and guarantees of non-repetition. It sought to clarify the obligation of cessation, which in his view was only relevant in cases of internationally wrongful acts having a continuing character and applied by virtue of general rules of State responsibility. The Special Rapporteur considered that assurances and guarantees of non-repetition served a different function from other forms of reparation and, therefore, their inclusion and analysis in the report was needed. He emphasized that assurances and guarantees of non-repetition were future-oriented, in the sense that they would only apply once the internationally wrongful act had been committed. It was also explained that the breached primary obligation must subsist and be in force, making the transfer of any secondary obligation contingent on the succession of the primary obligation. Draft article 19 (assurances and guarantees of non-repetition) was proposed to that effect. Paragraph 1 contained the general rule based on the articles on responsibility of States for internationally wrongful acts: where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States. Paragraph 2, in turn, addressed exceptional situations and contained two conditions in order to be applicable: (a) that the obligation breached by an internationally wrongful act remained in force between a successor State and another State concerned; and (b) that the circumstances so require. If both conditions were present, then an injured State might request appropriate assurances and guarantees of non-repetition from a successor State, and a successor State of a State injured by a wrongful act committed by another State could request appropriate assurances and guarantees of non-repetition from that State.

132. Part Three of the report discussed the future programme of work. The Special Rapporteur indicated that his fifth report would focus on matters related to the plurality of injured successor States, as well as the plurality of responsible States. It would also address miscellaneous and technical issues, including the renumbering of the draft articles

and their final structure. It was hoped that the topic could be completed on first reading at the Commission's seventy-third session.

2. Summary of the debate

(a) General comments

133. Members of the Commission expressed their appreciation to the Special Rapporteur for his fourth report.

134. Regarding the general considerations for the work on the topic, members generally agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned. Some members suggested that the commentaries to the draft articles could provide examples of succession agreements between States, and that a number of model clauses could be drafted to be used as a basis for negotiation of agreements on succession in respect of State responsibility.

135. Differing views were expressed pertaining to the general rule of non-succession, the "clean slate" rule, and that of "automatic" succession. Some members concurred with the Special Rapporteur's assertion that the diverse and context-specific State practice did not support the primacy of either the "clean slate" rule or automatic succession, while some members were of the view that there could be exceptions to the general rule of non-succession. Other members reiterated that the general rule applicable in the topic was the "clean slate" rule and that no such rule of automatic succession existed. While the view was expressed that the proposed draft articles appeared to go in the direction of automatic succession, other members did not share that view. The point was made that the fourth report, while stating that the "transfer of responsibility" of States is different from the "transfer of rights and obligations arising from responsibility" of States, did not sufficiently explain such difference. Some members questioned the methodology of the report and the extent to which the analysis contained therein was made by drawing parallels with succession of States in respect of debts and inspired by the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.⁴⁰²

136. A number of members emphasized the need to take into account more geographically diverse sources of State practice and recalled that the scarcity of State practice had been highlighted during the debate in the Sixth Committee. Other members noted that, although State practice was limited, the Commission should nevertheless ascertain what practice existed on the matter. Caution was expressed against drawing general conclusions on matters of reparation based on lump-sum agreements or on the inconsistent, insufficient and context-specific State practice. In that connection, it was recalled that the mandate of the Commission was not limited to codification, but also included progressive development of international law. A further suggestion was made that the commentary describe the relationship between State practice and each draft article more clearly, thus showing clearly which draft articles were supported by State practice and which constituted progressive development of international law.

137. The view was expressed that the focus of the work of the Commission on the topic should be on clarifying how the rules on State responsibility operate in the specific factual scenario of succession of States. It was suggested that the Commission should further explore the legal consequences of State succession in relation to claims by private persons, which was not covered by the articles on responsibility of States for internationally wrongful acts, although opposition was also expressed to that suggestion.

⁴⁰² Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983), United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.

138. The importance of maintaining consistency, in terminology and substance, with the previous work of the Commission was reiterated. In that regard, a proposal was made to add a provision to the draft articles concerning their temporal application, along the lines of article 7 of the 1978 Vienna Convention on Succession of States in respect of Treaties⁴⁰³ and article 4 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It was noted that the Commission could benefit from the work of the Institute of International Law on succession of States.

(b) Draft article 7 *bis*

139. Several members considered draft article 7 *bis* to be a useful complement to draft article 7. It was suggested that the draft article could rely on the definition of composite acts as contained in article 15 of the articles on responsibility of States for internationally wrongful acts. Another view recalled that Member States in the Sixth Committee had expressed reservations about a discussion on composite acts. Some members were of the view that the scope of paragraphs 1 and 2 needed to be clarified, in particular with regard to the responsibility of the predecessor State when it continued to exist. It was also considered that paragraph 1 could benefit from clarification as to whether it excluded the transfer of rights and obligations arising from State responsibility that could occur under circumstances different from those envisaged in paragraph 2. Moreover, it was observed that paragraph 2 related more to the extension in time of the breach of an international obligation, as referred to in article 14 of the articles on responsibility of States for internationally wrongful acts, than to composite acts. Some members considered it necessary to further examine matters related to shared responsibility when a predecessor State continued to exist, and an analysis was called for of how the obligation of cessation applied in the case of a composite act or a continuing act which occurred during the succession process. The view was expressed that there was some degree of confusion between composite acts and continuing acts. Attention was drawn to the work of the Institute of International Law regarding succession and continuing and composite acts. Drafting suggestions were made to streamline the provision, as some of its proposed content was deemed to already be covered by general rules on State responsibility. Other drafting suggestions were made in relation to clarifying the scope of paragraphs 1 and 2.

(c) Draft articles 16 to 19

140. Some members noted that chapter III in Part Two of the fourth report, entitled “Impact of succession of States on forms of responsibility”, actually focused on the consequences of an internationally wrongful act committed by States, particularly in relation to the forms of reparation (restitution, compensation and satisfaction, as envisaged in draft articles 16 to 18). It was recalled that the obligation of cessation, assurances and guarantees of non-repetition, and other forms of reparation, were not forms of responsibility, but rather legal consequences of responsibility of States under the articles on responsibility of States for internationally wrongful acts. Concern was expressed regarding the question of transfer of obligations to the successor State in order to provide reparation for acts of the predecessor State that took place before the date of succession, as it appeared that such concept was inconsistent with the requirement of attribution under article 2 of the articles on responsibility of States for internationally wrongful acts.

141. The need to clearly distinguish reparation, on one hand, and cessation and assurances and guarantees of non-repetition, on the other, was emphasized. Doubts were expressed regarding the value of having specific stand-alone draft articles for different

⁴⁰³ Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

forms of reparation. Accordingly, a proposal was made to simplify draft articles 16 to 19, so that they would become only two provisions: one concerning cessation and non-repetition, and the other concerning reparation. Further discussion of the forms of reparation with reference to the different categories of State succession was considered necessary, in particular on the circumstances leading to various solutions. The point was made that the draft articles were without prejudice to any right of reparation that might be owed to individuals subject to the jurisdiction of the injured State and, accordingly, it was suggested to add a draft article in that sense. A further view was expressed that discussing the issue of how to discharge the obligation to make full reparation for the injury caused by an internationally wrongful act committed by or against a predecessor State went beyond the scope of the topic.

142. Several members questioned whether draft articles 16 to 19, as proposed in the fourth report, were necessary, given that the situations governed therein were already covered by general rules of State responsibility. Concern was expressed with restating or rewriting the law on State responsibility, as the draft articles could risk misstating the law. It was noted, however, that the articles on responsibility of States for internationally wrongful acts might not cover all aspects relevant to the topic.

143. Some members were of the view that the recourse to lump-sum agreements should not undermine the rule of full reparation as a fundamental principle of the law of State responsibility. Furthermore, it was observed that lump-sum agreements might not be appropriate to settle disputes involving *erga omnes* obligations.

144. While the view was expressed that the flexible wording of “may request” employed in draft articles 16, 17 and 19 was appropriate, a number of members considered that such wording, and the expression “may claim” in draft article 18, were ambiguous and lacked clarity. Several members requested clarification of whether draft articles 16 to 19 applied to situations where the predecessor State ceased to exist. Clarification was requested that not every predecessor State was bound by an obligation of reparation, but only the predecessor State that was responsible for a wrongful act. Additionally, it was suggested that draft articles 16 to 19 be clarified to apply only to the extent that a successor State was bound to provide reparation for the acts of a predecessor State, in conformity with Part Two of the draft articles.

145. In relation to restitution, as foreseen in draft article 16, while agreement was expressed with the Special Rapporteur’s approach that restitution was the priority form of reparation under international law, some members questioned that approach. It was noted that a definition of restitution was absent from the provision. According to several members, draft article 16 was superfluous because it restated relevant provisions in the articles on responsibility of States for internationally wrongful acts. While appreciation was shown for the Special Rapporteur’s efforts to distinguish “legal” and “material” restitution, such distinction was questioned due to the lack of a basis in State practice. Agreement was expressed with the Special Rapporteur’s assertion that loss or destruction of the object of restitution was not representative of what the concept “material impossibility” could entail in situations of State succession. Regarding paragraph 1 of draft article 16, some members stressed the need to explain why the predecessor State should make restitution, as in some cases the predecessor State might not be responsible and the wrongful act might not be attributable to it. It was noted that the formulation of paragraph 1 could be clearer and less subjective and could benefit from full consistency with article 35 of the articles on responsibility of States for internationally wrongful acts. With respect to paragraph 2 of draft article 16, while some members suggested that the situation envisaged therein could be solved by applying the principle of unjust enrichment, scepticism was expressed on the application of that principle in the context of international law. Several members observed that, in the context of paragraph 2, the successor State did not have an obligation to make restitution in lieu of the predecessor

State. The view was expressed that paragraph 2 seemed to be based on “automatic succession”. Some members deemed it necessary to clarify whether the agreement between the successor State and the predecessor State referred to in paragraph 3 was opposable to injured States. The point was made that paragraph 3 was not in accordance with the rules on State responsibility pertaining to reparation, since agreements envisaged therein, between predecessor and successor States, could not produce legal effects in relation to injured States. The inclusion of a “without prejudice” clause in paragraph 4 to preserve the rights of individuals was proposed. Further, in that light, various drafting proposals were made in relation to draft article 16.

146. Regarding compensation, provided for in draft article 17, agreement was expressed with the Special Rapporteur’s assertion that compensation seemed to be the most common form of reparation in cases where responsibility for internationally wrongful acts was affected by the succession of States. Some members felt that it was necessary to clarify the principles underlying the proposed provision. The 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, as well as the work of the International Law Institute, were referred to as containing a number of references to the principle of equity, which could play a role in the calculation of the amount of compensation and the apportionment of the compensation between several States. It was noted that paragraph 1 did not contain a reference to financially assessable damage, unlike article 36 of the articles on responsibility of States for internationally wrongful acts. It was suggested that the situation foreseen in paragraph 2 could be resolved by applying the principle of the prohibition of unjust enrichment. In particular, that principle was relevant in situations in which the predecessor State ceased to exist. The need to clarify the circumstances that justified transferring obligations to the successor State whenever the predecessor State continued to exist was referred to. The view was expressed that the idea contained in paragraph 2 was already contained in draft article 7. It was suggested that the two conditions envisaged in paragraph 2 should be cumulative instead of alternative. The same suggestion was made concerning the two conditions in paragraph 4. Clarification was requested as to whether the agreement referred to in paragraph 3 was opposable to injured States. In that connection, the view was expressed that paragraph 3 was not in accordance with the rules on State responsibility pertaining to reparation, since agreements envisaged therein, between predecessor and successor States, could not produce legal effects in relation to injured States. Some members noted that the content of paragraph 3 appeared to already be covered in paragraph 2 of draft article 1. Several members considered that draft article 17 did not sufficiently demonstrate causality and requested further elaboration by the Special Rapporteur in that regard. A suggestion was made to include methods used for valuation of compensation in the commentary. Accordingly, various drafting proposals were made regarding the text of draft article 17.

147. Regarding satisfaction, as per draft article 18, support was expressed for the Special Rapporteur’s approach of interpreting, in the work on the topic, satisfaction through the modern concept of responsibility of States, which is based on “objective responsibility” and “legal injury”. It was reiterated that the provision was unclear regarding situations where the predecessor State ceased to exist, as well as when and under what conditions a successor State was entitled to request such form of satisfaction. In relation to paragraph 2, the inclusion of investigation and prosecution of international crimes was commended by some members. In contrast, the view was expressed that there was no evidence suggesting that investigation and prosecution of international crimes constituted a form of satisfaction, and the relevance of investigation and prosecution of such crimes as a form of satisfaction was questioned. Several members considered that it would be beneficial to have examples of State practice indicating that prosecution of international crimes was indeed regarded as a form of satisfaction by successor States, as well as an analysis of whether there was an obligation to claim or provide satisfaction by

means of prosecuting crimes under international law. It was suggested that the word “may” did not cover an obligation of the successor State to provide satisfaction through the prosecution of international crimes. Moreover, the prosecution of serious violations of obligations *erga omnes* was referred to as a specific form of satisfaction made in relation to the international community as a whole. Draft article 18 was considered unclear as to who was entitled to invoke responsibility within the meaning of article 48 of the articles on responsibility of States for internationally wrongful acts in cases of obligations *erga omnes*. Several members were of the view that, in cases of breaches of peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*, all forms of reparation would be relevant, not just satisfaction. It was observed that a distinction had to be drawn between State responsibility and individual criminal responsibility. Several drafting proposals were made to amend draft article 18 with the intention of introducing such distinction.

148. While support was expressed for the text of draft article 19, regarding assurances and guarantees of non-repetition, some members suggested revising it to make it clearer and more precise. Clarification was requested as to why draft article 19 did not include the obligation of cessation. In particular, it was noted that if, indeed, no draft article on cessation was included, the commentary ought to explain what constituted continuing harm. Cessation and guarantees and assurances of non-repetition were considered by some members as playing an equal role in situations in which restitution was not possible and where the injury was not only material. The use of the word “appropriate” in the draft article was questioned because it did not offer enough guidance to States. While support was expressed for paragraph 1, concerns were raised regarding paragraph 2, which seemed to suggest that only if the successor State committed a wrongful act after the date of succession would guarantees and assurances of non-repetition become one of the available remedies. Some members reiterated comments made in relation to paragraphs 2 of draft articles 16, 17 and 18. The question was raised as to whether paragraph 2 applied in situations where the predecessor State ceased to exist. It was noted that any purported rule of succession to the international obligations arising from the responsibility of a predecessor State would contradict draft article 7, paragraph 1, relating to acts having a continuing character. It was proposed that the commentary explain which “circumstances” were covered in paragraph 2, as well as that a list of examples of “appropriate assurances” and an overview in table form of the different situations of succession be provided. The need was mentioned for further analysis of the practice of the African Commission on Human and Peoples’ Rights on elements that formed part of assurances and guarantees of non-repetition. Drafting proposals were also made regarding draft article 19.

(d) Final form

149. Several members questioned whether draft articles were the most appropriate outcome for the topic, taking into account the comments by some States, which demonstrated a preference for draft guidelines, principles, conclusions, model clauses, or an analytical report as alternatives. A number of members suggested that the Commission could reconsider the format of its work on the topic at its seventy-third session, while others did not deem it necessary to do so. It was also suggested that the final decision on the outcome for the topic could be taken once the Commission had concluded most of its substantive work.

(e) Future programme of work

150. Several members agreed with the future programme of work proposed by the Special Rapporteur, while others cautioned that the Commission should not be hasty in its consideration of the topic. Some members expressed doubts as to whether the first reading could be concluded at the seventy-third session.

3. Concluding remarks of the Special Rapporteur

151. In his summary of the debate, the Special Rapporteur expressed his satisfaction with the substantive discussions of the fourth report. The debate in plenary had been rich and interesting and, in his view, demonstrated the intricacies and complex nature of the topic. He also noted that the various comments made by members were at times incompatible, but he was ready to engage with members to bridge gaps and adopt a flexible approach.

152. With respect to the need to ensure that geographically diverse State practice was taken into account, the Special Rapporteur affirmed his readiness to do so and welcomed any examples members had in that regard.

153. Concerning lump-sum agreements, the Special Rapporteur clarified that the fourth report took a cautious and qualified approach. While the Special Rapporteur was unable to confirm their status as customary international law, he still considered lump-sum agreements to be an important element for the topic because they reflected State practice. Furthermore, States were free to enter into agreements that provided less than full reparation, in particular in light of the pronouncements of the International Court of Justice in its judgment on *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,⁴⁰⁴ and national case law of Czechoslovak and Czech courts regarding the impact of certain lump-sum agreements concluded after the Second World War.

154. Regarding the principle of unjust enrichment, the Special Rapporteur again stated that such principle was relevant as one of the special elements or circumstances that supported the exceptional transfer of obligations arising from State responsibility to a successor State or States. However, he clarified that he had deliberately not expressly mentioned the principle in the proposed draft articles, as he did not accept it as the only ground for the responsibility of successor States for several reasons. The principle was considered to be ambiguous and imprecise, and was often linked to the concept of “acquired rights”, which was considered outdated and not in conformity with modern international law. He indicated his willingness to address the matter in the commentaries.

155. The Special Rapporteur stressed that the text of the proposed draft articles did not imply automatic succession. He agreed with the view expressed that State practice did not support the primacy of either the “clean slate” rule or the automatic succession rule. In the law of State succession, as developed between the 1960s and 1980s, the “clean slate” rule was the rule applicable with respect to newly independent States. However, he did not agree that the doctrine of “clean slate” should be elevated to a general rule applicable to all categories of succession.

156. While the Special Rapporteur understood the questions raised pertaining to the usefulness or necessity of the draft articles, he reiterated that the articles on responsibility of States for internationally wrongful acts did not cover all aspects relevant to the topic. Accordingly, the draft articles could be viewed as complementing existing rules. The work on the topic aimed to fill the gaps in the codification of rules of State responsibility and rules on the succession of States.

157. With respect to comments on the structure of the proposed draft articles, their applicability when the predecessor State continued or ceased to exist, and the different categories of succession, the Special Rapporteur explained that the draft articles proposed in the fourth report should be read in conjunction with those proposed in previous reports. The fourth report was focused on the content and forms of legal consequences of

⁴⁰⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

internationally wrongful acts. He nevertheless agreed that the proposed draft articles could be streamlined to avoid unnecessary repetition. The Special Rapporteur also agreed with members that it was more appropriate to refer to the content of the draft articles as legal consequences in general and to the forms of reparation in particular. With respect to the consequences of violations of obligations *erga omnes*, the Special Rapporteur stated that they were not limited to satisfaction and proposed to discuss the matter in the commentaries or in another draft article. In that regard, the Special Rapporteur proposed new draft articles and revisions to the proposed draft articles to clarify and resolve the different issues raised. He also proposed an overall reorganization of the draft articles on reparation, following suggestions made by members. In relation to comments made that an analysis of State succession in respect of responsibility in relation to private persons should be done, the Special Rapporteur considered that the issue would be better addressed under other topics that the Commission might include in its programme of work but agreed to draft a without prejudice clause.

158. The Special Rapporteur generally welcomed suggestions and proposals regarding draft article 7 *bis*. He indicated that he would propose changes in the order and numbering of the draft articles to take into account comments made by members.

159. Regarding draft articles 16 and 17, the Special Rapporteur stated that he was open to considering the drafting suggestions made by members. He pointed out that the purpose of draft article 16 was to confirm that obligations based on the general rules of State responsibility applied even in situations of State succession. In his view, paragraphs 3 of both draft articles 16 and 17 were not superfluous, as they addressed the special case of apportionment agreements between the successor State and the predecessor State. For example, an injured State could decide to address its claim to the predecessor State, which was no longer in a position to restitute an object because the object was in the territory of the successor State, and the successor State benefited from the outcome of the wrongful act. However, if the predecessor State paid compensation instead of restitution to the injured State, the apportionment agreement between successor and predecessor State could be concluded as a set off. Apportionment agreements, according to the Special Rapporteur, while allowing injured States to present their claims, were intended to settle claims between the predecessor State and the successor State. With regard to comments made by members on the expression “may request” in draft articles 16 and 17, the Special Rapporteur underlined that the provisions should stress an exceptional and conditional character of such obligations, possibly with the indication of progressive development, where appropriate. He welcomed most drafting proposals concerning the draft articles.

160. The Special Rapporteur stated that draft article 18 on satisfaction could perhaps be streamlined and be included in a draft article with the other forms of reparation, in light of his proposal to reorganize the draft articles. In respect of the possible inclusion of a reference in paragraph 2 to investigation and prosecution of crimes under international law, he drew attention to pleadings by the parties in the case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*⁴⁰⁵ before the International Court of Justice, which showed that prosecution of international crimes could be considered as a form of satisfaction. He noted that the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court could be understood in a way that indicated that investigation and prosecution of crimes, committed in violation of obligations *erga omnes*, were in the interest of the international community as a whole.

161. Concerning draft article 19, the Special Rapporteur said that he was willing to include in the commentary a list of examples of appropriate assurances, as had been

⁴⁰⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

suggested by some members. Regarding the lack of a proposal for a draft article on the obligation of cessation, the Special Rapporteur acknowledged that a new provision on that aspect would be a valuable addition and welcomed drafting proposals to that end.

162. With respect to the outcome of the topic, the Special Rapporteur agreed with the view that the Commission could decide on the most suitable option at a later stage. While indicating his willingness to discuss alternative forms, the Special Rapporteur stated that he did not wish to change the format of the Commission's work on the topic. The Special Rapporteur also indicated that informal consultations could be held on the various issues.

163. In relation to the future programme of work, the Special Rapporteur acknowledged that, owing to the current COVID-19 pandemic and the modified working arrangements for the Commission, the Commission might not be in a position to conclude its work on first reading by the end of the quinquennium.

C. Text of the draft articles on succession of States in respect of State responsibility provisionally adopted so far by the Commission

1. Text of the draft articles

164. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Succession of States in respect of State responsibility

Article 1

Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.
2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

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;
- (d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

...

Article 5

Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

...

Article 7

Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Article 8

Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Article 9

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

165. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session is reproduced below.

Article 7

Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Commentary

(1) Draft article 7 seeks to address the question of succession of State responsibility in respect of those acts having a continuing character that are commenced by a predecessor State before the date of succession and that continue thereafter by the successor State. In such circumstances, identifying and defining the scope of State responsibility in respect of predecessor and successor States was considered essential.

(2) Draft article 7, which should be understood within the context of the articles on responsibility of States for internationally wrongful acts,⁴⁰⁶ addresses acts having a continuing character.⁴⁰⁷

(3) The first sentence of draft article 7 sets forth the basic rule that, in the case of an internationally wrongful act of a continuing character that would continue to occur after a succession of States, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States.⁴⁰⁸ This means that the successor State is held responsible only where an internationally wrongful act can be attributed to that State, and not to the predecessor State. This conclusion is in conformity with the articles on responsibility of States for internationally wrongful acts, wherein article 14, paragraph 2, concluded that “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

(4) The first sentence being the rule in the case of succession, the second sentence of draft article 7 addresses exceptional circumstances. It states that the international responsibility of the successor State also extends to the act of the predecessor States only if and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own. This conclusion derives from and builds upon the articles on responsibility of States for internationally wrongful acts, specifically article 11, which states that “[c]onduct which is not attributable to a State ... shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”⁴⁰⁹ For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for 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 and eventually continued by Greece, even after the acquisition of territorial sovereignty over the island. Even if the claim was originally based on a breach of a concession agreement, if the

⁴⁰⁶ 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 of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

⁴⁰⁷ Article 14, *ibid.*, at p. 59; see also para. (5) of the commentary to article 14 of the articles on State responsibility, *ibid.*, at p. 60.

⁴⁰⁸ *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)* [Spanish Zone in Morocco Claims] (1925), UNRIAA, vol. II, pp. 615–742, at pp. 648–649 (available in French only).

⁴⁰⁹ See para. (1) 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.

successor State, faced with a continuing breach on its territory, endorses and continues that situation, the inference may be drawn that it has assumed responsibility for it.⁴¹⁰

Article 8

Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Commentary

(1) The purpose of this draft article is to address the specific situation of the conduct of an insurrectional or other movement.

(2) Paragraph 1 reaffirms the rule of attribution of the conduct of an insurrectional or other movement which prevails in establishing a new State, as contained in article 10, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.⁴¹¹ The text of paragraph 1 of draft article 8 closely follows the text of article 10, paragraph 2, of those articles, except that it refers to a “predecessor” State instead of a “pre-existing” State.

(3) Paragraph 2 is a without prejudice clause, to account for a circumstance where a State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but failed to do so. This paragraph is modelled closely on article 10, paragraph 3, of the articles on responsibility of States for internationally wrongful acts, but with reference to a “predecessor State” in order to contextualize the provision in terms of succession of States. The reference to “the rules on responsibility of States for internationally wrongful acts” is to be understood as a reference to the rules of international law regarding attribution, which are comprised generally in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts.⁴¹²

Article 9

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

⁴¹⁰ *Affaire relative à la concession des phares de l’Empire ottoman*, UNRIAA, vol. XII (1956), p. 155, at pp. 197-198; see also 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.

⁴¹¹ *Ibid.*, at pp. 50-51; A/CN.4/719 (second report of the Special Rapporteur), paras. 107-121.

⁴¹² See para. (1) of the commentary to chapter II of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 38.

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

Commentary

(1) Draft article 9 addresses the retention of obligations by the predecessor State arising from the commission of an internationally wrongful act by the predecessor State, when the predecessor State continues to exist after the date of the succession of States, as well as the possibility of an agreement between the successor State and the injured State. Such succession could occur in cases of separation of a part or parts of a State, establishment of a newly independent State, or transfer of part of the territory of a State.

(2) Paragraph 1 establishes the rule that, when an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist in the three specific cases listed thereunder, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession. As such, the entitlement of the injured State to invoke the responsibility of a predecessor State is not affected after the date of a succession of States.⁴¹³ This is reflected in the choice of the terms “continues to” and “even after the date of succession”.

(3) The text draws upon the articles on responsibility of States for internationally wrongful acts by using the formulation “invoke the responsibility”. This formulation encompasses all rules on the responsibility of States for internationally wrongful acts. Further, the predecessor State may continue to rely on circumstances precluding the wrongfulness of internationally wrongful acts.⁴¹⁴

(4) Paragraph 2 addresses exceptional situations where there is a direct link between the act or its consequences and the territory of the successor State or States. In such circumstances, the predecessor State may not be in a position to address the injury alone and cooperation with the successor State may be necessary. Paragraph 2 does not entail an automatic transfer of obligations to the successor State, but merely specifies that an agreement may be reached by the States depending on the factual situation and the form of reparation that is most appropriate.⁴¹⁵

⁴¹³ See W. Czapliński, “La continuité, l’identité et la succession d’États – évaluation de cas récents”, *Revue belge de droit international*, vol. 26 (1993), pp. 375–392, at p. 388; M. Koskenniemi, Report of the Director of the English-speaking Section of the Centre, *State Succession: Codification Tested against the Facts*, pp. 71 and 119 ff.; P. Pazartzis, *La succession d’États aux traités multilatéraux : à la lumière des mutations territoriales récentes* (Paris, Pedone, 2002), pp. 55–56.

⁴¹⁴ See articles 20 to 27 of the articles on State responsibility and commentaries thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 72–86. Cf. also Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), “State succession in matters of international responsibility”, Fourteenth Commission, Rapporteur: Marcelo Kohen, resolution, p. 711, at p. 714.

⁴¹⁵ A/CN.4/719 (second report of the Special Rapporteur), paras. 98–103.

(5) The phrase “in particular circumstances” covers diverse situations where a successor State may be relevant for addressing the injury. For example, the successor State may be relevant in a situation where restitution of property is appropriate in order to address responsibility or there is a link between the territory or an organ of the successor State and the internationally wrongful act.⁴¹⁶ Additionally, the successor State may be relevant for addressing the injury in a circumstance where the successor State would be unjustly enriched as a result of an internationally wrongful act committed before the date of succession. This may include, for example, cases where an expropriated factory belonging to foreign investors or an object of art belonging to another State is retained on the territory of the successor State.

(6) Paragraph 3 deals with the concept of shared responsibility and apportionment of responsibility between the predecessor State and the successor State by way of agreement. It is drafted without prejudice to the contents of paragraphs 1 and 2, and reaffirms the rule contained in draft article 1, paragraph 2, according to which “[t]he present draft articles apply in the absence of any different solution agreed upon by the States concerned”. Paragraph 3 does not limit itself to questions of financial apportionment in case of compensation, recognizing that the form of reparation necessary under different factual circumstances may be distinct, leaving it open for the predecessor and the successor State to discuss the form of reparation in the agreement.

⁴¹⁶ P. Dumberry, “Is a new State responsible for obligations arising from internationally wrongful acts before its independence in the context of secession?”, *Canadian Yearbook of International Law*, vol. 43 (2005), pp. 419–454, at pp. 429–430.

Chapter VIII

General principles of law

A. Introduction

166. The Commission, at its seventieth session (2018), decided to include the topic “General principles of law” in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. The General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

167. At its seventy-first session (2019), the Commission considered the Special Rapporteur’s first report (A/CN.4/732), which set out his approach to the topic’s scope and outcome, as well as the main issues to be addressed in the course of the Commission’s work. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur’s first report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft conclusion 1, provisionally adopted by the Committee in English only, which was presented to the Commission for information.⁴¹⁷

168. Also at its seventy-first session, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

B. Consideration of the topic at the present session

169. At the present session, the Commission considered the Special Rapporteur’s second report (A/CN.4/741 and Corr.1). In his second report, the Special Rapporteur addressed the identification of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and proposed six draft conclusions. He also made suggestions for the future programme of work on the topic. The Commission also had before it the memorandum it had requested from the Secretariat surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic (A/CN.4/742).

170. The Commission considered the Special Rapporteur’s second report at its 3536th, 3538th, 3539th, and 3541st to 3546th meetings, from 12 to 21 July 2021.

171. At its 3546th meeting, on 21 July 2021, the Commission decided to refer draft conclusions 4 to 9, as contained in the Special Rapporteur’s second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.⁴¹⁸

⁴¹⁷ The interim report of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.

⁴¹⁸ The draft conclusions proposed by the Special Rapporteur in his second report read as follows:

Draft conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

- (a) the existence of a principle common to the principal legal systems of the world; and
- (b) its transposition to the international legal system.

172. At its 3557th meeting, on 3 August 2021, the Commission considered the report of the Drafting Committee (A/CN.4/L.955 and Add.1) on draft conclusions 1 (in French and Spanish), 2, 4 and 5, provisionally adopted by the Committee at the present session.⁴¹⁹ At the same meeting, the Commission provisionally adopted draft conclusions 1, 2 and 4 (see sect. C.1 below), and took note of draft conclusion 5. At its 3561st and 3563rd meetings, on 5 and 6 August 2021, the Commission adopted the commentaries to draft conclusions 1, 2 and 4 provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the second report

173. The Special Rapporteur recalled the complexities of the topic, stating that general principles of law were one of the three principal sources of international law and therefore their analysis required careful and extensive treatment. He indicated that his second report dealt with the methodology for identifying general principles of law. He recalled the

Draft conclusion 5

Determination of the existence of a principle common to the principal legal systems of the world

1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.
2. The comparative analysis must be wide and representative, including different legal families and regions of the world.
3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Draft conclusion 6

Ascertainment of transposition to the international legal system

A principle common to the principal legal systems of the world is transposed to the international legal system if:

- (a) it is compatible with fundamental principles of international law; and
- (b) the conditions exist for its adequate application in the international legal system.

Draft conclusion 7

Identification of general principles of law formed within the international legal system

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

- (a) a principle is widely recognized in treaties and other international instruments;
- (b) a principle underlies general rules of conventional or customary international law; or
- (c) a principle is inherent in the basic features and fundamental requirements of the international legal system.

Draft conclusion 8

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.
2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Draft conclusion 9

Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

⁴¹⁹ The corresponding statement of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission:
http://legal.un.org/ilc/guide/1_15.shtml.

fruitful debates in the Commission, as well as in the Sixth Committee of the General Assembly, and highlighted six main points from them.

174. First, he recalled that there was general consensus regarding the topic's scope and the form of the final output of the Commission's work. In the Special Rapporteur's view, members of the Commission and States in the Sixth Committee widely agreed that the topic should deal with the legal nature of general principles of law as one of the sources of international law, their scope, their functions and their relationship with other sources of international law, as well as the method for identifying them. He also noted agreement that the Commission's output would take the form of draft conclusions accompanied by commentaries.

175. Second, the Special Rapporteur recalled that there was general agreement that the starting point for the Commission's work should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, analysed in the light of State practice and jurisprudence.

176. Third, he recalled that there was broad consensus that recognition was the essential condition for the existence and identification of general principles of law.

177. Fourth, there was general agreement both within the Commission and the Sixth Committee that the term "civilized nations" contained in Article 38, paragraph 1 (c), of the Statute of the Court was anachronistic and should be avoided.

178. Fifth, the Special Rapporteur recalled that there was virtually unanimous support for the category of general principles of law derived from national legal systems, as well as for the basic methodology for their identification.

179. Finally, with regard to the second category of general principles of law proposed in the first report, namely, those formed within the international legal system, the Special Rapporteur noted that, while members of the Commission and States in the Sixth Committee supported that category, some members and delegations had expressed doubts.

180. The Special Rapporteur indicated that the second report was divided into five parts: Part One addressed certain general aspects in relation to the identification of general principles of law; Parts Two and Three dealt with the methodology for identifying general principles of law derived from national legal systems and those formed within the international legal system, respectively; Part Four examined the subsidiary means for the determination of general principles of law; and Part Five briefly addressed the Commission's future programme of work on the topic. The Special Rapporteur proposed six draft conclusions in his second report.

181. In his introduction to Part One, the Special Rapporteur focused on three observations, namely that: (a) the Commission's approach should be limited to clarifying the methodology by which the existence of general principles of law, and their content, could be determined at a specific point in time; (b) there was general agreement among the members of the Commission and States in the Sixth Committee that recognition was the essential condition for determining the existence of general principles of law; and (c) the term "community of nations", included in article 15, paragraph 2, of the International Covenant on Civil and Political Rights⁴²⁰ referring to general principles of law, should be used instead of "civilized nations".

182. Part Two addressed the identification of general principles of law derived from national legal systems. Chapter I briefly set forth the basic approach to the issue, namely that to identify general principles of law derived from national legal systems, a two-step analysis was required. Chapters II and III dealt with each of those steps in detail. Chapter

⁴²⁰ New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

IV addressed the distinction between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law.

183. The Special Rapporteur noted that, both in practice and in the literature, a two-step analysis was followed to identify general principles of law: (a) first, the existence of a principle common to the principal legal systems of the world must be determined; (b) second, the transposition of that principle into the international legal system must be ascertained.

184. He highlighted specific findings concerning the first step, namely: (a) a comparative analysis must be conducted of national legal systems, demonstrating that a principle was common to them; (b) it was necessary to cover as many national legal systems as possible to ensure that a principle had effectively been generally recognized by the community of nations; (c) it was not necessary to examine every single national legal system of the world; (d) the use of the phrase “principal legal systems of the world” was proposed, as was used in the Statute of the International Court of Justice and the statute of the Commission, to describe the scope of the analysis covering different legal families and regions of the world; (e) the test of commonality was relatively straightforward, consisting of comparing existing rules in national legal systems and identifying the legal principle common to them; (f) the materials relevant to the analysis were the domestic legal sources of States, such as legislation and decisions of national courts, taking into account the particular characteristics of each national legal system; and (g) it was possible to argue that if an international organization was given the power to issue rules that were binding on its member States and directly applicable in the latter’s legal systems, those rules might be taken into account when carrying out the comparative analysis.

185. With respect to the second step, the Special Rapporteur noted that the transposition of a principle common to the principal legal systems of the world to the international legal system was not automatic. He highlighted two requirements: (a) the principle must be compatible with the fundamental principles of international law; and (b) conditions must exist for the adequate application of the principle in the international legal system. The Special Rapporteur also noted that compatibility with any conventional or customary international law rule was not a requirement for transposition, given the absence of hierarchy between the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. He also noted, in that sense, that any conflict that might arise among norms of the three sources should be resolved by resorting to principles such as *lex specialis*.

186. Part Three of the report concerned the identification of general principles of law formed within the international legal system. Chapter I recalled the main issues raised during the 2019 debate within the Commission at its seventy-first session and the Sixth Committee at the seventy-fourth session of the General Assembly, and set forth the Special Rapporteur’s general approach in that regard. Chapter II addressed the methodology to determine the existence of general principles of law formed within the international legal system. Chapter III dealt with the distinction between the methodology for identification of customary international law and the one for identification of general principles of law formed within the international legal system.

187. The Special Rapporteur recalled that, although members of the Commission and States in the Sixth Committee had expressed support for the second category of general principles of law, and the analysis thereof contained in his first report, some divergent opinions had also been expressed in both forums. He noted that the main concerns were: that there would not be sufficient or conclusive practice to reach conclusions regarding that category of general principles of law; the difficulty of distinguishing those principles

from customary international law; and the apparent risk that the criteria for identifying general principles in that category would not be sufficiently strict, which could render them too easy to invoke.

188. Part Four addressed the subsidiary means for the identification of general principles of law. The Special Rapporteur stated that his approach in that part was based on the conclusions reached by the Commission in its work on identification of customary international law.⁴²¹ The Special Rapporteur noted that, in principle, there was no difference as to how Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice applied in relation to customary international law or general principles of law. In his view, the “rules of law” to which that provision referred clearly applied to the three sources of international law listed in the preceding subparagraphs of Article 38.

189. Part Five briefly set forth the Special Rapporteur’s proposed future programme of work. He stated his intention to address the functions of general principles of law and their relationship with other sources of international law in his next report. Furthermore, he stated that his next report would also provide an opportunity to examine issues that might arise in relation to his second report during the debate at the Commission’s seventy-second session.

190. To conclude, the Special Rapporteur recalled his proposal that the Commission provide at the end of its work a broadly representative bibliography of the main studies relating to general principles of law and noted that the proposal had received support from members at the seventy-first session.

2. Summary of the debate

(a) General comments

191. Members generally welcomed the second report of the Special Rapporteur and expressed appreciation for the memorandum prepared by the Secretariat. Some members noted the importance of the topic and highlighted the need to take a careful approach when discussing issues related to the sources of international law.

192. Regarding the methodology of the report, several members commended the Special Rapporteur’s survey of relevant State practice, jurisprudence and teachings. Caution was expressed regarding the use of opinions of States on general principles of law expressed in the course of litigation, and it was noted that, in any event, the different views of the parties to a dispute should be properly weighed.

193. Some members reiterated their agreement with the Special Rapporteur that the scope of the topic should include the legal nature of general principles of law as a source of international law; the scope of general principles of law, which refers to the origins and corresponding categories of general principles of law; the functions of general principles of law and their relationship with other sources of international law; and the identification of general principles of law. As for the outcome, support was reiterated for draft conclusions accompanied by commentaries.

194. Several members recalled that the starting point of the work of the Commission was Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. A view was expressed that the title of the topic should have a specific and clear reference to Article 38, paragraph 1 (*c*). Several members noted that general principles of law were an autonomous source of international law and that, while the list of sources in the Statute

⁴²¹ General Assembly resolution 73/203 of 20 December 2018, annex. The draft conclusions adopted by the Commission and the commentaries thereto are reproduced in *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, paras. 65–66.

was not hierarchical, general principles of law played a subsidiary or supplementary role. Some members noted that the function of general principles of law, as envisaged by the drafters of the Statute of the Permanent Court of International Justice,⁴²² was to fill gaps in international law and to avoid situations of *non liquet*. Several members agreed with the Special Rapporteur's general approach that the criteria for identifying general principles of law must be sufficiently strict to prevent them from being used as a shortcut to identify norms of international law, and at the same time sufficiently flexible so that identification would not amount to an impossible task.

195. There was unanimous support among those who spoke in the plenary debate for abandoning the term “civilized nations” contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. While several members supported the use of the term “community of nations” proposed by the Special Rapporteur and based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights, others expressed doubt as to its use. Some members stated that there was a need to reflect on the meaning of the word “nations” in the context of the topic. Some members highlighted that the term “nations” was appropriate, as it would provide a more diverse source of legal systems and traditions than the word “States”. Concerns were raised that article 15, paragraph 2, of the Covenant utilized varying terms in the different authentic languages. Suggestions were made to use instead the terms “international community”, “international community of States”, “States”, or “community of nations as a whole”.

196. With respect to the terminology to be used in French (“principes généraux ‘de/du’ droit”) and Spanish (“principios generales ‘de/del’ derecho”), the view was expressed that it would be important not to depart from the wording contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Attention was drawn to the need to adapt the terminology used to current usage of the expression in each of the official languages. On the other hand, it was said that the appropriate terminology would eventually depend on the scope given by the Commission to the topic. It was also stated that, regardless of the terminology used, it should not affect the meaning of that provision.

197. Several members agreed that recognition was the essential requirement for the identification of general principles of law. There was also general agreement that the topic covered general principles of law derived from national legal systems. However, while several members expressed support for general principles of law formed within the international legal system, others expressed doubt regarding their inclusion in the topic or their existence as a source of international law. Some members highlighted that the term “principle” and its relationship to “rule” might need to be clarified.

198. Several members expressed caution as to the imprecise use of terminology. It was noted that several distinct terms, such as “general international law”, “general principles of international law” and “fundamental principles of international law”, were often used interchangeably in practice and teachings. Some members expressed the need to distinguish between “principles”, “general international law” and “general principles of law under Article 38, paragraph 1 (c)”. It was also noted that there was a need to differentiate between the notion of principles as a source of law and principles as a subcategory of customary or conventional rules of international law.

(b) Draft conclusions 4 to 6

199. With respect to draft conclusions 4 (identification of general principles of law derived from national legal systems), 5 (determination of the existence of a principle common to the principal legal systems of the world) and 6 (ascertainment of transposition to the international legal system), members generally agreed with the two-step analysis

⁴²² Geneva, 16 December 1920, League of Nations, *Treaty Series*, vol. 6, No. 170, p. 379.

proposed by the Special Rapporteur. Doubt was expressed, however, as to whether the two steps could be applied as a single combined operation, as suggested by the Special Rapporteur.

200. Regarding the first step, namely, the determination of the existence of a principle common to the principal legal systems of the world, it was observed that in draft conclusion 5, paragraph 1, it was not necessary to refer to the methods and techniques of comparative law in the analysis of national legal systems; rather, focus should be placed on basic notions that those systems might have in common. It was also suggested that the process would be better described as a “comparative examination”.

201. Regarding paragraph 2 of draft conclusion 5, several members agreed with the Special Rapporteur that the comparative analysis must be wide and representative, which translated into a requirement to cover as many national legal systems as possible. That included ensuring representativeness of the various legal systems of the world, including, as appropriate, of indigenous, autochthonous or first peoples. Some members considered the requirement too strict, and it was noted that in practice such comparative analysis was not always wide and representative. A view was expressed that the requirement for breadth and representativeness necessarily meant that the assessment did not have to be very deep. The view was also expressed that the matter of accessibility to national legal materials was not addressed in the draft conclusions.

202. Drafting suggestions were made to draft conclusion 5, paragraph 2, to the effect of including a requirement analogous to the one used in the Commission’s conclusions on identification of customary international law, namely that the comparative analysis must be sufficiently wide and representative. It was also suggested that the Commission might wish to include in draft conclusion 5 the notion that a significant number of national legal systems should recognize the principle in question. Other drafting suggestions were made to reflect that the analysis should be flexible and conducted on a case-by-case basis.

203. Some members expressed doubt as to using the concept of “legal families” to describe the scope of the comparative analysis. It was suggested that geographical representation and language should also be criteria for recognition. It was noted that national legal systems within a legal family might or might not share a principle. While several members supported the use of the phrase “principal legal systems of the world” proposed by the Special Rapporteur, it was noted that such wording might suggest that the recognition of a principle by legal families themselves could be considered determinative, rather than the recognition by national legislations within those families. The view was expressed that the word “principal” was not needed.

204. As to the proposal that the comparative analysis should include an assessment of national legislation and decisions of national courts, reflected in paragraph 3 of draft conclusion 5, some members considered that such a requirement was too stringent, while others suggested that the draft conclusion did not reflect the broad range of materials relevant for the identification of principles of law in domestic legal systems referred to in the report of the Special Rapporteur. Some members suggested that the draft conclusion should also include reference to constitutional, administrative or executive practice.

205. While several members supported the inclusion of the practice of international organizations in the analysis in cases where those organizations were given the power to issue rules that were binding on their member States and directly applicable in the legal systems of the latter, some members expressed caution in that regard. The view was expressed that such inclusion would require justification, as Article 38, paragraph 1 (c), of the Statute of the International Court of Justice did not refer to international organizations.

206. Regarding the second step of the analysis, as reflected in draft conclusion 6, namely the ascertainment of transposition to the international legal system, some members concurred with the Special Rapporteur that it was a necessary step and expressed support for the two elements listed as required for transposition. It was also stated, however, that those elements seemed too complicated and that the Commission should simply enunciate the requirement of transposition. It was further noted that none of the cases referred to by the Special Rapporteur in his report supported the premise that the two elements were cumulative. Some members were of the view that transposition was not a requirement for recognition, but rather the concretization of a principle as applicable law to a dispute. It was also noted that transposition was not contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and therefore was not necessarily part of the requirement of recognition as suggested by the Special Rapporteur. The view was expressed that the term “transposability” might be considered as an alternative to “transposition”.

207. With regard to the first element required for transposition according to draft conclusion 6, subparagraph (a), namely, compatibility with fundamental principles of international law, some members supported the use of that expression, while several others requested clarification as to the meaning and content of the expression “fundamental principles of international law”. Some members suggested that compatibility should also be considered in the light of more specific and precise rules of international law. Drafting suggestions were made to the effect that principles would need to be compatible with “fundamental principles and values of international law”, with the “exigencies of the international legal order” and with the “basic elements of the international legal order”.

208. As to the second element for transposition, which was reflected in draft conclusion 6, subparagraph (b), namely, that conditions existed for the principle’s adequate application in the international legal system, some members agreed with the logic behind it, while others expressed the view that the difficulty of application would not preclude transposition.

209. It was suggested that further consideration should be given to the exact nature of the subjects to whom a given principle would apply as an element to take into account in the process of transposition. The view was also expressed that the requirement of transposition, as reflected in the draft conclusions, did not account for the will of States to apply a given general principle of law to their legal relations.

(c) Draft conclusion 7

210. With respect to draft conclusion 7, some members supported the Special Rapporteur’s views concerning the existence of general principles of law formed within the international legal system, and concurred that their legal basis was in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It was stated that the need to avoid a *non liquet* could find answer not only in general principles of law derived from national legal systems, but also in general principles of law that had their origin in the international legal system itself. The view was also expressed that general principles of law formed within the international legal system could be seen as a sign of the increasing maturity and growing complexity of international law, which thus came to depend less on gap-filling sources from domestic law. Some members stated that the text of Article 38, paragraph 1 (c), together with its *travaux préparatoires*, as well as case law, showed that the provision did not limit general principles of law to those derived from national legal systems and supported the existence of general principles of law formed within the international legal system. It was noted that the existence of the category of general principles of law formed within the international legal system was clear from the need to identify certain overarching features of that system and that those principles could

provide appropriate solutions to situations that did not arise in domestic legal systems, which would otherwise be left unresolved.

211. Other members reiterated doubt as to the inclusion of such principles in the scope of the topic or as to whether the Statute of the International Court of Justice supported their existence. A view was expressed that the *travaux préparatoires* of the Statute of the Court reflected that only general principles of law developed in *foro domestico*, that is, domestic law, were included in Article 38, paragraph 1 (c), and none of the cases made a reference to Article 38, paragraph 1 (c), which were cited as evidence for creation of general principles at the international level. Some members stated that the general principles described under that category in the second report of the Special Rapporteur were in fact rules of conventional or customary law, and that general principles of law under Article 38, paragraph 1 (c), were exclusively those derived from national legal systems. It was noted that if a principle was incorporated in an international convention or customary international law, it would become a rule of international law under the respective source and not a general principle of law. The view was expressed that, given the subsidiary role of general principles of law, the application of principles of the second category was subject to two preconditions: (a) the appearance of the specific matter in international law that required regulation; and (b) that no general principle of law derived from national legal systems was identified. Clarification was sought as to the difference between general principles of law formed within the international legal system and customary international law.

212. As to the method for identifying general principles of law formed within the international legal system, various concerns were expressed about the three forms of recognition suggested by the Special Rapporteur in each of the three subparagraphs of draft conclusion 7. With regard to the first form, namely principles widely recognized in treaties and other international instruments, several members questioned whether a principle recognized in such form was truly a source of obligations independent from the rules that purportedly evidenced its recognition. In that connection, it was questioned whether a principle identified through that form could bind States that had not yet consented to be bound by the relevant conventional rules. It was also noted that a general principle of law formed within the international legal system could be reflected in treaties and other instruments and not recognized in them. Some members questioned the Special Rapporteur's approach of considering other instruments, such as General Assembly resolutions, as potential forms of recognition. Other members queried whether a principle widely recognized in treaties and other international instruments should have special characteristics or whether any principle could become a general principle of law in that manner.

213. As for the second form of recognition, namely principles identified by establishing that they underlay general rules of conventional or customary international law, the view was expressed that the terminology used was not sufficiently clear to provide a basis for identification of such principles, and that the deductive approach suggested by the Special Rapporteur appeared to be too subjective. The view was also expressed that such form of recognition confused the process of identification of rules of customary international law with that of recognition of general principles of law. The point was made that it was still not clear how identifying principles recognized by treaties or underlying them was an exercise distinct from giving meaning to the treaty rules in question as part of the process of their application or interpretation. A concern was also expressed regarding how the persistent objector rule would apply in that context.

214. With regard to the third form of recognition, namely principles inherent in the basic features and fundamental requirements of the international legal system, it was emphasized that there would be difficulty in identifying the content of the "basic features and fundamental requirements of the international legal system" from which the principle

would be deduced. It was also noted that the terminology appeared to confuse the process of identification of peremptory norms of general international law (*jus cogens*) with that of recognition of general principles of law. Other members supported that form of recognition, considering that there were general principles of law inherent in the international legal system.

215. The view was expressed that the second category of general principles of law must not be constructed too broadly and that it must be clearly distinguished from existing rules of customary international law, to avoid the risk that it would become a shortcut to identifying customary norms where general practice had not yet emerged.

(d) Draft conclusions 8 and 9

216. In relation to draft conclusion 8 (decisions of courts and tribunals), several members supported the notion that subsidiary means for the determination of rules of international law, as contained in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, applied to general principles of law. However, a question was raised as to whether that would be equating “principles” to “rules”. While several members supported maintaining consistency with the previous work of the Commission and thus using text similar to that of the conclusions on identification of customary international law, others expressed doubt regarding the formulation employed in draft conclusion 8. It was noted that, in the case of general principles of law, domestic judicial decisions were not subsidiary means, but direct means for the determination of the principles in question.

217. Regarding draft conclusion 9 (teachings), it was noted that teachings of scholars had often been relied upon to prove the widespread recognition of a principle in national legal systems, rather than the existence of general principles of law.

218. Finally, it was suggested that resolutions of the United Nations or international expert bodies could also serve as subsidiary means for the determination of general principles of law.

(e) Future programme of work

219. Members generally supported the proposal by the Special Rapporteur to address the functions of general principles of law and their relationship with other sources of law in his third report. However, the view was expressed that it would be difficult for the Commission to address the matter if it did not consider the processes through which general principles of law emerged, changed or ceased to exist.

220. Several suggestions were made for the future work of the Special Rapporteur on the topic, including the relationship of general principles of law with: each other; the fundamental principles of international law enshrined in the Charter of the United Nations; soft international law; and peremptory norms of general international law (*jus cogens*). The view was also expressed that the issue of general principles of law of a regional character, and whether the concept of universality of general principles would be inconsistent with such principles, should also be addressed.

221. Some members suggested that there might be a need to introduce a section in the draft conclusions for definition of terms used therein. There was also support for a draft conclusion defining or describing the essential elements of general principles of law as a source of international law.

3. Concluding remarks of the Special Rapporteur

222. In his summary of the debate, the Special Rapporteur expressed his gratitude to the members of the Commission and welcomed the interest that the topic had received.

223. The Special Rapporteur reiterated the agreement among members of the Commission and among States at the Sixth Committee of the General Assembly that the starting point for the work of the Commission on the topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, in light of State practice, jurisprudence and relevant teachings. In his view, that limited the work of the Commission to general principles of law as a source of international law, as referred to in the aforementioned article.

224. With regard to the terminology used in Spanish and French to refer to general principles of law, the Special Rapporteur highlighted that the Spanish formulation “principios generales del derecho” and the French formulation “principes généraux du droit”, had been used by the Commission as recently as 2018 in its conclusions on identification of customary international law. The Special Rapporteur also recalled that certain treaties, such as the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,⁴²³ the Rome Statute of the International Criminal Court⁴²⁴ and statutes of international criminal courts and tribunal, used “principios generales del derecho” and “principes généraux du droit” in Spanish and French, respectively.

225. The Special Rapporteur noted that a majority of members were in favour of replacing the expression “civilized nations”, as contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, with “community of nations” as contained in the International Covenant on Civil and Political Rights. He also noted, however, concerns expressed by some members regarding the varied terminology used in the authentic text in different languages of that Covenant. As to comments made by members highlighting the importance of the legal systems of indigenous, autochthonous or first peoples in the context of the methodology for the identification of general principles of law, the Special Rapporteur suggested addressing those matters in the commentaries.

226. Regarding comments by some members to the effect that once a general principle of law became part of customary international law, it could no longer be considered a general principle of law, the Special Rapporteur clarified that practice confirmed that a general principle of law and norms derived from other sources of international law could exist in parallel.

227. The Special Rapporteur also indicated that a definition of general principles of law could be useful to clarify the scope of the Commission’s work on the topic and suggested that the Commission could consider such a definition after addressing the functions of general principles of law.

228. Regarding the identification of general principles of law derived from national legal systems, as reflected in draft conclusion 4, he noted that there was consensus regarding an analysis in two steps: the determination that a principle was common to the principal legal systems of the world, on the one hand; and the ascertainment of the transposition of said principle to the international legal system, on the other.

229. The Special Rapporteur observed that several members agreed with the use of the term “principal legal systems of the world” to describe the scope of the comparative analysis that must be carried out in order to identify general principles of law under draft conclusion 5. He agreed with the suggestion made in plenary to include in paragraph 2 of draft conclusion 5 the term “sufficiently”, as that term would allow a level of flexibility, while reflecting the fact that the analysis had to be “sufficiently wide and representative”.

⁴²³ Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287, art. 67.

⁴²⁴ Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 21, para. 1 (c).

230. Regarding the differing views on the role of international organizations in determining the existence of a general principle of law, the Special Rapporteur stated that the relevant practice had always favoured the analysis of the legal systems of States to identify a general principle of law. He noted that the rules issued by an international organization could serve as complementary and not alternative means.

231. With regard to the second step of the analysis for the identification of general principles of law derived from national legal systems, namely, transposition into the international legal system, the Special Rapporteur addressed the drafting suggestion made during the debate to replace “transposition” with “transposability”. He stated that it was not a mere terminological issue, but a substantive one. The Special Rapporteur explained that “transposability” would not play a role in the process of identification, rather it would describe the criteria for determining whether a recognized general principle of law could be applied in a specific case. The Special Rapporteur used the term “transposition” in the report to mean forming part of the process of determination of the content of general principles of law in the international legal system. In certain cases, the principles found in national legal systems could be applied in the international legal system as they were identified after the comparative analysis. In other cases, some elements of the principle identified at the domestic level were not transposed to the international legal system.

232. The Special Rapporteur recalled the two requirements for the transposition of general principles of law set forth in draft conclusion 6. Pursuant to the first requirement, principles *in foro domestico* should be compatible with the fundamental principles of international law, which he understood as the principles enshrined in the Charter of the United Nations, developed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁴²⁵ In his view, the identification of general principles of law should not be subject to the authorization of any conventional or customary norm of international law, otherwise it would establish a hierarchy of sources. He added that principles on the conflict of norms, such as *lex specialis* would apply. At the same time, the Special Rapporteur acknowledged the different views that were expressed on the matter, which could be further discussed in the Drafting Committee.

233. Regarding the second requirement for transposition, namely, the existence of adequate conditions for the application of the principle *in foro domestico* in the international legal system, the Special Rapporteur agreed with members that draft conclusion 6, subparagraph (b), could be simplified to clarify that its purpose was to ensure that a principle could be applied without distortion or misuse in the international legal system.

234. With respect to the range of different views by members on general principles of law formed within the international legal system, the Special Rapporteur noted that it was part of the work of the Commission on the topic to examine in detail their possible existence. In his view, doing so would be an important contribution to international law. With respect to the various issues raised by members on the subparagraphs of draft conclusion 7, the Special Rapporteur indicated that they could be discussed in the Drafting Committee.

235. The Special Rapporteur stated that he was aware that the category of general principles of law formed within the international legal system remained controversial. He also stated that he had taken note of the suggestion, made by several members, to further examine the issue in order to achieve consensus in the Commission and indicated his willingness to work with members on that issue.

⁴²⁵ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

236. As for the subsidiary means for the determination of general principles of law, the Special Rapporteur observed that members were in general agreement with the approach proposed in his second report that subsidiary means for the determination of rules of international law, as contained in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, applied to general principles of law. He reiterated that recognizing the role of international courts and tribunals in the formation of general principles of law, beyond the scope of Article 38, paragraph 1 (*d*), of the Statute, was a question that needed to be handled with extreme caution.

237. With regard to the future programme of work, the Special Rapporteur indicated his intention to address in his third report the question of the functions of general principles of law and their relationship with norms from other sources of international law. He noted, however, that the results of the analysis contained in the upcoming report could have an impact on the methodology for identifying general principles of law. He also indicated that he would take into account the views of members on his second report and address the various issues raised during the debate.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-second session

1. Text of the draft conclusions

238. The text of the draft conclusions provisionally adopted by the Commission at its seventy-second session is reproduced below.

Conclusion 1 Scope

The present draft conclusions concern general principles of law as a source of international law.

Conclusion 2 Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

...

Conclusion 4 Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

- (a) the existence of a principle common to the various legal systems of the world; and
- (b) its transposition to the international legal system.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-second session

239. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at its seventy-second session, is reproduced below.

Conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern general principles of law as a source of international law. The term “general principles of law” is used throughout the draft conclusions to refer to “the general principles of law recognized by civilized nations” listed in Article 38, paragraph 1 (c), of the Statute of International Court of Justice, analysed in the light of the practice of States, the jurisprudence of courts and tribunals, and teachings.⁴²⁶

(2) Draft conclusion 1 reaffirms that general principles of law constitute one of the sources of international law. The legal nature of general principles of law as such is confirmed by their inclusion in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, together with treaties and customary international law, as part of the “international law” that shall be applied by the Court to decide the disputes submitted to it. The predecessor of that provision, Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, was the result of lengthy discussions in 1920 within the League of Nations, and in particular the Advisory Committee of Jurists established by the Council of the League, which sought to codify the practice that existed prior to the adoption of the Statute. Since then, general principles of law as a source of international law have been referred to in State practice, including in bilateral and multilateral treaties, as well as in the decisions of different courts and tribunals.⁴²⁷

(3) The term “source of international law” refers to the legal process and form through which a general principle of law comes into existence. The draft conclusions aim to clarify the scope of general principles of law, the method for their identification, and their functions and relationship with other sources of international law.

Conclusion 2

Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

Commentary

(1) Draft conclusion 2 reaffirms a basic element of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, namely, that for a general principle of law to exist, it must be “recognized” by the community of nations.

(2) Recognition features widely in the practice of States, the jurisprudence of courts and tribunals and in teachings as the essential condition for the emergence of a general principle of law. This means that, to determine whether a general principle of law exists at a given point in time, it is necessary to examine all the available evidence showing that its recognition has taken place. The specific criteria for this determination are objective and are developed in subsequent draft conclusions.

⁴²⁶ Taking into consideration recent practice of States and jurisprudence, the French and Spanish texts of draft conclusion 1 refer, respectively, to “*principes généraux du droit*” and “*principios generales del derecho*”. It was understood that the use of “*du droit*” and “*del derecho*” did not change, nor imply a change to, the substance of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

⁴²⁷ See, for example, A/CN.4/732 (first report) and A/CN.4/742 (memorandum by the Secretariat).

(3) Draft conclusion 2 employs the term “community of nations” as a substitute for the term “civilized nations” found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, because the latter term is anachronistic.⁴²⁸ The term “community of nations” is found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, a treaty to which 173 States are parties and which is thus widely accepted.⁴²⁹ The term used in the authentic languages of the Covenant is replicated in the different language versions of draft conclusion 2. For example, “l’ensemble des nations” in French and “comunidad internacional” in Spanish. By employing this formulation, the draft conclusion aims to stress that all nations participate equally, without any kind of distinction, in the formation of general principles of law, in accordance with the principle of sovereign equality set out in Article 2, paragraph 1, of the Charter of the United Nations.

(4) The use of the term “community of nations” is not intended to modify the scope or content of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. In particular, the term does not seek to suggest that there is a need for a unified or collective recognition of a general principle of law, nor does it suggest that general principles of law can only arise within the international legal system. Furthermore, the term “community of nations” should not be confused with the term “international community of States as a whole” found in article 53 of the Vienna Convention on the Law of Treaties,⁴³⁰ relating to peremptory norms of general international law (*jus cogens*).

(5) The use of the term “community of nations” does not preclude that, in certain circumstances, international organizations may also contribute to the formation of general principles of law.

Conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

- (a) the existence of a principle common to the various legal systems of the world; and
- (b) its transposition to the international legal system.

Commentary

(1) Draft conclusion 4 addresses the requirements for the identification of general principles of law derived from national legal systems. It provides that, to determine the existence and content of a general principle of law, it is necessary to ascertain: (a) the existence of a principle common to the various legal systems of the world; and (b) the transposition of that principle to the international legal system.

(2) This two-step analysis is widely accepted in practice and the literature and is aimed at demonstrating that a general principle of law has been “recognized” in the sense of

⁴²⁸ Other terms considered included “States”, “community of States”, “the international community”, “nations”, “nation States” and “nations as a whole”.

⁴²⁹ The provision reads: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. See United Nations, *Status of Multilateral Treaties*, chap. IV.4.

⁴³⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It is an objective method to be applied by all those called upon to determine whether a given general principle of law exists at a specific point in time and what the content of that general principle of law is.

(3) Subparagraph (a) addresses the first requirement for identification, that is, the ascertainment of the existence of a principle common to the various legal systems of the world. This exercise, which is essentially inductive, is necessary to show that a legal principle has been generally recognized by the community of nations. The use of the term “the various legal systems of the world” is aimed at highlighting the requirement that a principle must be found in legal systems of the world generally. It is an inclusive and broad term, covering the variety and diversity of national legal systems of the world. This requirement is further developed in draft conclusion 5.

(4) Subparagraph (b) addresses the second requirement for identification, that is, the ascertainment of the transposition of the principle common to the various legal systems of the world to the international legal system. This requirement, which is further elaborated on in draft conclusion [...], is necessary to show that a principle is not only recognized by the community of nations in national legal systems, but that it is also recognized as applicable within the international legal system.

(5) Subparagraph (b) employs the term “transposition”, understood as the process of determining whether, to what extent and how a principle common to the various legal systems can be applied in the international legal system. The use of this term is not intended to suggest that a formal or express act of transposition is required.

(6) The term “transposition” was preferred to “transposability”, which is sometimes used in this context. Transposition necessarily encompasses transposability; the latter term refers to whether or not a principle identified through the process indicated in subparagraph (a) can be applied in the international legal system, but does not cover the whole process of ascertainment of transposition.

(7) Owing to the differences between the international legal system and national legal systems, a principle or some elements of a principle identified through the process indicated in subparagraph (a) may not be suitable to be applied in the international legal system. Therefore, “transposition” encompasses the possibility that the content of the general principle of law identified through this two-step analysis may not be identical to the principle found in the various national legal systems.

Chapter IX

Sea-level rise in relation to international law

A. Introduction

240. At its seventieth session (2018), the Commission decided to include the topic “Sea-level rise in relation to international law” in its long-term programme of work.⁴³¹

241. In its resolution 73/265 of 22 December 2018, the General Assembly subsequently noted the inclusion of the topic in the long-term programme of work of the Commission, and in that regard called upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.

242. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. The Commission further took note of the joint oral report of the Co-Chairs of the Study Group.⁴³²

243. Also during that session, the Study Group, co-chaired by Ms. Patrícia Galvão Teles and Ms. Nilüfer Oral, held a meeting on 6 June 2019. The Study Group considered an informal paper on the organization of its work containing a road map for 2019 to 2021. The discussion of the Study Group focused on its composition, its proposed calendar and programme of work, and its methods of work.⁴³³

244. With regard to the programme of work, and subject to adjustment in the light of the complexity of the issues to be considered, the Study Group was expected to work on the three subtopics identified in the syllabus prepared in 2018,⁴³⁴ namely: issues related to the law of the sea, under the co-chairpersonship of Mr. Bogdan Aurescu and Ms. Nilüfer Oral; and issues related to statehood, as well as issues related to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria.

245. As to the methods of work, it was anticipated that approximately five meetings of the Study Group would take place at each session. It was agreed that, prior to each session, the Co-Chairs would prepare an issues paper. The issues papers would be edited, translated and circulated as official documents to serve as the basis for the discussion and for the annual contribution of the members of the Study Group. They would also serve as the basis for subsequent reports of the Study Group on each subtopic. Members of the Study Group would then be invited to put forward contribution papers that could comment upon, or complement, the issues paper prepared by the Co-Chairs (by addressing, for example, regional practice, case law or any other aspects of the subtopic). Recommendations would be made at a later stage regarding the format of the outcome of the work of the Study Group.

⁴³¹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 369.

⁴³² *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 265–273.

⁴³³ *Ibid.*, para. 269.

⁴³⁴ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, Annex B.

246. It was also agreed that, at the end of each session of the Commission, the work of the Study Group would be reflected in a report, taking due account of the issues paper prepared by the Co-Chairs and the related contribution papers by members, while summarizing the discussion of the Study Group. That report would be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, so that a summary could be included in the annual report of the Commission.

B. Consideration of the topic at the present session

247. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Bogdan Aurescu and Ms. Nilüfer Oral.

248. In accordance with the agreed programme of work and methods of work, the Study Group had before it the first issues paper on the topic (A/CN.4/740 and Corr. 1), which was issued together with a preliminary bibliography (A/CN.4/740/Add.1), prepared by Mr. Aurescu and Ms. Oral.

249. Owing to the outbreak of the COVID-19 pandemic, and the ensuing postponement of the seventy-second session of the Commission, the Co-Chairs invited the Commission's members to transmit written comments on the first issues paper directly to them. After the completion of the first issues paper, Antigua and Barbuda and the Russian Federation submitted information, which was posted on the Commission's website together with the information previously received from Governments⁴³⁵ in response to the request by the Commission in chapter III of its 2019 annual report.⁴³⁶ Comments from the Pacific Islands Forum relating to the first issues paper were circulated to all members of the Study Group on 31 May 2021.

250. The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021.⁴³⁷

251. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.⁴³⁸

Discussions held in the Study Group

252. At the first meeting of the Study Group, held on 1 June 2021, the Co-Chair (Ms. Oral) indicated that the purpose of the initial four meetings to be held during the first part of the session was to allow for a substantive exchange, in the manner of a plenary, on the first issues paper and on any relevant matters that members might wish to address. A summary of that exchange, in the form of an interim report, would then serve as a basis for discussion at the meetings of the Study Group scheduled for the second part of the session. Following those discussions during the second part of the session, that report would be consolidated, agreed upon in the Study Group, and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission. That procedure, agreed upon by the Study Group, was based on the 2019 report of the Commission.

⁴³⁵ Croatia, Maldives, the Federated States of Micronesia, the Netherlands, Romania, Singapore, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Information was also received from the Pacific Islands Forum. The information submitted is available from: https://legal.un.org/ilc/guide/8_9.shtml.

⁴³⁶ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 31–33.

⁴³⁷ See chapter I, above, for the membership of the Study Group.

⁴³⁸ See A/CN.4/SR.3550.

253. With regard to the substance of the topic, as also indicated in the syllabus prepared in 2018, it was recalled that the factual consequences of sea-level rise prompt a number of important questions relevant to international law. To the extent that they concern issues related to the law of the sea, these questions include that of the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones, whether by agreement or adjudication. The 2018 syllabus also provided that these questions are to be examined through an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the Commission, which is the progressive development of international law and its codification.⁴³⁹ This effort could contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

(a) First issues paper

254. The first issues paper was introduced by the Co-Chairs of the Study Group (Mr. Aureescu and Ms. Oral) at the first meeting of the Study Group with a summary of key points and preliminary observations.

255. The Co-Chair (Mr. Aureescu) presented the introduction, Part One and Part Two of the first issues paper. He recalled, *inter alia*, that the introduction to the first issues paper contained a summary of the views expressed by Member States in the Sixth Committee, and also drew the attention of the Study Group to the comments made by delegations in the Sixth Committee, during the seventy-fifth session of the General Assembly (2020), after the issuance of the first issues paper. A number of delegations had expressed appreciation for the first issues paper,⁴⁴⁰ while a few others had simply referred to it.⁴⁴¹ The scope and suggested final outcome of the topic, the limitations on the scope of the work of the Study Group, as agreed by the Commission, the focus on the practice of States and of regional and international organizations were recalled.

256. The Co-Chair (Mr. Aureescu) presented the analysis of the first issues paper on the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces that are measured from the baselines, including an analysis of the effects of the ambulation of the baselines as a result of sea-level rise. He then introduced the analysis of the first issues paper on the possible legal effects of sea-level rise on maritime delimitations, as well as on the issue of whether sea-level rise constituted a fundamental

⁴³⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, Annex B, para. 5. Paragraph 14 of the 2018 syllabus provides, in part: "This topic deals only with the legal implications of sea-level rise. It does not deal with protection of environment, climate change per se, causation, responsibility and liability. It does not intend to provide a comprehensive and exhaustive scoping of the application of international law to the questions raised by sea-level rise, but to outline some key issues. The three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences. Due attention should be paid, where possible, to distinguish between consequences related to sea-level rise and those from other factors. This topic will not propose modifications to existing international law, such as the 1982 United Nations Convention on the Law of the Sea. Other questions may arise in the future requiring analysis."

⁴⁴⁰ Eleven delegations, out of the 25 that made statements on the Commission's work, expressed appreciation for the first issues paper: Belize, on behalf of the Alliance of Small Island States; Fiji, on behalf of the Pacific small island developing States; Maldives; the Federated States of Micronesia; New Zealand; Papua New Guinea; Portugal; Solomon Islands; Tonga; Turkey; and Tuvalu, on behalf of the Pacific Islands Forum States.

⁴⁴¹ Three delegations made reference to the first issues paper: the Republic of Korea, Sierra Leone and the United States of America.

change of circumstances, in accordance with article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.⁴⁴² The Co-Chair (Mr. Aurescu) also presented the main preliminary observations of the Co-Chairs' analysis on the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces measured from the baselines, as well as on maritime delimitations, effected either by agreement or by adjudication, as presented in paragraphs 104 and 141 of the first issues paper.

257. The Co-Chair (Ms. Oral) then presented the structure and content of Parts Three and Four of the first issues paper and pointed, *inter alia*, to the two central issues addressed therein: the potential legal consequences of the landward shift of a newly drawn baseline due to sea-level rise, and the impact of sea-level rise on the legal status of islands, rocks and low-tide elevations. This was followed by an overview of the possible consequences on the rights and jurisdiction of the coastal State, as well as third party States, in established maritime zones where maritime zones shift because part of the internal waters become territorial sea, part of the territorial sea becomes contiguous zone and/or exclusive economic zone, and part of the exclusive economic zone becomes high seas. The Co-Chair (Ms. Oral) also highlighted the case of an archipelagic State where, due to the inundation of small islands or drying reefs, the existing archipelagic baselines could be impacted, potentially resulting in the loss of archipelagic baseline status.

258. The Co-Chair (Ms. Oral) further discussed the status of islands and rocks under article 121 of the United Nations Convention on the Law of the Sea⁴⁴³ and the potential significant consequences of being reclassified as a rock due to sea-level rise, possibly becoming a rock that "cannot sustain human habitation or economic life of their own" under article 121, paragraph 3, of the Convention. The Co-Chair (Ms. Oral) concluded by highlighting several of the preliminary observations made in the first issues paper (see paragraphs 190 and 218 thereof).

(b) Maritime delimitation practice of African States

259. The Co-Chair (Mr. Cissé) gave a presentation on the practice of African States regarding maritime delimitation. Since maritime delimitation was a recent process in Africa, with high stakes for coastal States, he had examined the legislative, constitutional and conventional practice of 38 African coastal States, as well as relevant judicial decisions rendered by international courts,⁴⁴⁴ in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits.

260. The outcome of the survey was that, while there was some African legislative and constitutional practice on baselines and maritime borders, such practice was diverse. As such, it was not possible to infer the existence of *opinio juris* in favour of or against

⁴⁴² Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

⁴⁴³ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3.

⁴⁴⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award of 14 February 1985*, United Nations, *Reports of International Arbitral Awards*, vol. XIX, part IV, pp. 149–196 (in French; English version available in *International Law Materials*, vol. 25 (1986), pp. 251–306); *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989*, United Nations, *Reports of International Arbitral Awards*, vol. XX, part II, pp. 119–213; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4; and *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3.

permanent or ambulatory baselines or maritime boundaries. There was no generalized African practice since the geography of the coasts varied, such that the justification for the use of baselines, tide (high or low), ambulatory or permanent lines was dependent on the general configuration of the coasts.

261. Nonetheless, in the view of the Co-Chair, the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries, for the following reasons:

(a) In the light of the principle of the immutability of borders inherited from the colonial era, in accordance with the principle of *uti possidetis juris*, it could be assumed that a maritime boundary drawn by the former colonial powers continued to apply between newly independent States without the possibility of modification;

(b) The limitation on the application of the principle of *rebus sic stantibus*, as provided for in article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, namely that boundary treaties could not be affected by a fundamental change of circumstances, seemed also applicable to maritime boundaries in the light of existing case law, which had recognized that there was no need to distinguish between land and maritime boundaries. As such, sea-level rise should not, in principle, have legal consequences in terms of maintaining boundaries already delimited or baselines or base points already defined. The freezing of baselines could address that concern;

(c) Given the obligation of States to cooperate when they are at an impasse or are having difficulty concluding an agreement on the delimitation of their maritime boundaries (recourse to article 83, paragraph 3, or article 74, paragraph 3, of the United Nations Convention on the Law of the Sea), the question of the unresolved maritime boundaries could be frozen in favour of other solutions, such as the establishment of joint development zones.

(c) Summary of the general exchange of views held during the first part of the session

(i) General comments on the topic

262. During the first part of the session, members of the Study Group presented comments on the first issues paper, in oral and written form.

263. The importance of the topic and the legitimacy of the concerns expressed by those States affected by sea-level rise, together with the need to approach the topic in full appreciation of its urgency, were emphasized. While some members stressed that sea-level rise was a modern phenomenon of the past few decades that was projected to have significant consequences – as noted in the first issues paper –, other members opined that it was not a new or a sudden phenomenon. It was also suggested that the existence and effects of two kinds of sea-level rise – natural and human-induced – should be identified and that coastlines may change as a result of natural sea-level rise and fall, or sea-level extremes, caused by earthquakes, tsunamis or other natural disasters. Referring to section III of the introduction of the first issues paper, on scientific findings and prospects of sea-level rise and their relationship with the topic, support was also expressed for treating sea-level rise as a scientifically proven fact of which the Commission could take notice for the limited purpose of its specific work on the international legal implications of sea-level rise. It was also noted that over time there are reasons other than sea-level rise that could cause a coastline to change location, as had been happening throughout history, and that any new rule justified by sea-level rise must have regard to practice in such cases and might need to identify the mechanism for distinguishing one case from another. It was also mentioned that the presumption in dealing with this topic is that this phenomenon is a result of climate change, and is as such (mainly) human-induced, while recalling that one of the limits of action by the Study Group, as outlined in the 2018 syllabus, was that

the topic “does not deal with ... causation”. As a result, the Study Group ought to consider the present topic based on the premise that sea-level rise due to climate change is a fact already proven by science.

264. The immense challenge of understanding and seeking solutions to complex legal and technical issues without losing sight of their human dimension, as well as the difficulty of assessing the magnitude of the phenomenon and its consequences – including from the point of view of the law of the sea – was also underlined. Members, however, generally considered that the topic was of particular importance, and that it raised significant issues on which the Commission could shed light.

(ii) *General comments on the first issues paper*

265. Concerns were expressed that the first issues paper had been read as already reflecting the Commission’s views and, as a consequence of the postponement of the Commission’s seventy-second session, it had been widely discussed outside the Commission before the Commission itself had had the opportunity to consider it. It was noted that it was also due to the adoption of a procedure different than that adopted by previous study groups, which was necessitated by the urgency and importance attached to this topic. It was noted though that this was not unique to this topic, and that reports of Special Rapporteurs being referred to as the product of the Commission was a recurring problem.

266. Some members expressed support for the analysis, including the preliminary observations contained in the first issues paper, while other members expressed doubts regarding these preliminary observations. Some members agreed on the need for stability, security, certainty and predictability, and the need to preserve the balance of rights and obligations between coastal States and other States, yet did not agree on whether the first issues paper’s preliminary observations reflected those needs. Further, some members took the view that the statements by States in favour of stability, certainty and predictability could be open to different interpretations, and called into question the first issues paper’s repeated reliance on “concerns expressed by Member States”. A view was expressed that the desire of States for “stability” was not necessarily an “indication” of *opinio juris*, as suggested by the first issues paper, to the extent that it was difficult to qualify the preference for stability as reflecting “a sense of legal right or obligation” as stated in the Commission’s conclusions on identification of customary international law.⁴⁴⁵ It was noted that the terms “stability”, “certainty” and “predictability” were referred in the jurisprudence in relation to land boundary delimitation and not maritime delimitation, where the considerations are different. It was also mentioned that they do not constitute a principle as such but a description of a phenomenon. While the Study Group welcomed the suggestion that the meaning of “legal stability” in connection with the present topic needed further clarification, including by addressing specific questions to the Member States, it was noted that the statements delivered in the Sixth Committee by the delegations of States affected by sea-level rise seemed to indicate that, by “legal stability”, they meant the need to preserve the baselines and outer limits of maritime zones.

(iii) *Consideration of views expressed in the Sixth Committee and State practice*

267. Members acknowledged that those States that had made statements on the subject had been largely supportive of the inclusion of the topic in the Commission’s programme of work. It was observed that States seemed to be generally in agreement that the outcome of the Commission’s work on the topic should not interfere with or amend the United Nations Convention on the Law of the Sea. It was also noted that the principles of

⁴⁴⁵ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chapter V, section E, conclusion 9.

certainty, security and predictability and the preservation of the balance of rights and obligations between coastal States and other States had figured prominently in the statements delivered by States during the debate of the Sixth Committee in 2019.

268. The lack of State practice, especially from certain regions of the world, was highlighted. Questions were also posed as to whether the statements by States and their submissions on State practice should be considered as giving rise to *emerging* rules, or could be considered as subsequent practice for purposes of interpretation of the relevant provisions of the United Nations Convention on the Law of the Sea. Some members questioned whether the statements by States in response to the first issues paper were adequate as evidence of State practice in favour of fixed baselines. In light of the insufficient availability of State practice, the view was also expressed that such statements by States in the Sixth Committee were important and relevant. It was further suggested that, in addition to requesting information from States, the Commission should conduct research, including reviewing the legislation of all States and the maritime zone notifications circulated by the Secretary-General under the United Nations Convention on the Law of the Sea.

(iv) *Work of the International Law Association*

269. Some members highlighted the work of the International Law Association's Committee on Baselines under the International Law of the Sea and Committee on International Law and Sea Level Rise, suggesting that the Study Group add more detail on their work and use it as a basis for analysis. They noted that in 2012 the Committee on Baselines under the International Law of the Sea concluded that the normal baseline is ambulatory and that existing law does not offer an adequate solution to a total territorial loss, due to sea-level rise for example. It was also recalled that the subsequently established Committee on International Law and Sea Level Rise recommended that the International Law Association adopt a resolution containing *de lege ferenda* proposals that "baselines and limits should not be required to be readjusted should sea level change affect the geographic reality of the coastline". This was endorsed by resolution 5/2018 of the Seventy-eighth Conference of the International Law Association in Sydney.⁴⁴⁶ There was also a suggestion that, like the International Law Association's report of its 2018 Sydney Conference on International Law and Sea Level Rise, the Study Group should conduct an analysis of the advantages and disadvantages of the different options. Further, it was noted that under the United Nations Convention on the Law of the Sea, the baselines had to be in line with reality. It was further observed that the Committee on Baselines under the International Law of the Sea did not see its 2012 findings as the last word as far as sea-level rise effects were concerned, and that these effects should accordingly continue to be examined by the Committee on International Law and Sea Level Rise, which, in 2018, proposed that, if the baselines and the outer limits of maritime zones of a coastal or an archipelagic State had been properly determined in accordance with the United Nations Convention on the Law of the Sea, those baselines and outer limits should not be required to be recalculated should sea-level changes affect the geographical reality of the coastline. The fact that the Commission employs a different methodology than the International Law Association, which includes a close relationship with the Sixth Committee, was also underlined.

⁴⁴⁶ *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise*, D. Vidas, et al. (eds.), Brill, Leiden, 2019, pp. 66–67.

(v) *Interpretation of the United Nations Convention on the Law of the Sea: ambulatory or fixed baselines*

270. Some members noted that the normal baseline in article 5 of the United Nations Convention on the Law of the Sea is the low-water line, which they viewed as inherently ambulatory. Other members observed that the Convention was silent on whether baselines were ambulatory or had to be regularly updated. Members agreed on the importance of and need for assessing State practice on questions relating to the freezing of baselines and the updating (or not) of charts. Some members expressed the view that baselines were not established by charts or lists, but by the detailed rules set out in the Convention and other relevant sources, that the charts and lists referred to in article 16 of the Convention only concerned straight baselines or closing lines (not normal baselines), and that the Convention expressly required that such charts and lists be produced in accordance with the rules set forth in articles 7, 9, and 10 of the Convention. The importance of making a distinction between base points (which are relevant for maritime delimitations if selected as relevant points on the relevant coasts) and baselines (which are relevant for establishing the outer limits of maritime zones) was also underlined, given that rising sea-level affects them differently, which entails that they may require different legal solutions.

271. Some members regarded article 5 of the United Nations Convention on the Law of the Sea as clear on the question of whether normal baselines were ambulatory, while other members considered that article to be susceptible to a different interpretation. It was noted that sea-level rise had not been mentioned in the *travaux préparatoires* of the Convention. Some members maintained that the Convention was fully silent on the issue of sea-level rise, including in relation to baselines and the updating of charts. Other members took the view that, even if sea-level rise was not discussed, the issue of change in the location of baselines was discussed, including the circumstances where a baseline could be fixed within specific contexts (such as deltas). It was however noted that not too much should be read into any silence, as it could be interpreted in different ways. The view was nonetheless also expressed that, consequently, the Convention was not dispositive of the question as to whether baselines were ambulatory or not. It was also mentioned, however, that the United Nations Convention on the Law of the Sea does contemplate the change of baselines due to changes in the coast, although sea-level rise was not specifically discussed.

272. In response to the diverse views expressed by members as to the existence of ambulatory or fixed or permanent baselines, there was a suggestion that the Commission should conduct additional research into whether a principle of stability existed under general international law, including a study of the law of river delimitation. It was also deemed important to closely consider the judgment rendered by the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case⁴⁴⁷ in which the Court used a moving delimitation line for maritime delimitation.

273. Some members emphasized that, if ambulatory baselines were to be retained, landward movement could result in a significant loss of sovereignty and jurisdictional rights for coastal States. It could also give rise to a significant loss of resources and protected maritime areas, while negatively affecting the conservation of biological diversity in areas beyond national jurisdiction. Those members commented that legal uncertainty regarding maritime boundaries would likely be a source of conflict and instability for coastal neighbouring States. It was further observed that States would have to dedicate significant resources for the purpose of regularly updating maritime charts or

⁴⁴⁷ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 139.

geographical data under an ambulatory system. Some members expressed agreement with the view of the Co-Chairs that the interpretation that baselines generally had an ambulatory character did not respond to the concerns of the States facing the effects of sea-level rise. It was thus suggested by some members that maintaining existing maritime baselines and limits was an optimal solution that responded to States' interests in connection with the effects of sea-level rise.

274. Other members were not convinced that shifting areas of maritime entitlements necessarily led to a loss of the total amount of such entitlements, as opposed to just changing their location. It was noted, also, that fixed baselines might not be required in all situations (for example, where the land surface of a State had actually increased owing to the shift of tectonic plates). The view was expressed that if baselines were fixed, States that may have their land surface increase would not be able to move their baselines seawards and claim larger areas, if they experienced such a phenomenon in the future. It was also mentioned that there may be specific situations where States facing the threat of sea-level rise may have erected coastal fortifications and may wish them to be treated as fixed baselines. As to the situation of increased land surface due to factors other than sea-level rise, it was stressed that this aspect is outside the mandate of the Study Group, which only deals with sea-level rise effects. It was also recalled that the final outcome of the Study Group should be clearly limited to sea-level rise due to climate change, according to the limits agreed to in the mandate of the Study Group.

275. Some members suggested that there might be a continuum of intermediate possibilities between the two options discussed in the first issues paper – ambulatory versus permanent baselines – that deserved a full and detailed examination. As the discussion was still of a preliminary nature, further in-depth analysis needed to be undertaken before the Study Group could take a position on what was a complex subject.

276. The issue of navigational charts was also raised, a view being expressed that updating them was important in the interests of navigational safety, while another view maintained that the potential dangers to navigation might be rather exceptional given that the coast receded landward in case of sea-level rise and that satellite technology was more accessible than ever. Support was expressed for the ensuing proposal made by the Co-Chairs that the issue of navigational charts could be subject to additional study. For example, such study could examine the different functions of navigational charts as required under the rules of the International Hydrographic Organization and of the charts that are deposited with the Secretary-General of the United Nations for purposes of registration of maritime zones.

277. Some members suggested that the Study Group take into account the possible situation where, as a result of sea-level rise and a landward shift of the coastline, the bilaterally-agreed delimitation of overlapping areas of exclusive economic zones of opposite coastal States no longer overlapped, as such a situation would result in States being trapped in an unreasonable legal fiction. Support was expressed for the examination of this hypothesis, including from the angle of concepts from the law of treaties, like obsolescence or the supervening impossibility of performance of a treaty. Another view expressed was that the preservation of existing baselines, when the natural baselines had shifted significantly, could lead to disproportionately large maritime zones – beyond what was permitted under the United Nations Convention on the Law of the Sea – which could benefit coastal States at the expense of the rights of other States or the international community. It was also agreed to examine in greater detail the possible loss or gain of benefits of third States, while it was noted that no State that had commented thus far on the topic had requested this analysis or mentioned the issue. Some members noted that, if the approach of fixed baselines were to be adopted, sea-level rise could result in large areas of internal waters that normally would be territorial sea (or even high seas), through

which there would be no right of innocent passage. Similarly, fixed baselines could result in maintaining a straits regime in a channel that normally would not be a strait.

(vi) *Other sources of international law*

278. Some members expressed the view that, while the United Nations Convention on the Law of the Sea was a key source for its States parties, other sources should be analysed further. It was also recalled that, according to the preamble of the Convention, matters not regulated by the Convention continued to be governed by the rules and principles of general international law. Since the legal problems arising as a consequence of sea-level rise could not be fully addressed within the regime of the Convention, it was suggested that other relevant rules of general international law should be considered. Other members noted that the matter was covered by article 5 of the Convention. Such other sources included, notably, customary international law, the 1958 Geneva Conventions⁴⁴⁸ and other multilateral and bilateral instruments concerning a whole range of aspects of the law of the sea and involving different zones that could be affected by sea-level rise. Some members suggested that other principles and rules also be examined in more detail, such as the principle that the land dominates the sea and the principle of freedom of the seas, as well as the role of the principle of equity, good faith, historic rights and title, the obligation to settle disputes peacefully, the maintenance of international peace and security, the protection of the rights of coastal States and non-coastal States, and the principle of permanent sovereignty over natural resources. The Study Group accordingly intends to follow up on these suggestions in its further work on the topic.

(vii) *Permanency of the exclusive economic zone and the continental shelf*

279. Some members raised specific questions concerning the relationship between the proposal of permanency of the continental shelf and the exclusive economic zone in relation to the reference, in the first issues paper, to a discrepancy that could emerge between the permanent outer limits of the continental shelf and possible ambulatory outer limits of the exclusive economic zone. A view was expressed that certain statements in the first issues paper regarding the permanency of the continental shelf were incorrect.

280. According to this view, there was no permanency: the argument made in the issues paper was premised on the identification of the continental shelf based on the geographical criteria; however, up to 200 nm, it is only the distance criteria that is applied, while, as per this view, the outer limits of the continental shelf and the exclusive economic zone depend on the location of baselines. Thus, it was argued, permanency of baselines cannot be asserted based on the continental shelf being the natural prolongation of the land territory.

(viii) *Sea-level rise and article 62, paragraph 2, of the Vienna Convention on the Law of Treaties*

281. Some members noted that maritime treaties and adjudicated boundaries should be final, while commenting that additional study was necessary. The relevance of the principle of *pacta sunt servanda* was noted. Several members commented on article 62 of the Vienna Convention on the Law of Treaties and the question as to whether sea-level rise would constitute an unforeseen change of circumstances. A number of members noted that there should be no distinction in that regard between land and maritime

⁴⁴⁸ Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205; Convention on the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

boundaries, as reflected in the international jurisprudence cited in the first issues paper. Other members were more reserved and considered that additional study should be undertaken on the issue, including an analysis of the pros and cons of each view. Support was expressed for this suggestion and it was recalled that on this matter doctrine and the 2018 conclusions of the International Law Association Committee on International Law and Sea Level Rise lean towards establishing that changes in land and maritime boundaries should not constitute an unforeseen change of circumstances. Some members noted that land boundaries are sometimes ambulatory, dependent upon the location of bank of a river or lake, the median point of a river or lake, or a river's thalweg, while a view was expressed that State practice has a different trend: in the case where the river flow is changed, the agreed river boundary is kept permanently. A view was expressed that whether maritime delimitation treaties were covered by article 62 was a matter of treaty interpretation, and that it was a matter for international courts and tribunals, and not for the Commission since that would be beyond its mandate. A point was also raised regarding the non-binding nature of bilateral maritime boundary agreements upon third States, which would therefore not be required to recognize agreements establishing or fixing maritime delimitation boundaries. Another view stated that maritime agreements establishing boundaries and fixing limits were treaties entered upon in accordance with the Vienna Convention on the Law of Treaties and are binding upon all States. This is without prejudice to the obligation of parties to such treaties to take due account of the legitimate rights of third States in regard to their maritime entitlements in accordance with the United Nations Convention on the Law of the Sea. It was noted that the matter needed to be further examined, including from the perspective of objective regimes in international law. It was also suggested that the Study Group examine the issue of the consequences for a maritime boundary if an agreed land boundary terminus ended up being located out at sea because of sea-level rise.

(ix) *Islands, artificial islands and rocks*

282. Some members called for caution in addressing the topic of islands under article 121 of the United Nations Convention on the Law of the Sea. Other members expressed the view that more attention should have been given to the arbitral award in *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*⁴⁴⁹ on the issue of the status of islands under article 121 and the reasons for according to them maritime entitlements, while the need for a critical analysis of that award was also expressed. The view was expressed that artificial fortifications dedicated exclusively to preservation from sea-level rise did not render a natural island artificial. However, a point was raised on the need for clearer guidelines to distinguish between the construction of artificial islands for the purpose of preservation from the construction of artificial islands to create artificial entitlements. A view was expressed that coastal fortifications should not be abused to make extensive maritime entitlements. A question was posed as to whether the observations in the first issues paper were limited to sea-level rise or had a more general application. A question was also raised as to whether "rocks" that become submerged should continue to enjoy maritime entitlements. It was suggested that freezing the status of an island should not be a general rule, given that its inundation could be the result of reasons not related to sea-level rise. The Study Group considered that additional research into this area could be conducted to ascertain whether such distinction could be made scientifically and how significant a certain factor was to its study. The high cost of artificial preservation of baselines and coastal areas was also highlighted.

⁴⁴⁹ *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016*, Arbitral Tribunal, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards*, vol. XXXIII, p. 166.

(d) Concluding remarks at the end of the first part of the session

283. Members made a number of suggestions with regard to the Study Group's future work and working methods.

284. Suggestions were made regarding the title of the topic⁴⁵⁰ and the structure of the first issues paper. The Study Group considered that the issue regarding the title of the topic could be examined at a later stage. It also welcomed the suggestions on the structure of the first issues paper, as well as the ones on bibliography. The suggestion for a study of State legislation on baselines to be elaborated, with the support of the Secretariat, was also welcomed by the Study Group. It was also suggested that the first issues paper be included in volume II, Part One, of the *Yearbook of the International Law Commission*.

285. Recalling that the mandate of the Study Group was to undertake a mapping exercise of the legal implications of sea-level rise, which might require follow-up but would not lead to the development of any specific guidelines or articles, some members suggested that, to preserve its credibility, the Study Group – and the Commission – ought to be clear and transparent from the beginning in distinguishing between *lex lata*, *lex ferenda* and policy options. It was also suggested that the Commission should be fully guided by its own prior work relevant to the topic, such as its conclusions on identification of customary international law and its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The preliminary character of the first issues paper and the need to respect the mandate of the Study Group to perform “a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues” were stressed; it was also emphasized that only at a later stage, after the Study Group had deepened its analysis, and taking into account the views of its members, could conclusions be drawn.

286. Conversely, the view was expressed that, given the importance of the subject, the topic should be considered by a special rapporteur, rather than by a study group, to ensure transparency and to allow the Commission to take a position in relation to draft texts, rather than undertaking thematic studies. In that regard, it was also suggested that co-special rapporteurs could be appointed with a view to concluding a set of draft articles that could be presented to States for the negotiation of a global framework convention on the legal consequences of sea-level rise, in accordance with article 23 of the Commission's statute.

287. The methodological approach of the Study Group was also deemed to have important consequences for the outcome of the topic, considering that such an approach might allow the Commission to be more creative with proposing solutions for States to deliberate on a topic that would become increasingly important for the peace, security and stability of the international community. The view was expressed that any conclusions reached by the Commission could provide States, especially those particularly affected by sea-level rise, with practical legal solutions that would preserve their rights and entitlements under the law of the sea, by explaining existing rules and proposing new ones where lacunae existed. It would then be for States and the international community as a whole to decide to adopt such rules, whether through practice, negotiations, international resolutions or agreements on relevant legal instruments.

288. Some members recommended a cautious approach to avoid rushing to early conclusions. Referring to the chapter on scientific findings, support was expressed for treating sea-level rise as a scientifically proven fact of which the Commission could take notice for the limited purpose of its specific work on the international legal implications of sea-level rise. In that regard, it was recalled that the mandate of the Study Group

⁴⁵⁰ These suggestions included a proposal to amend the title of the topic to read: “Sea-level rise and international law”.

excluded causation, the premise of the work on the topic being that sea-level rise due to climate change was to be taken as a scientifically proven fact. At the same time, if needed, the Study Group could consider inviting scientific experts to future meetings of the Study Group.

(e) Outcome of the interactive discussion held during the second part of the session

289. During the first meeting of the Study Group during the second part of the session, held on 6 July 2021, the Co-Chairs responded to comments made by members of the Study Group during the first part, and introduced a draft interim report, an English version of which had been circulated to all members on 2 July 2021, followed by all other language versions on 5 July 2021.

290. During the interactive discussion that followed, members had a debate on the working methods of the Study Group. Some members expressed concern that the Co-Chairs' first issues paper (A/CN.4/740 and Corr. 1 and Add. 1) may have been interpreted as being of the Study Group as a whole. The time constraints under which the Study Group was operating, as well as the need for a collective and consultative process, were also underlined. Some members further suggested that, given the importance of the topic, it might be preferable for the Commission to consider following its regular procedure, appointing one or several special rapporteurs on the topic, so as to allow for more transparency while being in a position to take into account the position of States through a system of first and second readings of draft texts. Questions were also raised about the foreseen outcome of the work of the Study Group.

291. In that regard, the Co-Chairs expressed the view that they had proceeded in accordance with the methods of work that the Commission had agreed upon in 2019.⁴⁵¹ In their view, these methods of work had been deliberately tailored to be more formal than those followed by previous study groups, and appeared to be hybrid between the special rapporteur format and traditional study groups. They welcomed the contributions made by members and emphasized the need for a collective product. It was noted that the current year's debate consisted in a "mapping exercise" conducted on the basis of the first issues paper and the preliminary observations included therein, and that substantial further research was required for the Study Group to complete its task on the aspects of the law of the sea related to the topic. Members were accordingly invited by the Co-Chairs to take the lead on the various subjects that the Study Group would collectively investigate, some of which had already been suggested during the exchange of views held in the first part of the session.

292. The foreseen outcome of the Study Group's work, as outlined during the first part of the session, was also recalled.⁴⁵² It was also suggested that the Study Group should, in parallel, continue to pursue progress on aspects related to the law of the sea.

293. In concluding their exchange on the Study Group's working methods, members agreed that the interim report encapsulating the main points of the debate held during the session would, once finalized and agreed upon by the Study Group, be presented to the Commission by the Co-Chairs for the purpose of inclusion as a chapter of the annual report of the Commission.

294. The Study Group then elected to have a substantive discussion on the topic on the basis of questions prepared by the Co-Chairs in follow up to the debate held during the

⁴⁵¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 265–273. See also paragraphs 245 and 246 above.

⁴⁵² See also paragraph 0296 below.

first part of the session.⁴⁵³ As an outcome of this discussion, the Study Group identified the following issues as areas for further in-depth analysis on which it would focus on a priority basis in the near future. These studies would be undertaken on a voluntary basis by members of the Study Group:

⁴⁵³ The guiding questions proposed by the Co-Chairs were as follows: (1) What other sources of law should the Study Group examine in relation to the topic? For example, it was suggested that, in addition to the United Nations Convention on the Law of the Sea, there are other “treaties to be considered, multilateral and bilateral, concerning a whole range of aspects of the law of the sea, involving different zones that could be affected by sea-level rise. These treaties need to be interpreted, including in the light of subsequent practice.” Beyond the 1958 Geneva Conventions, such treaties need to be identified. It was also suggested that the Study Group look to other rules of general international law that can be relevant in the new context. Indeed, this would be an important issue to examine. From this perspective, the Co-Chairs would appreciate an indication on which such other rules could be. It was further suggested that the Study Group examine norms of international customary law not included in the United Nations Convention on the Law of the Sea, so it would be very useful to point out which such norms should be taken into account; (2) What specific aspects of the question of charts and navigation maps should be examined and how? (3) Is there a need for additional scientific input into the work of the Study Group? Which aspects and how to reconcile examining different causes of sea-level rise and effects with the limitation of the mandate that the Study Group cannot examine “causation”?; (4) Is there a need for more technical studies of the impacts of sea-level rise on baselines, outer limits of maritime zones measured therefrom, and offshore features? If so, how should this be done? Should the Study Group examine different scenarios from a purely technical perspective?; (5) Should the Study Group engage in an analysis of sea-level rise as suggested by a member who expressed an interest for a “discussion of the interests of those States that stand to gain from sea-level rise due to the loss by other States of their existing rights and the increase of the surface area of the high seas”?; (6) On the issue of legal stability and predictability, the question was raised as to whether it deserves more thorough discussion. The question is which aspects should this be studied and how?; (7) Several members invoked the principle of equity, an issue also raised by many States. Should equity be an important factor for the Study Group to take into account in its analysis of the consequences of sea-level rise and finding solutions? What is understood by “equity” by the Study Group? What other policy considerations could be considered in favour of the preservation of baselines over ambulatory or vice versa (points raised by two members)?; (8) It was suggested that there may be “a continuum of possibilities” between the options (ambulatory/permanency approaches) and all of them should be explored. The Co-Chairs would appreciate an indication on what such possibilities could be; (9) As suggested by a member, should the Study Group engage in examining ways in which “to distinguish the construction of artificial islands for preservation from that to create artificial entitlement”?; (10) Several members indicated the need to study further article 62 of Vienna Convention on the Law of Treaties (*rebus sic stantibus*) and whether it would apply to maritime boundaries agreed to by treaties. In addition to the impacts of sea-level rise on valid maritime boundary agreements, another issue for the consideration of the Study Group could be the impact of sea-level rise in an ambulatory baseline scenario to maritime delimitation cases that have been adjudicated by the International Court of Justice, the International Tribunal for the Law of the Sea or arbitral tribunals. Would the principle of *res judicata* apply? What other principles might apply? Or would there be an obligation to re-open settled cases? What impact would this have on “stability, security and predictability”?; (11) How to approach the issue of the effects of sea-level rise on existing claims to the entitlement to maritime spaces in the case of future maritime delimitations (see paragraph 141 (f) of the first issues paper)?; (12) What would be the benefits of conducting a study on the law of river delimitations as proposed by a member?; (13) Should the Study Group develop a list of priority issues to be examined?; (14) Questions to the Co-Chair who reviewed the practice and laws of African States for further study; and (15) Study of practice of other regions (Asia, Europe, Latin America) needed. The Co-Chairs would appreciate members assuming such tasks (as already performed by two members).

(a) *Sources of law*: in addition to the United Nations Convention on the Law of the Sea⁴⁵⁴ (in particular, the genesis and interpretation of its article 5), the 1958 Geneva Conventions⁴⁵⁵ (and their *travaux préparatoires*), as well as customary international law of a universal and regional scope, the Study Group would examine other sources of law – relevant multilateral, regional and bilateral treaties or other instruments relating, for example, to fisheries management or the high seas that define maritime zones, or the 1959 Antarctic Treaty⁴⁵⁶ and its 1991 Protocol on Environmental Protection,⁴⁵⁷ the International Maritime Organization's treaties defining pollution or search and rescue zones, or the 2001 Convention on the Protection of the Underwater Cultural Heritage,⁴⁵⁸ general principles of law, as well as the regulations of relevant international organizations such as the International Hydrographic Organization. The purpose of this examination would be to determine the *lex lata* in relation to baselines and maritime zones, without prejudice to the consideration of the *lex ferenda* or policy options. It would also aim at assessing whether these instruments permit or require (or not) the adjustment of baselines in certain circumstances, and whether a change of baselines would entail a change of maritime zones;

(b) *Principles and rules of international law*: the Study Group would examine various principles and rules of international law in more detail, such as the principle that the land dominates the sea, the principle of the immutability of borders, the principle of *uti possidetis juris*, the principle of *rebus sic stantibus*, or the principle of freedom of navigation, as well as the role of the principle of equity, the principle of good faith, historic rights and title, the obligation to settle disputes peacefully, the maintenance of international peace and security, the protection of the rights of coastal States and non-coastal States, and the principle of permanent sovereignty over natural resources;

(c) *Practice and opinio juris*: the Study Group would aim to extend its study of State practice and *opinio juris* to regions for which scarce, if any, information had been made available, including Asia, Europe and Latin America (one member of the Study Group already assumed the task to perform such analysis for this region) and continuing the work on Africa. In doing so, the Study Group would examine the interrelation between State practice and sources of law by assessing whether such practice is relevant to customary international law or whether it is pertinent to treaty interpretation. The Study Group would also examine the maritime zone notifications deposited with the Secretary-General of the United Nations and the national legislation accessible on the website of the Division of the Law of the Sea and Ocean Affairs of the Office of Legal Affairs to determine whether States do – or do not – update such notifications and laws;

(d) *Navigational charts*: Further to the study mentioned in paragraph 37 above, the Study Group would also consider suggestions that take into account the operational considerations and circumstances as well as practices of States as far as the updating of navigational charts.

⁴⁵⁴ United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

⁴⁵⁵ Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205; Convention on the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

⁴⁵⁶ The Antarctic Treaty (Washington D.C., 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.

⁴⁵⁷ Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), *ibid.*, vol. 2941, p. 3.

⁴⁵⁸ Convention on the Protection of the Underwater Cultural Heritage (Paris, 12 November 2001), *ibid.*, vol. 2562, part I, No. 45694, p. 3.

295. Members of the Study Group also agreed that the Study Group might call upon scientific and technical experts to assist them in their task, on the understanding that they would do so in a selective, useful and limited manner.

(f) Future work of the Study Group

296. With regard to the future programme of work, the Study Group will address issues related to statehood and to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria, who will prepare a second issues paper as a basis for the discussion in the Study Group at the seventy-third session. The Study Group would then seek to finalize a substantive report on the topic, in the first two years of the following quinquennium, by consolidating the results of the work undertaken during the seventy-second and seventy-third sessions of the Commission.

Chapter X

Other decisions and conclusions of the Commission

A. Special memorial meetings

297. On 3 September 2020, a virtual informal memorial meeting of members of the Commission was convened in honour of the memory of Judge Alexander Yankov, former Chair of the Commission and Special Rapporteur for the topic “Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”.

298. At its 3547th meeting, held on 22 July 2021, the Commission convened a memorial meeting in honour of the memory of Judge James Crawford, Special Rapporteur for the topic “Responsibility of States for internationally wrongful acts”.

B. Programme, procedures and working methods of the Commission and its documentation

299. On 29 April 2021, the Planning Group was constituted for the present session.

300. The Planning Group held five meetings on 29 April, 25 May and 9, 23 and 27 July 2021. It had before it the topical summaries of the discussions held in the Sixth Committee of the General Assembly during its seventy-fourth ([A/CN.4/734](#)) and seventy-fifth ([A/CN.4/734/Add.1](#)) sessions, prepared by the Secretariat; General Assembly resolutions 74/186 of 18 December 2019 and 75/135 of 15 December 2020, relating to the work of the Commission; and General Assembly resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels.

1. Working Group on the long-term programme of work

301. At its 1st meeting, on 29 April 2021, the Planning Group decided to reconvene the Working Group on the long-term programme of work, with Mr. Mahmoud D. Hmoud as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 5th meeting, on 27 July 2021. The Planning Group took note of the oral report.

302. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the topic “Subsidiary means for the determination of rules of international law” in the long-term programme of work of the Commission. In the selection of the topic, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.⁴⁵⁹ The Commission considered that work on the topic would constitute a useful contribution to the progressive development of international law and its codification. The syllabus of the topic selected appears as an annex to the present report.

⁴⁵⁹ *Yearbook ... 1998*, vol. II (Part Two), para. 553.

2. Working Group on methods of work of the Commission

303. At its 1st meeting, on 29 April 2021, the Planning Group decided to re-establish the Working Group on methods of work of the Commission, with Mr. Hussein A. Hassouna as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 4th meeting, on 23 July 2021. The Planning Group took note of the oral report.

3. Consideration of General Assembly resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels

304. The General Assembly, in resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented at each of its sessions on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report⁴⁶⁰ remain relevant and reiterates the comments made at its previous sessions.⁴⁶¹

305. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its statute, is to promote the progressive development of international law and its codification.

306. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

307. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.⁴⁶²

308. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",⁴⁶³ without emphasizing one at the expense of the other. In this context,

⁴⁶⁰ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10).*

⁴⁶¹ *Ibid.*, Sixty-fourth Session, Supplement No. 10 (A/64/10), para. 231; *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), paras. 390–393; *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), paras. 392–398; *ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 274–279; *ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 171–179; *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 273–280; *ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), paras. 288–295; *ibid.*, Seventy-first Session, Supplement No. 10 (A/71/10), paras. 314–322; *ibid.*, Seventy-second Session, Supplement No. 10 (A/72/10), paras. 269–278; *ibid.*, Seventy-third Session, Supplement No. 10 (A/73/10), paras. 372–380; *ibid.*, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 293–301.

⁴⁶² General Assembly resolution 67/1 of 30 November 2012 on the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, para. 41.

⁴⁶³ Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

the Commission is cognizant that the 2030 Agenda for Sustainable Development recognizes the need for an effective rule of law and good governance at all levels.⁴⁶⁴

309. In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,⁴⁶⁵ the Commission wishes to recall that much of its work consists of collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law.

310. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,⁴⁶⁶ the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.⁴⁶⁷

311. In the course of the present session, which followed a postponement of its session in 2020 due to the COVID-19 pandemic, the Commission has continued to make its contribution to the promotion of the rule of law, including by working on the topics in its current programme of work, “Protection of the atmosphere” (adopted on second reading at the current session), “Provisional application of treaties” (adopted on second reading at the current session), “Immunity of State officials from foreign criminal jurisdiction”, “Sea-level rise in relation to international law”, “Succession of States in respect of State responsibility”, and “General principles of law”.

312. The Commission reiterates its commitment to the promotion of the rule of law in all of its activities.

4. Hybrid format of the International Law Commission at the present session

313. The Commission expresses its appreciation to the bureaux of its seventy-first and seventy-second sessions, together with the Secretariat, for the organizational arrangements put in place that allowed the Commission to be convened at its seventy-second session, in 2021, in a hybrid format. The hybrid format enabled members to participate either in person at the Palais des Nations or online through a platform (Zoom) with remote simultaneous interpretation into all official languages of the United Nations. The Commission also expresses its appreciation to the Government of Switzerland, the host of the Commission, for taking the necessary measures that allowed the convening of the hybrid session and facilitated travel to Geneva for members who attended the session in person and the staff of the Secretariat. The Commission notes that the convening of the session in the hybrid format and the functionality of the online platform used (Zoom) were crucial to the successful outcome of the session. The session of the Commission would have been impossible without the presence of some members and the staff of the Secretariat in Geneva. Their presence allowed for the smooth functioning of the Commission, whose work could otherwise have been adversely affected.

314. The Commission also notes that the session was held in accordance with the health regulations and COVID-19 mitigation measures in place at the United Nations Office in Geneva. This meant, for example, that the staff of the Secretariat were not permitted to distribute any paper copies of documentation. Documents required for participation in the

⁴⁶⁴ General Assembly resolution 70/1 of 21 October 2015, para. 35.

⁴⁶⁵ General Assembly resolution 75/141 of 15 December 2020 on the rule of law at the national and international levels, paras. 2 and 19.

⁴⁶⁶ *Ibid.*, para. 8.

⁴⁶⁷ See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10)*, para. 294.

meetings of the Commission were made available online through a dedicated drive set up by the Secretariat and through other electronic means.

315. The Commission acknowledges the extraordinary efforts made to ensure the smooth conduct of the Commission's deliberations, which enabled the Commission to complete its session. However, the Commission wishes to note that the normal work of the Commission was disrupted significantly despite every effort and measures taken to ameliorate the issues. A variety of challenges were encountered, particularly during the first segment, including: (a) reduced hours of operation, especially for decision-making and negotiation, because of members being in different time zones; under the special conditions for the organization of the session, interpretation was assured for shorter periods than the usual three hours, thereby allowing the Commission to meet for fewer hours a day than the usual six; and, moreover, there was insufficient flexibility, as the meeting time not spent in plenary could not, under the circumstances, be used by the Drafting Committee, as would ordinarily have been the case, even though the members of the Commission did make use of that time for informal consultations; (b) members of the Commission having to work in different time zones meant a lot of adjustments to their work schedule, creating fatigue and additional stresses, particularly for those members who were continuously online either very early in the morning or very late at night; (c) given that collegiality is central to the functioning of the Commission and even though an attempt was made to ensure equality of members and to level the playing field, the impact was more glaring in the Drafting Committee, whose ability to work in the usual manner, including through informal contacts and exchanges, was affected; (d) it was challenging to engage in detailed drafting in a virtual setting and this was not helped by the restriction on the circulation of paper copies of documents; (e) there were occasions during which Internet connectivity problems were encountered, sound was poor because of the equipment used, such that it was hard to understand what was being said and interpretation was rendered impossible; (f) access to Library facilities for members participating online proved to be a challenge, despite the improved availability of online resources and the bibliographical packages for members made available by the United Nations Library at Geneva; (g) the absence of the members' assistants from the Palais des Nations and from Geneva reduced the ability of members to involve them in their work, to the disadvantage of both; and (h) for the second year running, the International Law Seminar could not take place, which meant the loss of valuable interaction between members of the Commission and Seminar participants, who are usually young jurists and professors, specializing in international law, or government officials pursuing an academic or diplomatic career in posts in the civil service of their respective countries. Some of these challenges were to a slight extent overcome during the second part of the session; for example, there was flexibility in the working hours, more members attended in person and assistants were also able to attend in person.

316. Overall, the capacity of the Commission was reduced and, above all, the detailed negotiation of texts was rendered difficult. The Commission nevertheless notes that the convening of the session was worthwhile and that some lessons may be learned that could be useful for adapting the working methods of the Commission.

5. Honoraria

317. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.⁴⁶⁸ The

⁴⁶⁸ See *ibid.*, *Fifty-seventh Session, Supplement No. 10 (A/57/10)*, paras. 525–531; *ibid.*, *Fifty-eighth Session, Supplement No. 10 (A/58/10)*, para. 447; *ibid.*, *Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 369; *ibid.*, *Sixtieth Session, Supplement No. 10 (A/60/10)*, para. 501; *ibid.*, *Sixty-*

Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research.

6. Documentation and publications

318. The Commission underscored once more the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission stresses that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission. It follows that Special Rapporteurs cannot be asked to reduce the length of their report following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission by the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.⁴⁶⁹ The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterated its request that: (a) Special Rapporteurs submit their reports within the time limits specified by the Secretariat; and (b) the Secretariat continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

319. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English version for timely correction and prompt release. The Commission once more called on the Secretariat to resume the practice of preparing provisional summary records in both

first Session, Supplement No. 10 (A/61/10), para. 269; *ibid.*, *Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 379; *ibid.*, *Sixty-third Session, Supplement No. 10 (A/63/10)*, para. 358; *ibid.*, *Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 240; *ibid.*, *Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 396; *ibid.*, *Sixty-sixth Session, Supplement No. 10 (A/66/10)*, para. 399; *ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 280; *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 181; *ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, para. 281; *ibid.*, *Seventieth Session, Supplement No. 10 (A/70/10)*, para. 299; *ibid.*, *Seventy-first Session, Supplement No. 10 (A/71/10)*, para. 333; *ibid.*, *Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 282; *ibid.*, *Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 382; and *ibid.*, *Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 302.

⁴⁶⁹ For considerations relating to page limits on the reports of Special Rapporteurs, see, for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123–124. See also General Assembly resolution 32/151 of 9 December 1977, para. 10, and General Assembly resolution 37/111 of 16 December 1982, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission further noted that the more recent practice of submitting the provisional records electronically for changes to be made in track changes was working smoothly. The Commission also welcomed the fact that those working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

320. The Commission expressed its gratitude to all Services involved in the processing of documentation, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work. The work done by all Services was all the more appreciated under the current conditions.

321. The Commission reaffirmed its commitment to multilingualism and recalls the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolutions 69/324 of 11 September 2015 and 73/346 of 16 September 2019.

322. The Commission once again expressed its warm appreciation to the United Nations Library at Geneva, which continued to assist members of the Commission very efficiently and competently. It welcomed the bibliographic package that the Library prepared for the Commission. The Commission also wished to note that the Library continued to provide valuable services even under the limitations imposed by the COVID-19 pandemic at the present session.

7. *Yearbook of the International Law Commission*

323. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolutions 74/186 and 75/135, expressed its appreciation to Governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the trust fund.

324. The Commission recommends that the General Assembly, as in its resolutions 74/186 and 75/135, express its satisfaction with the remarkable progress achieved in the past few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the efforts made by the Division of Conference Management of the United Nations Office at Geneva, especially its Editing Section, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

8. Assistance of the Codification Division

325. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its efforts in 2020 and 2021, which enabled the Commission to meet informally and formally even against the backdrop of the COVID-19 pandemic.

9. Websites

326. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.⁴⁷⁰ The Commission reiterated that the website and other websites maintained by the Codification Division⁴⁷¹ constituted an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio and video recording of the plenary meetings of the Commission.

10. United Nations Audiovisual Library of International Law

327. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law⁴⁷² in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission.

C. Date and place of the seventy-third session of the Commission

328. The Commission decided that its seventy-third session would be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022.

D. Budgetary resources concerning the convening of future sessions of the International Law Commission

329. The Commission stresses the importance of ensuring that the necessary budgetary resources are provided for all of its members to be able to attend the annual session, and for attendance by the full substantive Secretariat team that is necessary for the Commission's effective functioning. The Commission is concerned that budgetary constraints in recent years have reduced the budgeted amounts to below these levels. Given its function in the progressive development of international law, and its codification, the Commission considers it essential that all of its members are able to attend its meetings, as this ensures the representation of the main forms of civilization and of the principal legal systems of the world in the Commission as a whole. The Commission has on numerous occasions reiterated its views concerning the question of honoraria, as well as the extent to which the research of Special Rapporteurs is affected by lack of resources. It stresses the importance of ensuring that the necessary budgetary resources are allocated for the functioning of the Commission and its Secretariat, including the need for Special Rapporteurs (particularly those from developing regions) to obtain the necessary assistance to undertake the research required for the preparation of their reports. The Commission welcomes all efforts made under the relevant programme budget to address these concerns. The Commission proposes that consideration be given to the establishment of a trust fund to support the Special Rapporteurs and to address any budgetary shortfalls in provision for full attendance of its Secretariat.

⁴⁷⁰ <http://legal.un.org/ilc>.

⁴⁷¹ In general, available from: <http://legal.un.org/cod/>.

⁴⁷² http://legal.un.org/avl/intro/welcome_avl.html.

E. Cooperation with other bodies

330. At the 3548th meeting, on 22 July 2021, Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.⁴⁷³ An exchange of views followed.

331. In view of the limited arrangements available due to the COVID-19 pandemic, the Commission was regrettably unable to have an exchange of views with the African Union Commission on International Law, the Asian-African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law of the Council of Europe or the Inter-American Juridical Committee. The Commission continues to value its cooperation with such bodies and expresses the hope that the exchanges of views can be organized at future sessions.

332. On 15 July 2021, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Welcoming remarks were made by Mr. Gilles Carbonnier, Vice-President, ICRC and opening remarks by Ms. Cordula Droege, Chief Legal Officer, Head of the Legal Division, ICRC, and Mr. Dire D. Tladi, First Vice-Chair of the Commission. Presentations were made on the topics, “ICRC position on autonomous weapon systems”, by Mr. Neil Davison, Scientific and Policy Adviser, ICRC, and “Sea-level rise in relation to international law”, by Ms. Patrícia Galvão Teles and Ms. Nilüfer Oral, Co-Chairs of the Study Group of the Commission on the topic. There was also a discussion moderated by Ms. Helen Durham, Director, International Law and Policy Department, ICRC, on “The protection of the environment in armed conflict” between Ms. Marja Lehto, Special Rapporteur on the topic “Protection of the environment in relation to armed conflicts” and Ms. Helen Obregón Gieseken, Legal Adviser, ICRC. Concluding remarks were made by Ms. Durham.

F. Representation at the seventy-sixth session of the General Assembly

333. The Commission decided that it should be represented at the seventy-sixth session of the General Assembly by its Chair, Mr. Mahmoud D. Hmoud.

G. International Law Seminar

334. The Commission stresses the importance it attaches to the International Law Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. Owing to the COVID-19 pandemic, the Seminar was not convened in 2020 or 2021. The Commission expresses the hope that the Seminar will be convened in 2022.

335. The Commission is grateful to those States that have continued to make voluntary contributions to the United Nations Trust Fund for the International Law Seminar and recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2022 with as broad participation as possible, and an adequate geographical distribution.

⁴⁷³ The statement is recorded in the summary record of that meeting.

Annex

Subsidiary means for the determination of rules of international law

by

Charles C. Jalloh

I. Introduction

1. The International Court of Justice (“ICJ”/“the Court”), whose function is to decide in accordance with international law such disputes as are submitted to it by States, is required to apply Article 38 (1) of the Statute of the International Court of Justice. Though formally only directed to the ICJ judges, the provision is widely considered one of the most, if not the most, authoritative statement of the sources of international law. Article 38(1) provides, in relevant part, that the Court in resolving disputes submitted to it shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*.¹ [Emphasis added].

2. Unsurprisingly, given the centrality of sources to the international legal system, the International Law Commission (“the Commission”) has devoted significant time to studying the sources identified in Article 38 (1) of the ICJ Statute, namely international conventions, and more recently, international custom as well as general principles of law. Indeed, arguably forming the Commission’s most important contribution to date has been its work on the law of treaties which culminated into the 1969 Vienna Convention on the Law of Treaties² but also continued afterwards.³ The Commission’s initial work on the law of treaties has subsequently given risen to increasingly more specialized Commission studies on the same subject. These include on the question of treaties concluded between States and international organizations or between two or more international organizations,⁴ reservations to treaties,⁵ the effects of armed conflict on treaties,⁶ unilateral acts of States,⁷ subsequent

¹ Statute of the International Court of Justice art. 38 ¶ 1, U.N. Charter, Annex I, at 21-30 (1945).

² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3; and Vienna Convention on the Law of Treaties Concluded Between States and International Organizations, or between International Organization, Mar. 21, 1986, 1155 U.N.T.S. 331.

³ See generally Int’l Law Comm’n, *About the Commission*, available at <https://legal.un.org/ilc/> (last accessed July 27, 2021) (The Commission’s related works include: the law of treaties (1949-1966); reservations to multilateral conventions (1951); succession of States in respect of treaties (1968-1974); treaties concluded between States and international organizations (1970-1982); reservations to treaties (1993-2011); effects of armed conflicts on treaties (2004-2011); unilateral acts of States (1996-2006); subsequent agreements and subsequent practice in relation to the interpretation of treaties, previously treaties over time (2008-2018); provisional application of treaties (2012-2021); *Jus cogens*, now Peremptory Norms of General International Law (*Jus Cogens*)(2015-present)).

⁴ Int’l Law Comm’n, Rep. on the Work of its Thirty-fourth Session, U.N. Doc. A/37/10 at 12-63 (1982).

⁵ Int’l Law Comm’n, Rep. on the Work of its Sixty-third Session, U.N. Doc. A/66/10 at 23 (2011).

⁶ *Id.* at 106.

⁷ Int’l Law Comm’n, Rep. on the Work of its Fifty-eighth Session, U.N. Doc. A/61/10 at 159-167 (2006).

agreements and subsequent practice in relation to the interpretation of treaties,⁸ provisional application of treaties,⁹ and peremptory norms of general international law (*jus cogens*).¹⁰

3. With regard to Article 38, paragraph 1(b) of the ICJ Statute, which refers to international custom as evidence of a general practice accepted as law, the Commission took the topic “Formation and evidence of customary international law” into the programme of work at its sixty-fourth session (2012) though the title was later amended to “Identification of customary international law” during the sixty-fifth session (2013).¹¹ At its seventieth session (2018), the Commission adopted a set of draft conclusions on the identification of customary international law, on second reading, with commentaries and forwarded them with a final recommendation pursuant to article 23 of the Statute of the Commission.¹² The General Assembly, at its seventy-third session (2018), welcomed the completion of the work on the topic and took note of the draft conclusions on the identification of customary international law which were annexed to its resolution.¹³ It commended them to States and encouraged their wider dissemination.

4. Continuing with its efforts to clarify the foundational sources of international law, during its seventieth session (2018), the Commission decided to add the topic “General principles of law” to its current programme of work and appointed a special rapporteur.¹⁴ General principles of law have given rise to several questions in practice, and of course, are also a source of law in Article 38(1)(c)¹⁵ of the ICJ Statute. During its seventy-first session (2019), the Special Rapporteur on the topic of general principles of law presented his first report to the Commission, and in 2020, the second report.¹⁶ Due to the COVID-19 global pandemic, however, the session was exceptionally postponed by a year. The debate on the latter report could therefore only take place during the seventy-second session in 2021.¹⁷

5. The Commission’s focus on the elucidation of the sources of international law appears to have been well received by States and the international legal community. To date, it has completed studies aimed at clarifying treaties and customary law. It is also well on track with its study of the sometimes neglected and sometimes misunderstood source of general principles of law. At this stage, the Commission has undertaken systematic consideration of the first three sub-paragraphs of Article 38, paragraph 1. But one last sub-paragraph of Article 38 (1) concerning “subsidiary means” for determining rules of international law remains largely unaddressed.

6. The subject matter has, of course, come up in the Commission’s work over the years. These include during the plenary debate of the first report on General principles of law during the seventy-first session exposing the lack of clarity regarding subsidiary means. However, the topic has not been separately examined for its potential value, even if by its own express terms, it is merely a “subsidiary means for the determination of rules of law.” In any case, there are aspects of these subsidiary means and their interaction and relationship to the sources that are uncertain, confusing, and arguably even unsettled. Consequently, in order not to leave a gap in the clarity,

⁸ Int’l Law Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 11 (2018).

⁹ *Id.* at 201.

¹⁰ Int’l Law Comm’n, Rep. on the Work of its Seventy-first Session, U.N. Doc. A/74/10 at 141 (2019).

¹¹ Int’l Law Comm’n, *Provisional summary record of the 3132nd meeting*, U.N. Doc. A/CN.4/SR.3132 at 22 (May 22, 2012).

¹² Int’l Law Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 119 (2018).

¹³ See G.A. Res. 73/203 ¶¶ 1, 4 (Dec. 20, 2018).

¹⁴ Int’l Law Comm’n, *Provisional summary record of the 3433rd meeting*, U.N. Doc. A/CN.4/SR.3433 at 3 (July 19, 2018).

¹⁵ Statute of the International Court of Justice art. 38 ¶ 1(c), U.N. Charter, Annex I, at 21-30 (1945).

¹⁶ Marcelo Vázquez-Bermúdez (Special Rapporteur for general principles of law), *First report on general principles of law*, U.N. Doc. A/CN.4/732 (Apr. 5, 2019); Marcelo Vázquez-Bermúdez (Special Rapporteur for general principles of law), *Second report on general principles of law*, U.N. Doc. A/CN.4/741 (Apr. 9, 2020); See also U.N. Secretariat, General principles of law, Memorandum by the Secretariat, Int’l Law Comm’n, U.N. Doc. A/CN.4/742, (May 12, 2020).

¹⁷ See Int’l Law Comm’n, *Daily Bulletin Seventy-second Session (2021)*, available at <https://legal.un.org/ilc/sessions/72/bulletin.shtml> (last accessed July 30, 2021) (The plenary debate on the topic general principles of law began with the special rapporteur’s introduction on July 12, 2021 during the Commission’s 3,536th meeting, and concluded with a referral to the drafting committee on July 21, 2021 during the Commission’s 3,546th meeting.)

predictability and uniformity of international law, it is proposed that the Commission consider completing its systematic study of Article 38(1) by also examining the subsidiary means for the determination of rules of international law listed in sub-paragraph (d), that is to say, *judicial decisions* and *the teachings of the most highly qualified publicists of the various nations*.

7. “Judicial decisions” as well as “the teachings of the most highly qualified publicists of the various nations” have played a vital role in the development of international law. This is particularly evident in, but not limited to, the formative years of international law. The weight of judicial decisions and scholarly works vary, depending on the tribunal and relevant field of international law. The Commission, given its previous as well as more recent work on sources of international law and its specific mandate as a general international law expert body, seems particularly well placed to provide clarification on several aspects of the subsidiary means for the determination of rules of law. This would include the nature, scope and functions of subsidiary means vis-à-vis the sources of international law.

8. As with other recent sources-related topics, and without prejudice to a different outcome that may emerge from the needs of this study, the outcome on the topic could be a set of draft conclusions accompanied with commentaries. The preference for draft conclusions will thus parallel the approach of the Commission on the topics “Identification of customary international law”¹⁸ and “General principles of law.”¹⁹ There is, as of yet, no single definition of “draft conclusions” in the practice of the Commission. In the meaning used here, it is proposed that the outcome of the study on the topic would represent the outcome of a process of reasoned deliberation and a restatement of the rules and practices found in relation to subsidiary means in determination of the rules of international law. Thus, the content of such draft conclusions, in line with the statute and settled practice of the Commission, could be presumed to reflect both the codification and progressive development of international law.

II. The topic fulfils the Commission’s criteria for new topics

9. The topic meets the criteria for selection of new topics set by the Commission in 1996 and again reiterated in 1998.²⁰ The requirements are that the topic should: (a) reflect the needs of States in respect of the progressive development of international law and its codification; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification.²¹ Though not applicable in this instance, since this would be a classic general international law topic, the Commission also agreed not to restrict itself to traditional topics but to also consider those that reflect new developments in international law and pressing concerns of the international community.²²

10. The Commission’s topic selection criteria mentioned immediately above are fulfilled in the present case. The topic is important for States by promoting a more comprehensive understanding of *judicial decisions* and *the teachings of the most qualified publicists of the various nations* and the underlying practical and theoretical approaches to them by different courts and tribunals at the national and international levels. A legion of international and national jurisprudence and an extensive body of scholarly literature refers to judicial decisions and teachings of publicists, though not always expressly as subsidiary means, in the process of determining the applicable rules of international law.²³ Studying the approaches and diverging views on the use of subsidiary

¹⁸ See Int’l Law Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 119-122 (2018).

¹⁹ See Int’l Law Comm’n, Rep. on the Work of its Seventy-first Session, U.N. Doc. A/74/10 at 329 (2019).

²⁰ [1997] 2 Y.B. Int’l L. Comm’n 1, at 71-71 ¶ 238, U.N. Doc. A/CN.4/SER.A/1997/Add.1; [1998] 2 Y.B. Int’l L. Comm’n 1, at 110 ¶ 553, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (1998).

²¹ *Id.*; See also Int’l Law Comm’n, Rep. on the work of its Fifty-second Session, U.N. Doc. A/55/10 at 131 ¶ 728 (2000).

²² [1998] 2 Y.B. Int’l L. Comm’n 1, at 110 ¶ 553, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (1998) (“The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.”).

²³ See Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 INT’L & COMP. L. Q.1 (2017); See also Sondre T. Helmersen, *Scholarly Judicial Dialogue in International Law*, 16 L. & PRACT. OF INT’L

means in Article 38(1)(d) could thus provide an authoritative methodological guide and would likely aid the determinations of the weight to attach to them in the process of determining the existence of the rules of international law in paragraphs 1(a) to 1(c) of Article 38 of the ICJ Statute.

11. The topic is also sufficiently advanced in terms of State practice to permit codification and progressive development. This is because there is a voluminous body of national and international judicial decisions. There has also been a dramatic increase in the number of international courts and tribunals over the past half century, as well as ample academic writings and other scholarly literature referring to subsidiary means of determining the rules of law.

12. The topic is also both concrete and feasible given the particular focus on Article 38(1)(d), and taken together with previous works of the Commission, offers it an opportunity to complete its contribution on the clarification of the role of subsidiary means in the identification of the sources of international law. The work may thus serve as a useful complement to the ongoing work on Article 38(1)(c), regarding general principles of law, and depending on when it is taken up by the Commission, could allow potential synergies between it and Article 38(1)(d) to be further explored.

III. Brief overview of Article 38(1) and doubts about subsidiary means

13. The place of judicial decisions and the writings of the most highly qualified publicists of the various nations in Article 38(1) remains the subject of debate among writers. There seems to be even a divergence of scholarly views on whether Article 38(1) establishes one or two lists. Some view the judicial decisions referred to in sub-paragraph (d) as a source of law much like the other sources of law listed in sub-paragraphs (a) to (c) of the article, and describe the language of Article 38 "... as essential in principle and see no great difficulty in seeing a subsidiary means for the determination of rules of law as being a source of the law, not merely by analogy but directly...."²⁴ The second, and perhaps more prominent approach, asserts that the article establishes two lists. Sub-paragraphs (a) to (c) provide the "formal sources from which legally valid rules of international law may emerge,"²⁵ while sub-paragraph (d) is said to provide alternative or additional means by which the existing "rules of law may be determined."²⁶ In other words, the subsidiary means are seen as solely a vehicle for the determination or ascertainment of the existence or content of the sources rather than themselves being sources as such. The opportunity to study this matter might enable the Commission to clarify the existing legal situation based on practice and to offer guidance on the status and use of subsidiary means across different areas of international law.

14. Furthermore, within the discussion of the wide category of "judicial decisions," there are questions concerning the status of decisions of *national* courts and tribunals in contrast to the decisions of *international* courts and tribunals.²⁷ While judicial decisions cannot in and of themselves be sources of law, the findings of judicial bodies when interpreting and applying treaties, custom and general principles of law determining rules of international law can identify binding legal obligations for States, international organizations and other bodies.

15. As regards the relationship of subsidiary means to the different sources of international law, judicial decisions seem to play different roles, sometimes clarifying general treaty rules or purposively interpreting them to apply

CTS. & TRIB. 464 (2017). For a thoughtful new monograph on teachings, see SONDRÉ T. HELMERSEN, *THE APPLICATION OF TEACHINGS BY THE INTERNATIONAL COURT OF JUSTICE* (Cambridge Univ. Press, 2021).

²⁴ Robert Y. Jennings, *International Lawyers and the Progressive Development of International Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY*, 413-24 (J. Makarczyk ed., 1996).

²⁵ Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT'L L. 649, 652 (2013); O. J. Lissitzyn, *Reviewed Work: International Law. Vol. 1 (3rd ed.): International Law as Applied by International Courts and Tribunals by Georg Schwarzenberger*, 53 AM. J. INT'L L. 197 (1959).

²⁶ *Id.* at 653 (citing Schwarzenberger).

²⁷ See Sienho Yee, *Article 37 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 J. INT. DISP. SETTLEMENT 472 (2016).

to new situations that might not have been previously contemplated.²⁸ In this regard, the ICJ, as the principal judicial organ of the United Nations, has through its judgments made substantial contributions to the development of various fields of international law, inter alia, on the law governing the use of force, law of the sea, maritime boundary delimitation, State responsibility, law of treaties, consular relations, asylum, international environmental law, decolonization, self-determination, etc. The Court, in turn, often applies the substantive rules elucidated in its prior decisions. In the process of doing so, by fiat of its judicial decisions explicating rules of international law, it also makes contributions to the consolidation if not the development of international law.²⁹

16. Regarding customary international law, as explained in the Memorandum prepared by the Secretariat of the Commission in the topic “Identification of customary international law,” “decisions of national courts have two general functions in the determination of customary international law.”³⁰ One function they serve is as evidence of State practice. Another is as an aid to the determination of rules of law. This duality was recognized in the Commission’s final conclusions on identification of customary international law.³¹ Accordingly, building on that prior work and the ongoing work on general principles of law, it might be beneficial for the analysis under this topic to consider the role that judicial decisions of both national and international courts play in the interpretation and application of international law rules articulated in treaties, custom and general principles of law as envisioned by Article 38.

17. Article 38 of the ICJ Statute did not, of course, develop in a vacuum. Writing in 1908, Oppenheim provided an insight into the state of affairs prior to the drafting of Article 38:

Apart from the International Prize Court agreed upon by the Second Hague Peace Conference but not yet established, there are no international courts in existence which can define these customary rules and apply them authoritatively to cases which themselves become precedents binding upon inferior courts. The writers on international law, and in especial the authors of treatises, have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognised usage has now ripened into a custom, and the like It is for this reason that textbooks of international law have so much more importance for the application of law than text-books of other branches of the law.³²

18. Current Article 38(1)(d) is based on the Permanent Court of International Justice (PCIJ) Statute. The 1920 Advisory Committee of Jurists, specifically President Descamps, proposed a text which read: international

²⁸ See INT’L CT. OF JUSTICE, HANDBOOK OF THE INTERNATIONAL COURT OF JUSTICE, at 98-100, U.N. Sales No. 1055 (2016), available at <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> (last accessed July 27, 2021) (Indeed, as far back as 1949, the ICJ recognized such a “new situation” in relation to the UN Charter in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949) (“The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.”) (Since then, in many decisions, the ICJ has expressly recognized the evolution of international law. It has stressed the importance of such evolution to the determination of the law applicable to the case in question.).

²⁹ See INT’L CT. OF JUSTICE, HANDBOOK OF THE INTERNATIONAL COURT OF JUSTICE, at 77, U.N. Sales No. 1055 (2016), available at <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> (last accessed July 27, 2021) (Concluding that “A judgment of the Court does not simply decide a particular dispute, but inevitably also contributes to the development of international law. Fully aware of this, the Court takes account of these two objectives in preparing and drafting its judgments.”).

³⁰ U.N. Secretariat, Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, Int’l Law Comm’n, U.N. Doc. A/CN.4/691 (Feb. 9, 2016).

³¹ See, for instance, Int’l Law Comm’n, Rep. on the Work of its Seventieth session, U.N. Doc. A/73/10 at 120-21 (2018) (Conclusions 6, 10, 13 and 14) (Encompassing, in some of these instances, both judicial decisions of national courts and the teachings of publicists).

³² Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 659 (2013); See also L. F. L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313 (1908).

jurisprudence as a means for the application and development of law.³³ This faced some opposition. In subsequent debates, President Descamps stated that “[d]octrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should only serve as elucidation.”³⁴ The initial Descamps proposal was not adopted. During subsequent discussions, Mr. Root and Mr. Phillimore submitted an alternative draft.³⁵ “Faced with continued opposition, Descamps [] suggested . . . the following wording: ‘[t]he Court shall take into consideration judicial decisions and the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law’.”³⁶ Descamps himself also proposed adding “as subsidiary means for the determination of rules of law.” This language was adopted without change.³⁷ Thus, as part of the proposed study, it is expected that a close review of the drafting history of the provision could prove useful to clarifying the intended role and current place of subsidiary means in the determination of rules of international law.

IV. Judicial decisions

19. The first paragraph of Article 38 of the ICJ Statute makes clear that “judicial decisions” are “subsidiary means for the determination of rules of law.”³⁸ That said, as one commentator has argued, “[t]his formula underestimates the role of decisions of international courts in the norm creating process. Convincingly elaborated judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law.”³⁹ In principle, of course, decisions of the ICJ carry no binding force, except between the parties, and even then, only in respect of that particular case (Article 59, ICJ Statute).⁴⁰ Thus, although there is no *stare decisis* before the Court similar to that found in Common Law legal systems, with a hierarchy of judicial precedents from higher courts being binding on lower courts, the ICJ does in practice rely on its own prior decisions. This enhances predictability and consistency in the application of international law. It also serves to advance legal security for States and international organizations. The Court departs from prior decisions only for serious reasons, and where it does so, it often provides the rationale for doing so.

20. At times, it can be challenging to determine how narrowly or broadly Article 38(1) is to be interpreted. The Court also naturally relies on the work of its predecessor, the PCIJ. The parties pleading before it do so as well. The parties and any interveners often also refer extensively to both judicial decisions and teachings or scholarly works. In the result, perhaps unsurprisingly, the Court also usually refers to the decisions of other international and national courts and tribunals. It has only, in a relatively small number of cases, cited the works of individual scholars in its main judgments though the work of expert bodies such as the Commission seem prominent when it is deciding cases or rendering advisory opinions.

21. The ICJ now increasingly refers to judicial decisions from other courts in a pattern that could only be expected to increase as international law becomes more specialized. For example, it has cited the International Tribunal for the Law of the Sea,⁴¹ the Central American Court of Justice,⁴² the Court of Justice of the European Communities⁴³

³³ *Id.* at 651.

³⁴ *Id.* at 652.

³⁵ Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 652 (2013).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Statute of the International Court of Justice art. 38 ¶ 1(d), U.N. Charter, Annex I, at 21-30 (1945).

³⁹ Rudolf Bernhardt, *Custom and Treaty in the Law of the Sea*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. (VOL. 205), 247-330 (1987).

⁴⁰ Statute of the International Court of Justice art. 59, U.N. Charter, Annex I, at 21-30 (1945).

⁴¹ See *Territorial and Maritime Dispute (Nicar. v. Col.)*, Judgment, 2012 I.C.J. Rep. 624, 666 ¶ 114 (Nov. 19).

⁴² See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. intervening)*, Judgment, 1992 I.C.J. Rep. 351, 599 ¶ 401 (Sept. 11) (Referring to the judgment in *El Sal. v. Nicar.* AJIL 674 (CACJ 1917)).

⁴³ See *Application of the Interim Accord of 13 September 1995 (The former Yugoslav Rep. of Maced. v. Greece)*, Judgment, 2011 I.C.J. Rep. 644, 678-79 ¶ 109 (Dec. 5).

(now Court of Justice of the European Union), some arbitral awards,⁴⁴ and to regional human rights bodies, such as the Inter-American Court of Human Rights,⁴⁵ the European Court of Human Rights,⁴⁶ and the African Commission on Human and Peoples' Rights.⁴⁷ In relation to the latter, in its 2010 *Diallo* judgment,⁴⁸ the ICJ referred to the African Commission on Human and Peoples' Rights interpretation of article 12(4) of the African Charter on Human and People's Rights. The Court stated:

[w]hen the court is called upon [...] to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.⁴⁹

22. Furthermore, the ICJ has frequently referred to the work of specialized tribunals, including the International Criminal Tribunal for the former Yugoslavia⁵⁰ (ICTY) and the International Criminal Tribunal for Rwanda⁵¹ (ICTR) on issues of international criminal and international humanitarian law. In some cases, as those cited in the preceding paragraph, it has given a measure of deference to rulings of specialized courts. Similarly, given that every field of international law is part of a wider international legal system, for their part, those tribunals also often refer to the ICJ for authoritative guidance on the status of international law on key issues alongside the sources mentioned in Article 38.

23. The practice of specialized and national courts in following the rulings of the ICJ on matters of general international law could also be interesting to examine as part of what is often referred to as judicial dialogue between different courts and tribunals.⁵² For example, the ICTY has referred to such subsidiary means as envisioned by Article 38(1)(d) of the ICJ Statute. To illustrate, in *Kupreškić et al.*, the ICTY Trial Chamber stated that “[b]eing international in nature . . . , the Tribunal [could not] but rely upon the well-established sources of international law and, within this framework, upon judicial decisions.”⁵³ Regarding the value that should be given to such decisions, the Trial Chamber held the view that they “should only be used as a ‘subsidiary means for the determination of rules of law’”.⁵⁴ The Tribunal further clarified that “judicial precedent is not a distinct source of

⁴⁴ See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, 701 ¶ 133 (Oct. 8) (Referring to the award rendered on Mar. 24, 1922 by the Swiss Federal Council in *Frontier Dispute between Colombia and Venezuela*, I R.I.A.A. 223 (1922)) (In the same case and just one paragraph later, the Court also referred to the award rendered on Jan. 23, 1933 by the Special Boundary Tribunal in *Honduras Borders* (Guat. v. Hond.), II RIAA 1325 (1949)).

⁴⁵ See *Case Concerning Ahmadou Sadio Diallo* (Rep. of Guinea v. Dem. Rep. Congo), Compensation, 2012 ICJ Rep. 324, 331 ¶ 13 (June 19).

⁴⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, 92 ¶ 119 (Feb. 26); *Case Concerning Ahmadou Sadio Diallo* (Rep. of Guinea v. Dem. Rep. Congo), Compensation, 2012 I.C.J. Rep. 324, 331 ¶ 13 (June 19); *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, 132 ¶ 72 (Feb. 3).

⁴⁷ See *Ahmadou Sadio Diallo* (Rep. of Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 I.C.J. Rep. 639, 663-64 ¶ 66-67 (Nov. 30).

⁴⁸ *Id.* at 664 ¶ 67.

⁴⁹ *Id.*; See also Mads Andenas and Johann R. Leiss, *The Systemic Relevance of “Judicial Decisions” in Article 38 of the ICJ Statute*, 77 MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 907-972 (2017) for a thorough discussion of article 38 and the ICJ approach to judicial decisions.

⁵⁰ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, 130 ¶ 212 (Feb. 26).

⁵¹ *Id.* at 126 ¶ 198.

⁵² See, for example, scholarly analysis of judicial dialogue in the field of human rights law in *Special Issue: Judicial Dialogue in Human Rights*, edited by Elżbieta Karska and Karol Karski, 21 INT’L COM. L. REV. 5 (2019).

⁵³ Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 653 (2013); See also L. F. L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313 (1908).

⁵⁴ *Id.*

law in international criminal adjudication.”⁵⁵ Relatedly, Article 20(3) of the Statute of the Special Court for Sierra Leone (SCSL) specifies that “[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the [ICTY and ICTR].”⁵⁶ However, the SCSL underscored that this provision does not imply that the decisions of those international tribunals constitute direct sources or are binding on the SCSL.⁵⁷

24. A similar position can be seen at the International Criminal Court (ICC) whose body of applicable law in Article 21⁵⁸ of the Rome Statute mirrors, to a great extent, the sources listed in Article 38 of the ICJ Statute. In addition to applying its own statute as well as applicable treaties and other principles and rules of international law as well as general principles derived from the national laws of legal systems of the world, including the laws of States that would normally exercise jurisdiction over the various crimes within its jurisdiction, the ICC may apply principles and rules of law as interpreted in its previous decisions.

25. While the question of the place of judicial decisions, including those from other courts and tribunals would depend on the relevant constitutive statutes or instruments of those tribunals and even their jurisprudence, a wide variety of practice can be found in the use of judicial decisions to ascertain the applicable rules of law to apply in a given case as subsidiary means for the determination of the law. This begs the question: what is a “judicial decision”? Moreover, the phrase “judicial decisions” in Article 38(1) of the ICJ Statute was not qualified by the words “international” or “national”, and for that matter, “regional”. This appears to suggest that a more comprehensive understanding of “judicial” and “decisions” may be required.

26. Questions also persist regarding the relevance and weight of decisions of national courts, as opposed to international courts, as well as those of regional judicial courts and quasi-judicial tribunals in the determination of the rules of *international* law in the context of sources. Legitimate questions can also be asked whether, in the context of determining specific rules, the works of specialized ad hoc panels or arbitrators established by one or two disputing parties ought to carry the same weight as decisions of judicial bodies established by international or regional courts created by States especially those of a universal or quasi universal character. This is particularly so in areas such as international investment law or where the decision of such arbitral bodies departs from existing rules of international law.

27. In some instances, concerns have also arisen that different international courts and tribunals might concurrently address the same dispute, or might reach conflicting conclusions with respect to the same international rule, leading to questions as to their respective institutional competences and their hierarchical relations *inter se*.⁵⁹ While those concerns and questions may be of some importance, they fall outside the scope of the present topic.

⁵⁵ Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 653 (2013).

⁵⁶ Statute of the Special Court for Sierra Leone art. 20 ¶ 3, Jan. 16, 2002, 2178 U.N.T.S. 145.

⁵⁷ See Prosecutor v. Issa Hassan Sesay et. al., Case No. SCSL-04-15-T, Trial Court Judgment, at 295 (Mar. 2, 2009); For commentary on the jurisprudential contributions to international criminal law by the Special Court for Sierra Leone, see CHARLES C. JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* (Cambridge Univ. Press, 2020); CHARLES C. JALLOH (ED.), *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* (Cambridge Univ. Press, 2014); Symposium, *The Legal Legacy of the Special Court for Sierra Leone*, 15 FIU L. REV. 1 (2021); Charles C. Jalloh, *The Continued Relevance of the Contributions of the Sierra Leone Tribunal to International Criminal Law*, 15 FIU L. REV. 1, 1-13 (2021); Charles C. Jalloh, *Closing Reflections on the Contributions on the SCSL’s Legal Legacy*, 15 FIU L. REV. 1, 91-95 (2021).

⁵⁸ For excellent commentary, see Margaret M. deGuzman, “Article 21”, in O. TRIFFTERER AND K. AMBOS, EDS., *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (3rd ed., Munich and Oxford, C. H. Beck, Hart, Nomos, 2016) 932–948.

⁵⁹ Concerns about fragmentation and regime conflicts have also led to debates about the unity, coherence and legitimacy of international law. See, in this regard, [2006] 2 Y.B. Int’l L. Comm’n 1, at 177-84, U.N. Doc. A/CN.4/SER.A/2006/Add.1; Rep.

28. Against this wider backdrop, it should be possible to determine a methodology that can assist in ascertaining the value and weight to be given to judicial decisions as subsidiary means for determination of the applicable rules of international law. This could enable the Commission to set out a consistent approach that could be useful to States, international organizations, courts and tribunals, as well as legal scholars and practitioners of international law.

V. The teachings of the most highly qualified publicists

29. The second prong of Article 38, paragraph 1(d), of the ICJ Statute affirms that “the teachings of the most highly qualified publicists of the various nations” are also “subsidiary means for the determination of rules of law.” True, as a historical matter, the work of the most well-known scholars was of greater importance in the clarification of the applicable rules of international law.⁶⁰ This stature appears to have somewhat diminished, no doubt in part, because States have increasingly regulated matters using international conventions, and where such may not exist or prove to be insufficient, may themselves resort to customary international law and general principles of law although the process of determining the existence and content of the applicable rules from those sources also usually benefit from consulting scholarly works. Courts and tribunals, independently of “the teachings” of “the most highly qualified publicists,” can also access with electronic means the extensive body of State practice through digests and other credible sources compiling such information. This appears to thereby limit the need for reliance on the work of “publicists.”

30. Different courts and legal systems at the national and international levels take different approaches to the teachings of publicists or doctrine in the context of determination of rules of law whether national or international in nature. Whereas the teachings of publicists are only somewhat present in the judgements of the ICJ, with a relatively small number of main judgments referring to them, scholarly works are quite prominent in the separate opinions of individual judges as well as in the rulings and judgments of numerous other international courts and tribunals. They are also common in decisions of regional and other international tribunals. These include, out of many possible examples, the African Court of Human and Peoples’ Rights, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights as well as the International Criminal Tribunals including the International Criminal Court as well as others such as the World Trade Organization. Some courts and tribunals at the municipal and international levels even frequently receive, or invite, the views of scholars acting as *amicus curiae* on specific legal issues.

31. If the works of individual scholars or publicists carry some weight, at least as an aid to interpretation, it appears that those originating from groups of scholars and certain expert bodies could be seen as even more authoritative. A threshold question would be whether the collective works of experts can be seen as forming part of the teachings of publicists. Furthermore, and if so, a distinction might also need to be drawn between the outcomes of the work of purely *private* expert bodies and those expert bodies created by States or international organizations. The pronouncements of groups of international lawyers, engaged in scientifically assessing the status of the law such as codification or progressive development, could certainly prove useful and influential. They could thus fall within the category of “teachings.” Examples of such expert groups would include both ad hoc and permanent groups such as the Harvard Research in International Law (1929-1932), the *Institut de Droit International* and the International Law Association. All these private bodies, at different times in history, have made useful contributions to the clarification and advancement of certain areas of international law.

32. State created bodies, for example those established by and tasked with specific roles under a treaty such as the Human Rights Committee, the Committee against Torture and the International Committee of the Red Cross may carry, depending on the issue, some authority in the determinations of the applicable rules of international law. At least in so far as it concerns interpretations of legal areas within their areas of competence. Similarly, the

of the Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, U.N. Doc. A/CN.4.L.682 at 13-14 ¶ 13 (Apr. 13, 2006).

⁶⁰ See Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 INT’L & COMP. L. Q. 1 (2017); See also Sondre T. Helmersen, *Scholarly Judicial Dialogue in International Law*, 16 L. & PRACT. OF INT’L CTS. & TRIB. 464 (2017).

works of legal or regional codification bodies such as that of the Asian-African Legal Consultative Organization, the African Union Commission on International Law, the Council of Europe Committee of Legal Advisers of Public International Law, the Inter-American Juridical Committee, being linked to States or State created organizations, albeit at the regional level, may also hold a similar place. The Commission's prior work has acknowledged this in the context of, for example, the draft conclusions addressing the pronouncement of expert bodies in the topic subsequent agreements and subsequent practice in relation to the interpretation of treaties.⁶¹ A further examination in relation to Article 38(1) would therefore seem to be warranted.

33. In a similar vein, consideration *could* be given to the work of the Commission in the discharge of its unique General Assembly mandate to assist States with the promotion of the progressive development of international law and its codification under Article 13 of the Charter of the United Nations. Indeed, the Commission and its special rapporteurs and members, not only refer extensively to judicial decisions, they also routinely refer to the "teachings" of scholars. This includes in their reports and commentaries to adopted articles, principles and guidelines, as well as during plenary debates and drafting committees. The Commission, under its Statute, may even enjoy closer relations with such authorities as it can also formally consult with "scientific institutions and individual experts" (Article 16). It is furthermore expressly required to present its draft articles to the General Assembly accompanied by "adequate presentations of precedents, and other relevant data, including treaties, *judicial decisions* and *doctrine*." (Article 20(a)).

34. With regard to codification, as it evaluates State practice, the Commission could request from governments "laws, decrees, *judicial decisions*..." (Article 19(2)). Similarly, in identifying the ways and means of making the evidence of customary international law more readily available, the Commission is to have due regard to collections and publications of "documents concerning State practice and the *decisions of national and international courts* on questions of international law" (Article 24). These statutory provisions appear to demonstrate the relevance of those decisions, not just for judicial bodies, but also for international legal expert bodies that assist with the codification and progressive development of international law. That said, the Commission has, quite understandably, refrained from claiming a special status or authority for its own work even though some courts and some academics tend to ascribe a measure of authority to it.

35. In the end, though pervasive in national and international courts and the work of experts and the Commission at least as aids to interpretation of the law, the works of individual legal experts, groups of legal experts and other learned bodies has attracted more limited attention as subsidiary means for the determination of rules of international law. Nonetheless, as stated by the United States Supreme Court in the *Paquete Habana* Case, "such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."⁶² The quality, objectivity and thoroughness of the work is therefore vital to its authoritativeness. Questions of how to assess the influence of scholars and their works through empirical and or other approaches could be of interest.

36. Interestingly, since the *Paquete Habana* decision in 1900, there does not appear to have been many attempts to systematize the category of "judicial decisions" and the "teachings of the most highly qualified publicists." Ultimately, perhaps due to the nature of the topic, it remains inconsistent how judicial decisions and the teachings of the most highly qualified publicists of the various nations are methodologically assessed and weight assigned to them in the determination of the applicable rules of law. Questions may also exist, in a multicultural and

⁶¹ Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 113 ¶ 18 (2018) ("An agreement of all the parties to a treaty, or even only a large part of them, regarding the interpretation that is articulated in a pronouncement is often only conceivable if the absence of objections could be taken as agreement by State parties that have remained silent. Draft conclusion 10, paragraph 2, provides, as a general rule: 'Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.' Paragraph 3, second sentence, does not purport to recognize an exception to this general rule, but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies."); See also Georg Nolte (Special Rapporteur for subsequent practice in relation to treaty interpretation), *Fourth report on subsequent agreements and subsequent practice in relation to treaty interpretation*, U.N. Doc. A/CN.4/694 (Mar. 7, 2016).

⁶² *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290 (1900), 686-700.

pluralistic world, how the language of international law is used to ensure the construction of understandings of international law by publicists can be truly representative of a universal system of international law.

VI. Scope of the topic and potential issues to be addressed

37. Taking the foregoing into account, it is proposed that the Commission study could cover some underlying issues regarding Article 38(1)(d), to determine how “subsidiary means” have been used by States, by international courts and tribunals, and by international organizations as well as by private and governmental expert bodies and scholars in the process of determining the applicable rules of (international) law.

38. Without excluding other questions, or aspects which may arise in the course of the topic, it can be suggested that the Commission could in the main analyze the following topics:

- (i) Description of the topic, aims, methodology.
- (ii) The nature and scope of subsidiary means for determination of rules of law:
 - a) The origins of subsidiary means, including drafting history during the establishment of the Permanent Court of International Justice, and the functional role played in different areas of international law such as international human rights law, international criminal law, international economic law, etc.;
 - b) Scope and terminology regarding “subsidiary means”, including the meaning of “subsidiary”, “means”, “judicial” “decisions”, “determination”, “rules of law”, “teachings”, “most highly qualified”, “publicists”, and “various nations”;
 - c) The status and use of subsidiary means by States, in particular in international adjudication, as well as eventually in judicial decisions and in the writings of publicists, as evidence of international law;
 - d) The functions and relationship between the subsidiary means for the determination of rules of law, including in national and international courts and differences in that regard, if any, between various legal systems;
- (iii) The relationship of subsidiary means with the sources of international law: i.e. treaties, custom and general principles of law;
- (iv) The various methods of ascertaining the weight and value assigned to judicial decisions and the weight of teachings of the publicists of the various nations as subsidiary means for determining the rules of law and the difference between the weight assigned to the works of individual scholars versus groups of scholars and official or other expert bodies including as between various legal systems;
- (v) Bibliography containing multilingual list of works on subsidiary means under Article 38(1)(d) collected in the course of the study and invited from States;
- (vi) Potential outcomes of the study (conclusions); and
- (vii) Any other/miscellaneous issues.

VII. Proposed method of work on the topic

39. The method of work on the topic will rely on both primary and secondary materials and literature on the topic. Primarily, the work will be guided by the extensive State practice, treaties, other international instruments, judicial decisions from relevant national, regional and international courts as well as national laws, decrees and other documents. Scholarly works, including those of individual experts and those of expert bodies and relevant international organizations will also be taken into account. This is particularly so given the nature of the present topic and the letter and spirit of Article 38(1)(d).

VIII. Conclusion

40. Overall, it appears that judicial decisions and the teachings of the most highly qualified publicists are a form of evidence of international law and are routinely referred to by international and national courts and tribunals. By their express terms, they are only “subsidiary means” for the “determination” of the rules

of law. Nonetheless, in the face of confusion and divergent judicial approaches in national and international courts and tribunals, there appears to be room for greater clarity regarding which judicial decisions and teachings are included and their potential legal and other effects in the system of modern international law. Against that backdrop, a comprehensive study of Article 38(1)(d) could help complement the Commission's primary work on the identification of rules of international law and recent topics it has undertaken in this significant area of general international law. In so doing, the Commission could significantly contribute to the codification and progressive development of international law in relation to the classical topic of sources of international law.

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