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United Nations

Report of the International Law Commission

Seventy-seventh session
(27 April–5 June and 29 June–30 July 2026)

General Assembly
Official Records
Eighty-first Session
Supplement No. 10

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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 2026*.

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Summary of contents

Chapter		*Page*
I.	Introduction	1
II.	Summary of the work of the Commission at its seventy-seventh session	
III.	Specific issues on which comments would be of particular interest to the Commission	
IV.	Immunity of State officials from foreign criminal jurisdiction	
V.	General principles of law	
VI.	Subsidiary means for the determination of rules of international law	
VII.	Settlement of disputes to which international organizations are parties	
VIII.	Succession of States in respect of State responsibility	
IX.	Non-legally binding international agreements	
X.	Prevention and repression of piracy and armed robbery at sea	
XI.	Due diligence in international law	
XII.	Compensation for the damage caused by internationally wrongful acts	
XIII.	Other decisions and conclusions of the Commission	
Annexes		
I.	The right to regulate in international investment law	
II.	Extraterritorial jurisdiction	

Contents

Chapter *Page*

I. Introduction
A. Membership
B. Casual vacancy
C. Officers and the Enlarged Bureau
D. Drafting Committee
E. Working Groups
F. Secretariat
G. Agenda
II. Summary of the work of the Commission at its seventy-seventh session
III. Specific issues on which comments would be of particular interest to the Commission
A. Non-legally binding international agreements
B. Prevention and repression of piracy and armed robbery at sea
C. Due diligence in international law
D. Compensation for the damage caused by internationally wrongful acts
IV. Immunity of State officials from foreign criminal jurisdiction
A. Introduction
B. Consideration of the topic at the present session
C. Recommendation of the Commission
D. Tribute to the Special Rapporteur
E. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction
1. Text of the draft articles
2. Text of the draft articles and commentaries thereto
General commentary
Part One
Introduction
Commentary
Article 1 Scope of the present draft articles
Commentary
Article 2 Definitions
Commentary
Part Two
Immunity *ratione personae*
Commentary
Article 3 Persons enjoying immunity *ratione personae*
Commentary
Article 4 Scope of immunity *ratione personae*
Commentary

Part Three

Immunity *ratione materiae*

Commentary .....

Article 5 Scope of immunity *ratione materiae* .....

Commentary .....

Article 6 Crimes under international law in respect of which immunity *ratione materiae* shall not apply .....

Commentary .....

Part Four

Procedural provisions and safeguards

Commentary .....

Article 7 Application of the present Part .....

Commentary .....

Article 8 Examination of immunity by the forum State .....

Commentary .....

Article 9 Notification to the State of the official .....

Commentary .....

Article 10 Invocation of immunity .....

Commentary .....

Article 11 Waiver of immunity .....

Commentary .....

Article 12 Requests for information .....

Commentary .....

Article 13 Determination of immunity .....

Commentary .....

Article 14 Transfer of the criminal proceedings .....

Commentary .....

Article 15 Fair treatment of the State official .....

Commentary .....

Article 16 Consultations .....

Commentary .....

Article 17 Settlement of disputes .....

Commentary .....

V. General principles of law .....

A. Introduction .....

B. Consideration of the topic at the present session .....

C. Recommendation of the Commission .....

D. Tribute to the Special Rapporteur .....

E. Text of the draft conclusions on general principles of law .....

1. Text of the draft conclusions .....

2. Text of the draft conclusions and commentaries thereto .....

Conclusion 1 Scope.....

Commentary.....

Conclusion 2 Recognition .....

Commentary.....

Conclusion 3 Categories of general principles of law .....

Commentary.....

Conclusion 4 Identification of general principles of law derived from national legal systems .....

Commentary.....

Conclusion 5 Determination of the existence of a principle common to the various legal systems of the world .....

Commentary.....

Conclusion 6 Transposition to the international legal system.....

Commentary.....

Conclusion 7 Identification of general principles of law formed within the international legal system .....

Commentary.....

Conclusion 8 Decisions of courts and tribunals.....

Commentary.....

Conclusion 9 Teachings .....

Commentary.....

Conclusion 10 Functions of general principles of law .....

Commentary.....

Conclusion 11 Relationship between general principles of law and treaties and customary international law .....

Commentary.....

Conclusion 12 General principles of law with a limited scope of application .....

Commentary.....

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

A. Introduction.....

B. Consideration of the topic at the present session .....

C. Text of the draft conclusions on subsidiary means for the determination of rules of international law adopted by the Commission on first reading .....

1. Text of the draft conclusions .....

2. Text of the draft conclusions and commentaries thereto adopted by the Commission on first reading.....

General commentary.....

Part One

Introduction

Commentary.....

Conclusion 1 Scope.....

Commentary .....

Part Two

General provisions

Commentary .....

Conclusion 2 Categories of subsidiary means for the determination of rules of international law .....

Commentary .....

Conclusion 3 Nature and function of subsidiary means .....

Commentary .....

Conclusion 4 General criteria for the assessment of subsidiary means for the determination of rules of international law .....

Commentary .....

Part Three

Decisions of courts and tribunals

Commentary .....

Conclusion 5 Decisions of courts and tribunals .....

Commentary .....

Conclusion 6 Absence of legally binding precedent in international law .....

Commentary .....

Conclusion 7 Weight of decisions of courts and tribunals .....

Commentary .....

Part Four

Teachings

Commentary .....

Conclusion 8 Teachings .....

Commentary .....

Conclusion 9 Weight of teachings .....

Commentary .....

Part Five

Other means generally used to assist in determining rules of international law

Commentary .....

Conclusion 10 Expert bodies .....

Commentary .....

Conclusion 11 Weight of the works of expert bodies .....

Commentary .....

Conclusion 12 Resolutions and other texts produced by international organizations or at intergovernmental conferences .....

Commentary .....

Conclusion 13 Weight of resolutions and other texts produced by international organizations or at intergovernmental conferences .....

Commentary .....

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

A. Introduction .....

B. Consideration of the topic at the present session .....

C. Text of the draft guidelines on settlement of disputes to which international organizations are parties adopted by the Commission on first reading .....

1. Text of the draft guidelines .....

2. Text of the draft guidelines and commentaries thereto .....

Part One

Introduction

Guideline 1 Scope .....

Commentary .....

Guideline 2 Use of terms .....

Commentary .....

Part Two

Disputes between international organizations as well as disputes between international organizations and States

Guideline 3 Scope of the present Part .....

Commentary .....

Guideline 4 Resort to means of dispute settlement .....

Commentary .....

Guideline 5 Accessibility of means of dispute settlement .....

Commentary .....

Guideline 6 Requirements for arbitration and judicial settlement .....

Commentary .....

Part Three

Disputes between international organizations and private parties

Guideline 7 Scope of the present Part .....

Commentary .....

Guideline 8 Resort to means of dispute settlement .....

Commentary .....

Guideline 9 Immunity of international organizations .....

Commentary .....

Guideline 10 Immunity and dispute settlement .....

Commentary .....

Guideline 11 Access to justice .....

Commentary .....

Guideline 12 Requirements for means of dispute settlement of an adjudicatory character .....

Commentary .....

VIII. Succession of States in respect of State responsibility .....

A. Introduction .....

B. Consideration of the topic at the present session .....
C. Report of the Working Group .....
1. Introduction, methodology and scope of the report .....
2. Summary of the debates on the topic .....
3. Major difficulties faced during the consideration of the topic .....
IX. Non-legally binding international agreements .....
A. Introduction .....
B. Consideration of the topic at the present session .....
C. Text of the draft conclusions on non-legally binding international agreements provisionally adopted thus far by the Commission .....
1. Text of the draft conclusions .....
2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-seventh session .....
Part One
Introduction
Commentary .....
Conclusion 1 Scope and purpose .....
Commentary .....
Conclusion 2 Rules or procedures followed by States and international organizations .....
Commentary .....
Conclusion 3 Use of terms .....
Commentary .....
Part Two
…
Commentary .....
Conclusion 4 Assessment of whether an international agreement is legally binding or not .....
Commentary .....
Conclusion 5 Express indication of intention .....
Commentary .....
X. Prevention and repression of piracy and armed robbery at sea .....
A. Introduction .....
B. Consideration of the topic at the present session .....
1. Introduction by the Special Rapporteur of the first report .....
2. Summary of the debate .....
3. Concluding remarks by the Special Rapporteur .....
XI. Due diligence in international law .....
A. Introduction .....
B. Consideration of the topic at the present session .....
1. Introduction by the Special Rapporteur of the first report .....

2. Summary of the debate .....
3. Concluding remarks by the Special Rapporteur.....
XII. Compensation for the damage caused by internationally wrongful acts.....
A. Introduction.....
B. Consideration of the topic at the present session .....
1. Introduction by the Special Rapporteur of the first report.....
2. Summary of the debate .....
3. Concluding remarks by the Special Rapporteur.....
XIII. Other decisions and conclusions of the Commission .....
A. Memorial for former members .....
B. Inclusion of a new topic in the programme of work .....
C. Request by the Commission for the Secretariat to prepare a memorandum .....
D. Programme, procedures and working methods of the Commission and its documentation.....
1. Working Group on the long-term programme of work .....
2. Working Group on methods of work and procedures .....
3. Consideration of General Assembly resolution 80/167 of 15 December 2025 on the rule of law at the national and international levels .....
4. Honoraria .....
5. Documentation and publications.....
6. *Yearbook of the International Law Commission*.....
7. Trust fund on assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto, established by General Assembly resolution 77/103 .....
8. Assistance of the Codification Division .....
9. Websites.....
10. Webcast.....
11. United Nations Audiovisual Library of International Law.....
12. Resolutions of the General Assembly on the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity and on the Protection of Persons in the Event of Disasters .....
13. Visit of the Secretary-General .....
14. Date and place of the seventy-eighth session of the Commission.....
E. Cooperation with other bodies.....
F. Representation at the eighty-first session of the General Assembly .....
G. International Law Seminar .....
Annexes
I. The right to regulate in international investment law.....
II. Extraterritorial jurisdiction .....

Chapter I
Introduction

1. The International Law Commission held the first part of its seventy-seventh session from 27 April to 5 June 2026 and the second part from 29 June to 30 July 2026 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Mārtiņš Paparinskis, Chair of the seventy-sixth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Dapo Akande (United Kingdom of Great Britain and Northern Ireland)

Mr. Carlos J. Argüello Gómez (Nicaragua)

Mr. Masahiko Asada (Japan)

Mr. Yacouba Cissé (Côte d'Ivoire)

Mr. Olufemi Elias (Nigeria)

Mr. Ahmed Amin Fathalla (Egypt)

Mr. Rolf Einar Fife (Norway)

Mr. Mathias Forteau (France)

Mr. George Rodrigo Bandeira Galindo (Brazil)

Ms. Patrícia Galvão Teles (Portugal)

Mr. Claudio Grossman Guiloff (Chile)

Mr. Charles Chernor Jalloh (Sierra Leone)

Mr. Ahmed Laraba (Algeria)

Mr. Keun-Gwan Lee (Republic of Korea)

Mr. Xinmin Ma (China)

Ms. Vilawan Mangklatanakul (Thailand)

Mr. Andreas D. Mavroyiannis (Cyprus)

Mr. Ivon Mingashang (Democratic Republic of the Congo)

Mr. Giuseppe Nesi (Italy)

Mr. Hong Thao Nguyen (Viet Nam)

Ms. Nilüfer Oral (Türkiye)

Ms. Alina Orosan (Romania)

Mr. Hassan Ouazzani Chahdi (Morocco)

Mr. Mario Oyarzábal (Argentina)

Mr. Mārtiņš Paparinskis (Latvia)

Mr. Bimal N. Patel (India)

Mr. August Reinisch (Austria)

Ms. Penelope Ridings (New Zealand)

Mr. Juan José Ruda Santolaria (Peru)

Mr. Alioune Sall (Senegal)

Mr. Louis Savadogo (Burkina Faso)

Mr. Munkh-Orgil Tsend (Mongolia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Evgeny Zagaynov (Russian Federation)

B. Casual vacancy

3. At its 3734th meeting, on 5 May 2026, the Commission elected Mr. Olufemi Elias (Nigeria) to fill the casual vacancy occasioned by the resignation of Ms. Phoebe Okowa, who had been elected to the International Court of Justice.

C. Officers and the Enlarged Bureau

4. At its 3729th meeting, on 27 April 2026, the Commission elected the following officers:

Chair:	Mr. Andreas D. Mavroyiannis (Cyprus)
First Vice-Chair:	Mr. Alioune Sall (Senegal)
Second Vice-Chair:	Ms. Alina Orosan (Romania)
Chair of the Drafting Committee:	Mr. Rolf Einar Fife (Norway)
Rapporteur:	Mr. Claudio Grossman Guiloff (Chile)

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 Rapporteurs[2] and the Chair of the Working Group on the topic "Succession of States in respect of State responsibility".[3]

6. On 29 April 2026, the Planning Group was constituted, composed of the following members: Mr. Alioune Sall (Chair); Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Ivon Mingashang, Mr. Giuseppe Nesi, Ms. Alina Orosan, Mr. Hassan Ouazzani Chahdi, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Ms. Penelope Ridings, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Marcelo Vázquez-Bermúdez, Mr. Evgeny Zagaynov and Mr. Claudio Grossman Guiloff (*ex officio*).

D. Drafting Committee

7. At its 3729th, 3735th, 3742nd and 3748th meetings, on 27 April and 6, 19 and 29 May 2026, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(*a*) *Immunity of State officials from foreign criminal jurisdiction*: Mr. Rolf Einar Fife (Chair), Mr. Claudio Grossman Guiloff (Special Rapporteur), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Giuseppe Nesi, Ms. Alina Orosan, Mr. Mario

[1] Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral, Mr. Mārtiņš Paparinskis and Mr. Marcelo Vázquez-Bermúdez.

[2] Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Mārtiņš Paparinskis, Mr. August Reinisch, Ms. Penelope Ridings, Mr. Louis Savadogo and Mr. Marcelo Vázquez-Bermúdez.

[3] Mr. Bimal N. Patel.

Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria and Mr. Evgeny Zagaynov;

(*b*) *Settlement of disputes to which international organizations are parties*: Mr. Rolf Einar Fife (Chair), Mr. August Reinisch (Special Rapporteur), Mr. Dapo Akande, Mr. Olufemi Elias, Mr. Ahmed Amin Fathalla, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Giuseppe Nesi, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Evgeny Zagaynov and Mr. Claudio Grossman Guiloff (*ex officio*);

(*c*) *Non-legally binding international agreements*: Mr. Rolf Einar Fife (Chair), Mr. Mathias Forteau (Special Rapporteur), Mr. Dapo Akande, Mr. Carlos J. Argüello Gómez, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Ivon Mingashang, Mr. Giuseppe Nesi, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Evgeny Zagaynov and Mr. Claudio Grossman Guiloff (*ex officio*);

(*d*) *Prevention and repression of piracy and armed robbery at sea*: Mr. Rolf Einar Fife (Chair), Mr. Louis Savadogo (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Olufemi Elias, Mr. Ahmed Amin Fathalla, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Ivon Mingashang, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall and Mr. Claudio Grossman Guiloff (*ex officio*).

8. The Drafting Committee held a total of 29 meetings on the four topics indicated above.

E. Working Groups

9. At its 3729th, 3731st, 3743rd and 3749th meetings, on 27 and 29 April, 20 May and 5 June 2026, respectively, the Commission established the following Working Groups of the Whole:

(a) Working Group on "Succession of States in respect of State responsibility" chaired by Mr. Bimal N. Patel;

(b) Working Group on "Subsidiary means for the determination of rules of international law", chaired by Mr. Charles Chernor Jalloh;

(c) Working Group on "Immunity of State officials from foreign criminal jurisdiction", chaired by Mr. Claudio Grossman Guiloff;

(d) Working Group on "General principles of law", chaired by Mr. Marcelo Vázquez-Bermúdez;

(e) Working Group on "Cooperation with regional legal bodies", chaired by the Chair of the Commission at the present session, Mr. Andreas D. Mavroyiannis.

10. On 30 April 2026, the Planning Group established the following Working Groups:

(*a*) *Working Group on the long-term programme of work*: Mr. Marcelo Vázquez-Bermúdez (Chair), Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Olufemi Elias, Mr. Rolf Einar Fife, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Charles Chernor Jalloh, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Ivon Mingashang, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Mr. August Reinisch, Ms. Penelope

Ridings, Mr. Juan José Ruda Santolaria, Mr. Alioune Sall, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Evgeny Zagaynov and Mr. Claudio Grossman Guiloff (*ex officio*);

(*b*) *Working Group on methods of work and procedures of the Commission*: Mr. Charles Chernor Jalloh (Chair), Mr. Carlos J. Argüello Gómez, Mr. Masahiko Asada, Mr. Yacouba Cissé, Mr. Olufemi Elias, Mr. Ahmed Amin Fathalla, Mr. Mathias Forteau, Mr. George Rodrigo Bandeira Galindo, Mr. Keun-Gwan Lee, Mr. Xinmin Ma, Ms. Vilawan Mangklatanakul, Mr. Andreas D. Mavroyiannis, Mr. Giuseppe Nesi, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Ms. Alina Orosan, Mr. Mario Oyarzábal, Mr. Mārtiņš Paparinskis, Mr. Bimal N. Patel, Ms. Penelope Ridings, Mr. Juan José Ruda Santolaria, Mr. Louis Savadogo, Mr. Munkh-Orgil Tsend, Mr. Evgeny Zagaynov and Mr. Claudio Grossman Guiloff (*ex officio*).

F. Secretariat

11. Ms. Elinor Hammarskjöld, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto, 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. Carla Hoe, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Mr. Carlos Ivan Fuentes, Ms. Paola Patarroyo, Mr. Jorge Paoletti and Mr. Douglas Pivnichny, Legal Officers, Mr. Gergő Balázs and Ms. Xiao Mao, Associate Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

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

1. Organization of the work of the session.
2. Filling of a casual vacancy.
3. Immunity of State officials from foreign criminal jurisdiction.
4. Succession of States in respect of State responsibility.
5. General principles of law.
6. Settlement of disputes to which international organizations are parties.
7. Prevention and repression of piracy and armed robbery at sea.
8. Subsidiary means for the determination of rules of international law.
9. Non-legally binding international agreements.
10. Compensation for the damage caused by internationally wrongful acts.
11. Due diligence in international law.
12. Programme, procedures and working methods of the Commission and its documentation.
13. Date and place of the seventy-eighth session.
14. Cooperation with other bodies.
15. Other business.

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

13. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission reverted to the report of the Drafting Committee (A/CN.4/L.1017) on its work at the seventy-sixth session (2025), and provisionally adopted draft article 7 by a vote of 23 votes in favour, 4 votes against and 3 abstentions (see rule 127 (a) of the rules of procedure of the General Assembly (A/520/Rev.21)), as well as draft articles 8 and 9 without a vote. The Commission subsequently received and considered the report of the Drafting Committee (A/CN.4/L.1034) for the present session, following the completion by the Drafting Committee of its consideration of the remaining draft articles referred to it previously by the Commission, as contained in the first and second reports of the Special Rapporteur (A/CN.4/775 and A/CN.4/780). The Commission adopted, on second reading, the entire set of draft articles on immunity of State officials from foreign criminal jurisdiction, comprising 17 draft articles, together with commentaries thereto. The Commission decided, in accordance with article 23 of its statute, to recommend the draft articles on immunity of State officials from foreign criminal jurisdiction to the General Assembly. In particular, the Commission recommended the elaboration, at the appropriate time, of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles (chap. IV).

14. With respect to the topic "**General principles of law**", the Commission adopted, on second reading, the entire set of draft conclusions on general principles of law, comprising 12 draft conclusions, 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 conclusions on general principles of law, annex the draft conclusions to the resolution, and ensure their widest dissemination; (*b*) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify or apply general principles of law; and (*c*) note the bibliography prepared by the Special Rapporteur and presented in his fourth report (A/CN.4/785, Add.1 and Add.2) (chap. V).

15. Regarding the topic "**Subsidiary means for the determination of rules of international law**", the Commission adopted, on first reading, 13 draft conclusions, together with commentaries thereto, on subsidiary means for the determination of rules of international law. In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 December 2027 (chap. VI).

16. With regard to the topic "**Settlement of disputes to which international organizations are parties**", the Commission considered the third report of the Special Rapporteur (A/CN.4/782, Add.1, Add.2 and Add.3), which focused on the discussion of disputes between international organizations and private parties. The third report contained an analysis of the practice of settling such disputes, as well as of policy issues relevant to the work of the Commission on the topic.

17. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, 12 draft guidelines, together with commentaries thereto, on settlement of disputes to which international organizations are parties. In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft guidelines, through the Secretary-General, to Governments and relevant international organizations for comments and observations, with a request

that such comments and observations be submitted to the Secretary-General by 1 December 2027 (chap. VII).

18. Concerning the topic "**Succession of States in respect of State responsibility**", and further to the decision taken at its seventy-fifth session (2024), the Commission re-established the Working Group of the Whole on the topic, chaired by Mr. Bimal N. Patel. The Working Group had before it a revised draft report of the Working Group prepared by the Chair (A/CN.4/L.1004/Rev.1). The Commission adopted the report of the Working Group on the topic and decided not to pursue consideration of the topic further. The report of the Working Group, as amended, is reproduced in the present report (chap. VIII).

19. Concerning the topic "**Non-legally binding international agreements**", the Commission had before it the second and third reports of the Special Rapporteur (A/CN.4/784 and A/CN.4/790). The second report addressed general elements of the topic, the terminology, scope of the project, form of output and analysed the distinction between treaties and non-legally binding international agreements based on jurisprudence, practice and doctrine. Six draft conclusions were proposed in the second report. The third report supplemented the second report and reflected the views of States at the Sixth Committee of the General Assembly at its eightieth session. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 6, as contained in the second report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the plenary debate. The Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.1036) and provisionally adopted draft conclusions 1 to 5 together with commentaries (chap. IX).

20. With respect to the topic "**Prevention and repression of piracy and armed robbery at sea**", the Commission had before it the first report of the Special Rapporteur (A/CN.4/791 and Corr.1). In the first report, the Special Rapporteur reviewed legal instruments on cooperation related to piracy and armed robbery at sea, including regional instruments, analysed the legislation and practice of States on policing measures to combat piracy and armed robbery at sea, as well as the mechanisms for criminal prosecutions of such acts, set forth his proposal for future work on the topic and provided a list of materials consulted in preparing the first report. The Special Rapporteur proposed 18 draft articles in the first report. Following the debate in plenary, the Commission decided to refer draft articles 5 to 14, as contained in the first report, to the Drafting Committee, taking into account the views expressed in the plenary debate and on the basis of the understanding of the Special Rapporteur as to their relationship with the previous provisions referred to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft articles 3 *bis*, 4 *bis*, 5, 5 *bis*, 5 *ter* and 5 *quater* provisionally adopted by the Committee, which was submitted to the Commission for information (chap. X).

21. Concerning the topic "**Due diligence in international law**", the Commission had before it the first report of the Special Rapporteur (A/CN.4/792), which discussed the methodological approach, terminological issues, reviewed the debate on the topic in the Sixth Committee of the General Assembly, and the previous work of the Commission and other international legal bodies relevant to the topic. The report contained an overview of available material on the topic since the late nineteenth century. It also identified issues and questions to be examined by the Commission and discussed the possible form of the final outcome and future work on the topic. The Commission considered the first report of the Special Rapporteur in the plenary (chap. XI).

22. Regarding the topic "**Compensation for the damage caused by internationally wrongful acts**", the Commission had before it the first report of the Special Rapporteur (A/CN.4/793), which reviewed the debate on the topic in the Sixth Committee of the General Assembly and the previous work of the Commission

and other international legal bodies relevant to the topic. The report contained an examination of the scope, content and legal status of article 36 of the articles on responsibility of States for internationally wrongful acts, an analysis of the scope of the topic and of relevant judicial decisions and State practice. It also identified issues and questions to be examined by the Commission and discussed the possible form of the final outcome and future work. The Commission considered the first report of the Special Rapporteur in the plenary (chap. XII).

23. Concerning "**Other decisions and conclusions of the Commission**", the Commission decided to include the topic "Identification and legal consequences of obligations *erga omnes* in international law" in its programme of work and to appoint Mr. Masahiko Asada as Special Rapporteur (chap. XIII, sect. B). The Commission requested the Secretariat to prepare a memorandum on the topic "Compensation for the damage caused by internationally wrongful acts" for the seventy-ninth session of the Commission (chap. XIII, sect. C).

24. 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. Marcelo Vázquez-Bermúdez, and the Working Group on methods of work and procedures, chaired by Mr. Charles Chernor Jalloh (chap. XIII, sect. D). The Commission decided to include in its long-term programme of work the topic "The right to regulate in international investment law". It also approved an updated syllabus on the topic "Extraterritorial jurisdiction", which had been added to the long-term programme of work of the Commission at the fifty-eighth session (2006) (chap. XIII, sect. D, and annex I; and chap. XIII, sect. D, and annex II, respectively).

25. The Commission received Mr. António Guterres, Secretary-General, on 6 July 2026. The Secretary-General delivered remarks to the Commission. Judge Iwasawa Yuji, President of the International Court of Justice, addressed the Commission on 15 May 2026. The Commission decided to establish a working group on cooperation with regional legal bodies, chaired by Mr. Andreas D. Mavroyiannis, and, in that context, resumed its traditional exchanges of information with 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. Members of the Commission also held an informal exchange of views with the International Committee of the Red Cross on 7 July 2026 (chap. XIII, sects. D and E).

26. The Commission decided that its seventy-eighth session would be held in Geneva, from 26 April to 11 June and from 5 to 30 July 2027 (chap. XIII, sect. D).

27. The Commission filled a casual vacancy during the session. Mr. Olufemi Elias was elected on 5 May 2026 to fill the vacancy occasioned by the resignation of Ms. Phoebe Okowa, who had been elected to the International Court of Justice (chap. I, sect. B).

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

A. Non-legally binding international agreements

28. The Commission considers as still relevant the request for information on the topic "Non-legally binding international agreements" contained in chapter III of the report of its seventy-fifth session (2024), and would appreciate receiving information from States as well as from international organizations, or any updates to information already submitted pursuant to that request, by 1 December 2026, including on any practice related to the possible legal implications of non-legally binding international agreements.

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

29. The Commission would appreciate receiving information from States, by 1 December 2026, concerning:

(*a*) legislation and any other relevant practice at the domestic level regarding the use of computer software, platforms or other electronic tools for the commission of acts of piracy and armed robbery at sea; and

(*b*) decisions of national courts, legislation and any other relevant practice at the domestic level regarding the investigation and prosecution of persons accused of committing acts of piracy and armed robbery at sea.

C. Due diligence in international law

30. The Commission would welcome information that States, international organizations and other relevant entities could provide on their practice, as well as other pertinent information concerning due diligence in international law as set out below.

31. At its seventy-eighth session, the Commission will focus on the question of the need for States to exercise due diligence in the performance of certain primary obligations across various fields of international law, while also preparing the groundwork for consideration of a potential general obligation of due diligence. The Commission would therefore appreciate receiving the following information by 1 December 2026:

(*a*) information on the practice of States, international organizations and other relevant entities and other pertinent information concerning whether States have had regard to due diligence in their dealings with other States, or in respect to non-State actors, either in general or in relation to specific obligations;

(*b*) decisions of national courts, legislation and any other relevant practice at the domestic level which identify, either explicitly or implicitly, a standard of due diligence or care to be taken by the relevant State, including in respect of the actions of non-State actors subject to its jurisdiction or control that operate in a transnational context, such as business enterprises and transnational corporations;

(*c*) provisions of regional or international treaties or instruments that either explicitly or implicitly refer to the need for a State or States to exercise diligence or care in their implementation of specified obligations;

(*d*) statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, that refer either explicitly or implicitly to the need for States to exercise due diligence either in general or in the performance of specified obligations; and

(*e*) decisions of national courts, legislation and any other relevant practice at the domestic level that identify criteria, factors or indicia taken into account in assessing whether a State has exercised requisite due diligence, either in its dealings with other States or in respect of the conduct of non-State actors subject to its jurisdiction or control.

D. Compensation for the damage caused by internationally wrongful acts

32. The Commission would appreciate receiving, by 1 December 2026, the following information from States and relevant international bodies: (*a*) examples of practice relating to compensation for the damage caused by internationally wrongful acts; (*b*) any information related to such compensation in adjudicative and other contexts; and (*c*) any information on agreements entered into by States related to such compensation. A questionnaire concerning issues specifically relevant to the topic will be communicated to States.

Chapter IV
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

33. 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.[4] The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, subsequently took note of the decision of the Commission to include the topic in its programme of work.

34. From its sixtieth (2008) to sixty-third (2011) sessions, the Commission considered[5] three reports by the Special Rapporteur,[6] as well as a memorandum by the Secretariat examining the main legal issues that arose in connection with the topic, both from classical and contemporary perspectives, also taking into account developments in the field of international criminal law that might have produced an impact on the immunities of State officials from foreign criminal jurisdiction.[7]

35. At its sixty-fourth session (2012), the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[8] From its sixty-fourth to seventy-second (2021) sessions, the Commission considered[9] eight reports by the Special Rapporteur.[10]

36. At its seventy-third session (2022), the Commission adopted, on first reading, a set of draft articles on immunity of State officials from foreign criminal jurisdiction which comprised 18 draft articles and a draft annex, together with commentaries thereto.[11] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.[12]

[4] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376.

[5] *Ibid.*, *Sixty-third Session, Supplement No. 10* (A/63/10), chap. X; and *ibid.*, *Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. VII. The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions. See *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[6] See A/CN.4/601, A/CN.4/631 and A/CN.4/646.

[7] A/CN.4/596 and Corr.1.

[8] *Official Records of the General Assembly*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[9] See *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), chap. VI; *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. V; *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. IX; *ibid.*, *Seventieth Session, Supplement No. 10* (A/70/10), chap. X; *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), chap. XI; *ibid.*, *Seventy-second Session, Supplement No. 10* (A/72/10), chap. VII; *ibid.*, *Seventy-third session, Supplement No. 10* (A/73/10), chap. XI; *ibid.*, *Seventy-fourth session, Supplement No. 10* (A/74/10), chap. VIII; and *ibid.*, *Seventy-sixth session, Supplement No. 10* (A/76/10), chap. VI..

[10] See A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, A/CN.4/722, A/CN.4/729 and A/CN.4/739.

[11] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 68–69.

[12] *Ibid*., para. 66.

37. At its seventy-fourth session (2023), the Commission appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission.[13]

38. At its seventy-fifth session (2024), the Commission had before it the first report of the new Special Rapporteur,[14] as well as comments and observations received from Governments.[15] Also at its seventy-fifth session, the Commission took note of the report of the Drafting Committee, containing draft articles 1, 3, 4 and 5, provisionally adopted by the Committee on second reading.[16]

39. At its seventy-sixth session (2025), the Commission had before it the second report of the Special Rapporteur,[17] as well as further comments and observations received from Governments.[18] At the same session, the Commission provisionally adopted, on second reading, draft articles 1, 3, 4 and 5,[19] together with commentaries thereto.[20] It also took note of the report of the Drafting Committee, containing draft articles 7, 8 and 9, provisionally adopted by the Committee on second reading.[21] The adoption of draft articles 7, 8 and 9 by the Commission was postponed to the seventy-seventh session (2026) as a consequence of the reduced length of the seventy-sixth session.[22]

B. Consideration of the topic at the present session

40. At its 3729th and 3730th meetings, on 27 and 28 April 2026, the Commission considered the report of the Drafting Committee on its work at the seventy-sixth session (A/CN.4/L.1017). At its 3730th meeting, the Commission provisionally adopted draft article 7 by a vote of 23 votes in favour, 4 votes against and 3 abstentions.[23] At the same meeting, the Commission provisionally adopted draft articles 8 and 9 without a vote. At its 3731st meeting, on 29 April 2026, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, Mr. Claudio Grossman Guiloff, to assist him in the preparation of the draft commentaries to the draft articles.[24]

41. At its 3741st meeting, on 15 May 2026, the Chair of the Drafting Committee introduced the report of the Committee on the topic (A/CN.4/L.1034).[25] At the same meeting, the Commission adopted the entire set of the draft articles on immunity of

[13] *Ibid.*, *Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 250.
[14] A/CN.4/775.
[15] A/CN.4/771, A/CN.4/771/Add.1 and A/CN.4/771/Add.2.
[16] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 145. See also A/CN.4/L.1001.
[17] A/CN.4/780. While the Commission had no new report for consideration at the seventy-seventh session (2026), the Special Rapporteur submitted a bibliography on the topic (A/CN.4/780/Add.1).
[18] A/CN.4/771/Add.3.
[19] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 86.
[20] *Ibid.*, paras. 184–185.
[21] *Ibid.*, para. 87. See also A/CN.4/L.1017.
[22] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 87.
[23] See rule 127 (a) of the rules of procedure of the General Assembly (A/520/Rev.21). For the views of those who spoke before adoption of draft article 7, see A/CN.4/SR.3729 and A/CN.4/SR.3730. For the explanations of vote after the vote, see A/CN.4/SR.3730. For the history of draft article 7, at its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 by a recorded vote, with 21 votes in favour, 8 votes against and 1 abstention. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74–75.
[24] The Working Group held two meetings, on 11 and 18 May 2026.
[25] For the statement of the Chair of the Drafting Committee, see: https://legal.un.org/ilc/documentation/english/statements/2026_dc_chair_statement_iso.pdf.

State officials from foreign criminal jurisdiction on second reading (see sect. E.1 below).[26]

42. At its 3762nd to 3771st meetings, from 14 to 21 July 2026, the Commission adopted the commentaries to the draft articles (see sect. E.2 below).

43. In accordance with its statute, the Commission submits the draft articles to the General Assembly, with the recommendation set out below.

C. Recommendation of the Commission

44. At its 3770th meeting, on 20 July 2026, the Commission decided, in accordance with article 23 of its statute, to recommend the draft articles on immunity of State officials from foreign criminal jurisdiction to the General Assembly. In particular, the Commission recommended the elaboration, at the appropriate time, of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

D. Tribute to the Special Rapporteur

45. At its 3771st meeting, held on 21 July 2026, the Commission, after adopting the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted the following resolution by acclamation:

"*The International Law Commission*,

Having adopted the draft articles on immunity of State officials from foreign criminal jurisdiction,

Expresses to the Special Rapporteur, Mr. Claudio Grossman Guiloff, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on immunity of State officials from foreign criminal jurisdiction."

46. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteurs, Mr. Roman A. Kolodkin and Ms. Concepción Escobar Hernández, to the work on the topic.

E. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction

1. Text of the draft articles

47. The text of the draft articles adopted by the Commission, on second reading, at its seventy-seventh session 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.

[26] At the same meeting, the Commission renumbered the draft articles. The number of the draft articles as adopted on first reading, and their corresponding number adopted on second reading, can be found in document A/CN.4/L.1034.

2. The present draft articles are without prejudice to special rules of international law on immunity from criminal jurisdiction enjoyed in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and armed forces of a State.

3. The present draft articles do not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

Article 2
Definitions

For the purposes of the present draft articles:

(*a*) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

(*b*) "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 period 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 period of office.

3. The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*.

Part Three
Immunity *ratione materiae*

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction 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 period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.

Article 6
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law, as defined according to the applicable rules of international law:

(*a*) crime of genocide;

(*b*) crimes against humanity;

(*c*) war crimes;

(*d*) crime of apartheid;

(*e*) torture;

(*f*) enforced disappearance;

(*g*) crime of aggression;

(*h*) slavery;

(*i*) slave trade.

Part Four
Procedural provisions and safeguards

Article 7
Application of the present Part

1. The procedural provisions and safeguards in the present Part shall apply in any situation that may involve the exercise of criminal jurisdiction by the forum State over an official of another State.

2. The present Part is applicable to the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

Article 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 against an official of another State;

(*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 to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings against an official of another State 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, unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings. In any event, when a State has taken an official of another State into custody, it shall immediately notify the State of the official of the fact that such person is in custody. States shall consider establishing appropriate procedures to facilitate such notifications.

2. A notification under paragraph 1 shall contain appropriate information for the State of the official to consider whether to invoke or waive immunity.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted by the States concerned.

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 should be invoked in writing, indicating 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 by the States concerned.

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 of a State official from foreign criminal jurisdiction may be waived by the State of the official.

2. Waiver of immunity must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted by the States concerned.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned of such waiver.

5. Waiver of immunity is irrevocable.

Article 12
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to determine 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 by the States concerned.

4. The requested State shall consider any request for information in good faith.

Article 13
Determination of immunity

1. A determination of the immunity of a State official from foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination of immunity, such competent authorities shall take into account in particular:

(*a*) whether the forum State has made the notification provided for in draft article 9;

(*b*) whether the State of the official has invoked or waived immunity;

(*c*) any other relevant information provided by the authorities of the State of the official; and

(*d*) any other relevant information provided by other authorities of the forum State.

3. When the forum State is considering the application of draft article 6 in making the determination of immunity:

(*a*) the authorities making the determination shall be at an appropriately high level; and

(*b*) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 6; and

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(*a*) before initiating criminal proceedings against an official of another State;

(*b*) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This subparagraph does not prevent, prior to the determination of immunity, the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination of immunity that may be brought under the applicable law of the forum State.

Article 14
Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.

5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Article 15
Fair treatment of the State official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.

2. Any such official who is in prison, custody or detention in the forum State shall be entitled:

(*a*) to communicate without delay with the nearest appropriate representative of the State of the official;

(*b*) to be visited by a representative of that State; and

(*c*) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

Article 16
Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Article 17
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of peaceful settlement entailing a binding decision.

2. Text of the draft articles and commentaries thereto

48. The text of the draft articles, together with commentaries thereto, adopted by the Commission on second reading at its seventy-seventh session is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

General commentary

(1) The present draft articles address the immunity of State officials from foreign criminal jurisdiction. As is always the case with the Commission's outputs, the draft articles are to be read together with the commentaries.

(2) The International Law Commission has addressed the immunity of State officials before, in the context of diplomatic[27] and consular[28] relations and immunities, special missions,[29] relations between States and international organizations,[30] and immunities of States and their property.[31] In addition, the Commission has considered the question of immunity when examining other topics related to the criminal responsibility of individuals, including in the Nürnberg Principles[32] and the different projects that culminated in the adoption of the draft Code of Crimes against the Peace and Security of Mankind[33] and, more recently, the draft articles on prevention and punishment of crimes against humanity.[34]

(3) The present draft articles take a different approach than the above, by specifically addressing the immunity of State officials from foreign criminal jurisdiction. The present draft articles define the general legal regime applicable to this type of immunity, which is distinguished by the following features: (*a*) it is limited to immunity from criminal jurisdiction; (*b*) it is limited to the criminal jurisdiction of another State and does not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements; and (*c*) it covers all State officials regardless of their position or the specific functions they perform for the State, with the sole exception of situations where State officials are covered by special regimes.

(4) In preparing the present draft articles, the Commission has taken into account the following different elements.

(5) The first of these elements is the need to guarantee respect for the principle of the sovereign equality of States, which is the very foundation of immunity of State officials from foreign criminal jurisdiction. Providing immunity under international law to a State official generally seeks to protect the rights and interests of the State. Indeed, as affirmed by the International Court of Justice, the immunities accorded to State officials are not granted for their personal benefit, but to ensure their ability to

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[27] See draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, *Yearbook of the International Law Commission* (*Yearbook ...*), *1958*, vol. II, document A/3859, p. 89, para. 53. See, in particular, draft articles 29, 30 and 36–38 and the commentaries thereto, *ibid*., pp. 98–99 and 101–103.

[28] See draft articles on consular relations adopted by the Commission at its thirteenth session, *Yearbook ... 1961*, vol. II, document A/4843, p. 92, para. 37. See, in particular, draft articles 41–45, 53, 57 and 61 and the commentaries thereto, *ibid*., pp. 115–119, 122–123, 125 and 126.

[29] See draft articles on special missions adopted by the Commission at its nineteenth session, *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 347, para. 35. See, in particular, draft articles 9, 29, 31, 36–41 and 44 and the commentaries thereto, *ibid.*, pp. 351–352, 361, 362, 363–365 and 366.

[30] See draft articles on the representation of States in their relations with international organizations, *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284, para. 60. See, in particular, draft arts. 22, 28, 30, 31, 36–38, 50, 53, 59, 61, 62, 67–69 and 74 and the commentaries thereto, *ibid.*, pp. 299–300, 302–305, 308–310, 315–316, 317, 319–321, 322–323 and 326.

[31] See articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II, (Part Two), para. 28. See, in particular, arts. 2 and 3 and the commentaries thereto, *ibid*.

[32] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), *Yearbook ... 1950*, vol. II, document A/1316, part three, paras. 97–127. See, in particular, principle III and the commentary thereto, *ibid*.

[33] *Yearbook ... 1996*, vol. II (Part Two), para. 50. See, in particular, draft art. 7 and the commentary thereto, *ibid.*

[34] The text of the draft articles adopted by the Commission at its seventy-first session and the commentaries thereto are reproduced in *Yearbook ... 2019*, vol. II (Part Two), paras. 44–45. See, in particular, draft art. 6, para. 5, and the commentary thereto, *ibid.*

represent their State or to exercise State functions.[35] Moreover, in view of the different positions that different State officials may hold, the draft articles distinguish between two legal regimes, namely immunity *ratione personae* and immunity *ratione materiae*.

(6) Second, under the principle of the sovereign equality of States, the forum State has the right to exercise its own criminal jurisdiction. As the International Court of Justice has pointed out, there is a close relationship between jurisdiction and immunity, since immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* the exercise of criminal jurisdiction.[36]

(7) Third, immunity of State officials applies bearing in mind that international law is a coherent legal system.[37] Therefore, in the elaboration of the present draft articles, consideration must be given to existing rules in different areas of contemporary international law. In particular, account must be taken of the strides made in international criminal law in terms of defining and punishing the most serious crimes under international law, defining the principle of accountability as one of its constituent elements, and consolidating the fight against impunity as a goal of the international community.[38] While the terms "immunity" and "impunity" are neither equivalent nor interchangeable, it is important to avoid that the immunity of State officials from foreign criminal jurisdiction results in impunity for the most serious crimes under international law.[39]

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[35] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at para. 53.

[36] *Ibid.*, para. 46.

[37] See conclusion (1) of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, adopted by the Commission in 2006: "(1) *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time". *Yearbook ... 2006*, vol. II (Part Two), para. 251.

[38] The important role of accountability and fight against impunity have been emphasized by the General Assembly. In the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, States "commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law". See General Assembly resolution 67/1 of 24 September 2012, para. 22. For its part, the Human Rights Council has affirmed the need to "ensure accountability, serve justice [and] provide remedies to victims", in the preamble of its resolution 27/3 of 25 September 2014. The principle of accountability has been also highlighted by the International Court of Justice noting that the oversight system established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is intended "to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party" (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at para. 120). The relation between immunity, on one hand, and accountability and fight against impunity, on the other hand, was pointed out by Judges Higgins, Kooijmans and Buergenthal in their separate opinion in the *Arrest Warrant* case, noting that the increasing recognition that "perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law" (*Arrest Warrant of 11 April 2000* (see footnote 35 above), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 74).

[39] In its judgment on the *Arrest Warrant* case, the International Court of Justice stated that "the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not

(8) Therefore, the Commission has included several provisions in the draft articles that address: the inapplicability of immunity *ratione materiae* of State officials with respect to several crimes under international law; the relationship between the present draft articles and the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements; and the existence or the establishment of mechanisms for enabling the potential prosecution of State officials, either by the courts of their own State or of a third State or, where possible, by an international tribunal.

(9) Finally, the Commission has also borne in mind that, under certain circumstances, the exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive, which in turn will create undesirable tension in the relations between the forum State and the State of the official. Consequently, immunity of State officials from the exercise of foreign criminal jurisdiction may contribute to the stability of international relations.

(10) Thus, the present draft articles include a set of procedural provisions and safeguards aimed at promoting trust, mutual understanding and cooperation between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State.

(11) These elements are present in both the content and the structure of the present draft articles and contribute to the balance of the text as a whole. The draft articles are divided into four parts dealing, respectively, with the scope of application and definitions (Part One), immunity *ratione personae* (Part Two), immunity *ratione materiae* (Part Three) and procedural provisions and safeguards (Part Four).

(12) As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law. Reference is made to this question as appropriate in the commentaries to the draft articles, with a view to providing States with enough information in this regard and ensuring the transparency that must govern the work of the Commission.

Part One
Introduction

Commentary

Part One, entitled "Introduction", contains provisions defining the general framework in which the draft articles apply. Draft article 1 defines the scope of the draft articles, and draft article 2 sets out the definitions of "State official" and "act performed in an official capacity", which, by their very nature, are particularly relevant for the correct understanding of the draft articles as a whole and are used throughout the text.

Article 1
Scope of the present draft articles

mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility". The Court adds that "[a]ccordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances". See *Arrest Warrant of 11 April 2000* (footnote 35 above), paras. 60 and 61.

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 special rules of international law on immunity from criminal jurisdiction enjoyed in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and armed forces of a State.

3. The present draft articles do not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

Commentary

(1) The purpose of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single draft article the dual perspective, positive and negative, that determines the scope. Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a "without prejudice" clause, which excludes from the scope of the draft articles special regimes of international law on immunity of State officials. Paragraph 3 contains a clause referring to international agreements establishing or relating to the operation of international criminal courts and tribunals, which also remain outside the scope of the draft articles. In the past, the Commission has used various techniques for defining this dual perspective of the scope of a set of draft articles,[40] but in this case it was preferable to combine both perspectives in a single draft article, since this presents the advantage of facilitating the simultaneous treatment of both perspectives of scope under a single title.

Paragraph 1

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "[t]he present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[41] The Commission decided that the scope of the draft articles should be defined as simply as possible, so it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions. The Commission used the language "from the criminal jurisdiction of another State" rather than "from

[40] In the articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate articles, and this was ultimately reflected in the Convention adopted in 2004 (United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38, annex, arts. 1 and 3). On the other hand, in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975, United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16), and in the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997, United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens (*Yearbook … 2014*, vol. II (Part Two) and corrigendum, paras. 44–45; see also General Assembly resolution 72/117 of 7 December 2017, para. 2), also dealt with the scope in a single article consisting of two paragraphs, the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[41] This wording has been used, for example, in article 1 of the articles on the expulsion of aliens and in draft article 1 of the draft articles on prevention and punishment of crimes against humanity.

the exercise of the criminal jurisdiction of another State", aligning the provision on the scope of the text with its title, as was done in article 1 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Commission noted that, while the phrase "exercise of" is used in other draft articles, it did not find that the phrase was necessary to define the general scope of the draft articles and decided to reserve it for use in other parts of the draft articles in which it is more suitably placed.[42]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (*a*) who are the persons enjoying immunity? (State officials); (*b*) what type of jurisdiction is affected by immunity? (Criminal jurisdiction); and (*c*) which criminal jurisdiction is affected? (The criminal jurisdiction of another State).

(4) As to the first element, the Commission chose to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by State officials. The term "State officials" has been defined in draft article 2 (*a*), to which text and commentary thereto attention is drawn. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[43] However, the use of this term, and its equivalents in the other language versions, has raised certain problems,[44] and it should be noted that the terms used in the various language versions are neither interchangeable nor synonymous. Nonetheless, with a view to simplifying the text, the Commission has decided to retain the term "State official" to refer in general to all persons who enjoy immunity from foreign criminal jurisdiction contemplated in the present draft articles. The expression "official of another State" used in some draft articles is equivalent to the expression "State official".

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. Following its practice in other projects in which it has dealt with immunity from criminal jurisdiction, the Commission has not considered it necessary to define what immunity and criminal jurisdiction mean. However, for merely descriptive purposes, it should be noted that the present draft articles address cases in which, by virtue of immunity, criminal jurisdiction cannot be exercised, criminal jurisdiction being the power of States to perform acts of varying nature whose ultimate purpose is to ensure accountability of individuals for criminal conduct.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State".

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the word "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, even where it exists, will not be exercised by the forum State over an official of another State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a

[42] See draft articles 3, 5, 6, 7, 8, 10, 13 and 15.

[43] The words used in the various language versions are as follows: المسؤولون (Arabic), 官员 (Chinese), "officials" (English), "*représentants*" (French), *должностные лица* (Russian) and "*funcionarios*" (Spanish).

[44] Preliminary report, *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; and second report, *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[45]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction does not exempt a person from criminal responsibility. It is a procedural bar to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[46] which is followed in the majority of State practice and in the literature.

Paragraph 2

(9) Paragraph 2 refers to cases in which there are special rules of international law on immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law in diplomatic and consular relations.[47] However, there are other examples in contemporary international law, both treaty-based and custom based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. The Commission considers that these special regimes are well established in international law and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[48] The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a "without prejudice" clause in paragraph 2. Accordingly, the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes. The framing of the provision as a "without prejudice" clause with respect to special rules of international law on immunity is intended to make clear that the provision does not affect either the immunity provided for by such rules, where such immunity exists, or any exceptions to it. Whether such immunity is available to a State official will depend on the special rules applicable to the official and the specific circumstances of the situation. The provision was considered broad enough to also preserve the inviolability and privileges enjoyed by certain persons under such special rules. Furthermore, the Commission chose to use the word "enjoyed" in paragraph 2 to maintain consistency with treaties establishing the kind of special rules referenced in the paragraph, for example article 31 of the Vienna Convention on Diplomatic Relations, which concerns the immunity of diplomatic agents from the criminal jurisdiction of the receiving State.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on fragmentation of international law, particularly conclusions 2 and 3.[49] For the purposes of the present draft articles, the Commission understands "special rules"

[45] *Arrest Warrant of 11 April 2000* (footnote 35 above), para. 46. See also the commentary to art. 6 of the articles on jurisdictional immunities of States and their property, particularly paras. (1)–(3), *Yearbook ... 1991*, vol. II (Part Two), para. 28.

[46] *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 60. The Court has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at paras. 58 and 100.

[47] See Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, art. 31; and Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid.*, vol. 596, No. 8638, p. 261, art. 43.

[48] Art. 3 and commentary thereto, *Yearbook ... 1991*, vol. II (Part Two), para. 28.

[49] *Yearbook ... 2006*, vol. II (Part Two), para. 251.

to mean those international rules, whether treaty- or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[50] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[51]

(11) The special regimes included in paragraph 2 relate in particular to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's armed forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[52]

(12) The first area includes special rules on the immunity from foreign criminal jurisdiction of persons carrying out specific functions in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained, in particular, in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions,[53] as well as the relevant rules of customary international law, fall into this category.

(13) The second area includes special rules on the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. This category includes the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[54] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization, especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when the agent is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the Convention on the

[50] In its commentary to article 3 of the articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "[t]he article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (para. (5) of the commentary, *Yearbook ... 1991*, vol. II (Part Two), para. 28). See also para. (1) of the commentary, *ibid.*

[51] The Commission also included a reference to international law in the above-mentioned article 3 of the articles on jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this point in its commentary to the draft article, particularly paragraphs (1) and (3) thereof, *ibid.*

[52] It must be kept in mind that the Commission also did not list such conventions in the articles on jurisdictional immunities of States and their property. However, the commentary to article 3 (para. (2) thereof, *ibid.*) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[53] Convention on Special Missions (New York, 8 December 1969), United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

[54] This list corresponds to the one already formulated by the Commission in article 3, paragraph 1 (*a*), of the articles on jurisdictional immunities of States and their property (*Yearbook ... 1991*, vol. II (Part Two), para. 28).

Privileges and Immunities of the United Nations[55] and the Convention on the Privileges and Immunities of the Specialized Agencies,[56] as well as other treaty-based and customary norms applicable in this area.

(14) The third area of special rules includes those on the immunity from criminal jurisdiction of persons connected to the lawful presence of the armed forces of a State in another State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, such as those included in status-of-forces agreements and those included in headquarters agreements or military cooperation accords. Also included in this category are agreements made in connection with the short-term activities of armed forces in a foreign State.

(15) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these three areas of special rules. The Commission also drew attention to special rules in other areas that may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements or in connection with the stationing of a State's paramilitary or police personnel on the territory of another State on the basis of a specific agreement.

(16) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2 reference to the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion.

(17) The Commission considered that the formulation of paragraph 2 should parallel the structure of paragraph 1. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "State officials" and that, consequently, this personal element should also be reflected in the "without prejudice" clause. The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the armed forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes. The term "persons" is understood to refer to natural persons. Accordingly, the provision concerns only immunities enjoyed by individuals and not by, for example, a diplomatic mission or consular post itself.

(18) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (*inter alios*, diplomatic agents, consular officers, members of special missions, agents of international organizations and members of the armed forces of a State) are excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances, the immunity from foreign criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

[55] 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.

[56] Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), *ibid.*, vol. 33, No. 521, p. 261.

Paragraph 3

(19) Paragraph 3 addresses the relationship between the present draft articles and the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements.

(20) The Commission determined that an express reference to agreements relating to international criminal courts and tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 emphasizes the separation and independence of the present draft articles, which do not affect the rights and obligations of States under agreements establishing or relating to the operation of international criminal courts and tribunals. Through this paragraph, the Commission sought to ensure that the present draft articles do not impair the achievements of such special legal regimes. The paragraph was also considered necessary to preserve existing rights and obligations of States in the event that a treaty is concluded on the basis of the present draft articles, which could otherwise be governed by the *lex posterior derogat legi priori* rule reflected in article 30 of the Vienna Convention on the Law of Treaties.[57]

(21) Paragraph 3 is inspired by article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, under the title "Other international agreements", reads as follows: "[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements". The purpose of this paragraph is to preserve "the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements".

(22) The expression "the rights and obligations of States" refers to any of the rights and obligations under a specific international agreement establishing or relating to the operation of an international criminal court or tribunal. The Commission has preferred this wording over other proposals such as "the question of immunity" regulated in such agreements or "the rules governing the functioning of international criminal tribunals", which were considered, respectively, as being too narrow or too broad in relation to the purpose of paragraph 3 of draft article 1. The phrase "international agreements establishing or relating to the operation of international criminal courts and tribunals" refers to the international rules considered to be special legal regimes for the purpose of paragraph 3 of draft article 1, bearing in mind the objective pursued by that clause. Therefore, this phrase does not mirror the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, because the phrase "which relate to matters dealt with in the present Convention" was not sufficiently clear to reflect the relationship between the present draft articles and the legal regimes applicable to international criminal courts and tribunals. The expression "international agreements" includes the constituent instrument of each international criminal court or tribunal, whether these agreements are concluded between States or between States and international organizations, including the Rome Statute of the International Criminal Court.[58]

(23) The phrase "or relating to the operation of" reflects both the broad scope of the provision and the reality that agreements other than those which establish international criminal courts and tribunals may be relevant. The Commission recognized that, for example, State obligations related to international criminal courts and tribunals can stem from provisions of the Charter of the United Nations, which may be used as a legal basis for their establishment or operation, including Article 25

[57] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[58] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

in connection with relevant Security Council resolutions. For instance, the Security Council has created international tribunals by resolutions adopted under Chapter VII of the Charter of the United Nations, with the corresponding obligations under the Charter.[59] Another case in point is the system of referrals by the Security Council to the International Criminal Court.[60] There may also be relevant agreements relating to the operation of hybrid or internationalized tribunals, which have often been created by provisions of domestic law, including as a result of initiatives originating from universal or regional international organizations.

(24) The Commission considered adding a subparagraph directly addressing international courts and tribunals established by international organizations. However, it decided that, as said courts and tribunals had their ultimate legal basis in a treaty, such a subparagraph was unnecessary.

(25) Paragraph 3 ends with the phrase "as between the parties to those agreements". The intention here is to highlight that conventional legal regimes applicable to international criminal courts and tribunals, as a matter of treaty law, apply only between the parties to the agreement establishing a particular international criminal court or tribunal. The paragraph reflects the well-accepted tenet of the law of treaties, embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties, that a treaty cannot create obligations for a State that has not consented to be bound by it. It does not, however, imply any statement whatsoever in relation to any other obligation that can be imposed upon States under international law, in particular by the Security Council or an international organization.

Article 2
Definitions

For the purposes of the present draft articles:

(*a*) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

(*b*) "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Commentary

(1) Draft article 2 sets out the definitions of the expressions "State official" (subparagraph (*a*)) and "act performed in an official capacity" (subparagraph (*b*)), two categories that are essential for the draft articles as a whole.[61]

(2) Draft article 2 is entitled "Definitions". This title is regarded as being equivalent to "Use of terms", which has been used by the Commission in other draft

[59] See Security Council resolutions 827 (1993), on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and 955 (1994) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal.

[60] See Rome Statute of the International Criminal Court, arts. 13 (b) and 15 *ter*, and Relationship Agreement between the United Nations and the International Criminal Court (New York, 4 October 2004), United Nations, *Treaty Series*, vol. 2283, No. 1272, p. 195, art. 17.

[61] The Commission also considered the definitions of "immunity", "criminal jurisdiction", "exercise of criminal jurisdiction" and "inviolability", which were presented by the Special Rapporteur in her second report (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/661) and in the framework of the Drafting Committee. However, following the practice in its previous work and in the universal conventions regarding immunity, the Commission has not considered it necessary to include these definitions in draft article 2.

articles. The use of a different title does not introduce any different meaning with regard to the nature of this provision.

Subparagraph (a)

(3) The purpose of draft article 2, subparagraph (*a*), is to define the persons to whom the present draft articles apply, namely "State officials". Defining the concept of "State official" facilitates an understanding of one of the normative elements of immunity: the individuals who enjoy immunity.

(4) The definition of the term "State official" contained in draft article 2, subparagraph (*a*), is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2, subparagraph (*a*), must not be confused with the nature and object of draft articles 3 and 5, paragraph 1, which define who enjoys each category of immunity.[62] The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of "State official", which is common to both categories.

(5) There is no general definition in international law of the term "State official" or "official", although both terms may be found in certain treaties and international instruments.[63] The term "State official", or simply "official", can mean different things in different national legal systems. Consequently, the definition of "State official" referred to in this commentary is autonomous and must be understood to be for the purposes of the present draft articles.

(6) The definition of "State official" uses the term "individual" to indicate that the present draft articles cover only natural persons. The draft articles are without prejudice to the rules applicable to legal persons.

(7) As indicated above, the term "State official" must be understood as encompassing persons who enjoy immunity *ratione personae* and those who enjoy immunity *ratione materiae*. In this connection, it must be noted that the Commission identified the persons who enjoy immunity *ratione personae* by listing the individuals cited *eo nomine* in draft article 3, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it has been decided not to mention them expressly in draft article 2, subparagraph (*a*), since they are deemed to be, *per se*, State officials in the sense of the present draft articles; accordingly, they need not be differentiated from other State officials for the purposes of the definition.

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[62] Draft article 3 states that "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction". Draft article 5, paragraph 1, states that "State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity".

[63] These terms are used in the following multilateral treaties: Vienna Convention on Diplomatic Relations; Vienna Convention on Consular Relations; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167; Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), *ibid.*, vol. 78, No. 1021, p. 277; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85; United Nations Convention against Corruption (New York, 31 October 2003), *ibid.*, vol. 2349, No. 42146, p. 41; Criminal Law Convention on Corruption (Council of Europe) (Strasbourg, 27 January 1999), *ibid.*, vol. 2216, No. 39391, p. 225; Inter-American Convention against Corruption (Caracas, 29 March 1996), E/1996/99; and African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), *International Legal Materials*, vol. 43 (2004), p. 5. For an analysis of these instruments for the purposes of defining "State official", see the third report of the Special Rapporteur (A/CN.4/673), paras. 51–93.

(8) As regards the "State officials" to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the positions of the individuals to whom immunity may apply and the variety of national legal systems that determine which persons are their officials, the Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list in a draft article of the positions of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the positions of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed "State officials" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition, which point to a specific link between the State and the official, namely representation of the State or the exercise of State functions.

(9) Nevertheless, by way of example, the following "State officials" have been mentioned in decisions of national and international courts and tribunals regarding immunity from criminal jurisdiction and, to the extent that it may be relevant, from civil jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-President and Minister of Forestry; a Minister of the Interior; an Attorney General and a General Prosecutor; a Head of National Security and a former intelligence service chief; a director of a maritime authority; an Attorney General and officials of a federal State of various ranks (a prosecutor and his legal assistants, a detective in the Attorney General's Office and a lawyer in a State agency); military officials of various ranks, and various members of government security forces and institutions, including a police director; border guards; the deputy director of a prison; and the head of a State's central archives.[64]

[64] See France, *Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe», Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Chamber, judgment of 19 January 2010 (09-84.818) (*Bulletin des Arrêts, Chambre criminelle*, No. 1 (January 2010), p. 41); United Kingdom of Great Britain and Northern Ireland, *Jones v. Saudi Arabia*, House of Lords, 14 June 2006, [2006] UKHL 26 (*International Law Reports*, vol. 129, p. 744); France, *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber, judgment of 23 November 2004 (*Bulletin criminel 2004*, No. 292, p. 1096); Ireland, *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones*, Supreme Court, judgment of 24 April 1997, [1997] 2IR 121; Germany, *Church of Scientology*, Federal Supreme Court of Germany, judgment of 26 September 1978 (*International Law Reports*, vol. 65, p. 193); France, *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber, judgment of 13 June 2013; Switzerland, *A. c. Ministère public de la Confédération*, Federal Criminal Court) (BB.2011.140), judgment of 25 July 2012; United Kingdom, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords, judgment of 24 March 1999 (*International Legal Materials*, vol. 38 (1999), p. 581); United Kingdom, *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice, judgment of 29 July 2011 ([2011] EWHC 2029 (Admin), *International Law Reports*, vol. 147, p. 633); Italy, *Public Prosecutor v. Adler* et al., Tribunal of Milan, Fourth Criminal Division, judgment of 1 February 2010 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1492 (IT 2010)]); United States of America, *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit, judgment of 7 July 1997, 117 F.3d 1206 (*International Law Reports*, vol. 121, p. 591); Germany, *Border Guards Prosecution*, Federal Supreme Court, judgment of 3 November 1992 (case No. 5 StR 370/92, *ibid.*, vol. 100, p. 364); United States, *In re Mr. and Mrs. Doe*, Court of Appeals, Second Circuit, judgment of 19 October 1988 (860 F. 2d 40 (1988), *ibid.*, vol. 121, p. 567); United Kingdom, *R. v. Lambeth Justices ex parte Yusufu*, Divisional Court, judgment of 8 February 1985 (*ibid.*, vol. 88, p. 323);

(10) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in accordance with the present draft articles. This is reflected in paragraph 3 of draft article 4, according to which "[t]he cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*", as well as in paragraph 3 of draft article 5, which provides "[i]ndividuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office". The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules applicable to each category of immunity contained in the present draft articles.[65]

Canada, *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi*, Superior Court, Commercial Division, judgment of 25 January 2011; United States, *Ali Saadallah Belhas* et al. *v. Moshe Ya'alon*, Court of Appeals for the District of Columbia Circuit, judgment of 15 February 2008, 515 F.3d 1279 (*International Legal Materials*, vol. 47 (2008), p. 144); United States, *Ra'Ed Mohamad Ibrahim Matar,* et al. *v. Avraham Dichter*, District Court, Southern District of New York, judgment of 2 May 2007, 500 F. Supp. 2d 284; Canada, *Jaffe v. Miller and Others*, Ontario Court of Appeal, judgment of 17 June 1993 (*International Law Reports*, vol. 95, p. 446); and Germany, case No. 3 StR 564/19, Federal Court of Justice of Germany, Judgment of 28 January 2021. With respect to international courts and tribunals, see International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177; European Court of Human Rights, *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, *Reports of Judgments and Decisions* 2014; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-AR 108 *bis*, Judgment on the request of the Republic of Croatia for review of the decision of the trial chamber II of 18 July 1997, 29 October 1997, Appeals Chamber, *Judicial Reports 1997*, vol. 1, p. 1099; and Permanent Court of Arbitration, *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea (the Italian Republic v. the Republic of India) concerning the "Enrica Lexie" incident*, case No. 2015-28, award of 21 May 2020, paras. 839 and 841 (available at https://pca-cpa.org/, under "Cases"). See also the declaration of Judge Kittichaisaree in relation to case No. 26 of the International Tribunal for the Law of the Sea, *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, provisional measures, order of 25 May 2019, *Reports of Judgments, Advisory Opinions and Orders*, vol. 18 (2018–2019), p. 283. The Tribunal's case law is available on its website (www.itlos.org).

[65] In this connection, it must be recalled that paragraph (15) of the commentary to draft article 4 below says: "The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules concerning immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles".

(11) The Commission notes that the definition of "State official" refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what acts may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (*a*), through the reference to the fact that the individual in question "represents the State or … exercises State functions". This is a clear and simple statement regarding the criteria for identifying what constitutes an official, and reiterating the proposition that the Commission accepted in relation to the scope under draft article 1, namely that the present draft articles relate to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State.[66] Lastly, attention must be drawn to the fact that a State official may fulfil both the requirements of "representing the State" and of "exercising State functions".

(12) The words "who represents the State" must be understood in a broad sense, as including any "State official" who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because, as the commentary to draft article 3 states, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[67] However, the reference to representation of the State may also be applicable to State officials other than the so-called "troika", in conformity with the rules or acts of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain persons, such as those Heads of State who typically do not perform State functions in a narrow sense, but who most certainly represent the State.

(13) The phrase "exercises State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State. A "State official" is an individual who is in a position to perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, allowing for sufficient account to be taken of the fact that immunity is granted to the individual for the ultimate benefit of the State. Although various expressions, such as "elements of the governmental authority", "public functions", "sovereign authority", "governmental authority" or "inherent functions of the State" were suggested to reflect this idea, the Commission chose the expression "State functions" as being most suitable. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter's duties; and second, the use of the term "functions" rather than "acts performed in the name of the State" avoids potential confusion between the personal (the official) and substantive (the act) elements of immunity. In any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what is understood by "State functions" depends to a large extent on the laws and organizational structure of the State.

(14) It is to be noted that the use of the verbs "represents" and "exercises" in the present tense must not be interpreted as making any statement about the temporal scope of immunity. This verb tense is used in order to identify in general terms the link between the State and the official and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope

[66] See para. (4) of the commentary to draft art. 1 above.
[67] See para. (2) of the commentary to draft art. 3 below.

of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(15) For the purposes of defining "State official", what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the Commission is of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials. The term "*de facto* official" is used to refer to many possible cases, and whether or not an individual may be considered a State official for the purposes of the present draft articles will depend on each specific case. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with a definition of "act performed in an official capacity".

(16) Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual within his or her State is irrelevant for the sole purposes of the definition. Although, in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of "State official".

(17) It should also be noted that in some cases a "State official" may be the national of a State and serve as a State official for a different State. In such cases, it is the State that the official is serving that benefits from any existing immunity, rather than the State of nationality of the official. Accordingly, the Commission notes that the term "State of the official" has been used in the draft articles to refer to the State that the official represents and/or on behalf of which he or she exercises functions, which may or may not correspond to his or her State of nationality.

(18) Lastly, it must be borne in mind that the definition of "State official" has no bearing on the type of acts covered by immunity. Consequently, the words "represent" and "exercise State functions" may not be interpreted as defining in any way the substantive scope of immunity.

(19) As to the question of terminology, to refer to persons who enjoy immunity, the Commission has decided to use the terms "مسؤول الدولة" in Arabic, "国家官员" in Chinese, "State official" in English, "*représentant de l'Etat*" in French, "должностное лицо государства" in Russian and "*funcionario del Estado*" in Spanish. Although the Commission is aware that the terms chosen for each official language do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term "State official" in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft articles, which bears no relation to the meaning that each term may have in domestic legal systems.

(20) As indicated in the final sentence of subparagraph (*a*), the term "State official" refers to both current and former State officials. This draws attention to the fact that immunity may apply to an individual who is a State official at the time when the question of immunity arises, and also to an individual who was a State official but no longer holds this position at the time when the question of immunity arises. However, it should be noted that this phrase is merely intended to explicitly mention the temporal situation in which the State official (current or former) may be in relation to the State, and that this does not preclude the possibility that a person may benefit from immunity even if he or she has ceased to be a State official. On the contrary, the inclusion of the reference to "current" and "former" State officials does not alter the temporal scope of immunity from criminal jurisdiction, which must be determined in

accordance with the provisions of paragraph 1 of draft article 4, with regard to immunity *ratione personae*, and paragraphs 2 and 3 of draft article 5 and paragraph 3 of draft article 4, with regard to immunity *ratione materiae*. Therefore, although the term "State official" includes "both current and former State officials" for the purpose of its definition, it should be noted that "former State officials" can only benefit from immunity from foreign criminal jurisdiction *ratione materiae*.

Subparagraph (b)

(21) Draft article 2, subparagraph (*b*), defines the concept of "act performed in an official capacity" for the purposes of the present draft articles. The Commission considered it useful to include this definition in the draft articles given the centrality of the concept of an "act performed in an official capacity" in the regime of immunity *ratione materiae*.

(22) The Commission has included in the definition contained in subparagraph (*b*) the elements that make it possible to identify a particular act as being an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. The Commission understands the term "acts" to refer both to actions and to omissions. Although the terminology to be employed has been the subject of debate, the Commission has chosen to use the term "acts" in line with the English text of the articles on responsibility of States for internationally wrongful acts, article 1 of which uses the term "acts" on the understanding that an act "may consist in one or more actions or omissions or a combination of both".[68] In addition, the term "act" is commonly used in international criminal law to define conduct (active and passive) that gives rise to criminal responsibility. In the Rome Statute of the International Criminal Court, the term "acts" is used in a general sense in articles 6, 7, 8, and 8 *bis*, without having elicited questions about whether both actions and omissions are included under that term, since this depends solely on each specific criminal offence. The statutes of the International Criminal Tribunal for the Former Yugoslavia[69] and the International Criminal Tribunal for Rwanda[70] also use the term "act" to refer to conduct, both active and passive, constituting an offence falling within the competence of those tribunals. The term "act" has also been used in treaties that define conduct that may give rise to criminal responsibility. This is the case, for example, with the Convention on the Prevention and Punishment of the Crime of Genocide (art. II) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1).

(23) The Commission has used the expression "in the exercise of State authority" to reflect the need for a link between the act and the State. The aim is to highlight that it is not sufficient that an act was performed or its performance omitted by a State official for it to be considered an "act performed in an official capacity". On the contrary, there must also be a direct connection between the act and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of the sovereign equality of States.

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[68] Para. (1) of the commentary to article 1, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001. It should be pointed out that, although the Spanish and French versions use different terms to refer to the same concept (*hecho* and *fait*, respectively), in the part of the Commission's commentary cited above, the three language versions coincide.

[69] Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1), annex.

[70] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994, annex.

(24) In this regard, the Commission believes that, in order for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the "single act, dual responsibility" model (double attribution) that the Commission applied in its 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 4),[71] the articles on responsibility of States for internationally wrongful acts (art. 58)[72] and the articles on the responsibility of international organizations (art. 66).[73] Under this model, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

(25) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission set out those rules in the context and for the purposes of State responsibility. Consequently, their application to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully, including the criteria for attribution set out in articles 8–11 of the articles on responsibility of States for internationally wrongful acts. In particular, the Commission is of the view that, as a rule, acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.[74] This does not mean, however, that an act cannot benefit from immunity *ratione materiae* simply

[71] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[72] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[73] *Yearbook ... 2011*, vol. II (Part Two), para. 87. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

[74] The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." According to that court, "[the Foreign Sovereign Immunities Act] does not immunize the illegal conduct of government officials" and thus, "[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the Act]" (In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, Judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), *International Law Reports* (ILR), vol. 104, p. 119, at pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: if officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity (In re *Jane Doe I,* et al. *v. Liu Qi,* et al.*; Plaintiff A,* et al.*, v. Xia Deren,* et al., United States District Court for the Northern District of California, (2004) 349 F. Supp.2d 1258 C 02-0672 CW (EMC), C 02-0695 CW (EMC)). It is noted that prior to *Samantar v. Yousuf,* 560 U.S. 305 (2010), many United States courts analysed immunity of foreign officials in civil cases by reference to the Foreign Sovereign Immunities Act. In *Samantar* the United States Supreme court held that immunity of foreign State officials was not governed by the Foreign Sovereign Immunities Act but, rather, by common law. However, previous decisions in which United States courts analysed immunity by reference to the Foreign Sovereign Immunities Act continue to offer valuable insight on the scope of such immunity, as the reasoning on which they are based remains cogent.

because it is *ultra vires*.[75] Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[76] even in cases where the act is contrary to international law.[77]

(26) In order for an act to be characterized as having been "performed in an official capacity", there must be a particular link between the act and the State. Such a link has been defined in draft article 2, subparagraph (*b*), using the formulation "State authority", which the Commission considered sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State, and is to be understood as covering the functions set out in subparagraph (*a*), which refers to any individual who "represents the State or who exercises State functions".

(27) This formulation was considered preferable to the one initially proposed ("exercising elements of the governmental authority") and to others that were successively considered by the Commission, in particular "governmental authority" and "sovereign authority". Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission's mandate. In addition, it was considered preferable not to use the expression "State functions", which is used in subparagraph (*a*), in order to make a clear distinction between the definitions contained in subparagraphs (*a*) and (*b*) of the draft article. In this regard, it should be recalled that the expression "State functions", together with "represents the State", was used in subparagraph (*a*) as a neutral term to define the link between the official and the State, without making any judgment as to the type of acts covered by immunity.[78]

(28) Lastly, although the definition contained in subparagraph (*b*) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act; in other words, the State official. It thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State. In addition, the reference to the State official creates a logical continuity with the definition of "State official" in draft article 2 (*a*).

(29) The Commission considers that it is not possible to draw up an exhaustive list of acts performed in an official capacity. Such acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in "the exercise of State authority". However, there are examples from judicial practice of acts or categories of acts that may be considered as having been performed in an official capacity, regardless of how the courts

[75] *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea (the Italian Republic v. the Republic of India) concerning the "Enrica Lexie" incident* (see footnote 64 above), para. 860.

[76] *Jaffe v. Miller and Others* (see footnote 64 above); United States, *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, 488 U.S. 428, *International Law Reports*, vol. 81, p. 658; and Ireland, *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, *ibid.*, vol. 104, p. 691.

[77] United Kingdom, *I Congreso del Partido*, House of Lords, 16 July 1981, [1983] A.C. 244, *International Law Reports*, vol. 64, p. 307. In *Jones v. Saudi Arabia* (see footnote 64 above), Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act.

[78] See para. (13) of the present commentary above. In this context, the Commission has taken the view that State functions include "the legislative, judicial, executive or other functions performed by the State".

specifically refer to them. Such examples can help judges and other national legal practitioners to identify whether a particular act falls into this category.

(30) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,[79] acts related to the exercise of police power,[80] diplomatic activities and those relating to foreign affairs,[81] legislative acts (including nationalization),[82] acts related to the administration of justice,[83] administrative acts of different kinds (such as the expulsion of aliens or the flagging of vessels),[84] acts related to public loans[85] and political acts of various kinds.[86]

(31) Moreover, immunity of State officials has been raised before criminal courts in relation to the following acts that were claimed to be committed in an official capacity: torture, extermination, genocide, extrajudicial execution, enforced disappearance, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[87] Such crimes are sometimes

[79] Germany, *Claims against the Empire of Iran*, Constitutional Court of the Federal Republic of Germany, 30 April 1963, *International Law Reports*, vol. 45, p. 57; United States, *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes*, US 336 F 2d 354 (Second Circuit, 1964), *ibid.*, vol. 35, p. 110; United States, *Saltany and Others v. Reagan and Others*, United States District Court for the District of Columbia, Judgment of 23 December 1988, 702 F. Supp 319, *ibid.*, vol. 80, p. 19; United Kingdom, *Holland v. Lampen-Wolfe*, [2000] 1 WLR 1573; and Italy, *Lozano v. Italy*, case No. 31171/2008, Court of Cassation, Judgment of 24 July 2008 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1085 (IT 2008)]). The Arbitral Tribunal constituted within the Permanent Court of Arbitration to consider the *"Enrica Lexie"* case held that acts performed by Italian naval officers to protect a commercial vessel constituted an act performed in an official capacity. See *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea* (footnote 64 above), paras. 839 and 841.

[80] *Empire of Iran* (see footnote 79 above); *Church of Scientology* (see footnote 64 above); United States, *Saudi Arabia and Others v. Nelson*, United States Supreme Court (1993): 507 U.S. 349, *International Law Reports*, vol. 100, p. 544; United Kingdom, *Propend Finance Pty Ltd. v. Sing*, Court of Appeal, *ibid.*, vol. 111, p. 611; *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones* (see footnote 64 above); and United States, *First Merchants Collection v. Republic of Argentina*, United States District Court for the Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

[81] *Empire of Iran* (see footnote 79 above); and *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 79 above).

[82] *Empire of Iran* (see footnote 79 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 79 above).

[83] *Empire of Iran* (see footnote 79 above); and France, case No. 12-81.676, Court of Cassation, Criminal Chamber, Judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber, Judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a similar ruling in case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

[84] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 79 above); United States, *Kline and Others v. Kaneko and Others*, District Court for the Southern District of New York, 3 May 1988, US, 685 F Supp. 386 (1988), *International Law Reports*, vol. 101, p. 497; and *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X* (see footnote 64 above).

[85] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 79 above).

[86] United States, *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DCC 2005) (establishment of Israeli settlements in the occupied territories); and United States, *Youming Jin* et al. *v. Ministry of State Security* et al., US, 557 F. Supp. 2d 131 (DDC 2008) (contracting of "thugs" to threaten members of a religious group, resulting in murders and excessive violence).

[87] Netherlands, In re *Rauter*, Special Court of Cassation of the Netherlands, Judgment of 12 January 1949, *International Law Reports*, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); Israel, *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), Judgment of 12 December 1961,

mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[88] Courts have considered other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, unlawful detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[89]

(32) In a number of cases, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State. For example, in a case related to the assassination of a political opponent, a court has indicated that "conduct designed to result in the assassination of an individual" is not an act covered by immunity.[90] Similarly, national courts have generally denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[91] and "by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest".[92] Following the same logic, courts have not accepted that acts performed by State officials that are closely

and Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, *ibid.*, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); Italy, *Yaser Arafat (Carnevale re. Valente – Imp. Arafat e Salah)*, Court of Cassation, Judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); Germany, *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, Judgment of 10 June 1997, *ibid.*, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, on diplomatic premises, weapons that were later used to commit terrorist acts); Netherlands, *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, Judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266–282 (torture, crimes against humanity); France, *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001) (English version reproduced in *International Law Reports*, vol. 125, pp. 490 and 508) (ordering a plane to be brought down using explosives, which caused the death of 170 people, considered as terrorism); Senegal, *Hissène Habré*, Court of Appeal of Dakar, Judgment of 4 July 2000, and Court of Cassation, Judgment of 20 March 2001, *International Law Reports*, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); Belgium, *Sharon and Yaron*, Court of Appeal of Brussels, Judgment of 26 June 2002, *ibid.*, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); *A. c. Ministère public de la Confédération* (see footnote 64 above) (torture and other crimes against humanity); and Germany, case No. 3 StR 564/19 (see footnote 64 above) (torture as a war crime).

88 United States, In re *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)*, Court of Appeals, Seventh Circuit, judgment of 8 September 2004 (383 F.3d 620) (unlike the cases cited in footnotes 87 above and 89 below, this was a case before a civil court).

89 *Border Guards Prosecution* (see footnote 64 above) (death of a young German as a result of shots fired by border guards of the German Democratic Republic when he attempted to cross the Berlin Wall); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones* (see footnote 64 above) (irregular circumstances during the detention of the plaintiff by State officials); *Khurts Bat v. Investigating Judge of the German Federal Court* (see footnote 64 above) (kidnapping and unlawful detention).

90 United States, District Court, District of Columbia, *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), p. 673.

91 *Teodoro Nguema Obiang Mangue et autres*, 13 June 2013 (see footnote 64 above).

92 France, *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber, application for annulment, Judgment of 16 April 2015.

linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[93]

Part Two
Immunity *ratione personae*

Commentary

(1) Although immunity of State officials from foreign criminal jurisdiction is a single legal category, differences can be established in accordance with the different types of State officials, especially in light of the different positions that they hold within the State and the different roles that they play. The Commission has taken these circumstances into account in defining two legal regimes, which are addressed in Parts Two and Three of the draft articles under the titles "Immunity *ratione personae*" and "Immunity *ratione materiae*".

(2) Part Two of the draft articles concerns the immunity *ratione personae* of State officials from foreign criminal jurisdiction. This part sets out the normative elements defining the legal regime applicable to this type of immunity, and consists of two draft articles. Draft article 3 addresses the personal element of immunity *ratione personae* (the State officials enjoying immunity), and draft article 4 concerns the substantive element (the acts covered by immunity) and the temporal element (the time during which immunity is applicable). Both draft articles must be read together for a correct understanding of the legal regime applicable to immunity *ratione personae*.

(3) Additionally, paragraph 3 of draft article 4 defines the relationship between the immunity from jurisdiction *ratione personae* and the immunity from jurisdiction *ratione materiae* applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs when they are no longer in office.

Article 3
Persons enjoying immunity *ratione personae*

[93] *United States of America v. Noriega* (see footnote 64 above); United States, *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan,* United States District Court for the District of Columbia, Judgment of 20 September 1996, 94 F. Supp. 312, *International Law Reports*, vol. 113, p. 522; France, *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, *Recueil général des lois et des arrêts 1872*, p. 293; France, *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, Judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; France, *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, Judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716–718; France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, Judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418 (reproduced also in *International Law Reports*, vol. 47, p. 275); United States, In re *Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, United States Court of Appeals, Ninth Circuit, 21 October 1992, 978 F 2d 493 (1992), *International Law Reports*, vol. 103, p. 521; United States, *Jimenez v. Aristeguieta* et al., United States Court of Appeals, Fifth Circuit, 311 F 2d 547 (1962), *ibid.*, vol. 33, p. 353; Switzerland, *Evgeny Adamov v. Office fédéral de la justice,* Federal Tribunal of Switzerland, Judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 339 (CH 2005)]); United States, *Republic of the Philippines v. Marcos and Others*, United States Court of Appeals, Second Circuit, 26 November 1986, 806 F.2d 344, *International Law Reports*, vol. 81, p. 581; United States, *Republic of the Philippines v. Marcos and Others (No. 2)*, United States Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, 862 F.2d 1355, *ibid.*, vol. 81, p. 608; and United Kingdom, *Republic of Haiti and Others v. Duvalier and Others*, [1990] 1 QB 2002, *ibid.*, vol. 107, p. 491.

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope.

(2) The Commission considers that there are two interlinked reasons, one representational and one functional, for according immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[94] Second, they must be able to discharge their functions unhindered.[95] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention should be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

(4) The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[96] and *Certain Questions of Mutual Assistance in Criminal Matters*[97] cases. It must be emphasized that examples of national judicial practice, although limited in number and geographical representativeness, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that

[94] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at para. 46).

[95] See *Arrest Warrant of 11 April 2000* (footnote 35 above), paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

[96] *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 51.

[97] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 64 above), para. 170.

such courts follow in deciding whether other State officials also enjoy immunity from criminal foreign jurisdiction.[98]

(5) The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is enjoyed by persons who actually hold that office. The title given to the Head of State in each State, the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft articles.[99]

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[98] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see Federal Republic of Germany, Re *Honecker*, Federal Supreme Court, Second Criminal Chamber, Judgment of 14 December 1984 (case No. 2 ARs 252/84), reproduced in *International Law Reports*, vol. 80, pp. 365–366; Spain, *Rey de Marruecos*, National High Court, Criminal Chamber decision of 23 December 1998; France, *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000 (footnote 87 above), and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001); Spain, *Fidel Castro*, National High Court, plenary decision of the Criminal Chamber, 13 December 2007 (the Court had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and Spain, *Case against Paul Kagame,* National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008. Also in the context of criminal proceedings, but as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed their period of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See Spain, *Pinochet (solicitud de extradición)*, National High Court, Central Investigation Court No. 5, request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet* (see footnote 64 above); Belgium, *H.S.A.,* et al. *v. S.A.,* et al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation, Judgment of 12 February 2003 (P-02-1139.F), reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596–605); Spain, *Scilingo*, National High Court, Criminal Chamber, Third Section, decision of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe», Association des familles des victimes du Joola et al.* (see footnote 64 above); *Khurts Bat v. Investigating Judge of the German Federal Court* (see footnote 64 above); and *A. c. Ministère public de la Confédération* (see footnote 64 above). It should be emphasized that national courts have never denied that a Head of State has immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see United States, *Rukmini S. Kline* et al. *v. Yasuyuki Kaneko* et al., Supreme Court of the State of New York, judgment of 31 October 1988 (535 N.Y.S.2d 1258) (141 Misc.2d 787); Belgium, *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal, Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in *International Law Reports*, vol. 102, p. 198); United States, *Lafontant v. Aristide*, District Court for the Eastern District of New York, Judgment of 27 January 1994, 844 F. Supp. 128; Austria, *W. v. Prince of Liechtenstein*, Supreme Court, Judgment of 14 February 2001 (7 Ob 316/00x); United States, *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); and United States, *Fotso v. Republic of Cameroon*, District Court of Oregon, order of 22 February 2013 (6:12CV 1415-TC).

[99] In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (para. (2) of the commentary to draft art. 1, *Yearbook ... 1972*, vol. II, document

(6) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their functions of representing the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition that there is no need to produce full powers in the case of the Head of State, Head of Government and Minister for Foreign Affairs for the conclusion of treaties[100] and the equality of the three categories of officials in terms of their international protection[101] and their involvement in the representation of the State.[102] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and, implicitly, the United Nations Convention on Jurisdictional Immunities of States and Their Property.[103]

(7) All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In this connection, it was noted that article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a specific mention of the Head of State while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft articles the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refer to any kind of immunity that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains

A/8710/Rev.1, pp. 312–313), and no reference was accordingly made in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

100 Vienna Convention on the Law of Treaties, art. 7, para. 2 (*a*). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 94 above), p. 27, para. 46).

101 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 1, para. 1 (*a*).

102 In this connection, see the Convention on Special Missions, art. 21, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

103 Article 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (paragraph 1 refers to the Head of State and paragraph 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in article 2, paragraph 1 (*b*) (iv). See paras. (6) and (7) of the commentary to art. 3 of the articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), para. 28.

outside its scope.[104] In addition, far from rejecting the immunities that may be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[105] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(8) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[106] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[107] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. The Commission concluded that the *Arrest Warrant* case reflects customary international law and, accordingly, Ministers for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. In the view of the Commission, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction.

(9) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their period of office.[108]

(10) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3. The Commission considered that the term "enjoy", rather than "shall enjoy", was appropriate in the draft article because enjoyment of such immunity was an entitlement under customary international law and introducing the word "shall" seemed to inadvertently weaken the provision.

(11) The Commission also considered whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. The

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104 The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

105 Para. (7) of the commentary to article 3 (*Yearbook ... 1991*, vol. II (Part Two), para. 28).

106 *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 51.

107 *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 64 above), para. 170.

108 With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel* (see footnote 93 above) (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); United States, *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii, Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and Others v. Reagan and Others* (see footnote 79 above); *Tachiona v. Mugabe ("Tachiona I")* (footnote 98 above); and *H.S.A.,* et al. *v. S.A.*, et al. (footnote 98 above).

Commission took into account that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international relations. It also took note that the use of the words "such as" in the *Arrest Warrant* case could be interpreted to extend the regime of immunity *ratione personae* to other high-ranking State officials. However, the Commission did not see the use of the words "such as" as widening the circle of the persons who enjoy this category of immunity, since the Court used the words in the context of a specific dispute, the subject of which was the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs.

(12) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[109] With regard to the other high-ranking officials, the Court stated that the acts attributed to them were not carried out within the scope of their duties;[110] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[111]

(13) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[112] in others, the national courts

[109] See *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 64 above), paras. 170–180.

[110] *Ibid*., para. 191.

[111] *Ibid*., para. 194. See, in general, paras. 181–197, *ibid*.

[112] In this connection, see United Kingdom, Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), p. 771; and United Kingdom, Re *Bo Xilai* (Minister for Commerce and International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005, reproduced in *International Law Reports*, vol. 128, p. 713, in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, the United States executive branch recognized Mr. Bo Xilai's immunity because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, 24 July 2006 (Civ. No. 04-0649): see United States, District Court for the District of Columbia, *Weixum* et al. *v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (deferring to the executive branch's position). In France, *Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe», Association des familles des victimes du Joola* (see footnote 64 above), the Court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In *A. c. Ministère public de la Confédération* (see footnote 64 above), the Swiss Tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity

found that the person on trial did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who benefit from such treatment,[113] which illustrates the major difficulty involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out that, in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives – immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission – reflecting the uncertainty in determining precisely what immunity from foreign criminal jurisdiction might be

because Mr. Nezzar had completed his period of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[113] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court* (see footnote 64 above), in which the Court admitted, based on the International Court of Justice judgment in the *Arrest Warrant* case (see footnote 45 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the Court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel* (see footnote 93 above)). Similarly, in a 2015 judgment, the Criminal Chamber of Court of Cassation of France denied the immunity *ratione personae* of a Second Vice-President responsible for defence and security because the official's functions were not those of a Head of State, Head of Government or Minister for Foreign Affairs: Court of Cassation, Criminal Chamber, 15 December 2015, No. 15-83.156. In the *United States of America v. Noriega* case, the Court of Appeals for the Eleventh Circuit, in its judgment of 7 July 1997 (see footnote 64 above), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. Another court in the United States, in the *Republic of the Philippines v. Marcos* case, District Court for the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793), indicated that the Attorney General of the Philippines did not enjoy immunity *ratione personae*. In the *Fotso v. Republic of Cameroon* case, the executive branch informed the Court that the President of Cameroon enjoyed immunity as a sitting Head of State, and the case was dismissed: United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 25 January 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 25424, at *2–6 (D. Ore. Jan. 25, 2013). The executive branch did not address the immunity of the Minister of Defence and the Secretary of State for Defence, but the court later found that those officials enjoyed immunity, given that they "acted in their official capacities": United States, District Court, District of Oregon, *Fotso v. Republic of Cameroon*, 16 May 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 83948, at*3, *16–21 (D. Ore. May 16, 2013). It should be kept in mind that the two cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: United Kingdom, *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the Court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and Italy, *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation, Third Criminal Section, Judgment of 28 December 2004 (*Rivista di diritto internazionale*, vol. 89 (2006), p. 568), in which the Court denied immunity to the President of Montenegro before it became an independent State. In *Evgeny Adamov v. Office fédéral de la justice* (see footnote 93 above), the Tribunal denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible that unspecified high-ranking officials could enjoy immunity.

enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[114]

(14) The Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[115] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (*b*) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument – as previously mentioned – does not apply to "criminal proceedings". Nevertheless, the Commission noted that high-ranking officials can enjoy the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State, which can offer a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(15) In view of the foregoing, the Commission considers that "other high-ranking officials" do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they might enjoy immunity from foreign criminal jurisdiction in accordance with the rules of international law relating to special missions. The Commission also notes that, as provided for in draft article 1, paragraph 2, the present draft articles are without prejudice to the application of such special regimes.

(16) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present

[114] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 64 above) is a good example of this. In *Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe», Association des familles des victimes du Joola* (see footnote 64 above), the Court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In *A. c. Ministère public de la Confédération* case (see footnote 64 above), after making a general statement about immunity *ratione personae*, the Court also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of United States, *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which, in its judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* cases (see footnote 112 above) was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister for Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

[115] Draft articles on the representation of States in their relations with international organizations, adopted by the Commission at its twenty-third session, *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284. On other occasions the Commission has used the expressions "*personnalité officielle*" ("official") (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, draft art. 1, *Yearbook ... 1972*, vol. II, document A/8710/Rev.1) and "other persons of high rank" (draft articles on special missions, draft art. 21, *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[116] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[117]

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 period 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 period of office.

3. The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*.

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal (para. 1) and material standpoints (para. 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first since this gives a better understanding of the scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the adverb "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

(3) This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that:

> After a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[118]

Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori*, to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna

[116] See para. (2) of the commentary to draft art. 1 above.
[117] See *Arrest Warrant of 11 April 2000* (footnote 35 above), para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 46 above), para. 58.
[118] *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 61.

Convention on Diplomatic Relations and the Convention on Special Missions.[119] The Commission itself, in its commentaries to the articles on jurisdictional immunities of States and their property, stated that "[t]he immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[120] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[121]

(4) Consequently, the Commission considers that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the period of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies. The term "period of office", as used in the English text, mirrors the terminology used by the International Court of Justice in the *Arrest Warrant* case[122] and was preferred to the phrase "term of office", which the Commission considered might refer only to fixed periods of time in office. The terms "*mandat*" and "*mandato*" in French and Spanish, respectively, were considered sufficiently clear.

(5) Only during the period of office does immunity *ratione personae* extend to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity".[123] This configuration reflects State practice.[124]

(6) As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts

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[119] Vienna Convention on Diplomatic Relations, art. 39, para. 2; and Convention on Special Missions, art. 43, para. 2.

[120] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts" (para. (19) of the commentary to draft art. 2, para. 1 (*b*) (v), *Yearbook ... 1991*, vol. II (Part Two), para. 28).

[121] Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, France: *Mellerio c. Isabel de Bourbon* (footnote 93 above); *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski* (footnote 93 above); *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior* (footnote 93 above); and *Société Jean Dessès c. prince Farouk et dame Sadek,* Tribunal de Grande Instance de la Seine, 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689 (English version reproduced in *International Law Reports*, vol. 65, pp. 37–38); United States: In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos* (see footnote 74 above), pp. 123 and 125. A British court found that the former King of Spain, Juan Carlos de Borbón y Borbón, has no longer enjoyed immunity *ratione personae* since his abdication. See United Kingdom, *Corinna Zu Sayn-Wittgenstein Sayn v. HM Juan Carlos Alfonso Víctor María de Borbón y Borbón*, High Court of Justice, Queen's Bench Division, Judgment of 24 March 2022, [2022] EWHC 668 (QB), para. 58. In the context of criminal cases, see Spain, *Pinochet* (footnote 98 above).

[122] *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 61.

[123] The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (para. (4) of the commentary to draft art. 29 of the draft articles on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, document A/3859, p. 98,).

[124] See, for example, Italy, *Yaser Arafat (Carnevale re. Valente – Imp. Arafat e Salah)* (see footnote 87 above); *Ferdinand et Imelda Marcos c. Office fédéral de la police* (footnote 98 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet* (see footnote 64 above), p. 592; *Gaddafi*, 20 October 2000 (footnote 87 above); *H.S.A.,* et al. *v. S.A., et al*. (footnote 98 above), p. 599; Sierra Leone, *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court,*

performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[125] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[126] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

(7) The full extent of immunity *ratione personae* is also reflected in the present draft articles, which do not establish any limitation or exception applicable to this type of immunity, in contrast to the case of immunity *ratione materiae* by virtue of draft article 6.

(8) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, and it is understood to apply to both categories.[127] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the expressions "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following the wording used by the International Court of Justice in the *Arrest Warrant* case.

(9) The definition of an "act performed in an official capacity" is set out in draft article 2, subparagraph (*b*). The Commission has not considered it necessary to define what is meant by "act performed in a private capacity", as this notion is residual in nature. As a result, it must be understood by default that any act not performed in an official capacity has been performed in a private capacity.

(10) The Commission has used the term "act" in the same sense and for the same reasons explained in the commentary to draft article 2, subparagraph (*b*), which contains the definition of "act performed in an official capacity".

(11) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to his or her period of office. The reason for this relates to the purpose of immunity *ratione personae*, which is both to protect the sovereign equality of States and to guarantee that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their period of office.

Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice, Supreme Court of Sierra Leone, Judgment of 14 October 2005 (S.C. No. 1/2003); and *Case against Paul Kagame* (footnote 98 above), pp. 156–157. Among more recent cases, see *Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe», Association des familles des victimes du Joola* et al. (see footnote 64 above); *Khurts Bat v. Investigating Judge of the German Federal Court* (see footnote 64 above), para. 55; and *A. c. Ministère public de la Confédération* (footnote 64 above), legal ground No. 5.3.1. See also *Teodoro Nguema Obiang Mangue et autres*, 13 June 2013 (see footnote 64 above).

125 *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 55.

126 *Ibid*.

127 This is the conclusion to be drawn from reading article 31, paragraph 1, in conjunction with article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. Articles 31, paragraph 1, and 43, paragraph 2, of the Convention on Special Missions must be construed in the same way.

In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their period of office. As regards acts performed prior to the period of office, it must be noted that immunity *ratione personae* applies only if the criminal jurisdiction of a foreign State is to be exercised during the period of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[128]

(12) In any event, it must be noted that, as the Court also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to his or her period of office, but solely as suspending the exercise of foreign criminal jurisdiction during the period of office of those high-ranking officials.[129] Consequently, when the period of office ends, the acts carried out during or prior to the period of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the period of office.

(13) Lastly, it should be noted that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after his or her period of office. Since they are now considered a "former" Head of State, Head of Government or Minister for Foreign Affairs, such immunity would have ceased when the period of office ended.

(14) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after his or her period of office ends. Paragraph 3 proceeds from the principle that immunity *ratione personae* ceases after the period of office ends. Consequently, immunity *ratione personae* no longer exists after the period of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[130]

(15) To address these problems, paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of the period of

[128] *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 55.

[129] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, para. 60).

[130] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on Special Missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596 and Corr.1, paras. 137 *et seq.*).

office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article.[131] Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles.

(16) The draft article, as adopted on first reading, referred in paragraph 3 to "the application of" rules. That phrase was deleted on second reading to broaden the scope of the "without prejudice" clause. The paragraph is intended to preserve not only the rules that strictly concern the applicability of immunity *ratione materiae*, but also related rules on process and procedure. In addition, the word "concerning" was replaced with "on" in order to more clearly define the scope of the paragraph, and in response to the suggestion that "concerning" may include rules not directly related to immunity *ratione personae*. The appropriate changes were also made in the Spanish version, that is, replacing "*relativas a la*" with "*sobre*", while the French version remained unchanged in that regard. In the French version, "*l'extinction*" was replaced with "*la cessation*", to align the text with the usage in other relevant instruments and in light of comments made by States on the terminology.[132]

Part Three
Immunity *ratione materiae*

Commentary

(1) Part Three of the present draft articles concerns immunity *ratione materiae* from foreign criminal jurisdiction. Immunity from jurisdiction *ratione materiae* is applicable to all State officials, current or former, including those who previously enjoyed immunity *ratione personae* as a Head of State, Head of Government or Minister for Foreign Affairs but are no longer in office.

(2) Part Three consists of two draft articles. Draft article 5 defines the normative elements of the legal regime applicable to immunity from jurisdiction *ratione materiae*, by identifying the personal element of immunity (State officials enjoying immunity), the material element (acts covered by immunity) and the temporal element (duration of immunity). Additionally, paragraph 3 of draft article 5 defines the relationship between immunity *ratione personae* and the immunity *ratione materiae* that applies to Heads of State, Heads of Government and Ministers for Foreign Affairs after their term of office has ended. Draft article 6 addresses the inapplicability of immunity *ratione materiae* with respect to the alleged commission of crimes under international law.

Article 5
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction 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 period of office has come to an end, continue to

[131] This has been confirmed by international courts and tribunals, such as, in the decision of the European Court of Human Rights in *M.M. v. France*. Application No. 13303/21, Decision, 23 May 2024.

[132] See art. 39, para. 2, of the Vienna Convention on Diplomatic Relations.

enjoy immunity with respect to acts performed in an official capacity during such period of office.

Commentary

(1) Draft article 5 defines the scope of immunity *ratione materiae*. The provision outlines the general regime applicable to this category of immunity and covers its personal, material and temporal elements.

(2) The lack of symmetry between the draft articles covering immunity *ratione personae* and those covering immunity *ratione materiae* underscores the fact that these two regimes are distinct. While the basis for immunity *ratione personae* is the nature of the office held by the State official, the basis for immunity *ratione materiae* is the nature of the act performed by the State official.

(3) Paragraph 1 addresses the personal and material elements together. The intention is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting the fact that acts performed in an official capacity are central to this category of immunity.

(4) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed by State officials in an official capacity, as the concept was defined in subparagraph (*b*).[133] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts. This is not altered by the deletion on second reading of the word "only", which was considered redundant.

(5) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (*a*), namely that a State official is: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (*a*), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (*a*), must be duly kept in mind for the purposes of the present draft article.[134]

(6) The material scope of immunity *ratione materiae* as set out in draft article 5, paragraph 1, does not prejudge the question of limitations or exceptions to immunity, which is addressed in draft article 6.

(7) In addition, attention must be drawn to the fact that paragraph 1 uses the expression "from the exercise of foreign criminal jurisdiction", as draft article 3 does to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[135]

(8) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds

[133] See draft art. 2, subpara. (*b*), and paras. (21)–(32) of the commentary thereto above.
[134] See paras. (3)–(20) of the commentary to draft art. 2 above.
[135] See para. (16) of the commentary to draft art. 3.

such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[136] has not been challenged in practice and is generally accepted in the literature.[137]

(9) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the models in the 1946 Convention on the Privileges and Immunities of the United Nations[138] and the 1961 Vienna Convention on Diplomatic Relations.[139] The expressions "continues to subsist" and "have ceased to be State officials" are based on those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2, subparagraph (*a*).[140]

(10) Lastly, it should be noted that, although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae.* The Commission also considered this was important to avoid an overly broad interpretation of the permanent character of this category of immunity, which should not be understood to apply to other acts.

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[136] See, *a contrario sensu*, para. (19) of the commentary to art. 2, para. 1 (*b*) (v), of the articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated" (*Yearbook ... 1991*, vol. II (Part Two), para. 28).

[137] See Institute of International Law, resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", which sets out – *a contrario sensu* – the same position in its article 13, paragraphs 1 and 2 (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III, paras. 1–2 (*ibid*., vol. 73 (Session of Naples, 2009), p. 226, at p. 227). The resolutions are available from the website of the Institute: www.idi-iil.org, under "Resolutions".

[138] Article IV, section 12, of the Convention provides: "In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model; in article V, section 14, it provides: "In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties."

[139] Article 39, paragraph 2, of the Convention provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[140] For the meaning of the term "individual", see para. (6) of the commentary to draft art. 2 above.

(11) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 5, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a "without prejudice" clause. In conformity with that paragraph,[141] immunity *ratione materiae* also applies to former Heads of State, Heads of Government and Ministers for Foreign Affairs since they fall under the definition in draft article 2, subparagraph (*a*), of "State official". The Commission does not consider it necessary to refer explicitly to those officials in the present draft article, because their enjoyment of immunity *ratione materiae* stems from the nature of acts performed in an official capacity.

(12) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that after the period of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. However, such "cessation … is without prejudice to the rules of international law on immunity *ratione materiae*" (draft article 4, paragraph 3). As the Commission stated in the commentary to that draft article, "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her period of office, have carried out acts in an official capacity which do not lose that quality merely because the period of office has ended and may accordingly be covered by immunity *ratione materiae*". The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of the period of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* that applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules on immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs".[142]

(13) This is precisely the situation referred to in paragraph 3 of draft article 5. The paragraph proceeds on the basis that, during their period of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. This does not prevent these State officials, after their period of office has ended, from enjoying immunity *ratione materiae*. Consistent with amendments adopted to draft article 4, the expression "term of office" was amended to "period of office" in draft article 5.

(14) The requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during his or her period of office. The purpose of draft article 5, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said, "does not prejudge the content of the immunity *ratione materiae* regime".[143]

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (art. 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (art. IV, sect. 12), which govern situations similar to those covered in the paragraph in question, namely the situation of persons who enjoyed immunity *ratione personae*, after the end of their period of office, with

[141] This provision reads: "The cessation of immunity *ratione personae* is without prejudice to the rules of international law on immunity *ratione materiae*." Concerning the scope of this "without prejudice" clause, see para. (15) of the commentary to draft art. 4 above.

[142] Paras. (14) and (15) of the commentary to draft art. 4 above.

[143] Para. (15) of the commentary to draft art. 4 above.

respect to acts performed in an official capacity during such period of office. The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and the moment when immunity is invoked. Like the treaties on which it is based, draft article 5, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term "immunity". Yet although the term is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their period of office has ended.

Article 6
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law, as defined according to the applicable rules of international law:

(*a*) crime of genocide;

(*b*) crimes against humanity;

(*c*) war crimes;

(*d*) crime of apartheid;

(*e*) torture;

(*f*) enforced disappearance;

(*g*) crime of aggression;

(*h*) slavery;

(*i*) slave trade.

Commentary

(1) Draft article 6 lists crimes under international law in respect of which immunity from the exercise of foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article is composed of a *chapeau* and the list of crimes. As draft article 6 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply with respect to immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(2) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 6. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their period of office",[144] and the cessation of such immunity "is without prejudice to the rules of international law on immunity *ratione materiae*".[145] In addition, draft article 5, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ... whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office".[146] Accordingly, as this immunity is immunity *ratione materiae*, draft article 6 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts

[144] Draft art. 4, para. 1. See paras. (2) and (3) of the commentary to draft art. 4 above.
[145] Draft art. 4, para. 3. See paras. (14) and (15) of the commentary to draft art. 4 above.
[146] Draft art. 5, para. 3. See paras. (9) to (15) of the commentary to draft art. 5 above.

performed in an official capacity during their period of office. Therefore, such immunity *ratione materiae* will not apply to these former officials in accordance with draft article 6.

(3) Draft article 6 lists crimes to which immunity *ratione materiae* from the exercise of foreign criminal jurisdiction does not apply, even if it is alleged that those crimes were committed by an official acting in an official capacity. Thus, draft article 6 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft article 5.

(4) The Commission has included this draft article for the following reasons. First, it considers that legal developments have taken place limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain acts that constitute crimes under international law. These developments are reflected in judicial decisions taken by national courts that, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to crimes under international law. For example, the inapplicability of immunity *ratione materiae* was reflected in the prosecutions before national courts of foreign State officials for international crimes committed during the Second World War.[147] More recently, a number of cases have expressly rejected immunity *ratione materiae* for crimes under international law.[148] In other cases, national courts have exercised their criminal jurisdiction over officials of another State for crimes under international law without expressly addressing immunity, but in a manner that is inconsistent with the existence of such immunity.[149] These developments are also reflected in the adoption of national legislation providing for exceptions to immunity *ratione materiae* in relation to the commission of crimes under international law.[150] They have also been highlighted in the literature and have been reflected in proceedings before international tribunals.[151]

(5) Second, the Commission noted that other international rules and obligations should not be overlooked and that the draft articles should be understood as consistent with the legal principles enshrined in other important sectors of contemporary international law, such as international humanitarian law, international human rights law and international criminal law. In particular, the Commission noted that it is an essential principle of international criminal law that persons bear individual responsibility for crimes under international law, even if those acts were performed in an official capacity. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious crimes under international law, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(6) In light of the above reasons, the Commission considers that it should pursue its mandate of promoting the progressive development of international law and its

147 See, for example: the trials before the Supreme National Court of Poland: Gauleiter Artur Greiser (1946), Amon Göth (1946), Rudolf Höss (1947), Ludwig Fischer (1947), the Krakow Auschwitz Trial (1948), Albert Forster *et al.* (1948) and Jozef Bühler (1948); United States, Trial of Lieutenant-General Shigeru Sawada and three others, United States Military Commission, Shanghai, 15 April 1946; Netherlands, *Netherlands v. Tanabe Koshiro*, Netherlands Temporary Court-Martial, Macassar, 5 February 1947; Netherlands, *Netherlands v. Susuki Motosuke*, Trial before the Netherlands Temporary Court-Martial at Amboina, Judgment delivered 28 January 1948; China, Trial of Takashi Sakai, Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 29 August 1946; Australia, *Trial of Lieutenant-General Baba Masao*, Australian Military Court, Rabaul, judgment of 2 May 1947; Italy, *The Prosecutor v. Herbert Kappler*, Military Tribunal of Rome, 20 July 1948; Belgium, *Auditeur-Général près la Cour Militaire v. Müller and Others*, Court of Cassation (Second Chamber), 4 July 1949; Israel, *Attorney-General of the Government of Israel v. Eichmann*, Record of Proceedings in the Supreme Court of Israel, Appeal session 7, 29 May 1962; France, *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Court of Cassation, Judgments of 6 October 1983, 26 January 1984 and 20 December 1985, *International Law Reports*, vol. 78, p. 125, Rhone Court of Assizes, Judgment of 4 July 1987, *ibid*., p. 148, and Court of Cassation, Judgment of 3 June 1988, *ibid*., vol. 100, p. 330; Argentina, *Office of the Prosecutor v Priebke (Erich)*, Ordinary appeal

judgment, request of extradition, P/457/XXXI, ILDC 1599 (AR 1995), 2 November 1995, Argentinian Supreme Court; and Italy, *Prosecutor v. Karl Hass and Erich Priebke*, Supreme Court of Cassation, 16 November 1998.

148 *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (see footnote 64 above); Belgium, *Pinochet*, Court of First Instance of Brussels, Judgment of 6 November 1998, *International Law Reports*, vol. 119, p. 345; *Bouterse* (footnote 87 above) (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, International Law in Domestic Courts [ILDC 80 (NL 2001)]); *Sharon and Yaron* (footnote 87 above), p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres) (see also *H.S.A.,* et al. *v. S.A.,* et al. (footnote 98 above)); Netherlands, *H. v. Public Prosecutor*, Supreme Court, Judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *A. c. Ministère public de la Confédération* (see footnote 64 above); Germany: case No. 3 StR 564/19 (see footnote 64 above); Koblenz Higher Regional Court, case No. 1 StE 3/21, Judgment, 24 February 2021; Koblenz Higher Regional Court, case No. 1 St 9/19, Judgment, 13 January 2022; Federal Court of Justice, case No. AK 4/24, Decision, 21 February 2024; and Federal Court of Justice, case No. 3 StR 454/22, Decision, 20 March 2024; Lithuania, case No. 2K-7-39-1073/2022, Supreme Court of Lithuania, 30 June 2022; and France, Court of Cassation, case No. 24-84.071, decision of 25 July 2025.

149 See, for example: the National High Court of Spain has addressed the situations of various foreign officials for alleged international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo* and *Guatemala* cases; Italy, Court of Cassation, *R.G.-Cass. Contro García Meza Tejada Luis ed altri*, case No. 12167/2020, Sentence, 9 July 2021; Sweden, Svea Court of Appeal, Case of *Nouri*, case No. B 9704-22, Judgment, 19 December 2023; and Switzerland, Federal Criminal Court, *The Office of the Attorney General of Switzerland and private claimants against Ousman Sonko* (SK.2023.23), Decision, 15 May 2024.

150 In support of this position, attention is drawn to the following national laws that recognize the inapplicability of immunity *ratione materiae* in relation to certain crimes under international law: Organic Act No. 16/2015 of 27 October, on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*); Mauritius, International Criminal Court Act 2001 (art. 6, para. 1); South Africa, Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 18 July 2002) (arts. 4 (2) (a) (i)), which states that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant; Belgium, Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003 (art. 5); the Niger, Criminal Code of the Republic of the Niger, as amended in 2003 (art. 208.7); Germany, Courts Constitution Act (sect. 20, para. 2, sentence 2), which explicitly states that functional immunity does not prevent the extension of German criminal jurisdiction to the prosecution of international crimes defined in the German Code of Crimes against International Law, namely the crime of aggression, crimes against humanity and genocide; Burkina Faso, Act No. 052-2009/AN520 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso (art. 7), according to which the official status of a suspect shall not be grounds for exception to or reduction of responsibility for the crimes under the referred Acts – additionally, the Act established that the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory; Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute (art. 7), which determines that "the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); and Austria, Decree of the Ministry of Justice regarding jurisdiction for war crimes and other international crimes

codification, including by applying both the deductive and inductive methods. It is on this premise that the Commission has included draft article 6, which contains a list of crimes to which immunity *ratione materiae* shall not apply.

Chapeau

(7) The chapeau of the draft article uses the phrase "immunity… shall not apply" following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[152] However, in draft article

and immunities of highest officials of foreign States in Austrian criminal proceeding of 5 July 2022, which established that foreign officials – outside the scope of the troika – do not enjoy immunity *ratione materiae* for crimes such as genocide, crimes against humanity, war crimes, aggression and torture. According to the decree, this exception also applies to Heads of State, Heads of Government and Ministers for Foreign Affairs once they have left office.

[151] The inapplicability of immunity *ratione materiae* to crimes under international law is supported by the following decisions from international criminal tribunals. In 1946, the International Military Tribunal expressly rejected immunity for the crimes prosecuted before it, by stating: "The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings … [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law": International Military Tribunal, Judgment of 1 October 1946 in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August, 1946 to 1st October, 1946)*, p. 422. A defence based on immunity was also rejected by the International Military Tribunal for the Far East (Judgment of 4 November 1948 in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, vol. 22). The International Criminal Tribunal for the Former Yugoslavia noted the absence of immunity for international crimes on different occasions, including in: *Prosecutor v. Blaškić* (see footnote 64 above), para. 41; *Prosecutor v. Radovan Karadžić* et al., case No. IT-95-5-D, Decision in the matter of a proposal for a formal request for deferral to the competence of the Tribunal addressed to the Republic of Bosnia and Herzegovina in respect to Radovan Karadžić, Ratko Mladić and Mićo Stanišić, Trial Chamber, 16 May 1995, paras. 23–24; and *Prosecutor v. Slobodan Milošević*, case No. IT-02-54, Decision on preliminary motions, Trial Chamber, 8 November 2001, para. 26–34. In the *Blaškić* judgement, the Appeals Chamber expressly recognized that the inapplicability of immunity for certain international crimes is not limited to international jurisdictions by affirming that: "The general rule under discussion is well established in international law and is based on the sovereign equality of States *(par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity". The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion to the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 85. Also of interest are the following decisions of the Inter-American Court of Human Rights, which have affirmed the obligation of member States to investigate and prosecute certain international crimes and the inadmissibility of provisions seeking to prevent the investigation and punishment of those responsible for serious human rights violations: *Case of Barrios Altos v. Peru*. Judgment (Merits), 14 March 2001, Series C No. 75; *Case of Trujillo-Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, Series C No. 92; *Case of Carpio Nicolle et al. v. Guatemala*, Judgment (Merits, Reparations and Costs), 22 November 2004, Series C No. 117; and *Case of La Cantuta v. Peru*, Judgment (Merits, Reparations and Costs), 29 November 2006, Series C No. 162.

[152] Articles on jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), para. 28. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant in articles 10 to 17 in the same part. For an

6, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(8) The expression "from the exercise of foreign criminal jurisdiction" is included in the *chapeau* for consistency with the formulation used in draft articles 3 and 5. It illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act. While mindful of this relationship, the Commission notes that draft article 6 concerns only the procedural bar of immunity *ratione materiae* and not the basis for the exercise of jurisdiction by the forum State. In particular, the Commission wishes to emphasize that the recognition of non-application of immunity in relation to a certain crime pursuant to this provision does not, in itself, imply the existence of jurisdiction by the forum State in relation to that crime. The question of whether a court can exercise criminal jurisdiction still has to be assessed separately and in accordance with international law.

(9) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The expression was used previously by the Commission in the Nürnberg Principles[153] and in the 1954 draft Code of Offences against the Peace and Security of Mankind.[154] In this context, the Commission took the view that the use of this language means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[155] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes,[156] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[157] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in draft article 6 to international law and ensures that the definition of such crimes is understood in accordance with international standards.

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explanation of the reasons that led the Commission to use this phrase, see, in particular, para. (1) of the commentary to part III and paras. (1) to (5) of the commentary to art. 10. The United Nations Convention on Jurisdictional Immunities of States and Their Property likewise uses the phrase "[p]roceedings in which State immunity cannot be invoked" in the title of part III and similar wording in articles 10 to 17.

153 See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

154 See draft art. 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook ... 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that "[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook ... 1996*, vol. II (Part Two), para. 50).

155 See para. (6) of the commentary to draft art. 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook... 1996*, vol. II (Part Two), para. 50.

156 Para. (9), *ibid.*

157 Para. (10), *ibid.* It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg Principles, had stated that "[t]he general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

(10) The Commission decided to include the phrase "as defined according to the applicable rules of international law" in the *chapeau* of draft article 6 to further clarify that the crimes listed in the provision must be understood according to their established definition under international law. While the Commission acknowledged that those crimes are often also criminalized and defined in the national laws of States, it considered that, for the purpose of the present draft articles, ultimately, their definition is founded in customary international law and international treaty law.

*Subparagraphs (*a*)–(*i*)*

(11) Subparagraphs (*a*)–(*i*) of draft article 6 list crimes under international law in respect of which immunity *ratione materiae* does not apply, even if the official is alleged to have committed those crimes while acting in an official capacity during his or her period of office. The crimes listed are: the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, enforced disappearance, the crime of aggression, slavery and slave trade.

(12) The specific crimes are included for the following reasons: (*a*) they are crimes under international law that have been identified as the most serious crimes of concern to the international community; (*b*) they are crimes for which there is individual criminal responsibility under international law; (*c*) they are crimes for which there are international treaty-based and customary rules relating to their prohibition, including an obligation to take steps to prevent and punish them; and (*d*) they are crimes which, in practice, are considered crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction.

(13) In applying the above criteria, the Commission included the crime of genocide, crimes against humanity, war crimes and the crime of aggression, stressing that these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law. It should be noted that these four crimes are included in article 5 of the Rome Statute, where they are described as "the most serious crimes of concern to the international community as a whole".[158] International courts have also emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*).[159] Additionally, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised.[160]

[158] Rome Statute, art. 5, para. 1, and preamble, fourth paragraph.

[159] See the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43 and 44).

[160] See for example, the trials before the Supreme National Court of Poland: Greiser, Fischer, Forster *et al.* and Bühler (crime of aggression) (footnote 147 above); *Attorney-General of the Government of Israel v. Eichmann* (footnote 147 above) (genocide, crimes against humanity, war crimes); *Sharon and Yaron* (footnote 87 above) (genocide, crimes against humanity and war crimes); *A. c. Ministère public de la Confédération* (footnote 64 above) (crimes against humanity and war crimes); case No. 2K-7-39-1073/2022, Supreme Court of Lithuania (see footnote 148 above), paras. 103–109 (although the case concerned crimes against humanity and war crimes, the court generally stated that persons responsible for committing international crimes cannot rely on functional immunity from national or international jurisdiction, even if they committed these crimes while acting as public officials); France, Court of Cassation, case No. 24-84.071 (see footnote 147 above), paras. 9–33 (while the case concerned genocide and crimes against humanity, the Court of Cassation concluded that the principle of functional immunity from jurisdiction in criminal matters cannot be invoked in the case of prosecutions for crimes against humanity, war crimes, as well as genocide); and Germany, Federal Court of Justice decisions: case No. 3 StR 564/19 (see footnote 64 above), paras. 11–49 (war crimes); case No. AK 4/24 (see footnote 148 above) (although the case

(14) In light of the criteria above, the Commission also included in the list of crimes in draft article 6 the crimes of apartheid, torture, enforced disappearance, slavery and slave trade as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,[161] the Commission took into account the following elements to consider them as separate crimes under the present draft articles. First, the crimes of apartheid, torture, enforced disappearance, slavery and slave trade have been the subject of treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and punishment,[162] which impose specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[163] It should be added that the treaties in question establish systems of international cooperation and judicial assistance between States.[164] Second, the Commission noted that these crimes are subject to a specific threshold under the Rome Statute, requiring the commission of such crimes be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[165] which does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials, at the instigation of a State official or with their support or acquiescence.[166] In addition, the Commission took into account the fact that national courts that have dealt with these crimes in relation to immunity have done so by treating them as separate crimes.[167]

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concerned crimes against humanity, the Court generally stated that functional immunity does not apply to international crimes, irrespective of the status and rank of the perpetrator, as a matter of customary international law); and case No. 3 StR 454/22 (see footnote 148 above), paras. 32–34 (while the case concerned crimes against humanity, the Court held that functional immunity does not apply to acts the punishability of which is directly rooted in customary international law, which includes crimes against humanity and war crimes).

161 Respectively, Rome Statute, art. 7, para. 1, subparas. (j), (f), (i) and (c), the latter of which lists "enslavement", which is further broken out into the separate crimes of slavery and slave trade in the present draft article to better reflect the two crimes encompassed by enslavement.

162 See International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3; Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253; and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), United Nations, *Treaty Series*, vol. 266, No. 3822, p. 3.

163 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4–6; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9; Slavery Convention art. 6; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, arts. 3 and 5–6.

164 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. XI; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 6–9; and International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10–11 and 13–14.

165 Rome Statute, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

166 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1; and International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

167 For example, in the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts

(15) The inclusion of a list of crimes seeks to promote legal certainty, but does not exclude the possibility that the application of the above criteria may lead to the identification of other crimes to which, as a result of further legal development, immunity *ratione materiae* would not apply.

(16) With regard to the order in which the crimes are listed, the Commission stresses that each of the offences included in draft article 6 is of a high gravity and that there is no hierarchy among them.

(17) The Commission considered the inclusion of other crimes on the list of draft article 6, such as terrorism, trafficking in persons, child prostitution and child pornography, and piracy, which are also the subject of treaties that establish special legal regimes.[168] In deciding not to include these crimes, the Commission considered that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*. In addition, such crimes are usually committed by non-State actors and are generally not reflected in national judicial practice relating to immunity from jurisdiction *ratione materiae*. In any event, the non-inclusion of other international crimes in draft article 6 should not be taken to mean that the Commission underestimates the gravity of such crimes.

(18) The Commission chose not to include on this list the crime of corruption because it considered that corruption cannot be regarded as an act performed in an official capacity and therefore does not need to be included among the crimes for which immunity does not apply.[169] In the Commission's view, the fact that the crime of corruption is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status.[170] Accordingly, since the normative element contained in draft article 5, paragraph 1, does not apply to the crime of corruption, the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore corruption did not need to be included in the list of crimes for which *immunity ratione materiae* does not apply.

(19) The Commission also chose not to include on this list crimes committed by a foreign official present in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime.[171] This scenario differs in many respects from the crimes under international law included on the list in the draft article, as well as from the crime of corruption. While the Commission decided not to address this scenario in the text of draft article 6, it noted the decisions of national courts that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and, accordingly, immunity from jurisdiction *ratione*

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of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (see footnote 64 above); and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, Judgment of 7 October 2014, [2014] EWHC 3419 (Admin.). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia* (see footnote 64 above).

168 Statement of the Chair of the Drafting Committee, 20 July 2017, p. 9, available at https://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_iso.pdf.

169 See the fifth report of the Special Rapporteur, *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/701, paras. 230–234.

170 See also paras. (23) and (25) of the commentary to draft art. 2 above.

171 See *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/701, paras. 225–229.

materiae is excluded, as confirmed by State practice in that regard.[172] This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.[173]

(20) This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

Definitions of crimes

(21) The Commission considered that, as "[t]he present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State" (draft art. 1, para. 1), the precise definitions of the crimes on the list fell outside the scope of the present topic. While the Commission agreed on the inclusion of each of the crimes on the list and that the definition of each crime must be understood in accordance with international law, it saw the question of which elements constituted each crime as a separate issue to that of the applicability or non-applicability of immunity in respect to those crimes. Accordingly, the normative source of such definitions is less important than their conformity with the definition of the crime applicable under international law between the States concerned.[174] At the same time, mindful of the importance of preserving the principle of legal certainty, characteristic of criminal law, the Commission found it necessary to provide guidance on defining these crimes. To that end, the Commission identified treaty instruments that define each of these crimes. Reference to the treaties below is intended to enable the competent authorities of the forum State to act with greater certainty in the application of draft article 6. The Commission considers that definitions for these crimes may also be found in customary international law and recalls that many of the definitions found in treaties reflect customary international law, so that they are not only applicable in relation to Parties to such treaties.

(22) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide,[175] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Criminal Tribunal for the Former Yugoslavia (art. 4), the statute of the International

[172] See for example: Germany, Federal Court of Justice, *Staschynskij Case*, Judgment of 19 October 1962, case No. 9 StE 4/62, 18 *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt) 87–96; New Zealand, *R v. Mafart and Prieur* (*Rainbow Warrior*, judicial phase), High Court of Auckland, judgment, 22 November 1985; Germany, Federal Constitutional Court, Order of 15 May 1995, *Entscheidungen des Bundesverfassungsgerichts*, vol. 92; Republic of Korea, Suwon District Court, *Won Jeong* case (espionage under National Security Act), Judgment, 15 October 2008; Italy, Criminal Court of Milan (Tribunale di Milano), Fourth Criminal Section, *Abu Omar case*, judgment, 4 November 2009; and Germany, Federal Court of Justice, Decision of 27 August 2024 (StB 54/24). The International Criminal Tribunal for the Former Yugoslavia has also referred to this exception, in *Prosecutor v. Blaškić* (see footnote 64 above), para. 41. The Commission also notes the decision of the German Federal Court of Justice of 10 December 2025 in which the Court recognized the existence of a customary exception to immunity *ratione materiae* for acts of violence directed by foreign intelligence services, which are committed outside the territory of the forum State, provided that they violate the sovereign rights of another State under international law: Germany, Federal Court of Justice, Order of 10 December 2025 (StB 60/25).

[173] Paragraph (19) of the commentary to draft article 6 does not affect the rules specifically applicable to combatants for lawful acts of war under the law of armed conflict.

[174] The Commission discussed whether to include precise definitions of the crimes included in the present draft article. It ultimately did not do so to avoid creating the impression that it was incorporating definitions from treaties that might not be applicable to the States concerned. It found that the definitions in certain treaties had been subject to multiple amendments, not all of which have been widely ratified by the States Parties to those treaties, leading to varying obligations depending on the States concerned.

[175] Convention on the Prevention and Punishment of the Crime of Genocide, art. II.

Criminal Tribunal for Rwanda (art. 2), the Rome Statute of the International Criminal Court (art. 6), and the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (art. 5, para. 1).[176] For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[177] For the purposes of the present draft articles, the crime of genocide should be understood as defined in the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), given that the wording used in that Convention has been repeated in other instruments and is considered to constitute customary international law.

(23) With regard to crimes against humanity, it should be recalled that some treaties have identified certain acts as "crimes against humanity"[178] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Criminal Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this category of crimes. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[179] The Rome Statute (art. 7) was the first instrument to define this category of crimes separately and comprehensively. Draft article 2 of the draft articles on prevention and punishment of crimes against humanity[180] and article 5, paragraphs 2 and 3 of the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes essentially reproduce the definition of this category of crimes contained in article 7 of the Rome Statute.[181]

(24) The concept of war crimes has a long tradition which finds expression in treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), define that category of crimes as "grave breaches".[182] War crimes were defined in the statute of the International Criminal

[176] Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (Ljubljana, 26 May 2023), available from https://diplomatie.belgium.be/sites/default/files/downloads/eng-LHC.pdf.

[177] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[178] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I; and International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

[179] *Yearbook... 1996*, vol. II (Part Two), para. 50.

[180] *Yearbook ... 2019*, vol. II (Part Two), para. 44.

[181] The definitions of crimes against humanity contained in draft article 2 of the draft articles on prevention and punishment of crimes against humanity (*Yearbook ... 2019*, vol. II (Part Two), para. 44) and in article 5, paragraphs 2 and 3, of the Ljubljana-The Hague Convention reproduce the text of article 7 of the Rome Statute with a few changes. Among those changes, the Commission highlights that the definition of "gender" (and the cross-reference thereto in paragraph 1 (*h*)) contained in article 7, paragraph 3, of the Rome Statute has not been retained in either of the instruments.

[182] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (First Geneva Convention), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Geneva Convention), *ibid.*, No. 971, p. 85, art. 51; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), *ibid.*, No. 972, p. 135, art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), *ibid.*, No. 973, p. 287, art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3, art. 85.

Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[183] A definition of war crimes is also contained in article 8, paragraph 2, of the Rome Statute, which draws on previous precedents and refers to war crimes committed in both international and non-international armed conflicts, as well as to crimes recognized on the basis of treaties and customary international law. Lastly, a definition of war crimes is also found in the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (art. 5, para. 4).

(25) The crime of apartheid was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, which describes apartheid as a crime against humanity and a crime under international law (art. I), and contains a detailed definition of the crime of apartheid (art. II). This definition does not include the requirement that acts amounting to the crime of apartheid be committed as part of a widespread or systematic attack directed against any civilian population.

(26) The definition of torture can be found in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which characterizes torture as prohibited conduct liable to criminal prosecution. The Commission draws attention to the fact that the definition contained in that Convention establishes, as a requirement for an act to be characterized as torture, that it is carried out by, at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles.[184] A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[185] Neither of those definitions requires that acts amounting to torture be committed as part of a widespread or systematic attack directed against any civilian population.

(27) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (art. II).[186] The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by, at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles.[187] The definition of enforced disappearance contained in these instruments does not require that the acts amounting to this crime be committed as part of a widespread or systematic attack directed against any civilian population.

(28) The crime of aggression traces back to the concept of crimes against peace as established and defined in the Charter of the International Military Tribunal at Nürnberg (art. 6 (*a*))[188] and in the Charter for the International Military Tribunal for the Far East (art. 5 (*a*)).[189] The concept of aggression is also closely connected to the

[183] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[184] See also footnote 166 above.

[185] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[186] Inter-American Convention on the Forced Disappearance of Persons (Belem do Pará, Brazil, 9 June 1994), Organization of American States, *Official Records*, OEA/Ser.A/55.

[187] See also footnote 166 above.

[188] Charter of the International Military Tribunal (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.

[189] Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946) (as amended on 26 April 1946), C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4 (Washington, D.C., Department of State, 1968), p. 20.

prohibition on the use of force prescribed in Article 2, paragraph 4, of the Charter of the United Nations. The definition of aggression, as State conduct, is contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. For its part, the Commission has defined the crime of aggression in article 16 of the 1996 draft Code of Crimes against the Peace and Security of Mankind. A definition of the crime of aggression can also be found in article 8 *bis* of the Rome Statute, which draws on previous precedents and greatly reflects the definition provided for in resolution 3314 (XXIX).

(29) A definition of slavery can be found in the Slavery Convention of September 1926 (art. 1, para. 1). While this treaty established obligations for States regarding the prevention and suppression of slavery, the notion of a criminal offence of slavery was later introduced in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of September 1956 (art. 6, para. 1). The definition of slavery contained in the latter instrument does not require that the acts amounting to this crime be committed as part of a widespread or systematic attack directed against any civilian population. Given that the latter instrument contains the most up-to-date definition of this category of crime, the Commission considers the definition contained therein to be particularly relevant for the purposes of the present draft article.

(30) Similarly to slavery, a general definition of slave trade can be found in the Slavery Convention (art. 1, para. 2). A more specific definition for the context of individual criminal responsibility was included in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (art. 3, para. 1), which defines the criminal offence of slave trade. The definition of slave trade contained in the latter instrument does not require that the acts amounting to this crime be committed as part of a widespread or systematic attack directed against any civilian population. The Commission considers the definition contained in the latter Convention to be particularly relevant for the purpose of the present draft article.[190]

Part Four
Procedural provisions and safeguards

Commentary

(1) Part Four of the draft articles concerns the procedural provisions and safeguards to be applied in connection with the immunity of State officials from foreign criminal jurisdiction.

(2) International instruments that refer to the immunity of State officials from foreign criminal jurisdiction have generally been confined to stating that immunity exists, identifying those who enjoy immunity, defining its scope and, in certain cases, establishing rules on the waiver of immunity, without including provisions of a procedural nature.

(3) Nevertheless, the Commission has considered that the present draft articles should include procedural provisions and safeguards supplementing the provisions included in Parts One, Two and Three. This is explained, first, by the need to maintain a balance between the rights and interests of the State of the official and the rights and interests of the forum State, as in both cases such rights and interests are directly linked to the principle of the sovereign equality of States. Second, the inclusion of procedural provisions and safeguards is conceived as a means of offering the States involved some useful instruments to facilitate reciprocal communication and cooperation regarding a particularly sensitive issue. In this context, the procedural provisions and safeguards are intended to promote mutual trust and the stability of

[190] The Commission takes note of General Assembly resolution 80/250 of 25 March 2026 on the Declaration on the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Greatest Crime against Humanity.

international relations. Last but not least, the procedural provisions and safeguards are meant to ensure that the exercise of criminal jurisdiction with regard to an official of another State is not abusive or politically motivated. For all these reasons, the Commission takes the view that the inclusion of procedural provisions and safeguards, which helps to strike a balance among the different provisions contained therein, is essential for the effective application of the draft articles.

(4) The procedural provisions and safeguards apply generally to all cases where the question of immunity of State officials from foreign criminal jurisdiction arises, but they are especially important in cases where immunity from foreign criminal jurisdiction may be affected by the provisions of draft article 6, which refers to the non-applicability of immunity *ratione materiae* in relation to the crimes under international law listed in that draft article. The Commission has duly taken this circumstance into account, which is adequately reflected in the text of the draft articles contained in Part Four.

(5) For the purpose of the present Part, the term "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. They may include governmental, police, investigative and prosecutorial acts. Conversely, the term "criminal proceedings" is used in reference 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.

(6) The term "official of another State" is used (in draft articles 7, 8, 9, 13 and 15) as an equivalent of "State official", which is used in the title of the draft articles (in the plural) and whose definition is contained in draft article 2, subparagraph (*a*). This term thus covers any State official, regardless of rank, whether he or she is covered by immunity *ratione personae* or immunity *ratione materiae*, and whether he or she is still an official at the time when the question of immunity is to be examined. Additionally, the term "forum State" has been used to refer to the State exercising or enforcing criminal jurisdiction over the official of another State, which includes situations in which a State is considering extradition or cooperation requests.

(7) Part Four consists of 11 draft articles dealing with the scope of Part Four and its relationship to the rest of the draft articles (draft art. 7), the procedural provisions and safeguards that apply in the direct relations between the forum State and the State of the official (draft arts. 8–14), the application of the rules pertaining to the right to a fair trial and the procedural safeguards applicable to the official of another State in respect of whom the question of immunity arises (draft art. 15) and the establishment of mechanisms for facilitating consultations and the settlement of any dispute that may arise between the forum State and the State of the official with regard to the immunity from foreign criminal jurisdiction of an official of the latter State (draft arts. 16 and 17).

Article 7
Application of the present Part

1. The procedural provisions and safeguards in the present Part shall apply in any situation that may involve the exercise of criminal jurisdiction by the forum State over an official of another State.

2. The present Part is applicable to the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of

whether immunity applies or does not apply under any of the present draft articles.

Commentary

(1) Draft article 7 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. By establishing that connection, draft article 7 takes into account the notion of balance between the provisions contained in Parts Two and Three and the procedural provisions and safeguards contained in Part Four.

(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.

Paragraph 1

(3) Part Four is applicable "in any situation that may involve the exercise of criminal jurisdiction by the forum State over an official of another State". This language is purposely used to maintain a broad yet precise formulation that ensures procedural safeguards apply at all relevant stages of criminal proceedings and with respect to all draft articles under Parts Two and Three. The term "exercise of criminal jurisdiction" is used in draft article 7 to refer broadly to different steps that may be taken by the forum State to determine, where appropriate, the criminal responsibility of an individual. In view of the differences in practice between States' various legal systems and traditions, it was not considered necessary to refer specifically to the nature of these steps, which may include both acts of the executive and acts performed by judges and prosecutors.

(4) Paragraph 1 uses the phrase "over an official of another State". This reflects the need for there to be a connection between the foreign State official and the exercise of criminal jurisdiction by the forum State.

Paragraph 2

(5) Paragraph 2 specifies the applicability of Part Four to the articles in Parts Two and Three, concerning immunity *ratione personae* and immunity *ratione materiae*, respectively. Draft article 7 does not prejudge and is without prejudice to any additional procedural guarantees and safeguards that States may develop in their bilateral or multilateral relations.

(6) With the phrase "including to the determination of whether immunity applies or does not apply under any of the present draft articles", the Commission has confirmed that Part Four, in its entirety, also applies in a situation where immunity does not apply under draft article 6. 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. In determining the applicability of immunity *ratione materiae*, account should be taken both of the normative elements listed in draft articles 4 and 5 and of the limitations and exceptions set out in draft article 6. In addition, under draft article 7, all the procedural provisions and safeguards set out in Part Four must be respected in the process of determining whether limitations and exceptions are applicable.

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 against an official of another State;

(*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 an official of another State. Thus, "examination" of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies. Therefore, while closely related, "examination" and "determination" of immunity are distinct categories, where examination, generally, precedes determination. The "determination of immunity" is addressed in draft article 13.

(2) Draft article 8 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule that is applicable to specific situations (para. 2). In both cases the obligation to examine the question of immunity is attributed to the "competent authorities" of the forum State. The Commission decided not to specify which State organs fall into this category, since the identification of such organs will depend on the time when the question of immunity arises and on the legal system of the forum State. Since such organs may differ from one national legal system to another, it was considered preferable to use a term that encompasses organs of different types, including administrative bodies, executive organs, prosecutors and courts. Determining which State organs fall within the category of "competent authorities" for the purposes of the present draft article is a matter to be considered on a case-by-case basis.

(3) The general rule contained in paragraph 1 defines the obligation of the competent authorities of the forum State to "examine the question of immunity without delay" when they "become aware that an official of another State may be affected by the exercise of its criminal jurisdiction".

(4) The obligation to examine the question of immunity will arise only when an official of another State may be affected by the exercise of the criminal jurisdiction of the forum State. For the general rule, the Commission has used the expression "exercise of … criminal jurisdiction", which it considered preferable to "criminal proceeding", an expression that was considered too narrow. The term "exercise of … criminal jurisdiction" is also used in draft articles 3, 5, 6, 7, 10, 13 and 15, both terms are explained in the general commentary to Part Four.

(5) 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[191] and in *Certain Questions of Mutual Assistance in Criminal Matters*,[192] a particular measure in the exercise of criminal jurisdiction may affect the immunity of a foreign official only if it subjects that official to a constraining act of authority. For example, the carrying out of investigations 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 collection of evidence for the case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.

Paragraph 1

(6) 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 concept 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*.[193] With this in mind, the Commission decided to indicate explicitly the point at which examination of the question of immunity should begin, defining it as follows: "[w]hen the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction". The phrase "[w]hen [they] become aware" follows, to some extent, the wording used by the Institute of International Law in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law,[194] 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" is inspired by articles 36 and 37 of the Vienna Convention on Consular Relations.

[191] *Arrest Warrant of 11 April 2000* (see footnote 35 above), paras. 54–55.

[192] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 64 above), paras. 170–171.

[193] The question was addressed by the International Court of Justice in relation to civil proceedings concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court elucidated the applicability of the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations in connection with the lawsuit in Malaysia against the Special Rapporteur on the independence of judges and lawyers, who had been sued for defamation in connection with statements made in an interview. In this context, the Court – at the request of the United Nations Economic and Social Council – issued an advisory opinion in which it stated that "questions of immunity are … preliminary issues which must be expeditiously decided *in limine litis*", and that this affirmation "is a generally recognized principle of procedural law", the purpose of which is to avoid "nullifying the essence of the immunity rule". Accordingly, the Court concluded by 14 votes to 1 "[t]hat the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at paras. 63, and 67 (2) (*b*)).

[194] Article 6 of the resolution of the Institute of International Law states that "[t]he authorities of the State shall afford to a foreign Head of State the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 137 above), p. 747.

Paragraph 2

(7) Paragraph 2 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 specific rule 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 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 specific 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.

(8) Under the specific rule contained in paragraph 2, the competent authorities must always examine the question of immunity "before initiating criminal proceedings against an official of another State" (subpara. (*a*)) and "before taking coercive measures that may affect an official of another State" (subpara. (*b*)). The Commission selected these two situations as examples of acts that could affect the immunity from foreign criminal jurisdiction that an official of another State 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*.

(9) The term "criminal proceedings" is explained in the general commentary to Part Four. 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 national 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 national law of the forum State. The identification of the time of "initiati[on] [of] criminal proceedings" as the moment at which, in any event, the question of immunity must be examined is consistent with international practice and jurisprudence. This does not mean, however, that the question of immunity cannot also be examined at a later stage if necessary, including at the appeal stage.

(10) 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 measures that may affect, *inter alia*, the official's freedom of movement, such as the obligation to appear in court as a witness, seizing of personal documents, detention, or 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 national legal system to another, it was considered preferable to use the general wording "coercive measures" to refer to "constraining act of authority", which was used by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, and is inspired by the reasoning of the Court in the case concerning the *Arrest Warrant of 11 April 2000*.[195]

(11) In practice, one of the most common coercive measures is the detention of the official. Whether the question of immunity can be examined before detention is ordered was considered 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

[195] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 64 above), para. 170; see also *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 54.

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".[196] The Commission therefore considered it necessary to address this issue in connection with the examination of immunity.

(12) The Commission also took into account that coercive measures that warrant an examination of the immunity of a foreign official may also affect his or her inviolability. This is the reason for the last phrase of subparagraph (*b*) of paragraph 2, 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 inviolability will only be enjoyed when granted by customary international law or treaty law.

(13) While the Commission considered that directly addressing the question of inviolability was beyond the scope of the present draft articles, it notes that inviolability is dealt with in various treaties, such as the Vienna Convention on Diplomatic Relations, which provides that "[t]he person of a diplomatic agent shall be inviolable [and] shall not be liable to any form of arrest or detention" (art. 29)[197] and that "[n]o measures of execution may be taken in respect of a diplomatic agent" (art. 31, para. 1).[198] In a similar vein, reference may be made to the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, in which the Court recognized that a Head of State enjoys "full immunity from criminal jurisdiction and inviolability".[199] Lastly, the Commission draws attention 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).[200]

Article 9
Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings against an official of another State 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, unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings. In any event, when a State has taken an official of another State into custody, it shall immediately notify the State of the official

[196] Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, 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".

[197] Similar provisions can be found in the Convention on Special Missions, art. 29, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28 and 58. A more nuanced reference to this idea can be found in the Vienna Convention on Consular Relations, art. 41, paras. 1–2.

[198] 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.

[199] *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 64 above), para. 170.

[200] *Yearbook of the Institute of International Law*, vol. 69 (see footnote 137 above), pp. 745 and 747.

of the fact that such person is in custody. States shall consider establishing appropriate procedures to facilitate such notifications.

2. A notification under paragraph 1 shall contain appropriate information for the State of the official to consider whether to invoke or waive immunity.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted by the States concerned.

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. 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. In order for the State 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.

(2) 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.[201] The Commission also took account of the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 of the Convention specifies the means by which "[s]ervice of process by writ or other document instituting a proceeding against a State" must be effected. Although this provision corresponds to a model that differs from that of 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.

(3) 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. 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 16.

[201] Article 42 of the Convention reads as follows: "In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel." The Vienna Convention on Diplomatic Relations, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Convention on Special Missions do not contain any similar provisions.

(4) 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.

Paragraph 1

(5) Paragraph 1 refers to the point in time at which notification should be provided. In view of its purpose, notification must be provided at an early stage, since otherwise it may frustrate the objectives of notification. 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. In view thereof, the Commission decided to include the phrase "unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings".

(6) The first sentence of paragraph 1 identifies the following acts in exercise of criminal jurisdiction that shall trigger notification to the State of the official: (*a*) initiation of criminal proceedings against an official of another State or (*b*) coercive measures that may affect the immunity of an official of another State. Notification must be provided prior to the occurrence of either of these two circumstances, unless, as the remainder of the first sentence of paragraph 1 provides, "such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings". Apart from the exception provided, paragraph 1 of the present draft article has been aligned with draft article 8, paragraph 2, 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 "initiating 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.[202] The exception was included to provide the forum State with a degree of flexibility to ensure that notification would not compromise investigations or future prosecutions. In that context, the expression "proper conduct of criminal proceedings" aims to prevent the possible destruction of evidence, manipulation of witnesses and the evasion of justice, among other measures that may compromise a State's ability to investigate and prosecute a crime.

(7) The second sentence of paragraph 1 states that "[i]n any event, when a State has taken an official of another State into custody, it shall immediately notify the State of the official of the fact that such person is in custody". This sentence is intended to ensure that, at the latest, the State of the official is notified when its official has been taken into custody.[203] The phrase "in any event" is included to address cases where the forum State has not notified before it initiated criminal proceedings or took coercive measures because the notification would have jeopardized the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings.

(8) The last sentence of paragraph 1 is based on the understanding that some national legal systems may not have procedures in place to allow for communication

[202] See, in particular, paras. (5)–(13) of the commentary to draft art. 8 above.

[203] See for example the following instruments containing an obligation of notification following the taking into custody or the arrest or detention of a person alleged of having committed a crime: Vienna Convention on Consular Relations (art. 42); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6, para. 4); International Convention for the Protection of All Persons from Enforced Disappearance (art. 10, para. 2); draft articles on prevention and punishment of crimes against humanity (draft art. 9, para. 3, *Yearbook ... 2019*, vol. II (Part Two), para. 44); and the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (art. 13, para. 4).

between executive, judicial or prosecutorial authorities.[204] 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. Taking into account, *inter alia,* that a State may not have diplomatic relations with another State, the Commission therefore considered it necessary to draw the attention of States to the issue by including this final sentence in paragraph 1. However, bearing in mind as well the diversity of national 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. Additionally, the term "notifications" is used in the plural here to clarify that the reference to "appropriate procedures" relates to any notification under paragraph 1.

Paragraph 2

(9) Paragraph 2 refers to the content of the notification. The paragraph begins with a cross-reference to paragraph 1 to clarify that it applies to any notification, whether made before the initiation of criminal proceedings, before the taking of coercive measures or upon taking an official of another State into custody. Given the purpose of the notification, while its content may vary from one case to another, the notification should always include sufficient information to enable the State of the official to form a judgment as to whether the immunity that might be enjoyed by one of its officials should be invoked or waived. 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. This is indicated by the phrase "appropriate information".[205] Accordingly, paragraph 2 is intended to accommodate the interest of the State of the official in receiving the information it needs to preserve its rights without being overly intrusive or prescriptive with respect to the forum State's domestic criminal processes.

(10) As paragraph 2 explains, the notification "shall contain appropriate information for the State of the official to consider whether to invoke or waive immunity". While the Commission did not prescribe exactly which types of information must be included in the notification, for the reasons stated above, it considered the following categories of information to be generally useful in aiding the State of the official to decide whether to invoke or waive immunity: (*a*) the identity of the official; (*b*) the grounds for the exercise of criminal jurisdiction; and (*c*) the competent authority to exercise jurisdiction. The first category, the "identity of the official", is a basic element for enabling the State of the official to assess whether the individual in question is indeed one of its officials and to decide on the invocation or waiver of immunity. The second category, "grounds for the exercise of criminal jurisdiction", allows for the inclusion in the notification of factual elements relating to the official's conduct, as well as information on the law of the forum State on which the exercise of jurisdiction would be based. The third category, "competent authority to exercise jurisdiction", reflects the fact that the State of the official may have an interest in knowing which organs of the forum State are 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.

[204] See the analysis of this issue in the seventh report of the Special Rapporteur (A/CN.4/729), paras. 121–126.

[205] Para. (3) of the commentary to draft art. 9 of the draft articles on prevention and punishment of crimes against humanity.

(11) Concerning the form of the notification, the Commission found it unnecessary to provide expressly that notification must be made in writing. Thus, although written notification is preferable for the sake of legal certainty, the Commission did not exclude other possibilities, 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).

Paragraph 3

(12) Paragraph 3 deals with the means of communication that the forum State may use to transmit the notification to the State of the official. This issue has not been addressed in any of the treaties dealing with one form or another of immunity of State officials from foreign criminal jurisdiction. However, the United Nations Convention on Jurisdictional Immunities of States and Their Property specifies the means by which service of process by writ or other document instituting a proceeding against a State must be effected. Under article 22, paragraph 1, it "shall be effected: (*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or (*b*) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or (*c*) in the absence of such a convention or special arrangement: (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum".

(13) 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 by the States concerned".

(14) 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.[206] 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. Since that expression is not identical in all official versions of the Convention, the original terms used in the Convention have been retained in the different language versions of the present draft article.

(15) 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 by the States concerned". This wording thus provides for an alternative, the use of which will have to be decided upon by the States concerned on a case-by-case basis; such alternatives may be reflected in either treaties that are general in scope or any other agreements concluded by the States concerned. It should also be noted that the phrase "accepted by the States concerned" refers to the requirement that such other

[206] 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".

means of communication must have been accepted by both the forum State and the State of the official.

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 should be invoked in writing, indicating 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 by the States concerned.

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.

(2) Paragraph 1 of draft article 10 is based on the recognition that the State of the official is entitled to invoke the immunity of its officials when another State seeks to exercise criminal jurisdiction over them. Although treaties addressing one form or another of immunity of State officials from foreign criminal jurisdiction do not expressly refer to the invocation of immunity or the corresponding right of the State of the official, invocation of the immunity of State officials is a common practice that is understood to be covered by customary international law. The invocation of immunity has a dual purpose: on the one hand, it serves as an instrument with which the State of the official may claim immunity for its official; on the other, it makes the State seeking to exercise jurisdiction aware of this circumstance and enables it to take account of the information provided by the State of the official for the purpose of determining immunity.

(3) The right to invoke immunity rests with the State of the official. This is easily justified by the fact that the purpose of immunity is to preserve the sovereignty of the State of the official, meaning that immunity is recognized in the interest of the State and not in the interest of the individual.[207] It is thus for the State itself to invoke

[207] 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 137 above), p. 743, third paragraph).

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. It is important to note, however, that the application of immunity does not require its express invocation.

(4) The right 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. Identification of those authorities depends on the national law, it being understood that this category includes those with responsibility for international relations under international law. 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 declaration by a foreign State official, who lacks legal authority to invoke immunity, that he or she has immunity therefore is not an invocation of immunity in the sense of the present draft article. That does not mean that such a declaration has no significance at all in the context of legal procedures carried out in relation to that person. Such a declaration may be considered by the forum State when examining or determining immunity.

(6) The invocation of immunity must 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.[208] 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 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 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.

Paragraph 1

(7) 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.

(8) 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 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

[208] See, in particular, *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 64 above), para. 196.

preferred over "as promptly as possible" or "within a reasonable time", the interpretation of which may be ambiguous. While the phrase "as soon as possible" draws attention to the importance of invoking immunity at an early stage, the use of the word "may" in paragraph 1 indicates that the State of the official has the right to invoke immunity at any time. That said, its effect may vary depending on when the invocation occurs, including if it occurs at an advanced stage of the proceeding.

(9) It should be reiterated that the inclusion of this last sentence in paragraph 1 does not create any obligation for the State of the official to invoke immunity or shift the burden to determine immunity from the forum State to the State of the official.

Paragraph 2

(10) 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 should be invoked in writing. The Commission chose the phrase "should be" rather than "shall be" because, while it considered that the legal and political effects of invocation were significant, both for the forum State and the State of the official, it found that a requirement that immunity must be invoked in writing did not exist in customary international law.[209] Accordingly, the more flexible and recommendatory language of "should" is used to accommodate situations in which invocation of immunity may not be made in writing.

(11) 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".[210]

(12) The Commission took the view that the State of the official should not be required to identify the type of immunity being invoked (*ratione personae* or *ratione materiae*), since that might constitute an excessive technical requirement. The reference to the position held by the official and the grounds for invoking immunity should provide a basis on which the forum State can assess whether the rules contained in Part Two (*ratione personae*) or Part Three (*ratione materiae*) of the present draft articles apply.

Paragraph 3

(13) 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.

Paragraph 4

(14) Paragraph 4 is intended to ensure that the State seeking to exercise criminal jurisdiction communicates any invocation of immunity by the State of the official to

[209] Second report by the Special Rapporteur (A/CN.4/780), para. 161.
[210] Para. (16) of the commentary to draft art. 2 above.

all of its authorities that are competent to deal with the question of immunity and with the examination or determination of its application. The International Court of Justice has affirmed a comparable obligation regarding immunity of a United Nations expert on mission under the applicable treaty framework in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory opinion.[211] The purpose of this paragraph is to prevent a situation where the invocation of immunity is ineffective simply because it has not been made known to the authorities responsible for examining or determining 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 ensure its authorities carry out 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 of the State, it was not considered necessary to identify which authorities are obliged to report and which authorities should receive notice of the invocation. This is logically predicated on the understanding that, in both cases, the authorities referred to are those of the State that intends to exercise or has exercised its criminal jurisdiction over an official of another State, and that the words "any other authorities" refer to those authorities that are competent to participate in the processes of examining or determining immunity. In both cases, it is irrelevant whether they are administrative bodies, authorities of the executive, the judiciary or the prosecution service, or even police authorities.

Article 11
Waiver of immunity

1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.

2. Waiver of immunity must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted by the States concerned.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned of such waiver.

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 concepts that should not be confused.

(2) In contrast to invocation, the waiver of immunity from jurisdiction has been discussed in detail by the Commission in several of its previous sets of draft articles[212]

[211] *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 para. 62.

[212] 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

and has been reflected in the treaties based on those draft articles, which cover certain forms of immunity from foreign criminal jurisdiction in the case of certain State officials. These include, in particular, the Vienna Convention on Diplomatic Relations (art. 32), the Vienna Convention on Consular Relations (art. 45), the Convention on Special Missions (art. 41) and the Vienna Convention on the Representation of States in Their Relations with International 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.[213] The same is true of the waiver of State immunity, which is addressed both in the United Nations Convention on Jurisdictional Immunities of States and Their Property[214] and in national laws on State immunity.[215]

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).

213 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 137 above), p. 749). Article 8 of the resolution states: "1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means" (*ibid*.). This approach remained the same in the Institute's 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, although the resolution incorporates a new element by stipulating, in article II, paragraph 3, that "States should consider waiving immunity where international crimes are allegedly committed by their agents". This recommendation mirrors the provisions of paragraph 2 of the same article II, according to which, "[p]ursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled" (*Yearbook of the Institute of International Law*, vol. 73-I-II (see footnote 137 above), p. 227.

214 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.

215 See United States, Foreign Sovereign Immunities Act 1976, sects. 1605 (*a*) (1), 1610 (*a*) (1), (*b*) (1) and (*d*) (1), and 1611 (*b*) (1); United Kingdom, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect.

(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. 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".[216]

Paragraph 1

(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 of a State official from foreign criminal jurisdiction may be waived by the State of the official". The emphasis is thus placed on the holder of the right to waive immunity, which is the State of the official rather than the official himself or herself. This is a logical consequence of the fact that the immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official. Therefore, 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) While the right to waive immunity rests with the State of the official, the language of paragraph 1 intentionally leaves open the possibility that immunity may be waived either *proprio motu* or at the request of the forum State.

(6) The right 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.[217] The Commission itself, in its previous work, has already considered it preferable not to refer expressly to the State organs that are competent to waive immunity.[218] Moreover,

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.

216 *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 61.

217 Exceptionally, some national laws refer to waivers communicated by a head of mission. See United Kingdom, State Immunity Act 1978, sect. 2.7; Singapore, State Immunity Act 1979, sect. 4.7; Pakistan, State Immunity Ordinance 1981, sect. 4.6; South Africa, Foreign States Immunities Act 1981, sect. 3.6; and Israel, Foreign States Immunity Law 2008, sect. 9 (*c*).

218 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

State practice is scant and inconclusive.[219] Which authorities are competent to waive immunity depends on the national law of the State of the official, 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.

(7) In contrast to draft article 10 on the invocation of immunity, draft article 11 does not include any temporal element, as the Commission found it unnecessary, given that immunity may be waived at any time, including after it was initially invoked.

Paragraph 2

(8) 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. The requirement that the waiver be express has been consistently reaffirmed by the Commission in its previous work,[220] and is reflected in both relevant treaties[221] and national laws.[222]

(9) The Commission also considered that a waiver might be contained in a treaty.[223] The possibility that a waiver of immunity may be derived from obligations

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" (para. (2) of the commentary to article 30, *Yearbook ... 1958*, vol. II, document A/3859, p. 99). 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" (para. (2) of the commentary to draft art. 45, *Yearbook ... 1961*, vol. II, document A/4843, p. 118).

219 For example, in the United States, the waiver was formulated by the Minister of Justice of Haiti in *Paul v. Avril* (United States District Court for the Southern District of Florida, Judgment of 14 January 1993, 812 F. Supp. 207), and, in Belgium, by the Minister of Justice of Chad in the *Hissène Habré* case (see footnote 87 above). In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police* (see footnote 98 above), the courts did not analyse which ministries were competent, but merely noted that it was sufficient that they were government bodies and therefore accepted a communication sent by the diplomatic mission of the Philippines.

220 See footnote 212 above.

221 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.

222 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.

223 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

imposed on States by treaty provisions relating to the exercise of foreign criminal jurisdiction specifically over State officials was addressed, in particular, in the *Pinochet (No. 3)* case.[224]

(10) In addition to being express, the waiver of immunity must be formulated in writing. This does not, however, affect the precise form that such writing should take, which will depend not only on the will of the State of the official, but also on the means used to communicate the waiver and even on the framework in which it is formulated. Thus, nothing prevents the waiver from being formulated by means of a *note verbale*, letter or other non-diplomatic written communication addressed to the authorities of the forum State, by means of a procedural act or document, or even by means of any other document that expressly, clearly and reliably affirms the State's willingness to waive the immunity of its official from foreign criminal jurisdiction.

(11) Finally, attention is drawn to the fact that, in contrast to draft article 10, paragraph 2, draft article 11 contains no express reference to the content of the waiver. However, in the view of the Commission, 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.[225] 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 and procedural scope it intends to give to the waiver, especially when the State wishes to limit the waiver to certain acts, to exclude certain acts alleged to have been performed by the official or to restrict it to certain procedural acts. 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.

Paragraph 3

(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

from measures of execution accorded to their own Heads of State" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 137 above), p. 749).

[224] *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)* (see footnote 64 above). See also United Kingdom, Supreme Court, *The Kingdom of Spain (Appellant) v. Infrastructure Services Luxembourg S.À.R.L. and another (Respondents); Republic of Zimbabwe (Appellant) v. Border Timbers Ltd and another (Respondents)*, Judgment, 4 March 2026, p. 25, paras. 69–70.

[225] 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, 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 219 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 98 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

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 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 "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.

Paragraph 4

(13) Paragraph 4 provides that "[t]he authorities to which the waiver has been communicated shall immediately inform any other authorities concerned of such waiver". 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.

Paragraph 5

(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 concept would lose all meaning. Paragraph 5 is based on the principles of good faith and legal certainty.

Article 12
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to determine 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 by the States concerned.

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 each other. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 13. Draft article 12 consists of four paragraphs referring to the right of the States concerned to request

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).

information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State is to consider the request (para. 4).

Paragraphs 1 and 2

(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 determine whether immunity applies or not" under draft article 13; and for the State of the official, "to decide on the invocation or the waiver of immunity" under draft articles 10 or 11.

(3) 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 (e.g., name, position within the State, scope of authority) 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 make a determination of 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.

(4) 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 trust between them. The system for requesting information provided for in draft article 12 therefore serves as a procedural safeguard for both States.

(5) The request may relate to any item of information that the requesting State considers useful for the purposes specified in paragraphs 1 and 2. Given the variety of items of information that may be taken into account by States for the purpose of determining immunity or deciding on its invocation, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression "any information that it considers relevant", in preference to "the necessary information", as the adjective "necessary" could be understood in a narrow, literal sense, especially in English. Conversely, the use of the word "relevant" acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide on the information that it wishes to request in each case, as provided in a number of international instruments.[226]

[226] See, for example, European Convention on Mutual Assistance in Criminal Matters, art. 3; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 1, paras. 1 and 2; and Model Treaty on Mutual Assistance in Criminal Matters, art. 1, para. 2.

Paragraph 3

(6) 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 the present paragraph.

(7) 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.

Paragraph 4

(8) Paragraph 4 sets 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. The term "requested State" reflects the terminology commonly used in international cooperation and mutual legal assistance treaties, which is familiar to States.

(9) 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 light of two elements operating together: first, the obligation to consider 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.

(10) The requested State should take these elements into account as a starting point for the consideration of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request (e.g., concerns of sovereignty, public order, security and essential public interest).

(11) 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.

Article 13
Determination of immunity

1. A determination of the immunity of a State official from foreign criminal jurisdiction shall be made by the competent authorities of the forum

State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination of immunity, such competent authorities shall take into account in particular:

(*a*) whether the forum State has made the notification provided for in draft article 9;

(*b*) whether the State of the official has invoked or waived immunity;

(*c*) any other relevant information provided by the authorities of the State of the official; and

(*d*) any other relevant information provided by other authorities of the forum State.

3. When the forum State is considering the application of draft article 6 in making the determination of immunity:

(*a*) the authorities making the determination shall be at an appropriately high level; and

(*b*) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 6; and

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(*a*) before initiating criminal proceedings against an official of another State;

(*b*) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This subparagraph does not prevent, prior to the determination of immunity, the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination of immunity that may be brought under the applicable law of the forum State.

Commentary

(1) Draft article 13 concerns the determination of immunity. A "determination" under draft article 13 refers to the decision made by the forum State as to whether or not immunity applies in a particular case before the initiation of criminal proceedings against an official of another State or the taking of coercive measures that may affect that official. This is a key provision of Part Four of the present draft articles and one of the most fundamental procedural safeguards contained in this part.

(2) A "determination" of immunity under draft article 13 may not necessarily be the ultimate decision of the issue of immunity by the forum State, but it is the final stage of a process in which the competent authorities of the forum State make an assessment of the various elements and circumstances of a particular case prior to

initiating criminal proceedings against the official or taking coercive measures that may affect the official. It is to be distinguished from the "examination" of immunity covered in draft article 8, which refers only to the initial consideration of this question. In any case, as determination is the final stage of that process, draft article 13 should be read in conjunction with other provisions of Part Four, in particular draft articles 8 to 12, which explain the other steps in the process of determination of immunity. In this connection, attention is also drawn to the special relevance of draft article 7, which defines the scope of application of the present Part and its relationship to the other parts of the draft articles. Under that draft article, a determination of immunity must be made whenever the question of immunity from the forum State's exercise of criminal jurisdiction arises, including in cases where draft article 6 may be applicable.

(3) Draft article 13 consists of five paragraphs concerning, respectively, the identification of who is to make the determination of immunity and what legal rules must be followed in that process (para. 1); what general criteria must be taken into account by the forum State in determining immunity (para. 2); what special criteria must be taken into account by the forum State in determining immunity in connection with draft article 6 (para. 3); when immunity must be determined (para. 4); and judicial challenges to the determination of immunity (para. 5).

Paragraph 1

(4) Paragraph 1 begins with the words "[a] determination". The use of the article "a" is intended to show that the determination is always made with respect to a specific case, the elements and circumstances of which may differ from those of any other case. In each language version of the draft article, the most appropriate word for achieving this purpose has been used.

(5) The determination of immunity is to be made by "the competent authorities of the forum State". The reference to "the competent authorities of the forum State" introduces an element of flexibility that allows two factors to be taken into account: first, that the determination of immunity may be made at different times and is not limited to a judicial procedure *stricto sensu*, and second, that the authorities competent to determine immunity may vary from one State to another, depending on the applicable national rules. Authorities with competence to determine immunity may include administrative and executive bodies, prosecutors, judges or other organs to which the national law of the forum State grants such competence. Moreover, it should be borne in mind that several organs of the forum State may be considered successively as competent authorities in cases where the determination of immunity can or must be made at different stages, in particular when the exercise of the criminal jurisdiction of the forum State requires the intervention of judicial authorities. In such cases, the criteria set forth in paragraphs 2, 3 and 4 of draft article 13 must be applied by each of the competent authorities in making a determination of immunity.

(6) The determination of immunity is to be made in accordance with the national law of the forum State. Paragraph 1 uses the phrase "according to its law and procedures" to indicate that the competent authorities must take into account both the substantive rules and the procedural rules applicable to the case. However, while the national law of the forum State will be the primary basis for determining immunity, an express reference to the fact that the determination is to be made "in conformity with the applicable rules of international law" has also been included, given that immunity is part of international law and that States are also bound by both customary and treaty rules that may have a bearing on immunity and its determination. The phrase "in conformity with" was chosen because the Commission considered that it imposes a higher standard than other similar expressions such as "taking into account" and "in accordance with". The use of this phrase emphasizes the fact that, regardless of the flexibility envisaged with respect to the organs, laws and procedures of the forum State relevant to the determination of immunity, the determination must nevertheless produce a result consistent with international law.

Paragraph 2

(7) Paragraph 2 sets out the criteria to be taken into account by the competent authorities of the forum State in determining immunity in a particular case. The criteria in this paragraph shall be taken into account in all cases of the determination of immunity, including those in which the application of draft article 6 may be considered. In any event, while these are the basic criteria that shall always be taken into account, they are not the only ones that the competent authorities of the forum State may consider in determining immunity. This is reflected by the words "in particular" at the end of the introductory phrase of the paragraph.

(8) The list of criteria to be taken into account by the competent authorities of the forum State includes some essential elements forming part of the procedural path that begins with the examination of immunity and ends with the determination of immunity, in particular the notification provided for in draft article 9 (referred to in subparagraph (*a*)), the invocation or waiver of immunity by the State of the official (subparagraph (*b*)) and the information made available to the forum State (subparagraphs (*c*) and (*d*)).

(9) These criteria have been included because of their direct connection to the procedural safeguards referred to in draft articles 9, 10, 11 and 12. However, while all the criteria included in draft article 13, paragraph 2, are related to these other draft articles, the Commission did not consider it necessary to include cross references to them in all cases. Only an express reference to draft article 9 has been included, given that this is the only draft article that imposes an obligation on the forum State, while the other draft articles refer to rights of the State of the official (invocation and waiver) or to optional instruments available to the forum State and the State of the official (requests for information).

(10) It should be borne in mind, in view of the discretionary character of the safeguards provided in draft articles 10, 11 and 12, that the criteria listed in paragraph 2 are not prerequisites for the determination of immunity, but elements of guidance which are offered to the competent authorities and which they must take into consideration for the purpose of determining immunity. This is particularly relevant with regard to the invocation of immunity, which has not been considered by the Commission as a prerequisite for the application of either immunity *ratione personae* or immunity *ratione materiae*. The competent authorities of the forum State must therefore determine immunity in any case, whether or not it has been invoked

(11) With regard to the information available to the competent authorities of the forum State, the Commission considered it useful to refer separately to information from each of the sources from which it may originate. Information provided by the State of the official (subparagraph (*c*)) is directly related to the system of requests for information provided for in draft article 12, but nothing prevents such information from being provided *proprio motu* outside that system. The reference to information "provided by other authorities of the forum State" (subparagraph (*d*)) reflects the fact that the authorities with competence to determine immunity may receive, and often do receive, information from other authorities of the State that may be useful or necessary for the determination of immunity, including information provided by the police, the Ministry for Foreign Affairs, the Ministry of Justice or others.

(12) It should be noted that the Commission decided not to establish in paragraph 2 any hierarchy among the sources from which the available information has originated. Therefore, subparagraphs (*c*) and (*d*) begin with the words "any other relevant information". This phrase also means that the information to be taken into consideration in determining immunity must always be "relevant", and it is for the competent authorities of the forum State to assess such relevance.

(13) Lastly, the Commission notes that the competent authorities of the forum State often receive or have access to information from other sources, including third States, international organizations (such as the International Criminal Police Organization

(INTERPOL)), international investigative mechanisms, courts, the International Committee of the Red Cross and non-governmental organizations. While the Commission considered that this information may be useful for the determination of immunity in a particular case, it decided not to include an express reference to those sources among the criteria listed under paragraph 2. However, given the non-exhaustive character of the list in paragraph 2, the competent authorities of the forum State may still take into account other information that it considers relevant in determining immunity.

Paragraph 3

(14) Paragraph 3 applies only in cases where the determination of immunity is related to draft article 6. In other words, it applies only in cases where the forum State considers that the official of another State may have committed one of the crimes under international law within the scope of that draft article, which may lead the forum State to determine that the official does not enjoy immunity *ratione materiae,* even if the acts in question were performed in an official capacity. The Commission has thus taken the view that special criteria for determining immunity must be established for cases of this type to ensure a proper balance between the interests of the forum State and those of the State of the official. These special criteria serve two complementary purposes: first, to reduce the risk of politicization and misuse of draft article 6, and second, to ensure that effect can be given to draft article 6 and that its use in good faith is not prevented.

(15) The special criteria listed in paragraph 3 are complementary to those set out in paragraph 2, which also apply in cases of determination of immunity that may be affected by draft article 6. The special criteria set out in paragraph 3 relate to two distinct questions: which authorities should determine immunity in these circumstances (subparagraph (*a*)) and what additional elements should be assessed by the competent authorities for the purpose of determining immunity (subparagraph (*b*)).

(16) Subparagraph (*a*) requires that the authorities of the forum State that are to determine immunity "be at an appropriately high level". The Commission included this criterion taking into account, in the first place, the seriousness of the crimes alleged to have been committed by the official in such cases, which, owing to their characteristics and specific nature, require assessment by specially qualified State authorities with a special level of competence. Additionally, the Commission considered that the authorities making the determination of immunity should be competent, within the specific legal structure of the forum State, to make determinations regarding the legal rights of foreign States and their officials. This is particularly important given that the exercise of criminal jurisdiction over a foreign official, in relation to this category of crimes, may have a significant impact on the relations between the forum State and the State of the official. This is another reason that the authorities making the determination of immunity should have sufficiently high-level decision-making power.

(17) The Commission understands "appropriately high level" to be the necessary criterion for defining the concept of a "competent authority" for the purpose of this type of determination. Therefore, in subparagraph (*a*), it used only the term "authorities" rather than "competent authorities", as used in subparagraph (*b*). In any event, it should be recalled that, as noted above, the term "authorities" is used to refer to a broad range of State organs, including administrative, executive, prosecutorial and judicial authorities. It should moreover be borne in mind that the determination of which "authorities [are] at an appropriately high level" will depend on each State's legal system. Therefore, "appropriately high level" does not necessarily mean "hierarchically superior", since the existence or not of a hierarchical relationship in each category of organs will depend on the internal system of the forum State.

(18) Paragraph 3, subparagraph (*b*), sets out two criteria that serve as additional elements to be assessed when determining immunity in cases that may be covered by draft article 6. Because they are different in nature, they use different wording to express the obligation imposed on the competent authorities: "assure themselves" with respect to the first criterion and "give consideration" with respect to the second.

(19) Under the first of these criteria, set forth in subparagraph (*b*) (i), "the competent authorities [must] assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 6"; that is, a crime of genocide, a crime against humanity, a war crime, a crime of apartheid, a crime of torture, a crime of enforced disappearance, a crime of aggression, a crime of slavery, or a crime of slave trade. The expression "[must] assure themselves" refers to the competent authorities' obligation to form a reasoned judgment on this point. This should not, however, be confused with the standard of being convinced beyond reasonable doubt, which would be necessary for a court to conclude that the official in question is criminally responsible for the commission of any of these crimes. This distinction is very important, especially since, as will be noted below, the determination of immunity may be made at different times and need not necessarily take the form of a judicial determination.

(20) To prevent the politically motivated or improper use of exceptions to immunity, the criterion contained in subparagraph (*b*) (i) is intended to ensure that the determination of immunity is not based solely on news reports, complaints or other types of unsubstantiated information. It is therefore essential to define the standard of proof applicable to the information which the competent authorities use as the basis for forming their judgment. After weighing different possibilities,[227] it was decided that an internationally established standard of proof should be used. The Commission thus decided that the standards defined in the Rome Statute of the International Criminal Court would serve as a useful model, especially as these standards were considered and agreed upon by States at an international conference with wide participation.

(21) In line with this approach, the Commission assessed the different formulations used in the Rome Statute to identify a sufficient basis for the exercise of jurisdiction, namely: (*a*) a "reasonable basis to believe that a crime … has been or is being committed", as a sufficient standard of proof for the Prosecutor to decide to initiate an investigation, [228] and, conversely, "substantial reasons to believe that an investigation would not serve the interests of justice";[229] (*b*) "reasonable grounds to believe that [an individual] has committed a crime", as the applicable standard for the Pre-Trial Chamber to issue a warrant of arrest;[230] and (*c*) "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged", for the Pre-Trial Chamber to confirm the charges.[231]

(22) After analysing each of these ways of describing the standard of proof, the Commission decided to use the expression "substantial grounds to believe", which in its view is precise enough to achieve the objectives pursued by this criterion. This expression is taken from the English version of article 61, paragraph 7, of the Rome Statute, which is the same in the Arabic, Chinese, French and Russian versions. Although the wording of that paragraph is different in the Spanish version ("*motivos fundados para creer*"), the Commission preferred not to use different wording in each of the official languages, in order to avoid possible misinterpretations on an issue of such importance as the standard of proof required for the application of draft article

[227] The Commission considered, among others, the following formulations: "*prima facie* evidence", "clear and convincing evidence" and "the highest standard of proof for the prosecution of crimes in the domestic legal system" of the forum State.

[228] Rome Statute, art. 53, para. 1 (*a*).

[229] *Ibid*., art. 53, para. 1 (*c*).

[230] *Ibid*., art. 58, para. 1 (*a*).

[231] *Ibid*., art. 61, para. 7.

6. However, the Commission decided not to retain the words immediately preceding that phrase in article 61, paragraph 7 ("whether there is sufficient evidence to establish"), to avoid creating the erroneous impression that the authorities competent to determine immunity must examine the evidence as thoroughly as the Pre-Trial Chamber of the International Criminal Court is required to do, through a judicial procedure in which the right of the accused or his or her counsel to participate is recognized.

(23) In connection with the above-mentioned considerations, it should be noted that the use of the phrase "*razones sustanciales para creer*" in the Spanish version of the present draft article should not be conflated with the use of the same phrase in article 53, paragraph 1 (*c*), of the Rome Statute[232] as a basis on which the Prosecutor of the Court may decide that, despite the existence of sufficient information indicating that crimes within the jurisdiction of the Court have been committed, an investigation need not be initiated because it "would not serve the interests of justice". Although the Commission considered this issue, it decided not to include a reference to the interests of justice as part of this criterion because doing so could potentially politicize the determination of immunity.

(24) The standard of proof just discussed refers to the conduct of the official of another State, using the wording "committed any of the crimes under international law listed in draft article 6". The verb "committed" follows the wording of the above-mentioned provisions of the Rome Statute and should be understood in relation to the process of determining immunity, which, as noted above, cannot be confused with the determination of any criminal responsibility that the official may have incurred. Therefore, the use of the verb "committed" does not prejudice the presumption of innocence of the official, respect for which is provided for in draft article 15, entitled "Fair treatment of the State official".

(25) Under the criterion set forth in paragraph 3 (*b*) (ii) of the present draft article, the competent authorities must "give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official". The obligation imposed on the competent authorities is less stringent than that referred to in subparagraph (*b*) (i), since those authorities need only "give consideration to" any such request or notification.

(26) This criterion allows for the fact that proceedings in respect of the crimes under international law within the scope of draft article 6 may be instituted by a plurality of jurisdictions, both national and international. Such crimes may be submitted to the criminal courts of the official's own State, to the criminal courts of third States by virtue of the jurisdictional powers provided for in their legal systems or in applicable treaties, and to the competent international and hybrid courts. Criminal jurisdiction may be exercised concurrently or consecutively before more than one of the courts indicated, as well as before the courts of the forum State.

(27) The Commission therefore decided to include this special criterion for the determination of immunity in connection with draft article 6, given that it allows for the operation of the applicable systems of cooperation and mutual legal assistance and, by this means, for the establishment of objective conditions for the exercise of jurisdiction by the forum State, the State of the official, a third State or an international court. The Commission also noted that the official's immunity from criminal jurisdiction will play a different role in each of the jurisdictions mentioned above, being inapplicable before the courts of the official's State and before international criminal tribunals. Consequently, assessing whether a court other than those of the forum State is exercising or intends to exercise jurisdiction may be a useful tool for avoiding a conflict between respect for immunity and establishment of criminal responsibility for the commission of crimes under international law. This

[232] The terms used in the Arabic, Chinese, English, French and Russian versions of article 53, paragraph 1 (*c*), are different from those used in draft article 13, paragraph 3 (*b*) (*i*).

amounts to an enhanced procedural safeguard for the purposes of Part Four of the present draft articles.

(28) The use, in paragraph 3 (*b*) (ii), of the alternative expressions "request or notification", "another authority, court or tribunal" and "its exercise of or intention to exercise" is meant to ensure that the wording is flexible enough to cover the different situations that may arise in practice.

(29) This criterion is clearly related to the transfer of criminal proceedings referred to in draft article 14. However, as its scope is broader, the Commission preferred not to include an express reference to that draft article in paragraph 3 of draft article 13.

Paragraph 4

(30) Paragraph 4 refers to the moment at which immunity must be determined and applies to any determination made under draft article 13. Like the examination of immunity, the determination of immunity should take place as early as possible, to avoid a situation where the late determination of immunity prevents it from producing its full effects.[233] However, the Commission did not consider it necessary to indicate, in a general way, when the determination should take place, since this will depend on different circumstances that cannot be listed in an exhaustive manner. Rather, paragraph 4 of this draft article indicates when immunity must necessarily be determined if it has not been determined earlier. This is reflected in the use of the word "always" with reference to the obligation to determine immunity that is incumbent on the competent authorities of the forum State.

(31) In indicating when immunity must necessarily be determined, draft article 13, paragraph 4, largely follows the wording of draft article 8, paragraph 2. Accordingly, the authorities must always determine immunity "before initiating criminal proceedings against an official of another State"[234] and "before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law".[235] The meaning and scope of these phrases have been previously analysed in the commentary to draft article 8, paragraph 2, to which reference is made.[236]

(32) However, paragraph 4, subparagraph (*b*), of draft article 13 adds a new sentence stating that the fact that immunity must always be determined before coercive measures can be taken against a foreign official "does not prevent, prior to the determination of immunity, the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". This clause strikes a balance between the interests of the State of the official, represented by the determination of immunity at a procedurally appropriate time, and the interests of the forum State, represented by the retention of the ability to take such coercive measures as are necessary to ensure that, should the forum State subsequently be able to exercise criminal jurisdiction over the foreign official, this will not be impossible in practice. The coercive measures that could be adopted or continued will therefore be measures of a precautionary nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities. The Commission included the phrase "prior to the determination of immunity" to indicate that, once the forum State has determined that immunity applies in a given case, it may not adopt or continue to enforce the coercive measure referred to in the last sentence of paragraph 4, subparagraph (*b*). This does

[233] See, in particular, para. (6) of the commentary to draft art. 8 above.
[234] See para. (9) of the commentary to draft art. 8 above.
[235] See para. (10) of the commentary to draft art. 8 above.
[236] See, in particular, paras. (8)–(12) of the commentary to draft art. 8 above.

not prejudice the result of any challenges to the determination of immunity that may occur pursuant to paragraph 5 of this draft article.

(33) Lastly, the Commission notes that paragraph 4, subparagraph (*b*), does not allow the adoption or continuation of measures in violation of the inviolability that the official may enjoy under international law.

Paragraph 5

(34) As noted above, the determination of immunity may be made at different times and may be decided upon by administrative, executive, prosecutorial or judicial authorities. This means that the determination of immunity need not necessarily be a judicial determination.

(35) However, because immunity is determined for the purpose of the exercise of criminal jurisdiction by the forum State, there is in practice a strong likelihood that the determination of immunity will lead to a judicial phase, especially in relation to a decision to initiate criminal proceedings against the foreign official or the adoption of certain coercive measures that must be approved by the courts or may be subject to challenge. In addition, the decisions adopted by administrative, executive or prosecutorial authorities on the determination of immunity may be subject to judicial oversight in many cases. With this in mind, the Commission has included in paragraph 5 of draft article 13 the possibility of challenging a determination regarding immunity by means of judicial proceedings.

(36) The Commission decided to approach the issue of challenging the determination of immunity in terms of the safeguards provided to the State of the official and to the official himself or herself. Consequently, priority has been given to challenges to a "determination that an official of another State does not enjoy immunity", which "shall be open to challenge through judicial proceedings". An obligation is thus imposed on the forum State to ensure that such a challenge is possible. The Commission has used the phrase "challenge through judicial proceedings", which was considered to be the most appropriate means, owing to its generality, of covering the different legal avenues and remedies established for this purpose in national judicial systems. Paragraph 5 likewise does not address the issue of standing to challenge the determination or other issues of a procedural nature that will depend on the national law of each State.

(37) The emphasis placed on cases where the determination concludes that immunity does not apply is also due to other considerations. For example, it has been argued that in some judicial systems a decision by the prosecutor not to exercise jurisdiction, including where the decision is based on a finding that immunity applies, is not subject to legal challenge. However, the priority treatment given to challenges to determinations denying immunity in no way implies that the Commission's intent is to exclude challenges to determinations upholding immunity. On the contrary, paragraph 5 contains a "without prejudice" clause stating that it is "without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State".

(38) Through this "without prejudice" clause, the Commission recognizes that a determination in favour of immunity may also be challenged in court, thus reflecting the existing practice in a number of States and the need to strike a balance between the rights of the foreign official, on the one hand, and those of the victims of the crimes he or she is alleged to have committed, on the other. In this context, the Commission has taken into account, in particular, the right of access to justice, which is a basic component of the right to effective judicial protection and, as such, is recognized in various international human rights instruments [237] and has been

[237] See, in this connection, the following instruments: International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, and vol. 1057, p. 407, art. 14; Convention for the Protection of Human

systematically referred to in the case law of regional courts such as the European Court of Human Rights[238] and the Inter-American Court of Human Rights,[239] as well as in the doctrine of the Human Rights Committee.[240] All these elements must be duly taken into account in order to determine whether a challenge "may be brought under the applicable law of the forum State", since the Commission understands that the expression "applicable law" refers both to State law and to the rules of international law that are enforceable against that State.

Article 14
Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.

5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Commentary

(1) Draft article 14 provides for the possibility of transferring criminal proceedings to the State of the official and regulates the conditions under which this may occur, as well as its effects.

(2) The transfer of criminal proceedings is one of the mechanisms for cooperation and mutual legal assistance in criminal matters. Although not very widespread, it has been provided for in some multilateral international instruments.[241] Its importance is

Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221, arts. 6 and 13; Charter of Fundamental Rights of the European Union (Nice, 7 December 2000), *Official Journal of the European Communities*, C 364, 18 December 2000, p. 1, art. 47; American Convention on Human Rights: "Pact of San José, Costa Rica" (San Jose, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 8; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid*., vol. 1520, No. 26363, p. 217, art. 7; and Arab Charter on Human Rights (adopted at the Summit of the League of Arab States at its sixteenth ordinary session, held in Tunis in May 2004, CHR/NONE/2004/40/Rev.1, or *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147), art. 12.

238 See, e.g., European Court of Human Rights: *Airey v. Ireland*, 9 October 1979, Series A, No. 32; and *Stanev v. Bulgaria* [GC], No. 36760/06, *Reports of Judgments and Decisions* 2012.

239 See, in particular, Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, Series A No. 9.

240 See, in particular, Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

241 The Council of Europe adopted the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. The European Convention on Mutual Assistance in Criminal Matters refers to the transfer of proceedings in article 21. Of particular importance is the treatment given to the transfer of criminal proceedings in article 21 of the United

illustrated by the General Assembly's adoption of the Model Treaty on the Transfer of Proceedings in Criminal Matters.[242] This mechanism allows a State that is exercising jurisdiction over an individual to transfer the criminal proceedings to another State that also has jurisdiction and that, for various reasons, would be in a better position to exercise jurisdiction. The transfer of proceedings is intended to ensure that jurisdiction is effectively exercised and that, where appropriate, the individual's criminal responsibility can be established.[243]

(3) Although the international instruments governing the transfer of proceedings do not refer to the immunity of State officials from foreign criminal jurisdiction, there is nothing to prevent this mechanism from also being used in a context where the question of immunity arises. Draft article 14 serves this purpose by permitting the transfer, to the State of the official, of proceedings instituted against him or her in the forum State. Recourse to this instrument of cooperation ensures a balance between the rights and interests of the State of the official and those of the forum State, helping to preserve immunity, where it applies, while also ensuring that immunity does not prevent the effective exercise of criminal jurisdiction over the official. This formula is fully compatible with the position taken by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, in which it stated that immunity does not affect the criminal responsibility of a State official, which may be established through the exercise of jurisdiction by the courts of the State of the official, by other courts or by an international criminal tribunal.[244]

(4) Draft article 14 refers only to the transfer of criminal proceedings from the forum State to the State of the official, since it is intended as a procedural safeguard operating between the States directly concerned by the present draft articles. This does not mean that the proceedings cannot be transferred to a third State under applicable rules on cooperation and mutual legal assistance in criminal matters, nor does it mean that the proceedings cannot be transferred to a competent international criminal court. However, the transfer of criminal proceedings to a third State or to an international criminal court must be carried out in accordance with the international rules applicable in each case and not in accordance with draft article 14, which establishes special rules for the transfer of criminal proceedings between the forum State and the State of the official in the context of the present draft articles.

(5) Draft article 14 consists of five paragraphs, which set out the procedural steps to be followed in transferring criminal proceedings and the effects of such transfer (paras. 1–3), and establish two safeguards concerning the exercise of jurisdiction by the forum State (paras. 4 and 5).

Paragraph 1

(6) Paragraph 1 concerns the first phase of the transfer process, providing that "[t]he competent authorities of the forum State may … offer to transfer the criminal proceedings to the State of the official". The transfer is therefore understood as a prerogative of the forum State and not as an obligation. Moreover, this prerogative of the forum State is embodied in the offer to transfer and not in the transfer itself, which will take place only if the requirement set forth in the second sentence of paragraph 2 of the draft article is met. The Commission chose to use the verb "offer" in the

Nations Convention against Transnational Organized Crime (New York, 15 November 2000, United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209), which, moreover, has been the subject of continued discussion within the Conference of the Parties to the Convention. In this regard, see Working Group on International Cooperation of the Conference of the Parties to the Convention, Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters (CTOC/COP/WG.3/2017/2).

242 General Assembly resolution 45/118 of 14 December 1990.

243 See Council of Europe, Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, *European Treaty Series*, No. 73.

244 *Arrest Warrant of 11 April 2000* (see footnote 35 above), para. 61.

paragraph to strengthen the connection between paragraph 1 and the condition established in paragraph 2 for the transfer to take place, as well as to make clear the consensual nature of the transfer procedure as a whole.

(7) In accordance with paragraph 1, the offer may be made "*proprio motu* or at the request of the State of the official". Although the transfer procedure is likely to be initiated at the request of the State of the official, the Commission did not wish to rule out the possibility that it may be initiated by an authority of the forum State in exercise of its own powers. In any event, the ultimate decision to "offer to transfer" is within the unilateral competence of the authorities of the forum State, subject to the clause contained in the first sentence of paragraph 2. As in other draft articles, the term "competent authorities" includes any authority of the forum State, whether administrative, executive, prosecutorial or judicial.

(8) Paragraph 1 does not mention the rules that should govern the decision to offer to transfer the proceedings, but this should not be taken to mean that such a decision is discretionary in absolute terms. Rather, the competent authorities referred to in this paragraph, like all State authorities, will be bound by the law applicable in the forum State, which includes both the rules of national law and the rules of international law that are enforceable against such State. This is particularly relevant in cases where the proceedings to be transferred relate to the commission of crimes under international law in respect of which the State has an obligation to exercise jurisdiction under international law. This circumstance has been particularly taken into account by the Commission, which included paragraph 5 to address this specific problem.

(9) Lastly, it should be noted that the offer to transfer the criminal proceedings is an autonomous act that does not require the authorities of the forum State to first decline to exercise their jurisdiction. The Commission noted in one case concerning the transfer of proceedings that the competent authorities of the forum State took the view that they were delegating, rather than relinquishing, the exercise of their own jurisdiction.[245] For this reason, the Commission chose to refer only to the offer to transfer, on the understanding that this implies that the competent authorities of the forum State will not be obliged to take a prior decision on the exercise of their own jurisdiction. This reflects the diversity of existing models in national legal systems and is consistent with the safeguard clause contained in paragraph 4, which provides for the resumption of criminal proceedings by the forum State.

Paragraph 2

(10) Although the forum State is not obliged to offer to transfer the proceedings, paragraph 2 imposes an obligation on the forum State to consider any request for transfer in good faith. It is understood that such a request for transfer will have to come from the State of the official, in view of the relationship between paragraph 1 and paragraph 2 referred to above. This obligation makes good faith an essential principle that will govern the relations between the State of the official and the forum State with regard to the transfer of criminal proceedings, being equally applicable to both States.

(11) The reference to good faith in the first sentence of paragraph 2 is of special significance when read in conjunction with the second sentence of that paragraph, according to which the transfer will only take place "if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution". This

[245] The decision in question is the judgment of 10 May 2018 of the Lisbon Court of Appeal, handed down in criminal proceedings for corruption involving a former Vice-President of Angola. See case No. 333/14.9TELSB-U.L1-9, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/88e2a666e33779ce802582b8003567f3?OpenDocument. The Court's interpretation was probably based on the fact that the transfer of the criminal proceedings to the Angolan courts was based exclusively on Portuguese law (the Code of Criminal Procedure).

wording reproduces what is known as the "Hague formula", which appeared for the first time in article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,[246] and which has subsequently been reproduced in many conventions. This "formula" was examined by the Commission in its work on the obligation to extradite or prosecute (*aut dedere aut judicare*)[247] and on prevention and punishment of crimes against humanity.[248] The wording of this phrase in draft article 14 is identical to that of draft article 10 of the draft articles on prevention and punishment of crimes against humanity, although the latter draft article deals with the obligation to extradite or prosecute.

(12) As indicated by the Commission in its work on the aforementioned two topics, the submission of the case to the competent authorities should be understood as a substantive and not merely formalistic measure. This means that the State of the official has an obligation to transmit all available evidentiary and other information to its competent authorities, so that they may evaluate it and conduct an investigation that will enable them to form a judgment on whether to initiate proceedings against the official. However, the submission of the case for prosecution does not amount to an obligation to initiate such proceedings, as the decision on whether to do so will depend on the evaluation of the evidence submitted and other available information, as well as the evidence obtained in the investigation to be carried out by the competent authorities. In any event, the submission of the case to the competent authorities must, at the very least, be done in good faith and not for the purpose of blocking prosecution or preventing the establishment of the official's responsibility; as the International Court of Justice stated in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the exercise of jurisdiction by the State concerned (in this case the State of the official) must be carried out for the purpose of ensuring that the individual (in this case the official) will not go unpunished.[249] In this regard, it should be recalled that draft article 10 of the draft articles on prevention and punishment of crimes against humanity expressly provides that the competent authorities to whom the matter is referred "shall take their decision [whether or not to initiate criminal proceedings] in the same manner as in the case of any other offence of a grave nature under the law of that State".[250] The phrase "submit the case … for the purpose of prosecution" must similarly be interpreted in a substantive manner and with the ultimate purpose in mind.

(13) The interpretation of the obligation of the State of the official to act in good faith in submitting the case to its national authorities is of particular importance in relation to paragraph 4 of draft article 14, to which the above comments apply.

Paragraph 3

(14) Paragraph 3 provides for the suspension of criminal proceedings in the forum State as a consequence of the transfer. Such suspension will only occur when the transfer has been agreed and, in any case, will be limited in scope by the "without prejudice" clause included at the end of the paragraph. The wording of the "without prejudice" clause is identical to that of paragraph 4, subparagraph (*b*), of draft article

[246] Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

[247] See *Yearbook … 2014*, vol. II (Part Two) and corrigendum, chap. VI, in particular paras. (10)–(21) of the final report on the topic, which is reproduced in paragraph 65 of the Commission's report.

[248] Draft article 10 (*Aut dedere aut judicare*) and commentary thereto of the draft articles on prevention and punishment of crimes against humanity, *Yearbook … 2019*, vol. II (Part Two), paras. 44–45.

[249] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 38 above), paras. 115 and 120.

[250] This expression is also found in the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 38 above), para. 90.

13 and serves the same purpose. Therefore, reference is made to the commentary to that provision as to the clause's meaning and scope.[251]

Paragraph 4

(15) Paragraph 4 is intended as a safeguard clause in favour of the forum State, which, despite having transferred the criminal proceedings to the State of the official and suspended its own criminal proceedings, may resume them if the State of the official does not adequately fulfil the obligation to submit the case to its competent authorities for the purpose of prosecution. As a gesture of good faith and to promote confidence between the States concerned, the State of the official should strive to keep the forum State informed of important developments in the proceedings after the transfer has taken place.

(16) The Commission drafted paragraph 4 in a simple way that avoids subjective components and allows a direct link to be established with paragraph 2 of draft article 14. This ensures that if the State of the official fails to fulfil the obligation it has undertaken to submit the case to its competent authorities for the purpose of prosecution, the forum State will be able to reactivate its criminal proceedings. The expression "may resume" emphasizes the optional nature of this power of the forum State. The aim is to reflect the different situations in which the forum State may find itself, depending on the nature of the crime committed by the official and the circumstances of the crime, in particular its gravity and, especially, its possible classification as a crime under international law, a category of crimes that cannot be allowed to go unpunished.

(17) Paragraph 4 expressly mentions, as a factor indicating a breach of the obligation, failure to "promptly and in good faith submit the case" to the competent authorities of the State of the official for the purpose of prosecution. This wording is meant to draw attention to the requirement to avoid any delaying tactics or merely formalistic submissions that would be contrary to the purpose of the transfer of proceedings.

Paragraph 5

(18) Paragraph 5 contains a "without prejudice" clause stating that draft article 14 is "without prejudice to any other obligations of the forum State or the State of the official under international law".

(19) This paragraph is meant to address the concern expressed, during the debate on draft article 14, that the provision on the transfer of criminal proceedings might not be fully compatible or might even be in contradiction with various rules of international law that impose a primary obligation on States to exercise jurisdiction over individuals who have committed certain crimes under international law. The discussion focused, in particular, on the obligation to extradite or prosecute established in article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the interpretation given to it by the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. Since the Court has defined the obligation to prosecute as a treaty obligation, and extradition as an option,[252] a question arose as to

[251] See, in particular, paras. (32) and (33) of the commentary to draft art. 13 above.

[252] In its judgment of 20 July 2012, the Court stated as follows: "94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect. 95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the

whether the system for the transfer of criminal proceedings established in draft article 14, which does not make the transfer contingent on an inability of the forum State to exercise its jurisdiction, is in conformity with the obligations voluntarily accepted by the States Parties to the Convention against Torture.

(20) In view of this special problem, the Commission has included a "without prejudice" clause to be applied in connection with the transfer of criminal proceedings. This clause applies both to obligations owed by the forum State and to those owed by the State of the official and is not subject to limitations. It therefore applies in respect of any obligation arising under international law, irrespective of its source or the subject matter to which it relates.

Article 15
Fair treatment of the State official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.

2. Any such official who is in prison, custody or detention in the forum State shall be entitled:

(*a*) to communicate without delay with the nearest appropriate representative of the State of the official;

(*b*) to be visited by a representative of that State; and

(*c*) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

Commentary

(1) Draft article 15 recognizes the right of an official of another State to be treated fairly by the authorities of the forum State exercising criminal jurisdiction over that official. The Commission has opted for an approach centred on the official, whose rights are recognized, rather than the mere enumeration of obligations owed by the forum State. This more adequately reflects the eminently personal nature of the rights and guarantees set forth in the draft article. This approach is reflected both in the title of the draft article (Fair treatment of the State official) and in its paragraphs 1 and 2, which begin, respectively, with the words "[a]n official … shall be guaranteed" and "[a]ny such official … shall be entitled". The rights enjoyed by the State official are encompassed under the general heading of "fair treatment", on the understanding that this expression necessarily includes the requirements of impartiality and independence.

(2) The recognition of the official's right to fair treatment is an additional safeguard supplementing those already listed in draft articles 8 to 14. This safeguard applies to the official, insofar as the rights listed in draft article 15 are of an individual

provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State". See *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 38 above), paras. 94–95.

nature. It should nonetheless be recalled that these safeguards apply to the official in his or her capacity as such and are therefore also safeguards for the State of the official. The present draft article, thus, responds to the concerns expressed by some States regarding the possibility that one of their officials might be subjected to the jurisdiction of a State whose legal system does not provide sufficient guarantees of respect for human rights, especially the rights and guarantees inherent in the notion of a fair trial, a principle reflected both in treaty law and in customary international law.

(3) Draft article 15 draws upon and echoes the wording of draft article 11 of the draft articles on prevention and punishment of crimes against humanity.[253] Like that draft article, draft article 15 consists of three paragraphs concerning, respectively, the recognition of the general procedural rights and guarantees that any individual may enjoy (para. 1); special recognition of a set of rights enjoyed by a State official who is in prison, custody or detention in the forum State (para. 2); and the rules applicable to the exercise of the special rights set forth in paragraph 2 (para. 3). However, while draft article 15 follows the structure of the aforementioned draft article 11, there are drafting and conceptual differences corresponding to elements that are specific to the present draft articles.

Paragraph 1

(4) Paragraph 1 provides that "[a]n official of another State … shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees". This generic statement includes all the rights and guarantees enjoyed by any individual in relation to any measure taken against him or her by the authorities of the forum State. These include rights relating to personal liberty or deprivation thereof and the various components of the right of access to the courts and the right to a fair trial, including the right of a person accused of a crime to be informed of the charges against him or her, to be assisted by counsel of his or her own choosing and to communicate with the authorities of the forum State in a language he or she understands.[254] The category of rights and procedural guarantees also includes the various components of the right recognized under article 36 of the Vienna Convention on Consular Relations. This right is enjoyed by any national of a State, whether or not he or she has the status of an official within the meaning of the present draft articles.

(5) The rights and procedural guarantees referred to in draft article 15, paragraph 1, and the conditions in which their exercise must be ensured and protected are those set forth in the national law of the forum State and international law. In particular, human rights law and international humanitarian law define the applicable international standard, the meaning of which has already been established by the Commission in relation to draft article 11 of the draft articles on prevention and punishment of crimes against humanity.[255] Although the relevant international standards usually refer to "rights" or "rights and guarantees", the term "rights and procedural guarantees" has been used in paragraph 1 to accommodate the variety of circumstances in which these must be ensured in respect of a foreign official, which are not limited to judicial proceedings.

(6) Regarding this last issue, the Commission did not consider it necessary to include in the draft article an express reference to the different stages or points in time at which the authorities of the forum State must ensure respect for the official's rights

[253] Draft art. 11 (Fair treatment of the alleged offender) and commentary thereto of the draft articles on prevention and punishment of crimes against humanity, *Yearbook … 2019*, vol. II (Part Two), paras. 44–45.

[254] For a list of the rights included in this category, see A/CN.4/729, paras. 159–168.

[255] Commentary to draft article 11, in particular para. (7), of the draft articles on prevention and punishment of crimes against humanity, *Yearbook … 2019*, vol. II (Part Two), paras. 44–45. See also A/CN.4/729, paras. 159–168.

and procedural guarantees. These rights and guarantees must be safeguarded and protected whenever those authorities take any action with respect to the official of another State, both in the period prior to the determination of immunity and during and after the process of determining immunity, including the prosecution of the official and the enforcement of any sentence imposed on him or her.

Paragraph 2

(7) Paragraph 2 establishes a new right that is accorded to an official of another State who is under any form of imprisonment, custody or detention in the forum State. Its wording is modelled on draft article 11, paragraph 2, of the draft articles on prevention and punishment of crimes against humanity, but some significant changes have been introduced, in particular the deletion of any reference to ties of nationality or residence between the official and the State of the official. This is because the special rights articulated in paragraph 2 of draft article 15 are distinct from the right recognized under article 36 of the Vienna Convention on Consular Relations, which is understood to be included among the rights and procedural guarantees referred to in paragraph 1 and will apply in all circumstances.[256]

(8) Although the right recognized under article 36 of the Vienna Convention on Consular Relations applies to any State official who is a national of that State, the Commission has borne in mind that, under the definition of "State official" contained in draft article 2, subparagraph (*a*), the official need not necessarily be a national of the State, in which case he or she would not be covered by the right recognized under article 36 of the Vienna Convention on Consular Relations by the State of the official. It has also taken into account the fact that an official's immunity from foreign criminal jurisdiction is recognized for the benefit of the State and by virtue of the special relationship between the official and the State of the official, which should have a special bearing on the rights and procedural guarantees to which the official is entitled. For this reason, the Commission considered it useful to include, in the draft article on fair treatment of the State official, a special provision creating certain rights that operate solely by virtue of the relationship between the State and its official. These additional rights are linked to cases in which the official is in prison, custody or detention in the forum State, as this is the most extreme scenario in which the forum State's exercise of jurisdiction over a foreign official can have an adverse impact on the performance of his or her State functions or representation of the State and, therefore, on immunity.

(9) Paragraph 2 of the draft article begins with the words "[a]ny such official" to reinforce the link with paragraph 1. The two paragraphs must be read together for a proper understanding of the scope of the concept of "fair treatment of the State official". In defining the content of the special rights accorded to an official of another State, draft article 11 of the draft articles on prevention and punishment of crimes against humanity was used as a model. As noted in the preceding paragraph, the Commission considered that ensuring that the foreign official can communicate with and be visited by the nearest appropriate representative of his or her State, and be informed of these rights, constitutes a safeguard both for the official and for the official's State.

Paragraph 3

(10) Paragraph 3 reproduces almost verbatim the corresponding paragraph of the above-mentioned draft article 11, which in turn is based on article 36, paragraph 2, of the Vienna Convention on Consular Relations. It must be noted that, for the sake of consistency with the terminology used in the present draft articles, paragraph 3

[256] Consular assistance has been considered as one of the components of the "fair treatment". See commentary to draft article 11, in particular paras. (8) and (9) of the draft articles on prevention and punishment of crimes against humanity, *Yearbook … 2019*, vol. II (Part Two), paras. 44–45.

refers to applicable law as the laws and regulations "of the forum State".[257] Pursuant to this paragraph, national law is identified as the applicable law for the exercise of the special rights set forth in paragraph 2, given that the precise manner in which individuals are arrested, detained or imprisoned is, to a large extent, governed by national rules. Therefore, the manner in which such an individual may exercise the rights to receive information and to communicate with or be visited by the appropriate representatives of another State may vary from one State to another. However, the recognition of this diversity and the resulting margin of discretion of the forum State are limited by the last phrase of paragraph 3, which states that the application of national law is "subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended". This criterion of interpretation in accordance with the intended purpose is designed to ensure that the forum State will not apply its laws and regulations in an arbitrary manner that would, in practice, impair the rights to which the official of another State is entitled under paragraph 2 of the draft article.

Article 16
Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Commentary

(1) Draft article 16 concerns consultations between the forum State and the State of the official. Consultations are a mechanism that is commonly used for different purposes in inter-State relations. Consultations are held in particular, though not exclusively, to obtain information on matters of common interest, to seek the views of another State on such matters, to identify ways of avoiding a dispute between two States or to facilitate a solution to a dispute that has already arisen. The obligation for the States concerned to hold consultations has been included in numerous international treaties and in treaties on international cooperation and legal assistance in criminal matters.[258]

(2) The consultations referred to in draft article 16 are not limited to a specific area and may concern all "matters relating to the immunity of an official covered by the present draft articles". Consultations may therefore relate both to the process of determining immunity and to any other issue related to immunity, including the normative elements that define immunity *ratione personae* (Part Two) and immunity *ratione materiae* (Part Three), as well as procedural provisions and safeguards (Part Four). Consultations should thus be distinguished from the "requests for information" provided for in draft article 12, which are limited to the information necessary for the determination of immunity by the forum State and the decision on the invocation or waiver of immunity by the State of the official.

(3) Consultations are a procedural safeguard for both the State of the official and the forum State and may therefore be held at the request of either State. Given that consultations are considered a procedural safeguard, the Commission decided to use the word "shall" to denote the obligatory nature of the consultations. However, the phrase "as appropriate" was also included to introduce an element of flexibility that allows the forum State and the State of the official to adapt to the circumstances of

[257] These terms are, consequently, different to the terms used in the Vienna Convention on Consular Relations ("the laws and regulations of the receiving State") and in draft article 11, paragraph 3, of the draft articles on prevention and punishment of crimes against humanity ("State in the territory under whose jurisdiction the person is present", *Yearbook ... 2019*, vol. II (Part Two), para. 44).

[258] See Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 18; and Model Treaty on Mutual Assistance in Criminal Matters, art. 21.

each specific case, including the situation of their diplomatic relations. The use of this flexible formula does not change the obligatory nature of the consultations, nor does it mean that recourse to such consultations is merely recommended.

(4) The Commission did not consider it necessary to establish any procedure for consultations, preferring instead to preserve the flexible nature of this mechanism.

(5) Lastly, it should be emphasized that consultations do not in themselves constitute a dispute settlement system, nor is their function exclusively related to dispute settlement. However, there is nothing to prevent consultations from being held in the context of an ongoing or emerging dispute between the forum State and the State of the official. For this reason, the draft article on consultations has been placed at the end of Part Four of the draft articles, immediately before the draft article on the settlement of disputes.

Article 17
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of peaceful settlement entailing a binding decision.

Commentary

(1) Draft article 17 is the last of the provisions in Part Four of the draft articles and concerns the settlement of any disputes that may arise between the forum State and the State of the official.

(2) The practice generally followed by the Commission to date has been not to include dispute settlement provisions in its draft articles, leaving the matter to be decided by States at a later stage. However, the draft articles on prevention and punishment of crimes against humanity include draft article 15 on the settlement of disputes, which was justified by the fact that the draft articles were conceived by the Commission as a draft treaty. The same reasoning applies to the present draft articles.

(3) A further consideration is that draft article 17 follows the logic underpinning the content and structure of Part Four. The procedural provisions and safeguards contained in Part Four are intended, *inter alia*, to help create conditions of trust between the forum State and the State of the official that will eliminate or reduce the possibility that a dispute may arise in connection with the immunity of a particular official from foreign criminal jurisdiction. If such a dispute were nonetheless to arise, it could only be resolved through the means of peaceful settlement accepted in contemporary international law. The Commission has therefore considered it useful to include draft article 17 as the final step in the *iter* or logical sequence that serves as the common thread running through Part Four.

(4) In order to ensure consistency in its work, the Commission has taken into account the text of draft article 15 of the above-mentioned draft articles on prevention and punishment of crimes against humanity, the basic elements of which are reflected in draft article 17 of the present draft articles. However, the wording adopted by the Commission differs in some respects from that earlier text, in order to reflect certain features specific to the dispute settlement system applicable in relation to the immunity of State officials from foreign criminal jurisdiction.

Paragraph 1

(5) Paragraph 1 of the draft article establishes the obligation to settle by peaceful means any dispute arising between the forum State and the State of the official. The dispute has been defined by reference to "the interpretation or application of the present draft articles". This terminology is generally accepted and is found in various dispute settlement clauses contained in treaties, as well as in the jurisprudence of the International Court of Justice and international tribunals.

(6) Paragraph 1 broadly follows the wording of Article 33 of the Charter of the United Nations, using the expression "shall seek a solution" to refer to an obligation of conduct required of the forum State and the State of the official. The phrase "by negotiation or other peaceful means of their own choice" is intended to emphasize the principle of free choice of means. The specific mention of negotiation follows the generally accepted model in various dispute settlement clauses found in treaties, without implying that other peaceful means of dispute settlement are excluded. On the contrary, the reference to "other peaceful means" is to be understood as including all the means spelled out in Article 33 of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. In any event, it should be borne in mind that the negotiation referred to in this paragraph should not be confused with the consultations referred to in draft article 16, which are autonomous in nature and are not required to be held as a precondition for the implementation of draft article 17.

Paragraph 2

(7) Paragraph 2 establishes a dispute settlement system which, following the traditional model, will be triggered only if the States have been unable to resolve their dispute by a means of their own choice, as provided in paragraph 1 of the draft article. This system is compulsory, as shown by the phrase "the dispute shall, at the request of either the forum State or the State of the official, be submitted". It may be activated unilaterally by either the forum State or the State of the official, on the sole condition that they have been unable to reach "a mutually acceptable solution … within a reasonable time". The Commission did not consider it appropriate to set a specific time limit for this purpose, preferring instead to use the term "reasonable time", the scope of which will need to be determined on a case-by-case basis by the International Court of Justice or other dispute settlement body.

(8) Jurisdiction to settle the dispute in a binding manner is attributed to the International Court of Justice, unless the forum State and the State of the official "have agreed to submit the dispute" to another means of judicial settlement, which must, in any case, lead to "a binding decision". This recognizes the character of the International Court of Justice as a reference jurisdiction for international law, which has also played a significant role in relation to the immunity of State officials from foreign criminal jurisdiction.

(9) Among the alternative means of binding settlement of disputes relating to immunity, the Commission has included arbitration in the first place, since it is a well-established means that is frequently used by States and is included as an alternative legal means in many treaties. Paragraph 2 of draft article 17 also provides, as an alternative, for any "other means of peaceful settlement entailing a binding decision". This wording, inspired by article 282 of the United Nations Convention on the Law of the Sea,[259] accommodates the possibility that disputes concerning immunity of State officials from foreign criminal jurisdiction may or must be submitted to other international tribunals, especially those established pursuant to treaties or within regional organizations.

[259] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3.

(10) It should be emphasized that if the International Court of Justice is replaced with another means of peaceful settlement agreed upon by the States concerned, the alternative body chosen must in any case have jurisdiction to settle the dispute by means of a decision that is binding on the parties.

(11) Attention is drawn to the fact that draft article 17 does not contain an opt-out clause allowing for unilateral derogation from the system of binding settlement of disputes set out in paragraph 2, thus departing from the model of draft article 15 of the draft articles on prevention and punishment of crimes against humanity. However, States might decide whether to include such a clause in an eventual treaty negotiated on the basis of the present draft articles.

(12) Finally, it should be noted that draft article 17 does not include a provision suspending proceedings where the case is submitted to dispute settlement. While an obligation to suspend criminal proceedings after submitting the dispute to a binding means of settlement might constitute a useful procedural safeguard, the suspension of criminal proceedings in these circumstances could encounter serious difficulties in some national legal systems. The possible suspension of domestic proceedings will depend on any relevant agreement between the parties or, where applicable, any provisional measures ordered by the International Court of Justice or other organ having jurisdiction under paragraph 2.

Chapter V
General principles of law

A. Introduction

49. 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.[260] 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.

50. From its seventy-first (2019) to seventy-sixth (2025) sessions, the Commission considered[261] four reports by the Special Rapporteur,[262] as well as a memorandum by 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.[263]

51. At its seventy-fourth session (2023), the Commission adopted, on first reading, a set of 11 draft conclusions on general principles of law, together with commentaries thereto.[264] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations.[265]

52. At its seventy-sixth session (2025), the Commission had before it the fourth report of the Special Rapporteur, with the bibliography thereto, as well as comments and observations received from Governments.[266] Also at its seventy-sixth session, the Commission took note of the report of the Drafting Committee, containing draft conclusions 1 to 12, provisionally adopted by the Committee on second reading.[267] The adoption of draft conclusions 1 to 12 by the Commission was postponed to the seventy-seventh session (2026) as a consequence of the reduced length of the seventy-sixth session.[268]

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260 *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 363.

261 *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10 and A/74/10/Corr.1), chap. IX; *ibid., Seventy-sixth Session, Supplement No. 10* (A/76/10), chap. VIII; *ibid., Seventy-seventh Session, Supplement No. 10* (A/77/10), chap. VIII; *ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), chap. IV; and *ibid., Eightieth Session, Supplement No. 10* (A/80/10), chap. VI.

262 See A/CN.4/732, A/CN.4/741 and A/CN.4/741/Corr.1, A/CN.4/753, A/CN.4/785 and A/CN.4/785/Add.1. While the Commission had no new report of the Special Rapporteur for consideration at the seventy-seventh session (2026), the Special Rapporteur submitted a revised bibliography on the topic (A/CN.4/785/Add.2).

263 A/CN.4/742.

264 *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 40-41.

265 *Ibid.*, para. 38.

266 A/CN.4/779 and A/CN.4/779/Add.1. For the Commission's consideration, see *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 189.

267 *Ibid.*, para. 191. See also A/CN.4/L.1018.

268 *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 191.

B. Consideration of the topic at the present session

53. At its 3729th meeting, on 27 April 2026, the Commission considered the report of the Drafting Committee (A/CN.4/L.1018) and adopted the entire set of draft conclusions on general principles of law on second reading (see sect. E.1 below).[269] At its 3749th meeting, on 5 June 2026, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, to assist him in the preparation of the draft commentaries to the draft conclusions.[270]

54. At its 3776th to 3780th meetings, from 23 to 27 July 2026, the Commission adopted the commentaries to the draft conclusions (see sect. E.2 below).

55. In accordance with its statute, the Commission submits the draft conclusions to the General Assembly, with the recommendation set out below.

C. Recommendation of the Commission

56. At its 3780th meeting, on 27 July 2026, 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 conclusions on general principles of law, annex the draft conclusions to the resolution, and ensure their widest dissemination;

(*b*) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify or apply general principles of law; and

(*c*) note the bibliography prepared by the Special Rapporteur and presented in his fourth report.

D. Tribute to the Special Rapporteur

57. At its 3780th meeting, held on 27 July 2026, the Commission, after adopting the draft conclusions on general principles of law and the commentaries thereto, adopted the following resolution by acclamation:

"*The International Law Commission*,

Having adopted the draft conclusions on general principles of law,

Expresses to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on general principles of law."

E. Text of the draft conclusions on general principles of law

1. Text of the draft conclusions

58. The text of the draft conclusions adopted by the Commission, on second reading, at its seventy-seventh session is reproduced below.

General principles of law

[269] For the views of those who spoke before and after adoption of the draft conclusions, see A/CN.4/SR.3729.

[270] The Working Group held one meeting, on 6 July 2026.

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 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Conclusion 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.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Conclusion 6
Transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it is compatible with that system.

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 that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system.

Conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of general principles of law.

2. Without prejudice to their use for the purposes of draft conclusion 5, 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.

Conclusion 9
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law.

Conclusion 10
Functions of general principles of law

1. General principles of law may contribute to the coherence of the international legal system. They serve, *inter alia*:

(*a*) as a basis for substantive rights and obligations, as well as for secondary and procedural rules;

(*b*) to interpret and complement other rules of international law.

2. General principles of law are mainly resorted to when other rules of international law do not address or resolve a particular issue in whole or in part.

Conclusion 11
Relationship between general principles of law and treaties and customary international law

1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.

2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.

3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

Conclusion 12
General principles of law with a limited scope of application

The present draft conclusions are without prejudice to general principles of law with a limited scope of application.

2. Text of the draft conclusions and commentaries thereto

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

General principles of law

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 the International Court of Justice, analysed in the light of the practice of States, the jurisprudence of courts and tribunals, and teachings.[271]

(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.[272]

(3) The term "source of international law" refers to the legal process and form through which a norm of international 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.

(4) References in international legal instruments, judicial decisions and scholarly writings may be made to terms such as "general international law", "principles" and "general principles", which may refer to general principles of law, depending on the context. It is important to be attentive to terminology, given that the term "principle" is very often used in practice, but reference is not always necessarily to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. In particular, the term "general international law", which encompasses rules and principles of international law of general application,[273] may refer to certain treaties, customary international law or general principles of law.

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[271] 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.

[272] See, for example, A/CN.4/732 (first report by the Special Rapporteur) and A/CN.4/742 (memorandum by the Secretariat).

[273] Para. (2) of the commentary to draft conclusion 5 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44; and para. (2) of the commentary to conclusion 1 of the conclusions on identification of customary international law, *Yearbook of the International Law Commission 2018*, vol. II (Part Two), para. 66. See also discussion in judicial decisions of the International Court of Justice: "general or customary international law rules and obligations, … by their very nature, must have equal force for all members of the international community": *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 63; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at para. 173, which referred to "principles of customary and general international law"; and *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), I.C.J. Reports*

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,[274] the jurisprudence of courts and tribunals[275] and in teachings[276] as the essential condition for the emergence of a general principle of law. The determination of whether a general principle of law exists at a given point in time requires an assessment of all available evidence indicating that such recognition has occurred. The criteria for such assessment are objective in nature and are developed in subsequent draft conclusions, taking into account the categories of the general principles of law in question. As further explained below, States constitute the primary subjects through or by which recognition is expressed, while international organizations may contribute to such recognition and other actors may provide contextual or corroborative indications thereof.

(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. 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.[277] The term used in the authentic languages of the Covenant is replicated in the different language versions of draft conclusion 2:

2015, p. 665, Separate Opinion of Judge Donoghue, p. 782, at para. 2, and Separate Opinion of Judge a*d hoc* Dugard, p. 842, at paras. 12–17.

274 See, for example, Kingdom of the Netherlands, Ministry of Foreign Affairs, "Government response to the CAVV's Advisory Report No 46 on the ILC's draft conclusions on general principles of law" (9 January 2025), available at https://www.adviescommissievolkenrecht.nl/site/binaries/site-content/collections/documents/2024/06/12/advisory-report-46/government-response-to-cavv-46-draft-conclusions-of-the-ilc-on-general-principles-of-law-2024.pdf ; International Court of Justice, *Right to Strike under ILO Convention No. 87*, Advisory Opinion, 21 May 2026, General List No 191, written statement of Colombia of 16 May 2024, available at https://icj-cij.org/sites/default/files/case-related/191/191-20240516-wri-03-00-en.pdf (recognizing that the right to strike is a general principle of public international law, see paras. 4.25 and 5.14).

275 See, for example, International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, General List No 187, paras. 147 and 165; and Iran-United States Claims Tribunal, *Sea-Land Service, Inc. v. Iran*, Award No. 135-33-1, 20 June 1984, *Iran-United States Claims Tribunal Reports* (IUSCTR), vol. 6, pp. 149 *et seq.*, at p. 168.

276 See, for example, E. Bjorge, "General principles of law formed within the international legal system", *International & Comparative Law Quarterly*, vol. 72 (2023), pp. 845–867; G. Gaja, "General principles in the jurisprudence of the ICJ" in Mads Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019) 35–43; R. Yotova, "Challenges in the identification of the general principles of law recognized by civilized nations: the approach of the International Court", *Canadian Journal of Comparative and Contemporary Law*, vol. 3 (2017), pp. 269 *ff.*

277 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.

"community of nations" in English, "l'ensemble des nations" in French, "communidad internacional" in Spanish, "المجتمع الدولي" in Arabic, "各国" in Chinese, and "сообщество государств" in Russian. 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, and not also from national legal systems. 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,[278] 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. The term "international community" may be understood as analogous to the term "community of nations" when it is used in relation to the recognition of general principles of law, referring to States and international organizations.

(6) International organizations may contribute to the recognition of general principles of law through their internal instruments, including, for example, reports of the Secretary-General of the United Nations[279] and opinions and reports of the Office of Legal Affairs, as well as pleadings and statements in judicial proceedings[280] and their treaty-making practice with other international organizations and States. Such evidence may contribute to the recognition of a general principle of law. However, recognition by international organizations cannot, in and of itself, serve as

[278] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[279] This has been the case, for example, in the context of the establishment of international criminal tribunals. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704 and Add.1, annex, paras. 53, 58, 64–68 and 123.

[280] For instance, written statements of international organizations cited general principles of law in the request for an Advisory Opinion of the International Court of Justice in *Obligations of States in respect of Climate Change* (footnote 275 above): see written statement of the European Union (22 March 2022), available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-07-00-en.pdf (referring to equity as a general principle of law and the principle of common but differentiated responsibilities and respective capabilities as being "best understood as an application of the general principle of equity in international law": para. 167, also paras. 168–172). For intergenerational equity as a general principle of law, see *ibid*., paras. 173–184; written statement of the African Union (15 August 2024), available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-08-00-en.pdf (referring to the principle of systemic integration, see paras. 27–30); written statement of the International Labour Office (14 May 2024), available at https://icj-cij.org/sites/default/files/case-related/191/191-20240516-wri-01-00-en.pdf (referring to the right to strike as a "general principle of international law": para. 400); World Trade Organization, Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 16 (where the European Communities argued that the precautionary principle is a general principle of law); and World Trade Organization, Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, para. 81 (the European Union "considers Article 31(3)(c) to be a principle of 'systemic integration'").

the sole basis for the emergence of general principles of law, as recognition by States is also required.

(7) As regards actors other than States and international organizations, such as, *inter alia*, non-governmental organizations, transnational corporations and non-State armed groups, they do not participate in the recognition of general principles of law in the sense described above. However, their conduct may still be relevant in providing context and in assessing recognition by the community of nations.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Commentary

(1) Draft conclusion 3 addresses the two categories of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The term "categories" is employed to indicate two distinct groups of general principles of law in light of their origins and thus the process through which they may emerge or are identified.

(2) Subparagraph (*a*) of the draft conclusion refers to the general principles of law that are derived from national legal systems. That general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice include those derived from national legal systems is established in the jurisprudence of courts and tribunals [281] and teachings, [282] and is confirmed by the *travaux préparatoires* of the Statute.[283] Draft conclusions 4 to 6 deal in greater detail with the methodology for the identification of these general principles of law.

(3) Subparagraph (*b*) of the draft conclusion refers to the general principles of law that may be formed within the international legal system. The existence of this category of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, finds support in the jurisprudence of

[281] See, for example, the *Fabiani* case (1896) (in H. La Fontaine, *Pasicrisie internationale 1794–1900: Histoire documentaire des arbitrages internationaux* (Berlin, Stämpfli, 1902), p. 356); *Affaire de l'indemnité russe (Russie, Turquie)*, Award, 11 November 1912, *Reports of International Arbitral Awards* (UNRIAA), vol. XI, pp. 421–447, at p. 445; International Court of Justice, *Corfu Channel case, Judgment of 9 April 1949: I.C.J. Reports 1949*, p. 4, at p. 18; International Court of Justice, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at para. 88; *Argentine-Chile Frontier Case*, Award, 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, at p. 164; Iran-United States Claims Tribunal, *Sea-Land Service, Inc. v. Iran*, Award No. 135-33-1, 20 June 1984, *Iran-United States Claims Tribunal Reports* (IUSCTR), vol. 6, pp. 149 *et seq*., at p. 168; Iran-United States Claims Tribunal, *Questech, Inc. v. Iran*, Award No. 191-59-1, 25 September 1985, IUSCTR, vol. 9, pp. 107 *et seq*., at p. 122; Inter-American Court of Human Rights, *Aloeboetoe* et al. *v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, Series C, No. 15, para. 50; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 225; *Prosecutor v. Zejnil Delalić* et al., No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, para. 179; World Trade Organization, Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW, 14 January 2002, paras. 142–143; Germany, Constitutional Court, Judgment, 4 September 2004 (2 BvR 1475/07), para. 20; Permanent Court of Arbitration, *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Case No. 2008-7, Award, 22 July 2009, UNRIAA, vol. XXX, pp. 145–416, at p. 299, para. 401; Philippines, Supreme Court, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC*, Decision, 8 March 2016 (G.R. No. 221697; G.R. Nos. 221698-700), pp. 19 and 21.

[282] See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press 1953/2006), p. 25; G. Abi-Saab, "Cours général de droit international public", in *Collected Courses of The Hague Academy of International Law*, vol. 207 (1987), pp. 188–189; J. A. Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", *Revista IIDH*, vol. 14 (1991), pp. 11–41, at pp. 30–31; R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I, 9th ed. (Longman, 1996), pp. 36–37; S. Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases", *Journal of International Dispute Settlement*, vol. 7 (2016), pp. 472–498, at p. 487; P. Palchetti, "The role of general principles in promoting the development of customary international rules", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 47–59, at p. 48; A. Pellet and D. Müller, "Article 38", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 925.

[283] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th, 1920* (The Hague, Van Langenhuysen Bros., 1920), pp. 331–336.

courts and tribunals[284] and, although sometimes debated, in teachings.[285] Draft conclusion 7 addresses the methodology for identifying this category of general principles of law.

[284] See, for example, *The Walfish Bay Boundary case (Germany, Great Britain)*, Award, 23 May 1911, UNRIAA, vol. XI, pp. 263–308, at p. 294; *Georges Pinson (France) v. United Mexican States*, Award, 18 October 1928, UNRIAA, vol. V, pp. 327-466, at p. 422; *Corfu Channel case* (see footnote 281 above), p. 22; International Court of Justice, *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23; International Court of Justice, *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954*, p. 19, at p. 32; International Court of Justice, *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at paras. 20–21; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 183; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić* et al., No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 738; and International Centre for Settlement of Investment Disputes, *Infinito Gold Ltd. v. Republic of Costa Rica*, Case No. ARB/14/5, Award, 3 June 2021, para. 332.

[285] See, for example, D. Anzilotti, *Cours de droit international* (Editions Panthéon-Assas, 1929/1999), p. 117; C. Rousseau, "*Principes généraux du droit international public*", vol. I (Sources) (Paris, Pedone, 1944), p. 891; F. Castberg, La méthodologie du droit international public, *Collected Courses of The Hague Academy of International Law*, vol. 43 (1933), p. 309, at p. 370; M. Sørensen, *Les sources du droit international* (Copenhagen, E Munksgaard, 1946), p. 113; C. Rousseau, *Droit International Public* (Librairie du Recueil Sirey, 1953), p. 71; L. Siorat, *Le problème des lacunes en droit International: Contribution à l'étude des sources du droit et de la fonction judiciaire* (Paris, Librairie générale de droit et de jurisprudence, 1958), p. 286; P. Reuter, *Principes de droit international public*, *Collected Courses of The Hague Academy of International Law*, vol. 103 (1961), pp. 425–656, at pp. 466–467; J.G. Lammers, "General principles of law recognized by civilized nations", in F. Kalshoven, P.J. Kuyper and J.G. Lammers (eds.), *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Alphen aa den Rijn, Sijthoff & Noordhoff, 1980), pp. 53–75, at p. 67; O. Schachter, "International law in theory and practice: general course in public international law", in *Collected Courses of The Hague Academy of International Law*, vol. 178 (1982), pp. 9–396, at pp. 75 and 79–80; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin, Duncker & Humblot, 1984), paras. 601–606; R. Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Geneva/Paris, Presse Universitaire de France, 2000), pp. 56–57; R. Wolfrum, "General international law (principles, rules, and standards)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, vol. IV (entry updated in 2010; Oxford, Oxford University Press, 2012), para. 28; M. Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), pp. 126–127; A.A. Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, 3rd rev. ed. (Leiden/Boston, Martinus Nijhoff, 2013), pp. 55–86; B.I. Bonafé and P. Palchetti, "Relying on general principles of law", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar Publishing, 2016), pp. 160–176, at p. 162; R. Yotova, "Challenges in the identification of the 'general principles of law recognized by civilized nations': the approach of the International Court", pp. 269–325, at p. 275 and 291–310; M. Fitzmaurice, "The history of Article 38 of the Statute of the International Court of Justice: the journey from the past to the present", in S. Besson, J. d'Aspremont and S. Knuchel (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford, Oxford University Press, 2017), p. 193; J. Rauber, *Strukturenwandel als Prinzipienwandel* (Berlin, Springer, 2018), pp. 249–283; A. Yusuf, "Concluding remarks", in Andenas *et al*., *General Principles and the Coherence of International Law*, p. 450; P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford, Oxford University Press, 2020), pp. 35–42; F. Francioni, "Custom and general principles of international cultural heritage law", in F. Francioni and A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law* (Oxford, Oxford University Press, 2020), pp. 531–550, at pp. 541–544; G. Gaja, "General principles of law", in *Max Planck Encyclopedia of Public International Law* (2020), paras. 17–20; X. Shao, "What we talk about when we talk about general principles of law", *Chinese Journal of International Law*, vol. 20 (2021), pp. 219–255; G. Boas, *Public International Law: Contemporary Principles*, 2nd ed. (Cheltenham, Edward Elgar, 2023),

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 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 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. 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 6, 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

pp. 125–126; E. Bjorge, "General principles of law formed within the international legal system", pp. 845–867; C. Su, "General legal principles in international law", *Journal of International Law [Guojifa Xuekan]*, pp. 121–153, at p. 128; and C. McLachlan, "On the interface between public and private international law: general course on international law", *Collected Courses of The Hague Academy*, vol. 446 (2025), p. 23, at p. 292.

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 entirely identical to the principle found in the various legal systems of the world.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Commentary

(1) Draft conclusion 5 addresses the first step of the two-step methodology for the identification of general principles of law derived from national legal systems set out in draft conclusion 4, that is, the determination of the existence of a principle common to the various legal systems of the world. Paragraph 1 of the draft conclusion provides that, to determine the existence of such a principle, a comparative analysis is required. Paragraph 2 describes the comparative analysis by indicating that the latter must be wide and representative, including the different regions of the world. Paragraph 3 explains which materials are relevant for the purposes of this methodology.

(2) Paragraph 1 of draft conclusion 5 states that a "comparative analysis of national legal systems" is required to determine the existence of a principle common to the various legal systems of the world. This formulation is based on a general approach that is found in practice and in the literature, whereby national legal systems are assessed and compared in order to establish that a legal principle is common to them. The "comparative analysis" referred to in the draft conclusion does not require that particular methodologies that exist in the field of comparative law be employed. While such methodologies may, when appropriate, provide some guidance, a degree of flexibility is generally maintained in practice. What is relevant for the purposes of draft conclusion 5 is that a common denominator is found across national legal systems.[286]

(3) What is meant by a legal principle "common" to the various legal systems of the world is not specified in draft conclusion 5. The Commission considered that, since the content and scope of general principles of law derived from national legal systems may vary, it was appropriate not to be overly prescriptive in this regard, thus allowing for a case-by-case analysis. In many cases, the result of the comparative analysis may be the determination of the existence of a legal principle of a general

[286] See, for example, *Furundžija* (footnote 284 above), para. 178; and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Nos. IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 439.

and abstract character.[287] In other cases, however, the comparative analysis can lead to the ascertainment of legal principles with a more concrete or specific character.[288]

(4) The second paragraph of draft conclusion 5 indicates that the comparative analysis for the determination of the existence of a principle common to the various legal systems of the world must be "wide and representative, including the different regions of the world". This description is aimed at clarifying that, while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of the sovereign equality of States. The term "different regions of the world"[289] was included to emphasize that it does not suffice to show that a legal principle exists in legal systems representing certain legal traditions (such as civil law, common law and Islamic law),[290] but that it is also necessary to show that the

[287] A general principle of law that is often referred to in practice and in the literature, and which may be considered to be of a general and abstract character, is the principle of good faith. Permanent Court of International Justice: *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926, *P.C.I.J. Series A*, No. 7, pp. 4–83, at p. 42; and *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment of 16 December 1927, *P.C.I.J. Series A*, No. 13, at p. 17; and International Court of Justice: *North Sea Continental Shelf* (see footnote 273 above), para. 85; *Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, p. 253, at para. 46; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at para. 130; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, *Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 392, at para. 60; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgment, I.C.J. Reports 1988*, p. 69, at para. 94; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 102; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at paras. 128 and 145.

[288] Examples of general principles of law that have been invoked or applied in practice, and which may be considered to be of a more specific character (because they present, for instance, precise conditions for their application), include the principles of *res judicata*, *lis pendens* and the right to lawyer-client confidentiality. See, respectively, International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at paras. 58–61; Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia, Preliminary Objections*, Judgment, 25 August 1925, *P.C.I.J. Series A*, No. 6, pp. 5 *et seq.*, at pp. 19–20; and International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, at paras. 24–28.

[289] International Law Association, "The use of domestic law principles in the development of international law", in International Law Association, Report of the Seventy-Eighth Conference Held in Sydney, 19–24 August 2018 (London, 2019), pp. 1170–1242, at para. 214 ("Therefore, it is also not enough to 'identify' a general principle among the main legal systems if there is not enough geographical representation, e.g. a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations"); R.Y. Jennings, "Universal international law in a multicultural world", in *International Law and the Grotian Heritage* (TMC Asser Institute, The Hague 1985), p. 195 ("important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions"). If the general principle is not sufficiently representative it will not be a general principle of law, see *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic*, Award, 19 January 1977, *International Legal Materials*, vol. 17 (1978), p. 1, at para. 57.

[290] C. Bassiouni, "A functional approach to 'general principles of international law'", *Michigan Journal of International Law*, vol. 11 (1990), pp. 768–818, at p. 812; S. McLaughlin Mitchell and E.J. Powell, *Domestic Law Goes Global* (Cambridge, Cambridge University Press, 2011), p. 22; H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 3rd ed. (Oxford, Oxford University Press, 2007), p. 136; and D. Carreau and F. Marrella, *Droit international*, 11th ed. (Paris, Pedone, 2012), p. 327.

principle has been recognized in the various regions of the world[291] or, to use the formulation of the International Court of Justice in the *Barcelona Traction* case, that

[291] Examples of State practice where a wide and representative comparative analysis may be considered to have been conducted include International Court of Justice, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, Observations and Submissions of Portugal on the Preliminary Objections of India, annex 20, pp. 714–752, and Reply of Portugal, annex 194, pp. 858–861 (including the legal systems of Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Ireland, Italy, Japan, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Türkiye, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen and Zambia, and Czechoslovakia and the Soviet Union); International Court of Justice, *Case concerning the Continental shelf (Tunisia/Libyan Arab Jamahiriya)*, vol. IV, *Pleadings. Oral Arguments, Documents* (Oral arguments on the application for permission to intervene by Malta) (1981), pp. 341-344 (Brazil, Egypt, France, Hungary, Italy, Japan, Libya, Portugal, Spain, Tunisia, United States, England, German Democratic Republic, States of the Union of Soviet Socialist Republics, etc.); International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, Memorial of Nauru, appendix 3 (including the legal systems of Argentina, Australia, Bangladesh, Belgium, Canada, Chile, China, Colombia, Cyprus, Denmark, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Pakistan, Romania, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States); International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 288 above), Memorial of Timor-Leste, annexes 22 to 24 (including the legal systems of Australia, Austria, Belgium, Brazil, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Singapore, South Africa, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Türkiye, United Kingdom and United States, and the European Union, and Hong Kong, China) and Counter-Memorial of Australia, annex 51 (covering the legal systems of Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russian Federation, Slovakia, Switzerland, Timor-Leste, Uganda, United Kingdom and United States). See also, for example, International Criminal Tribunal for the Former Yugoslavia, *Delalić*, Appeals Chamber (see footnote 281 above), paras. 584–589 (Australia, Bahamas, Barbados, Croatia, Germany, Italy, Japan, Russian Federation, Singapore, South Africa, Türkiye, United States, England, Scotland, and former Yugoslavia, and Hong Kong, China); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Pavle Strugar*, No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008, paras. 52–54 (Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, Croatia, Germany, India, Japan, Malaysia, Montenegro, Netherlands, Republic of Korea, Russian Federation, Serbia, United Kingdom and United States); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dražen Erdemović*, No. IT-96-22-A, Judgment, 7 October 1997, Appeals Chamber, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–65 (Australia, Belgium, Canada, Chile, China, Ethiopia, Finland, France, Germany, India, Italy, Japan, Malaysia, Mexico, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Poland, Somalia, South Africa, Spain, Sweden, Venezuela (Bolivarian Republic of), and England, and former Yugoslavia); *Furundžija* (see footnote 284 above), para. 180 (Argentina, Austria, Bosnia and Herzegovina, Chile, China, France, Germany, India, Italy, Japan, Netherlands, Pakistan, Uganda, Zambia, and England and Wales, former Yugoslavia, and New South Wales (Australia)); *Kunarac* (see footnote 286 above), paras. 437–460 (Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Canada, China, Costa Rica, Denmark, Estonia, Finland, France, Germany, India, Italy, Japan, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Uruguay, United Kingdom, United States and Zambia).

a principle has been "generally accepted by municipal legal systems".[292] If a comparative analysis is not sufficiently representative a general principle of law cannot be established.[293]

(5) Paragraph 3 of draft conclusion 5 provides additional guidance by listing, in a non-exhaustive manner, the sources that may be relied upon to carry out the comparative analysis of national legal systems. The terms "national laws" and "decisions of national courts" are to be understood in a broad way, covering the whole range of materials in national legal systems that can be potentially relevant for the identification of a general principle of law, such as constitutions, legislation, decrees and regulations, as well as decisions of national courts from different levels and jurisdictions, including constitutional courts or tribunals, supreme courts, courts of cassation, courts of appeal, courts of first instance and administrative tribunals. Decisions of the highest courts may carry more weight in the ascertainment of a principle within a national legal system than decisions of lower courts. The term "and other relevant materials" was included so as not to preclude other sources of national legal systems that may also be relevant, such as customary law.

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[292] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 3, at para. 50. See also *Corfu Channel case* (see footnote 281 above), p. 18 (stating "recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions"); Iran-United States Claims Tribunal, *Isaiah (Benjamin R.) v. Bank Mellat,* Case No. 219, Award No. 35-219-2, 30 March 1983, IUSCTR, vol. 2, p. 232, at p. 236 (affirming that unjust enrichment is a general principle of law "found in the laws of many nations"); *Sea-Land Service* (footnote 281 above), p. 168 (stating that unjust enrichment is "codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals"); Iran-United States Claims Tribunal, *Anaconda-Iran, Inc. v. the Government of the Islamic Republic of Iran*, Award No. ITL 65-167-3, 10 December 1986, IUSCTR, vol. 13, p. 199, at para. 43 (stating that "[u]nder a variety of names, most, if not all, legal systems recognize *force majeure* as an excuse for contractual non-performance. *Force majeure* therefore can be considered a general principle of law"); *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 281 above), pp. 19 and 21; *Abyei Area* (footnote 281 above), para. 401; Germany, Constitutional Court, Judgment, 4 September 2004 (footnote 281 above), para. 20; *Kunarac* (see footnote 286 above), para. 439; *Delalić*, Appeals Chamber (footnote 281 above), para. 179; *Tadić* (footnote 281 above), para. 225; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998, para. 46; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić* et al., No. IT-96-21-T, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, Trial Chamber, 28 May 1997, paras. 7–8; *Aloeboetoe* et al. *v. Suriname* (footnote 281 above), para. 62; *Questech* (footnote 281 above), p. 122; *Fabiani* case (footnote 281 above), p. 356; and the *Queen* case between Brazil, Norway and Sweden (1871) (reproduced in La Fontaine, *Pasicrisie internationale 1794–1900*: *Histoire documentaire des arbitrages internationaux* (footnote 281 above)), p. 155.

[293] See, for example, International Criminal Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, Trial Chamber I, paras. 7–10 and 39–44, where the prosecutor only cited the systems of Australia, Canada, the United States and England and Wales to establish a general principle of witness proofing; International Criminal Court, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Trial Chamber, paras. 26–32 (Australia, Canada, Malaysia, Sierra Leone, Singapore and the Philippines, United Kingdom and United States), although no general principle of law that would allow the review of decisions of lower courts by higher courts was found; Eritrea-Ethiopia Claims Commission, *Final Award: Eritrea's Damages Claim (Eritrea v. Ethiopia)*, 17 August 2009, UNRIAA, vol. XXVI, pp. 505–630, at para. 203, where the Claims Commission did not recognize a separate category of "consequential damages"; See also the *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 281 above).

(6) Draft conclusion 5, paragraph 3, acknowledges that national legal systems are not identical or unchanging and that each legal system must be analysed in its own context, taking into account its own characteristics. In certain legal systems, for example, the decisions of national courts may be more relevant to determine the existence of a legal principle, while in others written codes and doctrine may prevail. It is further recognized that all branches of national law, including both private and public law, are potentially relevant for the identification of a general principle of law derived from national legal systems, and that such principles may be of either a substantive or procedural character.[294]

(7) It should be highlighted that determining the existence of a principle common to the various legal systems of the world is not sufficient to establish the existence and content of a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. As noted in draft conclusion 4, the ascertainment of the transposition of that principle to the international legal system is also required. This second step of the methodology is addressed in draft conclusion 6.

Conclusion 6
Transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it is compatible with that system.

Commentary

(1) Draft conclusion 6 concerns the ascertainment of the transposition of a principle common to the various legal systems of the world to the international legal system. It states that such a principle may be so transposed insofar as it is compatible with the international legal system. It ought to be recalled that, as draft conclusion 4 makes clear, ascertaining transposition is the second requirement for determining the existence and content of a general principle of law derived from national legal systems.

(2) Draft conclusion 6 states that a principle common to the various legal systems of the world "may be" transposed to the international legal system. The words "may be" are used to highlight that transposition does not occur in an automatic fashion.

[294] See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (footnote 288 above), para. 58 (applying the principle of *res judicata*, derived from civil procedure); *United States–Tax Treatment for "Foreign Sales Corporations"* (footnote 281 above), para. 143 (applying a principle relating to taxation of non-residents, derived from tax law); *Questech* (see footnote 281 above), p. 122 (applying the principle *rebus sic stantibus*, derived from contract law); *Sea-Land Service* (footnote 281 above), p. 168 (applying the principle of unjust enrichment, derived from civil law or the law of obligations); *Furundžija* (see footnote 284 above), paras. 178–182, and *Kunarac* (see footnote 286 above), paras. 439–460 (applying a definition of "rape" derived from criminal law); *Aloeboetoe v. Suriname* (footnote 281 above), para. 62 (applying a principle relating to succession for purposes of compensation, derived from laws on inheritance or succession); *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 281 above), p. 21 (applying a principle of nationality of foundlings, derived from laws on nationality). See also International Centre for Settlement of Investment Disputes, *El Paso Energy International Company v. The Argentine Republic*, Case No. ARB/03/15, Award, 31 October 2011, para. 622 ("'general principles' are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters"); and *South West Africa, Second Phase* (footnote 281 above), Dissenting Opinion of Judge Tanaka, p. 250, at p. 294 ("So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.").

(3) The relevant test for the purposes of ascertaining transposition is that the principle common to the various legal systems of the world must be shown to be "compatible" with the international legal system. The rationale that underlies this compatibility test is that the international legal system and national legal systems have distinct structures and characteristics that should not be overlooked. Principles that may be common to the various legal systems of the world, adopted first and foremost to meet the needs of a particular society and to apply within a specific legal system, are not necessarily capable of operating at the international level due to those differences.

(4) A principle *in foro domestico* may be considered compatible with the international legal system if it is suitable to apply within the framework of the international legal system, when conditions for its application exist.[295] A principle common to the various legal systems of the world may be suitable to apply within the framework of the international legal system if it serves a normative function that is comparable, to some degree, to the regulatory function that it serves at the domestic level and is appropriate to the international legal system. A principle *in foro domestico* must also be able to operate in the international legal system when conditions exist that are comparable, to some degree, to the conditions under which it applies domestically. This serves to avoid distortion or misapplication of the principle as recognized in the various legal systems of the world.[296]

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[295] For instance, in the *North Atlantic Coast Fisheries* case, the tribunal did not support the principle of "international servitude" as it was considered as "being but little suited to the principle of sovereignty". *North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award, 7 September 1910, UNRIAA, vol. XI, pp. 167–226, at p. 182. In *North Sea Continental Shelf*, the International Court of Justice did not support the "principle of the just and equitable share" invoked by Germany as a general principle of law, pointing out that this doctrine was "quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement". *North Sea Continental Shelf* (see footnote 273 above), para. 17. In the *Tadić* case, regarding the principle that a tribunal must be established by law, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia observed that "[i]t is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations … Consequently the separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting." Taking into account several human rights conventions and decisions by human rights bodies, the Appeals Chamber considered that "established by law" means "in accordance with the rule of law": International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a "DULE"*, Case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, paras. 43–45. In *Delalić et al.*, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia considered that the "principles of legality [*nullum crimen sine lege and nulla poena sine lege*] exist and are recognised in all the world's major criminal justice systems", but that it was "not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems … because of the different methods of criminalisation of conduct in national and international criminal justice systems". As a result, the Trial Chamber found that "the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.": International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić et al.*, No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, paras. 403 and 405.

[296] *Barcelona Traction, Light and Power Company* (see footnote 292 above), Separate Opinion of Judge Fitzmaurice, p. 65, at para. 5.

(5) An example commonly referred to in this regard is the right of access to courts that invariably exists across national legal systems. Such a right cannot be transposed to international courts and tribunals because it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals, without prejudice to what could be established in a treaty regime. Transposition of the right of access to courts would not only result in a direct contravention of the principle of consent to jurisdiction – that right would also be incapable of operating at the international level due to the absence of conditions for its application, *i.e.* a judicial body with universal and compulsory jurisdiction to settle disputes.

(6) Draft conclusion 6 indicates that a principle common to the various legal systems of the world may only be transposed "insofar as" it is compatible with the international legal system. The use of these words ("insofar as") is meant to highlight that there is a degree of flexibility when determining transposition. As indicated in the commentary to draft conclusion 4 above: transposition encompasses the possibility that the content of the general principle of law identified through this two-step analysis may not be entirely identical to the principle found in the various legal systems of the world.[297]

(7) Draft conclusion 6 must be read together with draft conclusion 2, which indicates that, for a general principle of law to exist, it must be recognized by the community of nations. Therefore, recognition that a principle common to the various legal systems of the world is transposed to the international legal system is required. In this context, recognition is implicit when the compatibility test is fulfilled, as explained above. In other words, if a principle common to the various legal systems of the world is suitable for application within the framework of the international legal

[297] Owing to the differences between the international and national legal systems, sometimes only certain aspects of a principle common to various legal systems can be transposed to the international legal system. As a result of the transposition, general principles of law applied in international settings may not have exactly the same content as the relevant national legal principles. See, e.g., *Tadić* (footnote 281 above), paras. 41–45; *Delalić* (footnote 295 above), paras. 403–405; *Furundžija* (footnote 284 above), para. 178 (the Trial Chamber observed that "since 'international trials exhibit a number of features that differentiate them from national criminal proceedings', account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings."); *El Paso Energy International Company v. The Argentine Republic* (footnote 294 above), para. 622 (the tribunal observed that "[t]he mainstream view seems to be, however, that 'general principles' are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters, provided that, *after adaptation*, they are suitable for application on the level of public international law" (emphasis added)); and International Court of Justice, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 695, Separate Opinion of Judge Simma, para. 13 (on the transposition of domestic legal principles onto the international plane, Judge Simma observed that "[t]he question is, of course, the transferability of such a concept developed *in foro domestico* to the international legal plane, *respectively the amendments that it will have to undergo* in order for such a general principle to be able to play a constructive role also at the international level."). It has been noted, in this regard, that a principle *in foro domestico* cannot be transposed "lock, stock and barrel" (International Court of Justice, *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, Separate Opinion of Judge McNair, p. 146, at p. 148). See also in relation to the general principle of estoppel: *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 6, Separate Opinion of Sir Gerald Fitzmaurice, p. 52, at pp. 62–65; and Permanent Court of Arbitration, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Case No. 2011-03, Award of 18 March 2015, UNRIAA, vol. XXXI, p. 543, paras. 436–437 where the tribunal showed the differences in national law and international law regarding the principle of estoppel.

system, when conditions for that application exist, it can generally be inferred that the community of nations has recognized that it is transposed. No formal act of transposition is required for a general principle of law to emerge.

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 that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system.

Commentary

(1) Draft conclusion 7 addresses the identification of general principles of law formed within the international legal system.

(2) Draft conclusion 7 provides that, to determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to that system. The Commission considered that the existence of this type of general principle of law is justified for a number of reasons. First, there are examples in judicial and State practice which support the existence of these general principles of law. Second, the international legal system, like any other legal system, must be able to generate general principles of law that are specific to it, and not have only general principles of law borrowed from other legal systems. Third, nothing in the text of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice or in its drafting history limits general principles of law to those derived from national legal systems. Various teachings also support the existence of general principles of law formed within the international legal system.

(3) Since the international legal system is subject to evolution and development, recognition that a general principle of law is intrinsic to the international legal system does not mean that it has always existed or been recognized as such.

(4) As regards the methodology for the identification of general principles of law formed within the international legal system, the Commission considered that it has similarities to the methodology applicable to the identification of general principles of law derived from national legal systems, addressed in draft conclusions 4 to 6 above. In both cases, an inductive analysis of existing norms is first carried out. In the case of the principles of the first category, rules existing in the various legal systems of the world are analysed comparatively to determine the existence of a principle common to them. For the principles of the second category, in turn, an analysis of existing rules in the international legal system is required in order to find principles reflected in those rules or underlying them, and having an autonomous status. This analysis must take into account all available evidence of the recognition of the principle in question by the community of nations, such as international instruments reflecting the principle, resolutions adopted by international organizations or at intergovernmental conferences and statements made by States and international organizations. The recognition should be wide and representative, including the different regions of the world. Paragraphs (8) to (18) of the present commentary refer to decisions of courts and tribunals that illustrate aspects of this methodology, without expressing a definite view on the merits of those decisions.

(5) The methodology is also deductive for both categories. As regards general principles of law derived from national legal systems, their compatibility with the international legal system must be determined. General principles formed within the international legal system, for their part, must be shown to be intrinsic to that system. The term “intrinsic” means that the principle reflects and regulates the basic features of the international legal system. The word “may” has been included in draft

conclusions 3, paragraph (*b*), and 7 to note that the formation of general principles of law within the international legal system is sometimes debated.

(6) A principle formed within the international legal system that may be considered intrinsic to it is the principle of the sovereign equality of States. According to this principle, States have equal rights and duties and are equal members of the international community. The principle is reflected in Article 2, paragraph 1, of the Charter of the United Nations and in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States.[298] The principle can also be discerned from declarations and reservations made by States to various treaties.[299] Sovereign equality underpins related principles, such as non-intervention in the internal affairs of other States.[300]

(7) The principle of State consent to jurisdiction of international courts and tribunals can be considered as a general principle recognized by the community of nations as intrinsic to the international legal system due to the basic features of the latter. It is a consequence of the principle that sovereign States are equal and the fact that an international court or tribunal with universal and compulsory jurisdiction to which any dispute may be submitted has not been established by States. This principle inspires and finds reflection in various international instruments,[301] and has been referred to in decisions of courts and tribunals.[302]

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298 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex (Friendly Relations Declaration).

299 Declaration made upon signature of the Customs Convention on Containers by the Byelorussian Soviet Socialist Republic (22 October 1973), United Nations, *Treaty Series*, vol. 988, p. 250 ('universally recognized principle of the sovereign equality of States'); declaration made upon signature of the Customs Convention on Containers by Czechoslovakia (27 December 1973), *ibid.*; and declaration made upon ratification of and accession to the Customs Convention on the International Transport of Goods under Cover of TIR Carnets by Hungary (9 March 1978), *ibid.*, vol. 1079, p. 297.

300 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, I.C.J. Reports 1984*, p. 3, para. 35; *Military and Paramilitary Activities in and Against Nicaragua, Merits* (footnote 273 above), para. 202 (the Court noted that "[the principle of non-intervention] has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States"); and *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 288 above), para. 27 ("The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations"). See also C. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century. General course on public international law", *Collected Courses of The Hague Academy of International Law*, vol. 281 (1999), p. 9, at p. 161.

301 Statute of the International Court of Justice, art. 36; American Treaty on Pacific Settlement (Bogotá, 30 April 1948), United Nations, *Treaty Series*, vol. 30, No. 449, p. 55, art. 31; United Nations Framework Convention on Climate Change (New York, 9 May 1992), *ibid.*, vol. 1771, No. 30822, p. 107, art. 14; United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2225, No. 39574, p. 209, art. 35; and United Nations Convention against Corruption (New York, 31 October 2003), *ibid.*, vol. 2349, No. 42146, p. 41, art. 66.

302 See, for example, Permanent Court of International Justice, *Status of Eastern Carelia*, Advisory Opinion, 21 April 1923, *P.C.I.J. Series B*, No. 5, at p. 27; *Case of the monetary gold* (footnote 284 above), p. 32 ("[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent"); and International Court of Justice: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 71; *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952,*

(8) In *Frontier Dispute (Burkina Faso/Mali)*, a Chamber of the International Court of Justice referred to the principle of *uti possidetis* as a general principle logically connected to the phenomenon of independence, which has been recognized and confirmed by solemn affirmations of States. The Chamber noted:

> it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[303]

(9) The Chamber further maintained that "[t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope".[304] It similarly recalled that the principle had been reflected in statements by African leaders, the Charter of the Organization of African Unity and in resolution AGH/Res.16 (I), adopted at the first session of the Conference of African Heads of State in 1964.[305] The Chamber added that the obligation to respect pre-existing boundaries in the event of a State succession "derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States … are evidently declaratory rather than constitutive: they recognize and confirm an existing

I.C.J. Reports 1952, p. 93, at p. 103; *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959, I.C.J. Reports 1959*, p. 127, at p. 142; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 6, at p. 36; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at paras. 21, 28, 32, 33 and 42; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene,* (see footnote 300 above), at para. 35; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 92, at paras. 94, 95–96 and 99; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at paras. 26 and 34; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at para. 131 ("Prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States. The Court referred to this aspect reflecting the fundamental principle of consent in the Armed Activities case in the following terms: '[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them … When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*'"); *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 753, at paras. 32–35; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 92, at paras. 83–91; and *ibid*., Dissenting Opinion of Judge Donoghue, paras. 1 and 8–10.

303 *Frontier Dispute* (see footnote 284 above), para. 20.

304 *Ibid*., para. 21. On the relationship between customary international law and general principles of law, see draft conclusion 11 below.

305 *Ibid*., para. 22.

principle".[306] Thus, the principle of *uti possidetis*, considered logically connected to the phenomenon of obtaining independence,[307] has been applied by States and recognized and confirmed through solemn declarations, international instruments and resolutions.

(10) In *Furundžija*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia identified and applied a "general principle of respect for human dignity" on the basis that "[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person" and it is "the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law".[308] The Charter of the United Nations[309] and human rights instruments, such as the Universal Declaration of Human Rights,[310] the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,[311] are all grounded in the inherent dignity of the human person. Beyond treaties, respect for human dignity is also reflected in General Assembly resolutions, in which it is affirmed that all human rights instruments are to be based on the inherent dignity of the human person,[312] and in the draft articles on the protection of persons in the event of disasters as adopted by the Commission.[313] As such, the general principle of respect for human dignity is intrinsic to the international legal system.

(11) The general principle, as a matter of international law, that internal law cannot prevail over international law is an intrinsic feature of the international legal system. As stated by the Permanent Court of International Justice, "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".[314] Relying on this principle, the Court held that "[s]hould a proper application of the Convention be in conflict with some local law, the latter would not prevail as against the Convention".[315] Likewise, in the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* Advisory Opinion, the Court held that a "State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international

[306] *Ibid*., para. 24. See also para. 26 ("the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964").

[307] See International Court of Justice, *Land and Maritime Delimitation and Sovereignty over Islands (Gabon v. Equatorial Guinea)*, Judgment, 19 May 2025, Separate Opinion of Judge Tladi.

[308] *Furundžija* (footnote 284 above), paras. 162, 183–184.

[309] Charter of the United Nations, preamble ("reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"), Article 1, paragraph 3, and Article 55.

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

[311] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

[312] General Assembly resolution 41/120 of 1986 on setting international standards in the field of human rights, para. 4 (b): "derive from the inherent dignity and worth of the human person"; and World Conference on Human Rights, Vienna Declaration and Programme of Action (A/CONF.157/23).

[313] Draft art. 4 of the draft articles on the protection of persons in the event of disasters and commentaries thereto, *Yearbook … 2016*, vol. II (Part Two), para. 49 ("The inherent dignity of the human person shall be respected and protected in the event of disasters") and para. (1) of the commentary thereto ("Human dignity is the core principle that informs and underpins international human rights law").

[314] Permanent Court of International Justice, *The Greco-Bulgarian "Communities"*, Advisory Opinion, 31 July 1930, *P.C.I.J., Series B*, No. 17, at p. 32.

[315] *Ibid*., pp. 33 and 35.

law or treaties in force" considering this a "generally accepted principle".[316] The Court thereby underscored that national law can in no circumstances relieve a State of its obligations under international law. The International Court of Justice has similarly characterized this principle as a fundamental principle of international law, noting that it "was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since".[317] In relation to treaties, the principle was reflected in article 27 of the Vienna Convention on the Law of Treaties, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The principle was also reflected in article 32 of the articles on responsibility of States for internationally wrongful acts, "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part".[318] States have recognized this principle.[319] Accordingly, the principle that, within the international

[316] Permanent Court of International Justice, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, *P.C.I.J., Series A/B*, No. 44, at p. 24.

[317] International Court of Justice: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at para. 57; and *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 180 ("As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim"). See also World Trade Organization, Decision by the Arbitrator, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU And Article 4.11 of the SCM Agreement*), WT/DS46/ARB, 28 August 2000, para. 3.65 ("We do not consider the arguments based on Brazil's contractual obligations to be compelling. Obligations under internal law are no justification for not performing international obligations"); and United Nations Commission on International Trade Law (UNCITRAL), *Petrobart Limited v. The Kyrgyz Republic*, Award, 13 February 2003, para. 4.1.4.3 ("[i]t is a general principle of international law that a State cannot rely on its own laws to avoid its international obligations").

[318] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

[319] See, for example, objection by Greece concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide made by the United States of America upon ratification (26 January 1990), United Nations, *Treaty Series*, vol. 1557, p. 334: "the Government of the Hellenic Republic considers that, in accordance with the generally recognized principles of international law, a party to an international convention may not invoke its domestic legislation as a reason to avoid honouring its obligations under that Convention." Further examples include objections made by Hungary and Australia to the reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment made by Pakistan upon ratification, both asserting that the reservation contravened the general principle that a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty": see objection of Hungary to the reservations made by Pakistan upon ratification (28 June 2011), *ibid*., vol. 2762, p. 185; and objection of Australia to the reservations made by Pakistan upon ratification (28 June 2011), *ibid*., p. 173. Similarly, objections by the Czech Republic and Australia to the reservation to the International Covenant on Civil and Political Rights made by Maldives upon accession, which argued that the reservation was contrary to the general principle that "a State Party to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the treaty" and "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", respectively: see objection of the Czech Republic to the reservations made by Maldives upon accession (12 September 2007), *ibid*., vol. 2472, p. 113; and objection of Australia to the reservations made by Maldives upon accession (18 September 2007), *ibid*., p. 132. Likewise, Finland objected to the interpretative declaration made by Uruguay upon ratification of the Rome Statute of the International Criminal Court on the basis that it was contrary to "the general principle relating to internal law and observance of treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty": see objection by Finland to the interpretative declaration made by Uruguay

legal system, internal law cannot prevail over international law may be considered intrinsic to that system.

(12) The duty to cooperate may be considered an intrinsic principle of the international legal system. It requires States to pursue certain objectives through joint action where the conduct of a single State alone would be insufficient to achieve the same result.[320] The principle has been reflected and elaborated in both declarations of general international law [321] and specialized international instruments. [322] In international environmental law, the principle has been invoked to address the common problem of environmental degradation caused by human activities. Likewise, in climate change law, it emphasizes that States should cooperate to prevent climate change as a matter of common concern to humankind. Treaty practice further reflects this general principle in addressing global issues of common concern, including in the Vienna Convention for the Protection of the Ozone Layer[323] and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[324] Numerous treaties also contain specific cooperation provisions designed to achieve their objectives, including the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Law of the Sea,[325] the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction [326] and the Kyoto Protocol.[327] In its previous work on the articles on the prevention of transboundary harm from hazardous activities, the Commission recognized the principle of international cooperation as foundational to the obligation to prevent transboundary environmental harm.[328] Judicial practice likewise affirms the principle. For example, in the provisional measures order in *MOX Plant*, the tribunal underscored the importance of cooperation in preventing pollution of the marine environment.[329]

upon ratification (8 July 2003), *ibid*., vol. 2220, p. 403. See also Bjorge, "General principles of law formed within the international legal system", pp. 861–862.

320 R. Wolfrum, "Cooperation", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2012), p. 783, at paras. 2 and 25.

321 Friendly Relations Declaration, principle 4.

322 Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1 et Corr.1), part one, chap. I , principle 24; and Rio Declaration on Environment and Development (Rio de Janeiro, 3–14 June 1992), *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, principle 27.

323 Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293, art. 2, para. 2 (c).

324 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), *ibid*., vol. 1673, No. 28911, p. 57, art. 12.

325 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid*., vol. 1833, No. 31363, p. 3, arts. 143 and 242–244.

326 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 6.

327 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, art. 2, para. 1 (b).

328 The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97-98 (see also General Assembly resolution 62/68 of 6 December 2007, annex). See further on the principle to cooperate in the Commission, draft art. 7 and paras. (1)–(9) of the commentary thereto and draft art. 8 and paras. (1)–(8) of the commentary thereto of the draft articles on the protection of persons in the event of disasters, *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49.

329 International Tribunal for the Law of the Sea, *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at para. 82: "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [United Nations] Convention [on the Law of the Sea] and general international law". See also *Nuclear Tests* (footnote 287 above) para. 46: "Trust and

Taken together, this inductive and deductive assessment of the available evidence shows that the principle of cooperation has been recognized by the community of nations as intrinsic to the international legal system.

(13) The principle of speciality is another general principle of law that has developed within the international legal system and is intrinsic to the law of international organizations.[330] In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice applied the "principle of speciality" when determining whether the World Health Organization could request an advisory opinion by the Court on matters relating to the use of force. The Court determined that:

> [I]nternational organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them
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> …
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> > 'This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13, p. 18), and must be applied to the United Nations.' (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 182-183; cf. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 57.)
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> …
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> It follows from the various instruments mentioned above that the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter.[331]

(14) The principle of speciality was thus identified through an inductive analysis considering the constituent instruments of international organizations, as well as the objectives of such organizations in the light of "the necessities of international life".[332] The principle of speciality, which governs international organizations, may be considered to be intrinsic to the international legal system. In *Pulp Mills*, the International Court of Justice noted that the principle of speciality applies even where an international organization has only two members.[333]

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confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."

330 N. M. Blokker, "International organizations or institutions, implied powers", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (entry updated in 2021; Oxford, Oxford University Press, 2012), para. 1. See also D. Akande, "The competence of international organizations and the advisory jurisdiction of the International Court of Justice", *European Journal of International Law*, vol. 9 (1998), pp. 443–444; and F.L. Bordin, *The Analogy between States and International Organizations* (Cambridge, Cambridge University Press 2018), pp. 107–146.

331 International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at paras. 25–26; also para. (7) of the general commentary to the articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), para. 88.

332 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, para. 25.

333 *Pulp Mills on the River Uruguay* (footnote 287 above), para. 89: "also applies … to organizations, which like CARU [Comisión Administradora del Río Uruguay (Administrative Commission of the River Uruguay)], only have two member States".

(15) There are also subject-specific general principles of law formed within the international legal system that may be found, for example, in international environmental law.[334] Some of them have been associated with the principle of equity as referred to in the *Obligations of States in respect of Climate Change* Advisory Opinion and regulate the international climate change regime.[335] The International Court of Justice emphasized that the principle of common but differentiated responsibilities and respective capabilities is a manifestation of the general principle of equity, which is reflected in various climate change treaties, such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, as well as declarations, namely the Rio Declaration.[336] The Court explained the basis for this conclusion at paragraph 151, stating that:

> The principle of common but differentiated responsibilities and respective capabilities is a manifestation of the principle of equity (see paragraphs 152–154 below) and guides the interpretation of obligations under international environmental law beyond its express articulation in different treaties (see paragraphs 290–292 below; Rio Declaration, Principle 7). The principle of common but differentiated responsibilities and respective capabilities does not establish new obligations but is relevant for the interpretation of treaties and the determination of rules of customary law relating to the environment.

(16) Similarly, the principle of intergenerational equity has been acknowledged by the International Court of Justice as a manifestation of equity, identified by reference to article 3 of the United Nations Framework Convention on Climate Change, the preamble to the Paris Agreement and the Court's previous jurisprudence in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion. The Court stated at paragraph 157 the *Obligations of States in respect of Climate Change* Advisory Opinion that "intergenerational equity is a manifestation of equity in the general sense and thus shares its legal significance as a guide for the interpretation of applicable rules".[337] In both instances, the main purpose of these principles is to guide the interpretation of treaties and determination of customary international law. Another principle referred to by the International Court of Justice is the principle of sustainable development, which has "continuous and uncontested universal recognition", particularly within international environmental law. This principle has been referred to in previous cases of the International Court of Justice, climate change treaties, and declarations such as the Rio Declaration and resolutions of the General Assembly.[338] The International Court of Justice has observed that the principle of sustainable development is reflected in climate change treaties but has also "developed independently of treaties", as evidenced by relevant resolutions.[339]

(17) During its first session, the International Law Commission considered whether it should ascertain to what extent the Nürnberg Principles constituted "principles of international law" and decided that, since the Nürnberg Principles "had been affirmed by the General Assembly, the task entrusted to the Commission … was not to express any appreciation of these principles as principles of international law but merely to

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[334] See, for example, *ibid*., Separate Opinion of Judge Cançado Trindade, p. 135, at paras. 6, 28, 48 and 52; and R.O.F. Derler and M. Andenas, "The international climate change regime and general principles of law", *Review of European, Comparative and International Environmental Law*, vol. 35 (2026), pp. 321–339.

[335] See, for example, Derler and Andenas, "The international climate change regime and general principles of law".

[336] *Obligations of States in respect of Climate Change* (footnote 275 above), paras. 151–154. See also Rio Declaration on Environment and Development.

[337] *Obligations of States in respect of Climate Change* (footnote 275 above), paras. 155–157.

[338] *Ibid*., para. 147. See also Wolfrum, "General international law (principles, rules, and standards)", para. 63.

[339] *Obligations of States in respect of Climate Change* (footnote 275 above), para. 147.

formulate them".[340] Furthermore, in the context of its work related to the 1996 draft Code of Crimes against the Peace and Security of Mankind,[341] the Commission identified, based on the Nürnberg Principles (I and II), the "general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law"[342] and the "general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law".[343]

(18) Draft conclusion 7 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system which are not intrinsic to it.

Conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of general principles of law.

2. Without prejudice to their use for the purpose of draft conclusion 5, 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.

Commentary

(1) Draft conclusion 8 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of general principles of law. The approach towards this issue is the same as that adopted by the Commission in its conclusions on the identification of customary international law,[344] which is also, like general principles of law, a source of international law.

(2) Decisions of international courts and tribunals are often relied upon in order to determine the existence or lack thereof of general principles of law, in particular those derived from national legal systems, as well as their content. To cite but a few examples, in the *Corfu Channel* case, the International Court of Justice found that the use of indirect evidence, in addition to being admitted in "all systems of law", was "recognized by international decisions".[345] In *Pedra Branca/Pulau Batu Puteh*, the Court similarly noted that "[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claims must establish that fact".[346] In the *Chagos Marine Protected Area* arbitration, the tribunal noted that the "frequent invocation [of the principle of estoppel] in international proceedings has added definition to the scope of the principle".[347] In the *Yukos* case, the arbitral tribunal rejected the "clean hands" doctrine invoked by the Russian Federation, noting, in particular, that the latter did not refer to any "majority decision where an international court or arbitral tribunal

[340] *Yearbook ... 1950*, vol. II, document A/1316, p. 374, para. 96. See also *Yearbook ... 1949*, p. 133, para. 35; and *Yearbook ... 1950*, vol. II, document A/CN.4/22, p. 189, para. 36. See also General Assembly resolution 95 (I) of 11 December 1946.
[341] The draft Code adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 1996*, vol. II (Part Two), para. 50.
[342] Para. (8) of the commentary to draft art. 1 of the draft Code, *ibid*.
[343] Para. (12) of the commentary to draft art. 1, *ibid*.
[344] *Yearbook ... 2018*, vol. II (Part Two), paras. 65–66.
[345] *Corfu Channel case* (see footnote 281 above), p. 18.
[346] International Court of Justice, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at para. 45.
[347] Permanent Court of Arbitration, *Chagos Marine Protected Area (Mauritius v. United Kingdom)* (see footnote 297 above), para. 436.

has applied the principle of 'unclean hands' in an inter-State or investor-State dispute".[348]

(3) The European Court of Human Rights and the Inter-American Court of Human Rights have likewise relied on prior decisions to justify the existence of the principle *iura novit curia*.[349] In international criminal law, prior decisions by international courts and tribunals have also played a significant role in the identification of general principles of law.[350]

(4) Decisions by national courts may also be relied upon in the identification of general principles of law. In this regard, it should be recalled that decisions of national courts serve a dual role in the identification of general principles of law. On the one hand, as draft conclusion 5 indicates, they may be relevant for purposes of the comparative analysis required to determine the existence of a principle common to the various legal systems of the world. On the other hand, decisions by national courts may serve as a subsidiary means for the determination of general principles of law when such decisions themselves examine the existence and content of a general principle of law. Draft conclusion 8 concerns only the latter scenario. That is why paragraph 2 of draft conclusion 8 indicates that it is without prejudice to draft conclusion 5.

(5) Draft conclusion 8 follows closely the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties and in respect of that particular case, judicial decisions are a subsidiary means for the determination of rules of international law, including general principles of law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (unlike treaties, customary international law and general principles of law). The use of the term "subsidiary means" does not, and is not intended to, suggest that such decisions are not important for the identification of general principles of law.[351]

(6) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of general principles of law is considered and such principles are identified and applied, may offer valuable guidance for determining the existence or lack thereof of general principles. The value of such decisions may vary greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from an examination of various legal systems of the world and transposition, in the case of general principles derived from national legal systems, and from an analysis of all available

[348] Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Case No. AA 227, Final Award, 18 July 2014, para. 1362.

[349] European Court of Human Rights, *Handyside v. the United Kingdom*, 7 December 1976, Series A, No. 24, para. 41; European Court of Human Rights, *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I, para. 44; and Inter-American Court of Human Rights, *inter alia*, *Velásquez Rodríguez v. Honduras*, Judgment (Merits) of 29 July 1988, Series C, No. 4, para. 163.

[350] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber, 12 November 2002, paras. 58–61; and Special Court for Sierra Leone: *Prosecutor v. Sam Hinga Norman*, No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 25–26; *Prosecutor v. Sam Hinga Norman et al.*, No. SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 June 2004, paras. 22–30; and *Prosecutor v. Issa Hassan Sesay et al*., No. SCSL-04-15-T, Ruling on the Issue of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, paras. 10–11.

[351] See, for example, J.R. Leiss, "The juridical nature of general principles", in Andenas, *General Principles and the Coherence of International Law*, pp. 79–99.

evidence of the recognition of the principle in question by the community of nations, such as international instruments reflecting the principle, resolutions adopted by international organizations or at intergovernmental conferences, and statements made by States and international organizations, in the case of general principles formed within the international legal system), and on the reception of the decision, in particular by States and in subsequent decisions of courts and tribunals.

(7) For the purposes of the present draft conclusion, the term "decisions" includes judgments, awards and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal concerned, but they need to be approached with caution since they reflect the viewpoint of the individual judge or arbitrator, and may set out points not accepted by the court or tribunal.

(8) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider general principles of law. Express mention is made to the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its decisions and its particular position as the only standing international court of general jurisdiction. While the International Court of Justice has expressly mentioned Article 38, paragraph 1 (*c*), on only a few occasions,[352] it has referred to several general principles of law in its jurisprudence (as the Permanent Court of International Justice did), contributing to the understanding of this source of international law and to the scope of particular principles.[353] The term "international courts and tribunals" also

[352] *South West Africa, Second Phase* (footnote 281 above), para. 88; *North Sea Continental Shelf* (footnote 273 above), paras. 17–18; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at para. 127.

[353] See, for example, *Corfu Channel case* (footnote 281 above), pp. 18 and 22; *Reservations to the Convention on Genocide* (footnote 284 above), p. 23 ("The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th,1954: I.C.J. Reports 1954*, p. 47, at p. 53 ("According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute"); *Right of Passage* (footnote 291 above), p. 43 ("Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it"); *South West Africa, Second Phase* (footnote 281 above), para. 88 ("But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (*c*), of its Statute"); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at para. 36 ("But it does not appear to the Court that there is any general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements of their case to the review tribunal. General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal"); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, *Advisory Opinion, I.C.J. Reports 1982*, p. 325, at para. 29 ("The Court now comes to the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process: the principle of equality of the parties. In that Opinion the Court emphasized various applications of the principle; it referred to it first with regard to the decision by the Committee 'after an examination of the opposing views of the interested parties' (*I.C.J. Reports 1973*, p. 176, para. 26). It also referred to it in connection with the interpretation by the Committee of the requirement laid down in Article 11 of the Statute of the Administrative Tribunal that there should be 'a substantial basis for the application' brought before the Committee"); *Question*

includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea,[354] the International Criminal Court[355] and *ad hoc*

of the Delimitation of the Continental Shelf between Nicaragua and Colombia (footnote 288 above), para. 58 ("The Court recalls that the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal"); *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, at para. 68 ("The Court has previously had the occasion to emphasize that 'the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal'"); and *Obligations of States in respect of Climate Change* (see footnote 275 above), para. 152 ("In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, in which the relevant special agreement relating to maritime delimitation called on the Court to take account of equitable principles, the Court affirmed that '[e]quity as a legal concept is a direct emanation of the idea of justice' and 'the legal concept of equity is a general principle directly applicable as law' (*Judgment, I.C.J. Reports 1982*, p. 60, para. 71)").

354 See, for example, *MOX Plant* (see footnote 329 above), para. 82 (where the International Tribunal for the Law of the Sea states that: "The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [United Nations] Convention [on the Law of the Sea] and general international law"); and International Tribunal for the Law of the Sea, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at para. 124 (referring to the principle of estoppel). In the *M/T "*Heroic Idun*"*, the Special Chamber of the International Tribunal for the Law of the Sea "notes the Marshall Islands' suggestion that the Special Chamber could identify a general principle of international law on notification 'through an inductive analysis of existing rules in the international legal system' … Just as it was unable to establish the existence of a customary rule of international law to that effect, the Special Chamber is likewise unable to identify a general principle of international law such as suggested by the Marshall Islands requiring notification to the flag State of any enforcement measures in respect of one of its vessels.": International Tribunal for the Law of the Sea *M/T "*Heroic Idun*" (No. 2) case (Marshall Islands/Equatorial Guinea)*, Judgment, 27 May 2026, para. 375.

355 See, for example, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (footnote 291 above), para. 32 (rejecting the argument that a general principle of law may give a right to appeal on a basis not provided for in the Rome Statute); *ibid*., paras. 26–32 (where the International Criminal Court made a search for a general principle in *foro domestico* seeking whether there is a general principle of law "allowing for the reviewability of decisions of a hierarchically lower court disallowing an appeal to a higher court"). Witness proofing is not a general principle of law: see *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing, 8 November 2006, Pre-trial Chamber I, paras. 35–37; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-722, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, Appeals Chamber, para. 34; *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, Pre-trial Chamber I, para. 126; and *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014 (ICC-01/09-01/11), paras. 65 *ff*. (regarding the competence of Trial Chambers to subpoena witnesses).

international criminal tribunals,[356] regional human rights courts[357] and the World Trade Organization Dispute Settlement Body.[358] It also includes inter-State arbitral

[356] See, for example, decisions where the International Criminal Tribunal for the Former Yugoslavia identified a number of general principles of law: *Tadić*, Interlocutory Appeal (footnote 295 above), para. 42 (a general principle of law that a tribunal must be established by law); and *Prosecutor v. Tihomir Blaškić*, No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, para. 796 (proportionality of penalty is to be assessed on the gravity of the crime). In *Kupreškić*, the Tribunal stated that it should use general principles of law in the absence of Statute rules: *Prosecutor v. Kupreškić* (footnote 284 above), paras. 591, 539 and 677 *ff* (referring to general principles of law as part of the law to be applied by the Tribunal, and addressing general principles regarding multiple offences). In *Furundžija* it was stated that a wide analysis of the various legal systems should be made to find a general principle *in foro domestico*: *Furundžija* (footnote 284 above), paras. 177–186 (relying on general principles of law to provide a definition of rape); see also *Prosecutor v. Dražen Erdemović*, No. IT-96-22-T, Sentencing Judgment, 29 November 1996, Trial Chamber, paras. 31–40 (in which the Trial Chamber stated that the scale of the penalty for crimes against humanity entails the most severe penalty under national law); *Kunarac* (see footnote 286 above), paras. 437–460 (also relying on general principles of law to provide a definition of rape); and *Prosecutor v. Mucić et al. (Čelebići case)*, No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, paras. 583–590 (addressing a "special defence" of diminished responsibility). See also cases within the International Tribunal for Rwanda: *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, No. ICTR-96-10-T & ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, Trial Chamber, para. 42 (referring to the principle of *res judicata*); and *Prosecutor v. Akayesu* (see footnote 292 above), para. 501 (referring to "general principles of criminal law" to decide on the basis of an interpretation more favourable to the accused).

[357] See, for example, European Court of Human Rights, *Golder v. the United Kingdom*, Judgment, 21 February 1975, Series A, No. 18, para. 35. See also European Court of Human Rights: *Enea v. Italy* [Grand Chamber], No. 74912/01, Judgment, 17 September 2009, *Reports of Judgments and Decisions of the European Court of Human Rights 2009*, para. 104; and *Demir and Baykara v. Turkey* [Grand Chamber], No. 34503/97, Judgment, 12 November 2008, *Reports of Judgments and Decisions of the European Court of Human Rights 2008*, para. 71; and Inter-American Court of Human Rights: *Almonacid Arellano and Others v. Chile*, Judgment (Preliminary objections, merits, reparations and costs), 26 September 2006, Series C, No. 154, para. 65; *Moiwana Community v. Suriname*, Judgment (Preliminary objections, merits, reparations and costs), 15 June 2005, Series C, No. 124, para. 58; *Neira Alegría et al. v. Peru*, Judgment (Preliminary objections), 11 December 1991, Series C, No. 13, para. 29; and *Durand and Ugarte v. Peru*, Judgment, 16 August 2000, Series C, No. 68, para. 76.

[358] See, for example, World Trade Organization, Report of the Appellate Body, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 23 May 1997, and Corr.1, p. 14, where the Appellate Body identified these general principles on burden of proof based on common sense and that applicability of the concept is applicable to "any system of judicial settlement" ("In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption"). Another general principle that has been identified is the principle of due process, which was identified and invoked in *EC–Hormones* (see footnote 280), para. 133. Similar to *United States – Shirts and Blouses*, the Appellate Body identified the principle of due process through the notion that it has been recognized in "many jurisdictions". See also World Trade Organization, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 12 October 1998, para. 158; and World Trade Organization, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 224 (referring to good faith and abuse of rights).

tribunals,[359] international administrative tribunals[360] and other arbitral tribunals applying international law.[361] The breadth of evidence usually at the disposal of the international courts and tribunals may lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(9) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts). The distinction between international and national courts is not always clear-cut; in the present draft conclusions, the term "national courts" includes courts with an international composition operating within one or more domestic legal systems, such as some "hybrid" courts and tribunals with mixed national and international composition and jurisdiction. Decisions of higher courts carry more weight than those of lower courts particularly if they are final and not subject to further review.

(10) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of general principles of law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing arguments advanced by States.

Conclusion 9
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law.

Commentary

(1) Draft conclusion 9 concerns the role of teachings in the determination of general principles of law. Following Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means for determining general principles of law, that is to say, when ascertaining whether there is a principle common to the various legal systems of the world that may be transposed to the international legal system or whether there is a principle formed within the international legal system. The term "teachings", often

[359] See, for example, *Affaire relative à la concession des phares de l'Empire ottoman* (Grèce, France), Award, 24/27 July 1956, UNRIAA, vol. XII, pp. 155–269, at pp. 197, 199 and 241 (making reference to general principles of law with respect to unjust enrichment and succession of responsibility); *Affaire du lac Lanoux*, Award, 16 November 1957, UNRIAA, vol. XII, pp. 281–317, at p. 308 (considering, among others, the principle according to which bad faith cannot be presumed); *Argentine-Chile Frontier Case* (see footnote 281 above), p. 164 (referring to the principle of estoppel); and Permanent Court of Arbitration, *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Case No. 2012-04, Award, 29 June 2017, para. 347.

[360] A.-M. Thévenot-Werner, *Rapport de synthèse sur les principes généraux tels qu'appliqués par les tribunaux administratifs internationaux* (Tribunal administratif du Conseil de l'Europe, 2026).

[361] See, for example, International Centre for Settlement of Investment Disputes: *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Decision, 26 June 2002, paras. 38 *ff* (referring to *res judicata*); *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007, para. 203 (referring to *compétence-compétence*); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Case No. ARB/02/13, Award, 31 January 2006, paras. 70 *ff* (referring to burden of proof); and UNCITRAL, *Saluka Investments B.V. v. Czech Republic*, Partial Award, 17 March 2006, para. 449 (referring to unjust enrichment).

referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to above in draft conclusion 8, teachings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of general principles of law. This auxiliary role recognizes the value that teachings may have in collecting and assessing national laws and other materials and the compatibility of a principle common to the various legal systems of the world with the international legal system; in weighing up relevant rules in the international legal system and relevant resolutions adopted by international organizations or at intergovernmental conferences and statements made by States to assess the recognition of a general principle of law formed within the international legal system; in identifying divergences and the possible absence or emergence of general principles of law; and in evaluating the law. Use of teachings may be particularly useful to overcome any linguistic barriers found when conducting a comparative analysis of national legal systems.

(3) The value of scholarly writings in determining the existence and content of a general principle of law may vary. Teachings differ in quality, making it essential to assess the authority of any given work. The reference in the draft conclusion to "especially those generally reflecting the coinciding views of persons with competence in international law" indicates that converging views among scholars on the existence of a general principle of law carry greater weight than conflicting opinions or stand-alone opinions. Teachings sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). Furthermore, teachings may reflect the national or other individual viewpoints of their authors.

(4) The reference to "especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world" highlights the importance of having regard, so far as possible, to teachings that are representative of the various legal systems and regions of the world and in various languages, and considering gender diversity. This may acquire particular importance when identifying general principles of law derived from national legal systems. For principles derived from national legal systems, the writings on comparative law may be helpful in analysing whether there is commonality among principles across the various legal systems.[362]

(5) The output of private international bodies engaged in the codification and progressive development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (Institut de droit international)[363] and the International Law Association.[364] The value of each

[362] J. Ellis, "General principles and comparative law", *European Journal of International Law*, vol. 22 (2011), pp. 949–971.

[363] See, for example, Institute of International Law, *Annuaire*, vol. 37 (1932), pp. 305, 320, 323–325 and 328 (examining the nature of general principles of law with a limited scope of application). See, moreover, for an assessment whether provisional measures constitute a general principle of law: Institute of International Law, Provisional measures, Session of Hyderabad, 2017 (Third Commission, Rapporteur: Lord Collins of Mapesbury); final resolution of the Third Commission on provisional measures (Session of Hyderabad, 8 September 2017); and resolution on the equality of Parties before international investment tribunals (2019) (Eighteenth Commission, Rapporteur: Campbell McLachlan). See also J.E. Viñuales, "Of fragments, concepts and missions: general principles of law in the work of the Institut de Droit International", in M. Kohen and I. van der Heijden (eds.), *150 ans de contributions au développement du droit international – 150 Years of Contributing to the Development of International Law* (Paris, Pedone, 2023), pp. 395–410.

[364] See, for example, International Law Association: Report of the Study Group on the use of domestic law principles in the development of international law, *Report of the Seventy-Eighth Conference, Sydney* (2018), pp. 1170–1242; "The use of domestic law principles in the development of international law", in Report of the Seventy-Eighth Conference Held in

output needs to be carefully assessed in the light of the expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body and the reception of the output by States and others.

(6) Beyond teachings, special attention is warranted, among other subsidiary means, as regards the output of the International Law Commission, in particular considering its unique mandate as a subsidiary organ of the General Assembly to promote the progressive development of international law and its codification. It should also be taken into account that the members of the Commission are from different regions and represent various legal systems of the world, and that the Commission has a close relationship with the General Assembly and States, including the benefit of receiving oral and written comments from States as it proceeds with its work.

(7) Outputs of the Commission may also contain references to general principles of law. Examples of instances in which the Commission has contributed to the identification or development of general principles may be found across a range of topics, including draft article 2 of the draft articles on the continental shelf and related subjects on the exercise by the coastal State of control and jurisdiction over the continental shelf,[365] the draft articles on succession of States in respect of State property, archives and debts,[366] the draft statute for an international criminal court,[367] the draft Code of Crimes against the Peace and Security of Mankind,[368] the articles

Sydney; Study Group on Due Diligence in International Law, *Second Report Study Group on Due Diligence in International Law* (2016), pp. 1, 6–22 and 43; Report of the Committee on legal principles relating to climate change, Washington Conference (2014) pp. 9–19; and 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* (London, 2014), p. 26 (on the principle of common but differentiated responsibilities and intergenerational equity as manifestations of the principle of equity).

365 Para. 6 of the commentary to draft art. 2 of the draft articles on the continental shelf and related subjects, *Yearbook ... 1951*, vol. II, document A/1858, annex, at p. 142: "[t]he Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2 … It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community."

366 Para. (8) of the commentary to sect. 2 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 30: the Commission referred to the "general principle" of equity in the context of movable State property, which "should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State".

367 For example, draft art. 33 of the draft statute for an international criminal court provided that the court shall apply, *inter alia*, "[a]pplicable treaties and the principles and rules of general international law": *Yearbook ... 1994*, vol. II (Part Two), para. 91. The commentary to this provision specified that "[t]he expression 'principles and rules' of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty", see para. (2) of the commentary to art. 33, *ibid*. See also para. (5), *ibid*. For previous debates of the Commission on this issue, see *Yearbook ... 1992*, vol. I, 2254th to 2264th meetings, pp. 3–69; *ibid*., vol. II (Part Two), p. 14, para. 77; and *ibid., 1993*, vol. II (Part Two), para. 63.

368 The Commission identified, based on the Nürnberg principles, the "general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law": see para. (8) of the commentary to art. 1 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50. It similarly identified the "general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law": see para. (12), *ibid.* The Commission likewise referred to "general principles of criminal law relating to complicity" (para. (5) of the commentary to art. 6, *ibid*.), as well as the "general principle" of *aut dedere aut judicare*

on responsibility of States for internationally wrongful acts,[369] the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,[370] the articles on diplomatic protection,[371] the conclusions of the Commission's Study Group on fragmentation of international law,[372] the Guide to Practice on Reservations to Treaties[373] and the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[374]

Conclusion 10
Functions of general principles of law

1. General principles of law may contribute to the coherence of the international legal system. They serve, *inter alia*:

(*a*) as a basis for substantive rights and obligations, as well as a basis for secondary and procedural rules;

(*b*) to interpret and complement other rules of international law.

(para. (2) of the commentary to art. 9, *ibid.*) and of fair trial (para. (4) of the commentary to art. 11, *ibid.*). References to certain "general principles of criminal law" were also made in the debates of the Commission on the topic. See, for example, *Yearbook ... 1985*, vol. I, p. 15, para. 23, p. 20, paras. 51–52, p. 27, para. 42, p. 38, para. 27, pp. 52–53, paras. 35–36; *Yearbook ... 1986*, vol. I, p. 140, para. 43, pp. 141–142, paras. 58 and 61, p. 150, paras. 1 and 4, p. 151, paras. 11 and 14–16, p. 177, para. 36; and *Yearbook … 1988*, vol. I, p. 287, paras. 46–47.

369 In connection with article 3, for example, the Commission identified the "principle" according to which the characterization of an act of a State as internationally wrongful is not affected by the characterization of the same act as lawful by internal law: see commentaries to arts. 3 and 32 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77. With respect to *force majeure*, the Commission considered that it "may qualify as a general principle of law": see para. (8) of the commentary to art. 23, *ibid.* In a study of 1978, the Secretariat also referred to the possibility of *force majeure* being a general principle of law (see *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/315, paras. 525–529).

370 The Commission indicated that "[s]ome general principles concerning payment of compensation have evolved over a period of time and were endorsed by the [International Court of Justice] and other international tribunals": see para. (18) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), paras. 66–67.

371 The Commission considered that, in case of direct injury to shareholders and where the company is incorporated in the wrongdoing State, "there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment": see para. (4) of the commentary to art. 12 of the articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.

372 The Commission's Study Group on fragmentation of international law referred in its conclusions to the "general principle", "maxim" or "generally accepted technique of interpretation and conflict resolution" of *lex specialis derogat legi generali*, to the "principle" of *lex posterior derogat legi priori* and to the "principle of harmonization" as a "generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations": see paras. (4), (5), (24)–(27) of the conclusions of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), para. 251.

373 In its commentaries in the Guide to Practice on Reservations to Treaties, the Commission made reference to the "general principles" of good faith and reciprocity: see para. (5) of the commentary to guideline 3.1.5 and para. (33) of the commentary to guideline 4.2.4 of the Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol. II (Part Three), para. 2.

374 See, for example, draft conclusion 5, para. 2, and paras. (9)–(10) of the commentary thereto of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44.

2. General principles of law are mainly resorted to when other rules of international law do not address or resolve a particular issue in whole or in part.

Commentary

(1) Draft conclusion 10 addresses the functions of general principles of law. It states that general principles of law may contribute to the coherence of the international legal system. They serve, *inter alia*, as a basis for substantive rights and obligations, as well as for secondary and procedural rules, and are used to interpret and complement other rules of international law. It also indicates that general principles are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.

(2) It ought to be recalled that the functions of general principles of law are, in principle, similar to those performed by other sources of international law. Treaties, customary international law and general principles of law are all equally listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, and it is in the light of this and their application in practice that the functions of general principles of law should be understood.

(3) Paragraph 1 of draft conclusion 10 begins with the proposition that general principles of law may contribute to the coherence of the international legal system.[375]

[375] See statement of H.E. Mr. A.A. Yusuf, President of the International Court of Justice before the Sixth Committee of the General Assembly, New York, 1 November 2019, para. 37 ("The question of coherence in international law is an existential one. The lack of a centralized legislator at the international level has often triggered fears about the possible effect of contradictions between international legal norms. It has also raised questions about possible *lacunae* in international law, and its corollary, the potential declaration by the Court of a *non liquet*. General principles have proved effective in helping the Court to address both structural problems of law-making in international society and to promote coherence"); and *Pulp Mills on the River Uruguay* (footnote 287 above), Separate Opinion of Judge Cançado Trindade, para. 201. See also H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2019), p. 113 ("The principles contemplated by [Article 38, paragraph 1 (c), of the Statute of the International Court of Justice] are, or at all events include, those principles without which no legal system can function at all, that are part and parcel of legal reasoning"); R. Kolb, *Theory of International Law* (Oxford, Hart Publishing, 2016), p. 136 ("From the logical point of view, there are some general principles that must be supposed to conceive a legal order. Without these principles, the construction of the sources would fall into a vicious circle"); T. Gazzini, "General principles of law in the field of foreign investment", *Journal of World Investment and Trade*, vol. 10 (2009), p. 106 (general principles of law "lie at the very foundation of the [international] legal system and are indispensable to its operation" (citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*)); M. Andenas and L. Chiussi, "Cohesion, convergence and coherence of international law", in Andenas, *General Principles and the Coherence of International Law*, p. 10 ("principles of law represent a central cohesive force, revealing and reinforcing the systemic nature of the system. Second, they operate as a tool for intra-systemic convergence in the constellation of international courts and tribunals, avoiding or reducing fragmentation in the approaches adopted in different sub-fields of international law by ensuring that they remain part of general international law. Third, principles of law promote inter-systemic coherence by bridging the gap between international law and domestic legal systems"); R. Pisillo Mazzeschi and A. Viviani, "General principles of international law: from rules to values?", in R. Pisillo Mazzeschi and P. de Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (Springer, 2018), pp. 113–162, at p. 126; C. Eggett, "The role of principles and general principles in the 'constitutional processes' of international law", *Netherlands International Law Review*, vol. 66 (2019), pp. 197–217; Skomerska-Muchowska, "Some remarks on the role of general principles in the interpretation and application of international customary and treaty law", pp. 257 and 260; M. Koskenniemi, "General principles: reflexions on constructivist thinking in international law", in M. Koskenniemi (ed.), *Sources of International Law* (London, Routledge, 2017), pp. 359–402, at pp. 381–382; and S. Besson, "General principles of

While rules derived from other sources of international law may also contribute to the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner. Examples of such general principles of law may include *pacta sunt servanda*,[376] good faith,[377] the principles of *lex specialis* and *lex posterior*,[378] respect for human dignity,[379] elementary considerations of humanity,[380] the principle of systemic integration,[381] the principle of harmonization,[382] the obligation to make reparation for breaches of international law,[383] *ex injuria jus non oritur*[384] and *res judicata*.[385]

international law – Whose principles?", in S. Besson and P. Pichonnaz (eds.), *Les principes en droit européen – Principles in European Law* (Geneva, Schulthess, 2011), pp. 19–64, at p. 48.

376 *Nuclear Tests* (footnote 287 above), para. 46; *Amco Asia Corporation and Others v. Republic of Indonesia*, Award, 20 November 1984, para. 248; and Inter-American Court of Human Rights, Advisory Opinion OC-16/99 on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, 1 October 1999, Series A, No. 16, para. 128.

377 *Nuclear Tests* (footnote 287 above), para. 46; *Border and Transborder Armed Actions* (see footnote 287 above), para. 94; and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (see footnote 358 above), para. 158.

378 Para. (5) of the conclusions of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), para. 251.

379 *Furundžija* (footnote 284 above), para. 183.

380 *Corfu Channel case* (see footnote 281 above), p. 22; *Military and Paramilitary Activities in and Against Nicaragua, Merits* (footnote 273 above), para. 215; and *Legality of the Threat or Use of Nuclear Weapons* (footnote 287 above), para. 79.

381 See, for example, fragmentation report, *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, para. 413; and McLachlan, *The Principle of Systemic Integration in International Law*. See also M.A. Young, "Systemic integration of obligations in an era of climate change: stability and optimal control", *British Yearbook of International Law* (2025), pp. 1–20.

382 Paras. (4), (9), (26) and (42) of the conclusions of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1 ("It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations": para. (4) of the conclusions, *ibid.*); Sørensen, *Les sources du droit international*, p. 226; and fragmentation report, *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, paras. 37–43 and 229, also conclusion (19). The Study Group affirms that the principle of harmonization is "a widely accepted principle of interpretation" (*ibid.*, para. 38). It likewise recognizes the principle's function for resolving conflicts of norms (conclusions (4) and (42), *ibid.*). See also International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31; International Court of Justice, *Case concerning right of passage over Indian territory (Portugal v. India) (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957*, p. 125, at p. 142; International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, paras. 135–136; *Obligations of States in respect of Climate Change* (footnote 275 above), paras. 164–165; and A.D. McNair, *The Law of Treaties*, 2nd ed. (Oxford, Clarendon Press, 1961), p. 466.

383 Permanent Court of International Justice, *Case concerning the Factory at Chorzów* (Merits), Judgment, 13 September 1928, *P.C.I.J. Series A*, No. 17, p. 29.

384 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 133: "This does not mean that facts – in this case facts which flow from wrongful conduct – determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct."

385 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (footnote 288 above), para. 58. See also *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)* (see footnote 353 above), para. 68.

(4) Paragraph 1 also refers to two more concrete functions of general principles. The term "*inter alia*" is used to indicate that the functions referred to are not exhaustive, indicating that the functions of general principles must be determined on a case-by-case basis depending on their content and scope.

(5) Subparagraph (*a*) indicates that general principles of law may serve as the basis for substantive rights and obligations, as well as secondary and procedural rules. The term "substantive rights and obligations" covers the proposition that, like any other source of international law, general principles of law may give rise to substantive rights and obligations incumbent upon States and other subjects of international law, and that international responsibility may be engaged for a breach thereof.[386] Legal instruments and judicial decisions refer as examples of such general principles to the prohibition of unjust enrichment,[387] the principle of *uti possidetis*,[388] the principle that attribution of territory *ipso facto* carries with it the waters appurtenant to the territory attributed,[389] principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide,[390] the prohibition of crimes under international law,[391] elementary considerations of humanity, freedom of maritime communication, every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,[392] the principle of estoppel,[393]

[386] Art. 12 (Existence of a breach of an international obligation) of the articles on responsibility of States for internationally wrongful acts provides that: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin". In explaining the meaning of the term "regardless of its origin", the commentary noted that "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order". See para. (3) of the commentary to art. 12, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77. See also *Yearbook ... 1976*, vol. II (Part Two), pp. 80–87.

[387] *Sea-Land Service* (see footnote 281 above), p. 169; and *Saluka Investments B.V. v. Czech Republic*, Partial Award (see footnote 361 above), para. 449 ("The concept of unjust enrichment is recognised as a general principle of international law. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification.").

[388] *Frontier Dispute* (see footnote 284 above), paras. 20–21.

[389] *Dispute between Argentina and Chile concerning the Beagle Channel*, Decision, 18 February 1977, UNRIAA, vol. XXI, pp. 53–264, at p. 145.

[390] *Reservations to the Convention on Genocide* (see footnote 284 above), p. 23; Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[391] See art. 15, para. 2, of the International Covenant on Civil and Political Rights ("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"). See also art. 7, para. 2, of the European Convention on Human Rights ("This Article shall not 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 recognised by civilised nations").

[392] *Corfu Channel case* (see footnote 281 above), p. 22.

[393] *Case concerning the Temple of Preah Vihear* (see footnote 297 above), p. 26 ("[i]t is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error"); *Argentine-Chile Frontier Case* (see footnote 281 above), p. 164 (where, although the arbitral tribunal found that the claim of estoppel was unfounded in the circumstances of the case, it recognized that the principle of estoppel "can operate with decisive effect in international litigation, and especially in a boundary dispute"); *Chagos Marine Protected Area* (footnote 297 above), paras. 439–447 (where the tribunal relied on the principle of estoppel as a general principle of law, and considered that the undertakings and practice of the United Kingdom suggested "a legally binding commitment").

foundlings' right to be presumed to have been born of nationals of the country in which they are found,[394] and non-discrimination.[395]

(6) The words "secondary and procedural rules" in subparagraph (*b*) are meant to cover certain general principles of law that may be characterized as performing such specific functions in light of their particular content.

(7) International tribunals have considered that some secondary rules of responsibility are derived from general principles of law; for instance, the principle of *force majeure* as a ground for precluding wrongfulness,[396] the principle of mitigation of damages,[397] the obligation to make reparation for breaches of international law,[398] the obligation to pay moratory or compensatory interests,[399] *rebus sic stantibus*[400] and principles on succession of individuals for the purposes of compensation.[401]

(8) Procedural rules refer to those regulating the process in international courts and tribunals. Such principles referred to by international courts and tribunals include *iura novit curia*,[402] *compétence-compétence*,[403] review of excess of mandate,[404] the principle that no one can be judge in his or her own cause,[405] the admissibility of

[394] *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 281 above), p. 21.

[395] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on the Juridical Condition and Rights of Undocumented Migrants, 17 September 2003, Series A, No. 18, para. 101.

[396] See for example, Permanent Court of International Justice, *Payment of Various Serbian Loans Issued in France*, Judgment, 12 July 1929, *P.C.I.J. Series A*, No. 20, p. 5, at pp. 39–40; and *Brazilian Loans*, Judgment, 12 July 1929, *P.C.I.J. Series A*, No. 21, p. 92, at p. 120; European Court of Justice: *Denkavit België NV v. Belgian State*, case 145/85, judgment, 5 February 1987, *European Court Reports 1987*, p. 565; and *Commission of the European Communities v. Italian Republic*, case 101/84, judgment, 11 July 1985, *ibid., 1985*, p. 2629. See also United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3, art. 79; P. Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; art. 7.1.7 of the UNIDROIT Principles of International Commercial Contracts (Rome, UNIDROIT, 1994), pp. 169–171; and G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320.

[397] *Electricity Company of Sofia and Bulgaria,* Order (Request for the Indication of Interim Measures of Protection), 5 December 1939, *P.C.I.J. Series A/B*, No. 79, p. 193, at p. 199; International Centre for Settlement of Investment Disputes, *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, para. 67; and United Nations Claims Commission, Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim of 15 November 1996 (S/AC.26/1996/5/Annex) para. 54 ("under the general principles of international law relating to mitigation of damages, … the Claimant was not only permitted but indeed obligated to take reasonable steps to fight the oil-well fires in order to mitigate the loss, damage or injury being caused by those fires to the property of the Kuwaiti oil sector companies and the State of Kuwait").

[398] Permanent Court of International Justice, *Case concerning the Factory at Chorzów* (Merits), Judgment, 13 September 1928, *P.C.I.J. Series A*, No. 17, p. 29.

[399] *Affaire de l'indemnité russe* (see footnote 281 above), p. 441.

[400] *Questech* (see footnote 281 above), p. 122.

[401] *Aloeboetoe v. Suriname* (see footnote 281 above), paras. 61–62.

[402] See footnote 349 above.

[403] Permanent Court of International Justice, *Interpretation of Greco-Turkish Agreement of December 1st, 1926*, Advisory Opinion, 28 August 1928, *P.C.I.J. Series B*, No. 16, p. 20.

[404] *Abyei Area* (see footnote 281 above), paras. 401–406.

[405] Permanent Court of International Justice, *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne,* Advisory Opinion, 21 November 1925, *P.C.I.J. Series B*, No. 12, p. 32 (considering that Article 15, paragraphs 6 and 7, of the Covenant of the League of Nations reflected the "well-known rule that no one can be judge in his own suit").

indirect evidence,[406] burden of proof,[407] *non bis in idem*,[408] equality of the parties in judicial proceedings, [409] the competence to subpoena witnesses, [410] the general principle of *audi alteram partem*,[411] the general principle of distinguishing the

[406] *Corfu Channel case* (see footnote 281 above), p. 18.

[407] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (see footnote 361 above), paras. 70 *ff*; International Centre for Settlement of Investment Disputes, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Case No. ARB/00/5, Award, 23 September 2003, para. 110; UNCITRAL, *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 26 January 2006, para. 95; International Centre for Settlement of Investment Disputes, *Asian Agricultural Products Limited v. Republic of Sri Lanka*, Case No. ARB/87/3, Award, 27 June 1990, para. 56; *United States – Shirts and Blouses* (footnote 358 above), p. 14; and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, Malaysia v. Singapore* (see footnote 346 above), para. 45.

[408] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a "DULE"*, No. IT-94-1-T, Decision on the defence motion on the principle of *non-bis-in-idem*, 14 November 1995, Trial Chamber, para. 9.

[409] *Anglo-Iranian Oil Co.* (footnote 302 above), p. 105; *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 77, at p. 86 ("The principle of equality of the parties follows from the requirements of good administration of justice"); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (see footnote 353 above), para. 29 ("The Court now comes to the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process: the principle of equality of the parties. In that Opinion, the Court emphasized various applications of the principle; it referred to it first with regard to the decision by the Committee 'after an examination of the opposing views of the interested parties'"); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 353 above), para. 36; *Military and Paramilitary Activities in and against Nicaragua, Merits* (footnote 273 above), paras. 59 and 284; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Request for Advisory Opinion), Advisory Opinion, I.C.J. Reports 2012*, p. 10, at para. 44; and *Questions relating to the Seizure and Detention of Certain Documents and Data* (footnote 288 above), para. 27. See also Institute of International Law, resolution on the equality of parties before international investment tribunals, *Yearbook*, vol. 80 (2018–2019), Session of The Hague (2019), pp. 1–11, referring in the preamble to "the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication"; S. Forlati, "Fair trial in international non-criminal tribunals", in A. Sarvarian *et al.* (eds.), *Procedural Fairness in International Courts and Tribunals* (London, British Institute of International and Comparative Law, 2015), pp. 108–109; A. Clooney and P. Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2021), pp. 719–771; R. Kolb, "General principles of procedural law", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 969; and Institute of International Law, resolution on the equality of parties before international investment tribunals, art. 8, para. 1 ("The equality of the parties includes the principle of the equality of arms, namely that: (a) Each party shall have the right to be heard on the submissions of the other (*audi alteram partem*); and, (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading, production of documents and evidence.").

[410] *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (see footnote 355 above), paras. 65 *ff*.

[411] *Nuclear Tests* (footnote 287 above), para. 33 ("Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar"); and *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections *(Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999*, p. 31, at para. 15 ("there is no need for the Court to stress that it has and will strictly apply the principle of *audi alteram partem*"). See also Cheng, *General Principles of*

preliminary objections phase from the merits phase[412] and the general principle that immunity has to be expeditiously decided in *limine litis*.[413]

(9) In a limited number of cases, the distinction between substantive and procedural principles may not be clear-cut, as certain principles may operate on both levels simultaneously.[414]

(10) Subparagraph (*b*) states that general principles of law may serve to interpret and complement other rules of international law. That general principles of law may be relied upon for purposes of interpretation is well-established in practice.[415]

Law as Applied by International Courts and Tribunals, p. 290; and P. Hamacher, *Die Maxime* audiatur et altera pars *im Völkerrecht* (Vienna, Springer, 1986).

412 *South West Africa, Second Phase* (footnote 281 above), para. 64: "It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, – and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court".

413 *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 para. 63: "By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it."

414 An example is the principle of estoppel, see Permanent Court of Arbitration, *ELA USA, Inc. (U.S.A.) v. Estonia*, Case No. 2018-42, Final Award, 21 February 2025, para. 756; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (footnote 287 above), para. 130; *Chagos Marine Protected Area* (footnote 297 above), para. 438; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 144; D.W. Bowett, "Estoppel before international tribunals and its relation to acquiescence", *British Yearbook of International Law*, vol. 33 (1957), p. 176, at p. 179; W. Friede, "Das Estoppel-Prinzip im Völkerrecht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 5 (1935), pp. 517–545; and C. Brown, "A comparative and critical assessment of estoppel in international law", *University of Miami Law Review*, vol. 50 (1996), p. 369. The principle of estoppel may function substantively by modifying, creating or extinguishing legal rights and obligations: see, for contrast, for instance, in *Case concerning the Temple of Preah Vihear* (see footnote 297 above), pp. 6 and 32. At the same time, estoppel may also operate procedurally, for example where evidence is admitted in proceedings contrary to assurances previously given, see Kolb, "General principles of procedural law", paras. 52–54.

415 See, for example, *Obligations of States in respect of Climate Change* (see footnote 275 above), para. 161 ("For these reasons the Court concludes that the principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity and the precautionary approach or principle are applicable as guiding principles for the interpretation and application of the most directly relevant legal rules"); *Golder v. the United Kingdom* (see footnote 357 above), para. 35 ("Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of 'any relevant rules of international law applicable in the relations between the parties'. Among those rules are general principles of law and especially 'general principles of law recognized by civilized nations' … The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles"); *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (see footnote 358 above), para. 158 ("The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states … our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law"); *United States – Tax Treatment for "Foreign Sales Corporations"* (footnote 281 above), para. 142 ("Although these instruments do not define 'foreign-source income' uniformly, it appears to us that certain widely recognized principles of taxation emerge from them. In seeking to give meaning to the term 'foreign-source income' in footnote 59 to the SCM Agreement, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from

(11) That general principles of law are resorted to in order to interpret other rules of international law is confirmed by article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties, which requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in the relations between the parties". The report of the Commission's Study Group on fragmentation of international law states that this provision deals with the case where sources external to a treaty are relevant in its interpretation, which may include other treaties, customary rules or general principles of law.[416]

(12) The term "complement" in paragraph 1, subparagraph (*b*), of draft conclusion 10 is meant to cover other cases where a general principle of law is applied simultaneously with a treaty rule or rule of customary international law.[417]

(13) Paragraph 2 of draft conclusion 10 indicates that general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.[418] This aims to capture the tendency in judicial practice and

these widely recognized principles which many States generally apply in the field of taxation"); and *Kupreškić* (footnote 284 above), para. 609 ("The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity"). See also Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment, 9 March 1917, in *American Journal of International Law*, vol. 11 (1917), pp. 674–730, at p. 728; *Furundžija* (footnote 284 above), para. 180; *Kunarac* (footnote 286 above), paras. 437–460; and *Delalić*, Appeals Chamber (footnote 281 above), para. 538.

416 Report of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), para. 251, at p. 180, conclusions (17)–(20).

417 *Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 104. Similarly, the arbitral tribunal in the *Proceedings concerning the OSPAR Convention* noted, in determining the law applicable to the dispute, that "[i]t should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention [Convention for the Protection of the Marine Environment of the North-East Atlantic]. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*" (*Proceedings pursuant to the OSPAR Convention (Ireland – United Kingdom)*, Decision, 2 July 2003, UNRIAA, vol. XXIII, pp. 59–151, at para. 84). See also *Prosecutor v. Erdemović*, Judgment, Trial Chamber (footnote 356 above), para. 26 ("the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators of crimes falling within the International Tribunal's jurisdiction, including crimes against humanity, might be sentenced. In order to review the scale of penalties applicable for crimes against humanity, the Trial Chamber will identify the features which characterise such crimes and the penalties associated with them under international law and national laws, which are expressions of general principles of law recognised by all nations"); and International Centre for Settlement of Investment Disputes, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 228 (the tribunal indicated that general principles of law play a "complementary mission to the legal system, either national or international"). The complementary approach is also mentioned in literature: A. Verdross, "Les principes généraux du droit dans la jurisprudence international", *Collected Courses of The Hague Academy of International Law*, vol. 52 (1935), pp. 191–251, at p. 227; Bassiouni, "A functional approach to 'general principles of international law'", pp. 775–776 and 800–801; Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", p. 39; Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*, pp. 60–61; Besson, "General principles of international law – Whose principles?", p. 30; and Skomerska-Muchowska, "Some remarks on the role of general principles", pp. 255–274.

418 See also Pellet and Müller, "Article 38", pp. 934–935; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, 1927), p. 85; F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Martinus Nijhoff, 2008), pp. 42–43; M. Bogdan, "General principles of law and the problem of lacunae in the law of nations", *Nordic Journal of International Law*, vol. 46

in doctrine, when assessing a particular issue, to first determine whether there is a treaty rule or rule of customary international law that may provide a solution, and to resort to general principles of law if the two other sources prove insufficient. The words "are mainly resorted to" clarify that this is not the only manner in which one may proceed, and that in some cases general principles of law may be directly resorted to, depending on the circumstances.[419] The Commission thereby sought to avoid the misconception that general principles of law play merely an ancillary role *vis-à-vis* treaties or customary international law.

(14) The term "other rules of international law" refers to treaties and rules of customary international law. The words "do not address or resolve a particular issue in whole or in part" are meant to clarify that general principles of law may be applied when an issue does not find a solution in treaties or custom at all, or when treaties and custom provide only a partial solution and general principles may serve as a complement.

Conclusion 11
Relationship between general principles of law and treaties and customary international law

1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.

2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.

3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

Commentary

(1) Draft conclusion 11 clarifies certain aspects concerning the relationship between general principles of law, on the one hand, and treaties and customary international law, on the other.

(2) Paragraph 1 of draft conclusion 11 indicates that general principles of law are not in a hierarchical relationship with treaties and customary international law. This statement follows Article 38, paragraph 1, of the Statute of the International Court of Justice, which lists the three sources of international law without indicating the existence of any hierarchy among them. In addition, the conclusions of the work of the Study Group on fragmentation of international law[420] confirm also that no such hierarchy exists.[421]

(1977), pp. 37–53, at pp. 37–41; Yee, "Article 38 of the ICJ Statute and applicable law", p. 487; and Bonafé and Palchetti, "Relying on general principles in international law", p. 162.

[419] An example where general principles of law were applied in the first place may be seen in relation to consent to jurisdiction of international courts and tribunals which has to be decided *in limine litis.* See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (footnote 302 above), paras. 32–35; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 302 above), paras. 83–91; and *ibid.*, Dissenting Opinion of Judge Donoghue, paras. 1 and 8–10.

[420] Conclusion (31) of the conclusions of the work of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), para. 251 ("The main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*").

[421] This proposition is also generally accepted in teachings. See, for example, Pellet and Müller, "Article 38", p. 935; J. Dugard and D. Tladi, "Sources of international law" in J. Dugard *et al.* (eds.), *Dugard's International Law: A South African Perspective*, 5th ed. (Cape Town,

(3) It ought to be recalled that, as indicated in paragraph 2 of draft conclusion 10, general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part. As explained in the commentary thereto, this reflects what for the most part, but not always, occurs in practice, which can be explained in terms of legal reasoning, and as a result of the application of the *lex specialis* principle.[422] It was the Commission's understanding, however, that this practice should not be understood as suggesting that a hierarchical relationship exists between general principles of law and treaties and customary international law. The three sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice enjoy equal status. General principles of law may be applied independently or simultaneously with other rules of international law to interpret or complement them, as indicated in the commentary to draft conclusion 10.

(4) Paragraph 1 of draft conclusion 11 is a statement of general international law. It should be noted, however, that nothing prevents States from establishing, for example, a treaty regime envisaging a different arrangement, such as the Rome Statute of the International Criminal Court,[423] article 21 of which seemingly creates a hierarchy between the different sources to be applied by the Court referred to therein.[424]

(5) In line with the above, paragraph 2 of the draft conclusion states that a general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law. The Commission thereby intended to highlight that general principles of law are an independent source of international law, with their own requirements for identification, and that their existence and applicability as part of general international law is not affected if a treaty rule or a rule of customary international law addresses the same or a similar subject matter.

(6) This situation may arise, for example, when a treaty codifies a general principle of law in its entirety, with the result that a given rule may be found, with identical content, both in the treaty in question and in general principles of law. In such a case, the general principle of law may continue to inform the interpretation and application of the treaty, and it would remain applicable as a matter of general international law between the States parties to the treaty and non-parties, and between States non-parties to the treaty.[425] Similarly, a treaty may codify a general principle

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Juta & Company Ltd., 2018), pp. 28–56, at pp. 28–29; Palchetti, "The role of general principles in promoting the development of customary international rules", p. 49; Bassiouni, "A functional approach to 'general principles of international law'", pp. 781–783; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 20–22; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, p. 20; Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, pp. 121–122; V.D. Degan, *Sources of International Law* (The Hague, Martinus Nijhoff, 1997), p. 5; and T. Gazzini, "General principles of law in the field of foreign investment", p. 108.

422 See, for example, *Right of Passage* (footnote 291 above), p. 43 ("Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result").

423 Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

424 See also art. 61 of the African Charter on Human and People's Rights (Nairobi, 27 June 1981), *ibid*., vol. 1520, No. 26363, p. 217.

425 An example in this regard is the principle *pacta sunt servanda*, reflected in article 26 of the Vienna Convention on the Law of Treaties, which may apply as a treaty rule between the States Parties to the Convention, and as a general principle of law between States Parties and non-Parties to the Convention, as well as between States non-Parties to the Convention. The

of law only in part, in which case the general principle of law would need to be taken into account when interpreting and applying the treaty rule in question, and would furthermore remain applicable between parties and non-parties to the treaty.[426] Analogous considerations apply with respect to customary international law, depending on the specific content of the customary rule in question.[427] A general principle of law may apply in various areas of international law, such as the principle of good faith, which may become a customary rule,[428] but the principle maintains its distinct existence and applicability.

(7) Paragraph 3 of draft conclusion 11 indicates that any conflict between a general principle of law and a rule in treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law. This paragraph must be read together with the conclusions of the Study Group on fragmentation of international law, which it builds upon. The "generally accepted techniques of interpretation and conflict resolution in international law" mentioned in the draft conclusion refer to principles such as *lex specialis derogat legi generali*, *lex posterior derogat legi priori*, the principle of

preamble to the Convention notes that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized".

426 The principle of *res judicata*, for example, has been referred to on various occasions by the International Court of Justice as a principle that is at the same time a general principle of law and a rule provided for in its Statute: see *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (see footnote 288 above), para. 58 ("the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal … This principle establishes the finality of the decision adopted in a particular case"); and *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)* (see footnote 353 above), para. 68. Another instance where the Court seems to have noted the parallel existence of a rule laid down in its Statute and a general principle of law is the *Nottebohm* case, as regards the principle *compétence-compétence*: see *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 111, at p. 120: "Article 36, paragraph 6 [of the Statute], suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it' (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case." With respect to the principle *rebus sic stantibus*, the Iran-United States Claims Tribunal noted that "[t]his concept of changed circumstances … has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in article 62 of the Vienna Convention on the Law of Treaties": *Questech* (see footnote 281 above), p. 122. A further example is the doctrine of abuse of rights, codified in article 300 of the United Nations Convention on the Law of the Sea and the general principles of criminal law codified in Part 3 of the Rome Statute of the International Criminal Court.

427 For example, the "*pacta tertiis nec nocent nec prosunt*" principle, which is codified in article 34 of the Vienna Convention on the Law of Treaties, may be considered a rule of customary international law and a general principle of law at the same time.

428 The general principle of good faith has been codified, for instance, in the Vienna Convention on the Law of Treaties (e.g., arts. 26 and 31). Conclusion 2, paragraph 1, of the conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties states that the rules set forth in articles 31 and 32 of the Vienna Convention of the Law of Treaties also apply as customary international law (*Yearbook … 2018*, vol. II (Part Two), para. 51). The principle of good faith is also reflected in the Friendly Relations Declaration. For the general principle of full reparation, see, for example: art. 31, para. 1, of the articles on responsibility of States for internationally wrongful acts; and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, I.C.J. Reports 2005*, para. 259.

harmonization, as well as to articles 31 to 33 of the Vienna Convention on the Law of Treaties. Furthermore, account must be taken of hierarchical relationships recognized by the substance of the rule (peremptory norms of general international law (*jus cogens*)), and by virtue of a treaty provision (such as Article 103 of the Charter of the United Nations).

(8) A further relationship between customary international law and general principles of law is that the latter may inform and, in some cases, even help determine the content of customary international law.[429]

(9) The Commission noted the paucity of State practice or jurisprudence of international courts and tribunals implying the application of the persistent objector doctrine to general principles of law. Therefore, the Commission decided not to address the question whether the persistent objector doctrine applies to general principles of law.[430]

(10) In addressing the distinction between general principles of law and customary international law, one can observe the difference in the methodologies for identification. As mentioned in draft conclusion 2, recognition by the community of nations is central to the identification of general principles of law, while customary international law is based on two constituent elements: State practice and *opinio juris*. For the purposes of identifying customary international law, national laws, judicial decisions and other practice must be accompanied by *opinio juris*, namely the belief that the State is acting out of a sense of legal right or obligation under international law. In the case of general principles of law derived from national legal systems, recognition is evidenced in how national legal systems, through laws, judicial decisions and other materials, address and resolve essentially domestic matters and whether the domestic legal solutions are compatible with the international legal system. In other words, the recognition is implicit in domestic legal materials and in the compatibility with the international legal system, which is distinct from a manifestation of a sense of legal right or obligation under international law.[431] For general principles formed within the international legal system, as explained in draft conclusion 7, it is not necessary to identify general practice and its acceptance as law (*opinio juris*). What is decisive is the recognition by the community of nations, based on all available evidence, of the existence of a legal principle of general scope of application, having an independent status and intrinsic to the international legal system.

Conclusion 12
General principles of law with a limited scope of application

[429] See, for example, in its Advisory Opinion on *Obligations of States in respect of Climate Change* (footnote 275 above), the International Court of Justice elaborated on this relationship, affirming that the principle of common but differentiated responsibilities and respective capabilities "does not establish new obligations but is relevant for the interpretation of treaties and the determination of rules of customary law relating to the environment" (para. 151) and the same approach applies to the principle of sustainable development, which may likewise inform "the determination of rules of customary international law" (para. 147).

[430] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), paras. 219, 258 and 277 (and A/CN.4/SR.3726, pp. 5-6); and Report of the International Law Commission on the work of its seventy-sixth session (2025): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its eightieth session, prepared by the Secretariat, A/CN.4/788, para. 47. See also R.O.F. Derler, "General principles of law and the persistent objector rule: a theoretical and practical incompatibility", *International and Comparative Law Quarterly*, vol. 75 (2026), pp. 405–441; and M. Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25 (1976), pp. 801–825.

[431] Shao, "What we talk about when we talk about general principles of law", p. 232.

The present draft conclusions are without prejudice to general principles of law with a limited scope of application.

Commentary

(1) Draft conclusion 12 addresses general principles of law with a limited scope of application *ratione personae*. The draft conclusion is formulated as a "without prejudice" clause to reflect that particular general principles of law may emerge within regional and subregional legal systems or between a limited number of States.[432] Accordingly, the limited nature of these general principles of law is *ratione personae* rather than *ratione materiae*. The limited nature, therefore, does not concern thematic general principles of law, such as those associated with international criminal law or international environmental law. Paragraphs (2) to (11) of the present commentary refer to regional, subregional and other examples of these general principles, as well as their formation and function, whereas paragraph (12) provides examples of bilateral general principles of law. Meanwhile, the general principles of law applied by the administrative tribunals of specific international or regional organizations may also have a limited scope of application *ratione personae* and, as such, should be regarded as falling within this type of principles.[433]

(2) The more common general principles with a limited scope of application are regional or subregional general principles of law. Recourse to such general principles is provided for in a number of regional conventions, for example, in Europe, including within the European Union.[434] General principles of European Union law may also be reflected in the treaties and the legislation of the European Union, including in the

[432] Lammers, "General principles of law recognized by civilized nations", p. 63; H. Bokor-Szegő, "Les principes généraux du droit" in M. Bedjaoui (ed.), *Droit international : Bilan et perspectives*, vol. 1 (Paris, Pedone, 1991), p. 230; J. Charney, "Is international law threatened by multiple international tribunals?", *Collected Courses of The Hague Academy of International Law*, vol. 271 (1998), p. 101, at pp. 189–235; and R.O.F. Derler, "The existence of regional general principles of law" in M. Andenas *et al*. (eds.), *General Principles as a Source of International Law* (Oxford, Oxford University Press, forthcoming 2027). A similar approach was taken by the Commission in the conclusions on identification of customary international law; see para. 1 of conclusion 16, *Yearbook ... 2018*, vol. II (Part Two), para. 65.

[433] One example is the Noblemaire principle, relating to setting fair pay for professional staff, adopted in the United Nations context, which is not uniformly applied by the administrative tribunals of other international organizations. See, e.g., Administrative Tribunal of the International Labour Organization, *In re Beattie and Sheeran*, Judgment No. 825, 5 June 1987, para. 1. For broader discussions on this matter, see Thévenot-Werner, *Rapport de synthèse sur les principes généraux*; A.G. Muñoz *et al*., *The Law and Practice of International Administrative Tribunals* (Cambridge, Cambridge University Press, 2025); L. Germond and H. Thierry, *Les principes généraux selon le Tribunal administratif de l'OIT* (Paris, Pedone, 2009); and D. Ruzié, "Jurisprudence du Tribunal Administratif de L'organisation Internationale du Travail", *Annuaire français de droit international*, vol. XLVIII (2002), p. 472.

[434] See, for example, consolidated version of the Treaty on European Union, *Official Journal of the European Union*, C 326, p. 13, art. 6, para. 3 ("general principles of the Union's law"); consolidated version of the Treaty on the Functioning of the European Union, *ibid*., p. 47, arts. 340, paras. 2 and 3; consolidated version of the Treaty establishing the European Atomic Energy Community, *ibid*., C 327, p. 1, art. 188, para. 2 ("general principles common to the laws of the Member States"); Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *ibid*., C 384, p. 1, arts. 2 (a) (ii), 4, para. 3, 75 and 127, para. 3 ("general principles of the Union's law", "general principles of Union law" and "general principles as those applicable within the Union"); and T.C. Hartley, *The Foundations of European Union Law*, 8th ed. (Oxford, Oxford University Press 2014), pp. 144–145, citing M. Akehurst, "The application of general principles of law by the Court of Justice of the European Communities", *British Yearbook of International Law*, vol. 52 (1981), p. 29.

Charter of Fundamental Rights of the European Union,[435] and have been identified in the jurisprudence of the Court of Justice of the European Union.[436]

(3) Particular practices exist within the European Economic Area.[437] The EFTA Court refers to "[European Economic Area] law and its general principles", which apply exclusively among members of the European Economic Area. A principle specific to the European Economic Area legal order is the principle of homogeneity, which lies at the core of European Economic Area law and ensures systemic coherence between the interpretation of its provisions and corresponding provisions of European Union law, thereby avoiding normative conflict.[438]

(4) The jurisprudence of the Central American Court of Justice further refers to the recognition of general principles of law with a limited scope of application. In *El Salvador v. Nicaragua*,[439] the Court relied on principles of co-ownership and quasi-contracts in international law, drawing analogies from private law between the parties.[440] This illustrated that general principles of law of limited scope may be derived from the national legal systems of States concerned. The Tribunal of Justice of the Andean Community follows the principle of autonomy, under which Andean Community law enjoys primacy and direct effect. The Tribunal has also developed the principle of *complemento indispensable* (indispensable complement), pursuant to which domestic regulators may adopt national rules supplementing regional Andean

[435] Charter of Fundamental Rights of the European Union (Strasbourg, 12 December 2007), *Official Journal of the European Union*, C303, p. 1, preamble: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

[436] *Commission of the European Communities v. France*, Joined cases 6/69 and 11/69, Judgment, 10 December 1969, *Collection of Case Law 1969*, para. 16 ("The solidarity which is at the basis of these obligations as of the whole of the Community system"); and *Commission v Italy*, Case 39/72, Judgment, 7 February 1973, *European Court Reports 1973*, para. 25 ("This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."). See also *Portuguese Republic and Kingdom of Spain v. Council of the European Communities*, Joined Cases C-63/90 and C-67/90, Judgment, 13 October 1992, *European Court Reports 1992*, para. 51; and *José García and others v. Mutuelle de Prévoyance Sociale d'Aquitaine and others*, Case C-238/94, Judgment, 26 March 1996, *European Court Reports 1996*, paras. 14 ("social security schemes such as those in issue in the main proceedings, which are based on the principle of solidarity, require compulsory contributions in order to ensure that the principle of solidarity is applied and that their financial equilibrium is maintained").

[437] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Oporto, 2 May 1992), *Official Journal of the European Union*, L 344, p. 3, and EFTA States' official gazettes, art. 46; and C. Lebeck, "General principles" in EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration* (Oxford, Hart Publishing, 2014), p. 253.

[438] Agreement on the European Economic Area (3 January 1994), *Official Journal of the European Union*, L 1, p. 5, art. 6. For an overview see D.W. Holter, "Legislative homogeneity", in C. Baudenbacher (ed.), *The Fundamental Principles of EEA Law* (Springer, 2017), pp. 1–17; P. Speitler, "Judicial homogeneity as a fundamental principle of the EEA", in C. Baudenbacher (ed.), *The Fundamental Principles of EEA Law* (Springer, 2017), pp. 19–33; G. Baur, M. Sánchez Rydelski and C. Zatschler, *European Free Trade Association (EFTA) and the European Economic Area (EEA)* (Wolters Kluwer, 2018), pp. 69–85; F. Arnesen *et al.*, *Agreement on the European Economic Area: A Commentary* (C.H. Beck, Hart and Nomos, 2018), pp. 209-248; P. Hreinsson, "General principles", in C. Baudenbacher (ed.), *The Handbook on EEA Law* (Springer, 2016), pp. 349–355.

[439] Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment, 9 March 1917.

[440] Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 288–289.

norms, provided that such rules complement rather than contradict the regional legal framework.[441]

(5) Within the African continent, general principles of law are referred to in various legal instruments. For example, the Protocol on the Statute of the African Court of Justice and Human Rights provides that the Court shall have regard to "the general principles of law recognized universally or by African States".[442] They are also reflected in other instruments, such as the African Charter on Human and Peoples' Rights, article 61 of which provides that the Commission shall take into consideration, as subsidiary measures for the determination of principles of law, "general principles of law recognized by African States".[443] More specific general principles are codified in the Treaty for the Establishment of the East African Community, including principles such as asymmetry and market-driven cooperation, which do not find equivalency in international law.[444] These principles serve an important integrationist function within their respective subregional legal systems.

(6) Within the Caribbean Community, the Caribbean Court of Justice has identified general principles of law applicable specifically within that legal community. The Court has stated that a general principle between its member States exists where such a principle is common to the legal systems of the member States.[445]

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441 M.A. Villamizar, "The Andean Court of Justice" in R. Howse *et al.* (eds.), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge, Cambridge University Press, 2018), pp. 261–262.

442 Protocol on the Statute of the African Court of Justice and Human Rights (Sharm el-Sheikh, 1 July 2008), available at https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, art. 31, para. 1 (d). See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014, not yet in force), Assembly/AU/Dec.529(XXIII), art. 31, para. 1 (d): "The general principles of law recognized universally or by African States".

443 African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 61.

444 E. Mbembe Binda, "The legal framework of the EAC", in E. Ugirashebuja *et al.* (eds.), *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff, 2017), pp. 110–113. See also Derler, "The existence of regional general principles of law", pp. 27–28.

445 *Trinidad Cement Limited v. the Caribbean Community*, Judgment, 5 February 2009, paras. 40–41 ("The search in the application and interpretation of the Revised Treaty [of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy] is to discover Community law. In this quest the Court has to apply such rules of international law as may be applicable [Art 217 (1) of the Revised Treaty]. Part of that law is the emerging customary international law on, for example, the concept of *ultra vires* acts of organs of international organizations. *The Court may also consider "the general principles of law recognized by civilized nations". If one applies Article 217 of the Revised Treaty the principles of law common to the principal legal systems of the Community are a source of law for this Court, as it is for the International Court of Justice: see Article 38(1)(c) of the Statute of the International Court of Justice. This Court may take into account the principles and concepts common to the laws of Member States*. The search is for general principles of law common to Member States. It is not necessary for the principle to be expressed identically in all Member States. It is sufficient if the general principle is widely accepted … If the general principle is widely accepted throughout the Community and relevant it may become part of Community law. These are tests that will have to be applied if this Court is asked to strike down the decisions authorizing suspension of the CET [common external tariff] on grounds that derive from the domestic law applicable to judicial review in common law jurisdictions" (emphasis added)); and *SM Jaleel & Co Ltd & Guyana Beverages Inc v. Guyana*, Judgment, 9 May 2017, para. 29 ("This Court, unlike the [European Court of Justice], has no mandate to defer to national law, but, of course, in developing Community law it will have regard to principles of international law including the general principles of law as reflected, for instance, in national law reflecting common values and interests").

It has also accepted that a general principle may exist even where it is not expressed identically in every member State.[446]

(7) In Eurasia, references to general principles of law with a limited scope of application can be found in the practice of the Economic Court of the Commonwealth of Independent States. Article 29 of the 1997 rules of procedure of the Economic Court provides that the Court shall apply "general principles of law recognized in the member States of the Commonwealth of Independent States". In *E.A. Kurko v Eurasian Economic Commission*, the Appellate Chamber of the Court acknowledged general principles of Eurasian Economic Union law.[447]

(8) Within the Arab region, several regional organizations and treaties reflect the use of general principles of law of a limited scope of application. Examples include references providing that "liability for tort shall be governed by the common general principles of law of the members",[448] to "common general principles in the laws of the Member States"[449] and to "principles common to the respective legislation of the States members of the League of Arab States".[450] A subregional reference to general principles of law with a limited scope of application can be found, for example, in the Statute of the Judicial Organ of the Arab Maghreb Union, which provides that disputes shall be resolved "subsidiarily in accordance with the general principles of law common to the legislative systems of the Member States of the Union".[451]

(9) Other non-exhaustive examples include treaty references that limit the scope of general principles of law, such as "common general principles of law of the members",[452] "the general principles applicable in the respective countries"[453] or the "general principles of law commonly recognized by both Contracting Parties".[454]

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[446] *Trinidad Cement Limited v. Trinidad and Tobago* (see previous footnote), para. 32: "general principles of law widely accepted throughout the Community as a whole, even if not expressed identically in all Member States, could also become part of Community law on judicial review".

[447] Court of the Eurasian Economic Union, Decision of the Appellate Chamber, 17 March 2025, available at https://courteurasian.org/upload/iblock/bdf/s0n2x53lw8ehcq7hqjhfehoqsawx8dvc/%D0%A0%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%20%D0%90%D0%9F%2017032025.pdf (Russian only), paras. 33 and 36.

[448] Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries (Beirut, 9 January 1968), United Nations, *Treaty Series*, vol. 681, No. 9707, p. 235, art. 6 (*a*).

[449] Judicial Authority Protocol for the Organisation of Arab Petroleum Exporting Countries (Kuwait, 9 May 1978), art. 26, para. 4.

[450] Unified Agreement for the Investment of Arab Capital in the Arab States (Amman, 26 November 1980), art. 4.

[451] Statute of the Judicial Organ of the Arab Maghreb Union (10–11 March 1991), art. 26 (*b*).

[452] Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries (Beirut, 9 January 1968), United Nations, *Treaty Series*, vol. 681, No. 9707, p. 235, at art. 6 (a): "The contractual liability of the Organization shall be governed by the law of the contract entered into. The liability for tort shall be governed by the common general principles of law of the members".

[453] Agreement between the United States of America and Mexico relating to Reciprocal Trade (Washington, 23 December 1942), *ibid*., vol. 13, No. 81, p. 231, at art. XII. See also the Agreement between the United States of America and Paraguay relating to Reciprocal Trade (Asunción, 12 September 1946), *ibid*., vol. 125, No. 1677, p. 179, art. X.

[454] Agreement between the Government of the Russian Federation and the Government of the United Arab Emirates on the promotion and reciprocal protection of investments (28 June 2010), art. 11: "Where a matter is governed simultaneously both by this Agreement and general principles of law commonly recognized by both Contracting Parties or legislation of the Contracting Party in the territory of which the investments were made, nothing in this Agreement shall prevent either Contracting Party or any of its investors who made investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favorable for the investor."

(10) General principles of law may be "general" for a particular group of States, namely, those belonging to a relevant legal system. Accordingly, when identifying such principles through comparative analysis of national legal systems, judicial practice shows that they are common to those systems and applicable within that legal system, whether regional, subregional or other.

(11) General principles of law with a limited scope of application *ratione personae* mainly serve to promote stronger integration and cooperation within legal systems operating at regional, subregional or other levels. At the same time, they demonstrate that any legal system, whether international, regional, subregional or national, requires general principles to underpin its functioning.

(12) The Commission notes that it has been suggested that general principles of law may operate at the bilateral level. In this regard, reference has been made in scholarly writings,[455] in certain decisions of arbitral tribunals[456] as well as in certain treaties[457] that refer to general principles of law that are common to the contracting parties.

[455] See M.O. Hudson and L.B. Sohn, "Fifty years of arbitration in the Union of International Transport by Rail", *American Journal of International Law*, vol. 37 (1943), pp. 597–610; P.C. Jessup, *Transnational Law* (London, Geoffrey Cumberlege, Oxford University Press, 1956), pp. 78–80; A. McNair, "The general principle of law recognized by civilized nations", *British Yearbook of International Law*, vol. 33 (1957), pp. 1–19; F.A. Mann, "Reflections on a commercial law of nations", *ibid*., vol. 33 (1957), pp. 20–51; I. Seidl-Hohenveldern, "General principles of law as applied by the Conciliation Commissions established under the Peace Treaty with Italy of 1947", *American Journal of International Law*, vol. 53 (1959), pp. 853–872; R.B. Schlesinger and H.-J. Gündisch, "Allgemeine Rechtsgrundsätze als Sachnormen in Schiedsgerichtsverfahren: ein Beitrag zur Theorie der Entnationalisierung von Verträgen", *Rabels Zeitschrift für ausländisches und internationales Privatrecht/Rabel Journal of Comparative and International Private Law*, vol. 28 (1964), pp. 4–46; Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*, p. 199; M. Akehurst, "Equity and general principles of law", pp. 824–825; and Derler, "The existence of regional general principles of law".

[456] See, for example, *Administrations of the Gothard Zone (Gothard Railway, Swiss Federal Railways, Alsace-Lorraine Railways, Baden State Railways, Palatinate Railways, French Eastern Railways* and *Belgian State Railways) v. Administrations of the Brenner Zone (Austrian Southern Railways, Bavarian State Railways and Prussian-Hessian State Railways)*, *Bulletin des transports internationaux par chemins de fer*, vol. 15 (1907), pp. 85–100; *General Direction of the Belgian State Railways v. Direction of the Railways of the German Reich at Essen*, *Bulletin des transports internationaux par chemins de fer*, vol. 31 (1923), pp. 1–7.

[457] Memorandum by the Secretariat on general principles of law, A/CN.4/742, para. 46; see, for further examples, Agreement between the Government of the Russian Federation and the Government of the United Arab Emirates on the promotion and reciprocal protection of investments, art. 11 ("Where a matter is governed simultaneously both by this Agreement and general principles of law commonly recognized by both Contracting Parties or legislation of the Contracting Party in the territory of which the investments were made, nothing in this Agreement shall prevent either Contracting Party or any of its investors who made investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favorable for the investor."); Agreement between the Government of Romania and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (11 April 1993), art. 13, para. 1 ("Where a matter is governed simultaneously both by this Agreement and by other agreements to which both the Contracting Parties are parties or general principles of law commonly recognized by both Contracting Parties or domestic law of the host Party"); Agreement between the Government of the Argentine Republic and the Government of the Republic of Guatemala on the Promotion and Protection of Investments (21 April 1998), art. X, para. 6 ("The arbitral tribunal shall decide on the basis of the provisions of this Agreement and the Principles of International Law and the general principles of law recognized by the contracting parties.").

Chapter VI
Subsidiary means for the determination of rules of international law

A. Introduction

60. The Commission, at its seventy-third session (2022), decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur.[458] The General Assembly, in paragraph 26 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

61. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,[459] and a memorandum by the Secretariat identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[460] Following the debate in plenary, the Commission decided to refer to the Drafting Committee draft conclusions 1 to 5 as contained in the first report of the Special Rapporteur. The Commission provisionally adopted draft conclusions 1, 2 and 3, together with commentaries, and took note of the report of the Drafting Committee on draft conclusions 4 and 5.[461]

62. At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur[462] and a second memorandum by the Secretariat identifying elements in the case law of international courts and tribunals, and other bodies, which would be particularly relevant to the topic.[463] The Commission decided to refer to the Drafting Committee draft conclusions 6 to 8 as contained in the second report of the Special Rapporteur. Subsequently, the Commission provisionally adopted draft conclusions 4 to 8 with commentaries.[464]

63. At its seventy-sixth session (2025), the Commission considered the third report of the Special Rapporteur,[465] and a preliminary bibliography,[466] and decided to refer draft conclusions 9 to 13 contained in that report to the Drafting Committee. The Drafting Committee provisionally adopted a full set of draft conclusions on first reading, including draft conclusions 9 to 13.[467] At the same session, the Commission took note of the report of the Drafting Committee.[468] As a consequence of the reduction of the length of the seventy-sixth session, the Commission was unable to adopt the report of the Drafting Committee and conclude the first reading on the topic at that session.

[458] At its 3583rd meeting, on 17 May 2022. The topic had been included in the long-term programme of work of the Commission during its seventy-second session (2021), on the basis of the proposal contained in the annex to the report of the Commission (*Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10)).

[459] A/CN.4/760.

[460] A/CN.4/759.

[461] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 64–65.

[462] A/CN.4/769.

[463] A/CN.4/765.

[464] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No.* 10 (A/79/10), paras. 70–73.

[465] A/CN.4/781.

[466] A/CN.4/781/Add.1.

[467] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 291.

[468] *Ibid*., para. 292. See also A/CN.4/L.1019.

B. Consideration of the topic at the present session

64. At its 3729th meeting, on 27 April 2026, the Commission considered the report of the Drafting Committee (A/CN.4/L.1019) and adopted the entire set of draft conclusions on subsidiary means for the determination of rules of international law on first reading (see sect. C.1 below). At the same meeting, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, Mr. Charles Chernor Jalloh, to assist him in the preparation of the draft commentaries to the first reading text of the draft conclusions.

65. At its 3771st to 3775th meetings, from 21 to 23 July 2026, the Commission adopted the commentaries to the aforementioned draft conclusions (see sect. C.2 below).

66. At its 3775th meeting, on 23 July 2026, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (see sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2027.

67. At its 3775th meeting, on 23 July 2026, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Charles Chernor Jalloh, which had enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on subsidiary means for the determination of rules of international law.

C. Text of the draft conclusions on subsidiary means for the determination of rules of international law adopted by the Commission on first reading

1. Text of the draft conclusions

68. The text of the draft conclusions, adopted by the Commission on first reading, is reproduced below.

Subsidiary means for the determination of rules of international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Part Two
General provisions

Conclusion 2
Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(*a*) decisions of courts and tribunals;

(*b*) teachings;

(*c*) any other means generally used to assist in determining rules of international law.

Conclusion 3

Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Conclusion 4
General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(*a*) their degree of representativeness;

(*b*) the quality of the reasoning;

(*c*) the expertise of those involved;

(*d*) the level of agreement among those involved;

(*e*) the reception by States and other entities;

(*f*) where applicable, the mandate conferred on the body.

Part Three
Decisions of courts and tribunals

Conclusion 5
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Conclusion 6
Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Conclusion 7
Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 4, *inter alia*:

(*a*) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;

(*b*) the extent to which the decision is part of a body of concurring decisions; and

(*c*) the extent to which the reasoning remains relevant, taking into account subsequent developments.

Part Four
Teachings

Conclusion 8
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

Conclusion 9
Weight of teachings

When assessing the weight of teachings, regard should be had to, as appropriate, the criteria set out in draft conclusion 4.

Part Five
Other means generally used to assist in determining rules of international law

Conclusion 10
Expert bodies

The works of bodies consisting of experts serving in their personal capacity may serve as a subsidiary means for the determination of the existence and content of rules of international law.

Conclusion 11
Weight of the works of expert bodies

When assessing the weight of the works of expert bodies, regard should be had to, in addition to the criteria set out in draft conclusion 4:

(*a*) the character and normative value of the works produced by the expert body concerned;

(*b*) the methodology used in producing its works on a particular issue;

(*c*) the extent to which the works remain relevant, taking into account subsequent developments;

(*d*) the extent to which the body is comprised of experts with competence in international law; and

(*e*) the process and basis of selection of the experts.

Conclusion 12
Resolutions and other texts produced by international organizations or at intergovernmental conferences

Resolutions and other texts produced by international organizations or at intergovernmental conferences may be used as subsidiary means for the determination of the existence and content of rules of international law.

Conclusion 13
Weight of resolutions and other texts produced by international organizations or at intergovernmental conferences

When assessing the weight of resolutions and other texts produced by international organizations or at intergovernmental conferences, regard should be had to, as appropriate, in addition to the criteria set out in draft conclusion 4, the circumstances surrounding their production.

2. Text of the draft conclusions and commentaries thereto adopted by the Commission on first reading

69. The text of the draft conclusions and the commentaries thereto adopted by the Commission on first reading at its seventy-seventh session is reproduced below.

General commentary

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

(2) The present draft conclusions seek to contribute greater clarity on the use of subsidiary means and their relationship with the sources of international law in two principal ways. First, they aim to identify and elucidate the roles of subsidiary means for the determination of rules of international law, consistent with the letter and spirit of Article 38, paragraph 1, of the Statute of the International Court of Justice.

(3) Second, the present draft conclusions offer a consistent methodological approach when using subsidiary means for determining the existence and content[469] of rules of international law. Such determination relates to two main aspects. Firstly, in some cases, there may be a question whether, using subsidiary means, a rule of international law can be identified or determined to exist based on one of the established sources of international law, such as a treaty, customary international law or a general principle of law. Secondly, in other cases, it may be determined that a certain rule exists, but debate could remain about its content and scope. In either scenario, the subsidiary means, for instance a judicial decision, could be used as an auxiliary means to make that determination. The interaction between subsidiary means and the sources of international law, as well as the potentially far-reaching implications of the possible expansion of the category of subsidiary means, indicates that it is vital that the use of any subsidiary means to elucidate the sources of rules of international law be carried out using a coherent and systematic methodology.[470] Such a methodology should contribute to enhancing the consistency, predictability and stability of international law.

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[469] The Commission also addressed the question of the existence and content of rules in its topic on identification of customary international law (see conclusions on identification of customary international law and commentaries thereto: the conclusions adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2018*, vol. II (Part Two), paras. 65-66). The same logic applies here, even though the discussion in the present context is about subsidiary means instead of a source of international law. See the first report of the Special Rapporteur on the present topic (A/CN.4/760).

[470] The Commission, in various projects, has already determined that a methodology is needed to clarify the sources of international law. It should build, as appropriate, on its previous conclusions on subsidiary means that may be used for the determination of the existence and content of rules of international law, which have already found general support among States, whether those rules are of a customary international law nature (para. 1 of conclusion 13 of the conclusions on identification of customary international law: "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules"; conclusion 14: "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law", *Yearbook … 2018*, vol. II (Part Two), para. 65), general principles of law (para. 1 of draft conclusion 8 of the draft conclusions on general principles of law: "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of general principles of law"; draft conclusion 9 of the same draft conclusions: "[t]eachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law" (the draft conclusions on general principles of law and the commentaries thereto are contained in chap. V of the present report, paras. 58-59) or even peremptory norms of general international law (*jus cogens*) (para. 1 of draft conclusion 9 of the draft conclusions on identification and legal

(4) Article 38 of the Statute of the International Court of Justice, which is regarded as the authoritative statement of the sources of international law, is the point of departure for the present draft conclusions. Paragraph 1 of Article 38 directs that the Court, whose primary function is to decide in accordance with international law the disputes submitted to it by States, shall apply: (*a*) treaties, 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 the "community of nations";[471] and (*d*) as subsidiary means for the determination of rules of law, "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations".

(5) Article 38 is the applicable law provision of the Statute of the International Court of Justice. However, its significance stems not only from its inclusion in the Statute of the principal judicial organ of the United Nations[472] and the only universal court with general jurisdiction, but also from the broader acceptance and reliance on Article 38 by States and tribunals, as well as legal scholars, as an authoritative statement of the sources of international law under customary international law and subsidiary means for the determination of rules of international law. There is no suggestion from the practice of States and international organizations or established literature that Article 38 is an exhaustive enumeration of the sources of international law or the subsidiary means for the determination of rules of international law. Thus, in addition to judicial decisions and teachings, which may be thought of as the traditional subsidiary means, the present draft conclusions will also address additional subsidiary means prevalent in the practice of States and international organizations, which will be elaborated in later draft conclusions. Another view was expressed, however, according to which each of the two categories of subsidiary means found in Article 38, paragraph 1 (*d*) (judicial decisions and teachings), can be read broadly to address contemporary developments, including some of the additional means that the present draft conclusions address in Part Five below.

(6) The Commission has selected "draft conclusions" as the final form of output for its work on the topic. This is consistent with, and complements, the Commission's recent output on four topics addressing the sources and related issues of international law, namely, identification of customary international law,[473] general principles of law,[474] identification and legal consequences of peremptory norms of general

consequences of peremptory norms of general international law (*jus cogens*): "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law"; para. 2 of draft conclusion 9 of the same draft conclusions: "[t]he works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law" (the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission and the commentaries thereto are reproduced in *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44).

[471] Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice refers to "civilized nations". The Commission has, in the context of its topic "General principles of law", rightly dispensed with that outdated term in favour of the more inclusive term "community of nations". The latter term will therefore also be used in the present topic. See draft conclusion 2 of the draft conclusions on general principles of law, contained in chap. V of the present report.

[472] Charter of the United Nations, Article 92: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

[473] *Yearbook ... 2018*, vol. II (Part Two), paras. 53–66.

[474] Contained in chap. V of the present report.

international law (*jus cogens*)[475] and subsequent agreements and subsequent practice in relation to the interpretation of treaties.[476]

(7) Regarding the normative value of "draft conclusions", the Commission has, to date, not adopted a one-size-fits-all definition of draft conclusions, since it must examine the specific needs of each topic on its own terms. That said, because States and other users of the Commission's work may be more familiar with "draft articles" as a final form of output, draft conclusions as used here should be understood as the outcome of a process of reasoned deliberation and, more specifically, a statement of the rules derived from the practice found on subsidiary means in the determination of rules of international law. Their essential characteristic is to clarify the law based on the current practice. Thus, the content of the present draft conclusions, in line with the statute of the Commission and the general practice on the related topics mentioned above, reflects primarily codification and possibly elements of progressive development of international law.

(8) Taking the above considerations into account, and given its mandate to assist States with the codification and progressive development of international law consistent with article 1 of its statute, the Commission expects that the present draft conclusions may facilitate the work of all those who may be called upon to address subsidiary means for the determination of rules of international law. Nonetheless, as the present draft conclusions do not address all possible subsidiary means, it is mainly the process of applying the established subsidiary means to determine rules of international law and of determining the scope of new subsidiary means that may emerge in the future which would benefit from the application of the criteria contained in the present draft conclusions. Ultimately, when the text and the accompanying commentaries are read together, the draft conclusions should provide useful guidance to States, international organizations, international and national courts and tribunals and all those, including legal scholars and practitioners of international law, who may have reason to address subsidiary means for the determination of rules of international law.

(9) The present draft conclusions are divided into five parts and comprise 13 conclusions. Part One is introductory and deals with scope. Part Two sets out the general provisions on the nature and function of subsidiary means for the determination of rules of international law, the three categories of subsidiary means and the general criteria to be used to assess their weight. Part Three follows, with further guidance on decisions of courts and tribunals and specific additional criteria for assessment of their weight. Part Four addresses teachings and their weight. Lastly, Part Five examines the other subsidiary means that are generally used in practice to assist in determining rules of international law.

Part One
Introduction

Commentary

Part One, comprising a single draft conclusion, sets out the scope of the draft conclusions.

Conclusion 1
Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

[475] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44.

[476] *Yearbook ... 2018*, vol. II (Part Two), paras. 39–52.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides, in a general way, that the present draft conclusions concern the use of subsidiary means for the determination of rules of international law. The use of the term "present draft conclusions" makes clear that the objective is to set out the scope of the entire set of draft conclusions. The term "concern", instead of "apply" (which is typically used in outcomes that would be recommended to States as bases for future conventions), relates to the object of the work. It also reflects the practice of the Commission in the work on similar topics that result in "draft conclusions" or "draft guidelines" rather than "draft articles".

(2) The term "the use of" was selected after a consideration of two main options. First, like the scope provision on the topic of identification of customary international law,[477] the formula "the way in which subsidiary means are used" was initially proposed by the Special Rapporteur in order to underline the methodological nature of the topic.[478] Second, during the Commission's discussions, consideration was given to an alternative formulation that would have provided that subsidiary means "are to be used". The Statute of the International Court of Justice directs the Court to apply judicial decisions and teachings, as subsidiary means, but at the same time indicates that the judges may use them as a means for the determination of the rules of international law. That said, in practice, while the judges could and do refer to the subsidiary means when they deem it necessary, Article 38, paragraph 1 (*d*), of the Statute does not actually obligate the Court to apply the subsidiary means. The Commission settled on the formulation that the draft conclusions concern "the use of" subsidiary means, which was seen as less imperative than the phrase "are to be used". In addition, the formulation employed was preferred because it was more neutral.

(3) For the purposes of the present commentaries, and with the view to enhancing clarity, terminological explanations are important. First, while the reference to "subsidiary means for the determination of rules of international law" is derived from Article 38, paragraph 1 (*d*), of the Statute of the Court, it is not identical to the wording in that provision which speaks of the determination of "rules of law". The term "subsidiary means for the determination of rules of international law" will be frequently used in the present topic and the commentaries but the broader term "rules of law" contained in the Statute will sometimes be substituted with the term "rules of international law." The latter formula ensures consistency with the title of the present topic. Importantly, the fact that the term "rules of law" is broader than the term "rules of international law" does not operate as a limitation on the substantive scope of the present draft conclusions. Nor does it change the analytical approach that is required.

(4) Second, an analysis of the ordinary meaning of the term "subsidiary" under Article 38, paragraph 1 (*d*), of the Statute, in the various authentic language versions,[479] indicates that they are auxiliary in character.

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[477] The scope provision, in conclusion 1, stated: "[t]he present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined." See conclusion 1 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 65.

[478] See the first report of the Special Rapporteur on the present topic (A/CN.4/760), draft conclusion 1, para. 386.

[479] See, in this regard, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 33. Furthermore, pursuant to Article 111 of the Charter of the United Nations, the Chinese, French, Russian, English and Spanish texts are equally authentic. In accordance with Article 92 of the Charter, the annexed Statute of the Court forms an integral part of the Charter. The Charter has therefore been authenticated in the above five languages. Pursuant to resolution 3190 (XXVIII) of the General Assembly of 18 December 1973, Arabic was included among the official and the working languages of the General Assembly and its Main Committees.

(5) The term as expressed in English was derived from the Latin "*subsidiarius*" and refers to something that provides assistance, that is "subordinate", "supplementary" or "secondary"; "something which provides additional support or assistance; an auxiliary, an aid".[480] The second term "means" is a reference to an "intermediary agent or instrument"; "something interposed or intervening".[481]

(6) Third, and more substantively, the Commission's study of the French (*moyens auxiliaires*), Spanish (*medios auxiliares*) and other equally authentic language versions of Article 38, paragraph 1 (*d*), found that they more precisely underline the ancillary or auxiliary nature of the subsidiary means.[482] The other authentic language versions also set forth a relatively narrower understanding of the term subsidiary than a broader ordinary understanding which also became associated with the English term. They further confirm that both judicial decisions and teachings differ in their nature from the sources of law, expressly enumerated in Article 38, paragraph 1 (*a*) to (*c*), of the Statute: treaties, international custom and general principles of law. In other words, judicial decisions and teachings are subsidiary simply because they are not sources of law that may apply in and of themselves. Rather, they are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules. This is not to suggest that the subsidiary means are not important. On the contrary, they remain so, albeit only as auxiliary means for the identification and determination of rules of international law.

(7) On the preceding point, the Commission has already determined in its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) that some subsidiary means, specifically decisions of international courts and tribunals, are even "a subsidiary means for determining the peremptory character of norms of general international law".[483] Before reaching that conclusion, the Commission had also concluded – in its work on two other topics that are particularly relevant because they concern the sources in Article 38 of the Statute – that subsidiary means may be used for the identification or determination of rules of customary international law (Article 38, para. 1 (*b*)) and for general principles of law (Article 38, para. 1 (*c*)).

(8) That the sources of law are distinct from the subsidiary means, but at the same time interact with some of the latter, such as prior judicial decisions, is confirmed by the approach of the International Court of Justice to the application of Article 38 in several cases. For instance, in *Military Activities in and against Nicaragua (Nicaragua v. United States of America)*, in resolving the question of the law applicable to that case, the Court cited its prior judgment in the *North Sea Continental Shelf* cases for the rule that it was required to apply the various "sources of law

480 "Subsidiary", *Oxford English Dictionary* (Clarendon, 3d ed., 2013). Available at www.oed.com.

481 "Means", *ibid*.

482 The same understanding is reflected in the Chinese and Russian versions. The Arabic version of the Charter and of the annexed Statute is not covered by Article 111 of the Charter, and different translations exist. The Arabic-speaking members of the Commission therefore engaged in a useful linguistic exchange in a meeting with the United Nations translators and interpreters, leading to an assessment that the better translation of "subsidiary means" would be: وسائل احتياطية.

483 See, in this regard, draft conclusion 9, para. 1, entitled "Subsidiary means for the determination of the peremptory character of norms of general international law" and paras. (1) to (4) of the commentary thereto, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44. See also para. (2) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66 ("The term 'subsidiary means' denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term 'subsidiary means' does not, and is not intended to, suggest that such decisions are not important for the identification of customary international law").

enumerated in Article 38 of the Statute",[484] which would include multilateral treaties, customary international law and general international law, even where they overlap.

(9) Similarly, in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court recalled that "[w]hile the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (*a*), of that Article, to apply the provisions of the Special Agreement" and that, referring to the *North Sea Continental Shelf* judgment, international law required delimitation be effected "in accordance with equitable principles, and taking account of all the relevant circumstances".[485]

(10) Similarly, in the *Gulf of Maine* case, a Chamber of the Court determined that

> the Court, in its reasoning on the matter, must obviously begin by referring to Article 38, paragraph 1, of the Statute of the Court. For the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (a)) and international custom (para. 1 (*b*)), *to the definition of which the judicial decisions (para. 1 (d)) either of the Court or of arbitration tribunals have already made a substantial contribution*.[486] [Emphasis added].

(11) In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, the Court examined "the sources listed in Article 38 of the Statute of the Court", which it found that it "must consider" in relation to "the law applicable to the fishery zone" including its "material" prior decisions in the *Gulf of Maine* case.[487] Finally, in *Frontier Dispute (Burkina Faso/Niger)*, the Court interpreted Article 38, paragraph 1, in the context of the object of the Special Agreement between the parties and found that it "clearly indicates that the rules and principles mentioned in that provision of the Statute must be applied to any question that it might be necessary for the Court to resolve in order to rule on the dispute".[488] Among those rules the Court found applicable to that case was the principle of the intangibility of boundaries inherited from decolonization (*uti possidetis juris*), for which the Court referred to prior judgments in *Frontier Dispute (Burkina Faso/Republic of Mali) and Frontier Dispute (Benin/Niger)*.[489]

(12) As regards the phrase "for the determination of rules of international law", the term "determination" comes from Article 38, paragraph 1 (*d*), of the Statute. In the view of the Commission, the term could be understood in at least two ways. First, "determination" has one meaning when considered in its noun form "determination" and another as a verb "determine". As a noun it can mean "ascertainment" (a means of ascertaining what the rule is, a piece of evidence), whereas the word "determine" as a verb can also mean to "decide" (as will be explained in paragraph (15)). Under the first meaning, "determination" is "limited to a determination in the sense of finding out what is the existing law".[490] Such determination would encompass several operations, which may include, depending on the factual context, the identification

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[484] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 82–85.

[485] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 37, para. 23.

[486] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 290–291, para. 83.

[487] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 61, para. 52.

[488] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44, at p. 73, para. 62.

[489] *Ibid.*, paras. 63 and 66.

[490] M. Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996), p. 76.

of a rule or the determination of whether a certain rule exists; and, if it does exist, the content of the rule and its possible application to a specific case.

(13) For example, the determination process could involve analysis of a particular type of subsidiary means, e.g. a decision of an international court, establishing that an international legal rule exists on a given point in issue. The rule may be assessed to exist (or not) as any of the sources of international law contained in Article 38, paragraph 1 (*a*) to (*c*), namely treaties, customary international law and general principles of law. To take the example of treaties, the existence of a given rule may be relatively easy to establish, but the scope of the rule may be contested. This is where both the source of the rule and the subsidiary means may interact to help solve a practical problem. For example, a prior judicial decision, being used as a subsidiary means, might be cited by the parties and the court, since the decision might have already referred to and provided an interpretation of a rule stated in a treaty, such as the principle of the sovereign equality of States in Article 2, paragraph 1, of the Charter of the United Nations. Both the treaty rule, in the example from the Charter, and the prior decision explaining it could then be relevant to resolving the dispute between the parties.

(14) In other instances, when it comes to the sources of law other than treaties, i.e. customary international law or general principles of law, more analysis will be required of the interaction between the subsidiary means and the source. This is because proof of customary international law and proof of general principles of law each require certain additional legal tests to be fulfilled before the existence and content of the legal rule can be identified. To illustrate this point, for the identification of a rule of customary international law, it would be necessary to first ascertain whether the traditional two-part test has been fulfilled, namely, whether there is a general practice, and whether that general practice is accepted as law (*opinio juris*). The reference to the prior judicial decision as a subsidiary means does not mean that the latter is the source of the law; rather, the decision itself serves as evidence of the existence and content of a rule of international law that could then apply. The binding effect of the rule, if and when it is applied, would stem from the customary international law rule and not the prior judicial decision, since there is no doctrine of judicial precedent (*stare decisis*) in general international law (as confirmed by Article 59 of the Statute of the International Court of Justice and draft conclusion 6 below).

(15) But, in addition to the meaning given in paragraph (12) above, the word "determine" as a verb can also mean to state the law. In some cases, and although as a formal matter Article 59 will continue to apply, the Court simply refers to the rule whose content it determined in previous decisions. In most cases, it may do so without engaging in further analysis to establish whether the rule exists or not, since that could at a later stage be taken as a given, following the prior decision to that effect. For, after all, in practice, judges – as well as States and their legal representatives – do not start with a clean slate when they have to resolve a new dispute raising factual and legal issues similar to those already considered. Indeed, prior decisions are "frequently used to identify or elucidate a rule of the law, not to make such a rule, i.e. not so much in the quality of binding precedents as having persuasive influence".[491] For reasons of legal security, not only does the Court itself refer to its own prior decisions, it often seeks to explain a prior position that is based on previous decisions or to justify a departure from a prior decision.[492]

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[491] S. Rosenne, *The Law and Practice of the International Court, 1920–2005, Vol. III*, 4th ed. (Leiden, Martinus Nijhoff Publishers, 2006), p. 1553.

[492] See, for instance, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, where the Court determined that it must "determine, in accordance with Article 38 (1) (*b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, *it must apply the criteria which it has repeatedly laid down* for identifying a rule of customary international

Part Two
General provisions

Commentary

Part Two sets out the basic approach to the subsidiary means for the determination of rules of international law. Comprising three draft conclusions, it specifies the categories of subsidiary means, the nature and function of subsidiary means and the general criteria for the assessment of subsidiary means for the determination of rules of international law. The latter criteria apply to all three categories of subsidiary means.

Conclusion 2
Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(*a*) decisions of courts and tribunals;

(*b*) teachings;

(*c*) any other means generally used to assist in determining rules of international law.

Commentary

(1) Draft conclusion 2 sets out three main categories of subsidiary means for the determination of rules of international law. These are: the decisions of courts and tribunals; the teachings, in the sense of those of scholars from the various nations, regions and legal systems of the world; and any other means generally used to assist in determining rules of international law. The first two categories are rooted in and largely track the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, with the adjustments discussed below. The third category addresses the fact that there are other means used generally in practice to assist in the determination of the rules of international law, which are dealt with in Part Five. Below, the present commentary explains each of these categories in turn, but starts with the *chapeau*.

Chapeau *of draft conclusion 2*

(2) The *chapeau* of draft conclusion 2 simply states that "subsidiary means for the determination of rules of international law include". In formulating the current *chapeau*, consideration was given to using the alternative term "including but not limited to", or to replacing "include" with "can take the form of", all of which were aimed at confirming the non-exhaustive nature of the categories of subsidiary means mentioned in the draft conclusion. In the end, the Commission decided to use the term "include", at the end of the sentence, as it was sufficiently clear and general. Substantively, as already indicated earlier, the point of departure for the *chapeau* is that the list of subsidiary means contained in Article 38, paragraph 1 (*d*), of the Statute is not exhaustive and those means have broader relevance because they are part and parcel of customary international law.

(3) The first two categories set out in draft conclusion 2, subparagraphs (*a*) and (*b*), are based on Article 38, paragraph 1 (*d*), of the Statute of the Court, which refers to "judicial decisions" and the "teachings of the most highly qualified publicists of

law. In particular, *as the Court made clear* in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77)" (emphasis added).

the various nations" as subsidiary means for the determination of rules of law. Those formulations were shortened to refer to "decisions of courts and tribunals" and then "teachings". Then there is the third category of "any other means". The latter encompasses the subsidiary means that are not expressly mentioned in Article 38, but that have emerged in practice to also perform an auxiliary or assistive role in the determination of the rules of international law. That there is a third category of means described as subsidiary is captured in two senses: first, by the use of the term "include" at the end of the *chapeau* and, second and more substantively, by the inclusion of a paragraph (*c*) which anticipates the existence of a more open-ended category of any other subsidiary means.

*Subparagraph (*a*) – decisions of courts and tribunals*

(4) Subparagraph (*a*) recognizes the first category of subsidiary means as being comprised of "decisions of courts and tribunals". Consistent with its prior work addressing the subsidiary means,[493] the Commission decided to delete the qualifying word "judicial" in favour of the much broader formulation "decisions of courts and tribunals". This was intended to ensure that a wider set of decisions from a variety of bodies could be covered by the present draft conclusions. Some members expressed the view, however, that the much narrower formulation "judicial decisions", which mirrors the exact term in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, was preferable to the broader formulation "decisions of courts and tribunals" that was adopted.

(5) Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice expressly mentions "judicial decisions" as being among the subsidiary means for the determination of rules of international law. It is not immediately apparent from an examination of the Charter of the United Nations (Chapter XIV), the Statute, the secondary documents of the Court (for example, the Rules of Court or the Practice Directions) or the jurisprudence of the Court that they contain any explicit definitions of the term "judicial decisions". Questions have arisen in practice and in the present topic concerning the meaning and scope of the term "judicial decisions". That is why the Commission ultimately settled on the broader term "decisions of courts and tribunals" here, as it has done in other prior topics.

(6) The term "decisions" refers to a judgment, decision or determination by a court of law or a body of persons or an institution, as part of a process of adjudication with a view to bringing to an end a controversy or settling a matter. While normally such a decision, especially a judicial one, would be issued by a court of law, such as the International Court of Justice or other international or national courts, it may also be issued by another type of appropriate adjudicative body.

(7) Relatedly, as regards the decisions of the International Court of Justice or other international courts and tribunals, it should be clarified that decisions would include not just final judgments or awards rendered by a court or a tribunal, but also advisory opinions and any orders issued as part of incidental or interlocutory proceedings.[494] The latter would include orders on provisional measures issued by international courts and tribunals.[495] The term "decisions", understood in a broad sense, includes those taken under individual complaints procedures of State-created treaty bodies, such as the Human Rights Committee. Thus, instead of the term "judicial decisions",

[493] For example, as was the case in the title of conclusion 13 in the topic identification of customary international law: "Decisions of courts and tribunals". *Yearbook ... 2018*, vol. II (Part Two), para. 65.

[494] The above reading is consistent with the Commission's view in identification of customary international law, where, in the commentary to conclusion 13 addressing subsidiary means, it explained that "the term 'decisions' includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters": para. (5) of the commentary to conclusion 13, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

[495] Para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook...2018*, vol. II (Part Two), para. 66.

which is found in Article 38, paragraph 1 (*d*), of the Statute, the Commission, consistent with its prior work, selected the broader term "decisions", the merit of which is to encompass decisions issued by a wider range of bodies.

(8) The term "courts and tribunals" should be understood broadly. It encompasses both international courts and tribunals and national courts or, as they are sometimes referred to, municipal courts. The broad meaning captures, for example, the International Court of Justice, the International Tribunal for the Law of the Sea, the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the dispute settlement bodies of the World Trade Organization as well as investment tribunals. Reference to courts and tribunals would also encompass regional judicial bodies, such as the African Court on Human and Peoples' Rights, the Court of Justice of the European Union, the Economic Community of West African States (ECOWAS) Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights.

(9) For reasons of clarity, although this point will be elaborated in the commentary to later draft conclusions, national courts mean the courts or tribunals that may operate within a domestic legal system. They usually operate on the basis of national law: this includes some, but not all, of the so-called "hybrid" courts with mixed subject-matter jurisdiction and composition.[496] Here, it can be noted that national court decisions perform a dual function in the sense that, in addition to serving as subsidiary means, they can be also indications of State practice and a basis for finding *opinio juris* or to determine the existence of a principle common to the various legal systems. In the conclusions on identification of customary international law, for example, the Commission observed that State practice consisted of the conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.[497] Importantly, they could also, as already indicated above, be a form of subsidiary means. Their findings, especially on questions relating to international law, may prove to be valuable.

(10) The extensive practice of using decisions of international and national courts and tribunals as subsidiary means for the determination of rules of international law is elaborated upon in the commentary to draft conclusion 5 below. The criteria for assessing the weight of decisions of courts and tribunals are then elaborated in draft conclusion 7.

*Subparagraph (*b*) – teachings*

(11) Article 38, paragraph 1 (*d*), of the Statute directs the Court to apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Like the category of "decisions of courts and tribunals", which forms subparagraph (*a*) of draft conclusion 2, neither the Charter of the United Nations (Chapter XIV), the Statute nor the secondary documents of the Court (in particular the Rules of Court or the Practice Directions), contain any definition of the term "teachings". Neither the Court nor the Permanent Court of International Justice have defined the term "teachings" as a category in their practice. It would therefore seem useful to briefly examine the ordinary meaning of the term.

[496] The Commission, in the context of the topic of identification of customary international law, has offered working definitions of the terms "international courts and tribunals" and "hybrid" courts that are a convenient starting point for our purposes: para. (6) of the commentary to draft conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

[497] Conclusion 5 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 65. Further discussion of "hybrid courts", and their output, will follow in the commentary to later draft conclusions on the present topic.

(12) In the present draft conclusions, and as will be further explained in draft conclusion 8, the Commission decided to use the term "teachings" to describe the second category of subsidiary means. The Commission debated the possibility of using the "most highly qualified publicists" reference contained in Article 38, paragraph 1 (*d*). The formulation was however found to be a historically and geographically charged notion that could be considered elitist. It was also felt that it focused too heavily on the status of the individual as an author as opposed to the scientific quality of the individual's work, which ought to be the primary consideration. The Commission thus followed its prior work, in the 2018 conclusions on identification of customary international law, which simply described this category as "teachings".[498] The view was, however, expressed that the formulation "the teachings of the most highly qualified publicists of the various nations", which mirrors the exact phrase used in Article 38, paragraph 1 (*d*), of the Statute of the Court, was preferable to the succinct formulation "teachings".

(13) In draft conclusions 2 and 8, the reference to teachings is not just to any teachings, but those that may be considered as originating from either individual or groups of scholars that are eminent in the sense of being among the most highly qualified publicists of the various nations. Special attention should be given to the works of those considered prominent in their fields. That said, as indicated above, while the reputation of the author of the work may provide a useful indication of quality, it is ultimately the quality of the particular writing that is more important. Guidance on which additional factors to use to assess the weight to assign a teaching is included in the second sentence of draft conclusion 8 and in draft conclusion 9.

(14) The term "teachings", both in its ordinary meaning and in the form of its synonyms, is evidently a broad category. Its meaning encompasses written works as well as lectures. This meaning may be the immediate one that comes to mind, when one hears a reference to teachings, but the term need not be understood so narrowly. In fact, it is best understood more broadly given the possibilities that technological advancements may offer. Indeed, in its prior work, the Commission has determined that "teachings" and "writings" are "to be understood in a broad sense".[499] The Commission also considered that the category would include "teachings in non-written form, such as lectures and audiovisual materials".[500] Thus, it can be concluded that teachings are comprised of writings or doctrine, as well as recorded lectures and audiovisual materials and, for that matter, materials in any other format for dissemination, including those which might be developed in the future.

(15) As in the case of subparagraph (*a*), which addresses decisions of courts and tribunals and is further elaborated upon in draft conclusion 5, the nature of and the need for representativeness of teachings in terms of the various legal systems and regions of the world are elaborated upon in specific draft conclusions, starting with draft conclusions 8 and 9. The first of those draft conclusions explains that teachings would include the works of individual scholars, especially – as the drafting history of Article 38, paragraph 1 (*d*), confirms – the coinciding views of such scholars or doctrine. The coinciding views of scholars are not a requirement that there be scholarly consensus, assuming that were even possible. However, where there appears to be a general trend evident from a review of a diverse and representative body of scholarly works, such trend would likely be a reliable indication, on balance,

[498] *Yearbook ... 2018*, vol. II (Part Two), para. 66.

[499] Para. (1) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66; the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710/Rev.1).

[500] A/CN.4/710/Rev.1. See also third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur (A/CN.4/682), chap. V, and statement of the Chair of the Drafting Committee on identification of customary international law, p. 15, available from https://legal.un.org/ilc/guide/1_13.shtml#dcommrep.

that those views are more likely to be accurate. This is particularly the case where the general views follow objective individual assessments by the authors concerned.

(16) The second of the above-mentioned draft conclusions (draft conclusion 9) refers back to draft conclusion 4 and its general criteria for assessing weight, which, in the context of teachings, include the quality of the reasoning of the work, the expertise of those who produced the work and the level of agreement among those involved.

Subparagraph (c) – any other means generally used to assist in determining rules of international law

(17) Subparagraph (*c*) of draft conclusion 2 provides for the third category of subsidiary means when it states that subsidiary means for the determination of rules of international law include "any other means generally used to assist in determining rules of international law". While various candidates that could be included in the "any other means" category emerge from practice and the literature, the key ones may include the works of expert bodies and resolutions and other texts produced by international organizations or at intergovernmental conferences, as explained elsewhere.[501] The Commission notes that certain materials may be difficult to classify into each of the three categories identified above. In some cases, depending on the definition of "teachings" or "decisions" that is used, some of the works may simultaneously fall within different categories. In addition, the view was expressed that the works of expert bodies do not all fall within a single category. Another view was that resolutions are not subsidiary means but rather constitute an element of the formation of international law.

(18) The role of the works of expert bodies and other entities has been examined by the Commission in its recent work on other topics: "Identification of customary international law" (specifically conclusion 14 on teachings), "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (conclusion 13 on pronouncements of expert treaty bodies), "General principles of law" (draft conclusion 9 on teachings)[502] and "Peremptory norms of general international law (*jus cogens*)" (draft conclusion 9 on subsidiary means for the determination of the peremptory character of norms of general international law).[503] This third category of subsidiary means includes the works of private expert bodies such as the Institute of International Law and the International Law Association. The final texts produced by State-created bodies, such as the Commission and human rights treaty bodies, are considered separate from the "teachings of publicists". Their preparatory texts may encompass teachings, for example the reports of special rapporteurs, study groups, general comments or views, but their final texts and outputs are produced under the auspices of official institutions and usually reflect the involvement of States and/or their representatives in the work. This makes them different from the "teachings of publicists". The Commission elaborates on this matter in Part Five of the present draft conclusions.

(19) The Commission has left the third category open (by using the "any other means" formulation) in order not to foreclose the possibility of other subsidiary means, which may not be in widespread use now or that are in use but left out of the work on the present topic, from being covered by the present draft conclusions as practice develops. Still, it added the qualifier "generally" in order to indicate that a degree of qualification or usage in practice was needed. The goal is to make clear that not just any subsidiary means would qualify. It is those that are "generally used" in practice as aids in determining rules of international law, including by courts and

[501] See, in this regard, the detailed discussion of additional subsidiary means in A/CN.4/760, chap. IX.

[502] Contained in chap. V of the present report.

[503] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

tribunals. Specifically, the use of the term "generally" conveys that a particular material used on a single occasion as a subsidiary means by one specific court or tribunal would not automatically become a subsidiary means more generally.

(20) Finally, subparagraph (*c*) alluded to the role of subsidiary means, namely "to assist" in determining the rules of international law. This raised the question of the function of the traditional and additional subsidiary means, which is the subject of draft conclusion 3 (on the nature and function of subsidiary means).

Conclusion 3
Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Commentary

(1) Draft conclusion 3 aims to clarify the role of subsidiary means for the determination of rules of international law vis-à-vis the sources of international law. It consists of two paragraphs. Paragraph 1 considers the nature and function of subsidiary means, while paragraph 2 is a without prejudice clause.

Paragraph 1 – the nature and function of subsidiary means

(2) Paragraph 1 of draft conclusion 3 is composed of two sentences. The first sentence describes the nature and function of subsidiary means and provides that subsidiary means are not a source of international law. The Commission found that there is an extensive body of international and national judicial practice and scholarly works, as also confirmed by the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, to justify this conclusion.[504]

(3) Implicit in the negative formulation of the first sentence specifying what the subsidiary means are not, instead of what they are, is the question of the relationship between the sources of international law and the subsidiary means for the determination of rules of international law. In formulating the Commission's position, two main alternatives were considered. The first was to provide that the subsidiary means are auxiliary in nature *vis-à-vis* treaties, customary international law and general principles of law and that they are mainly resorted to when determining the rules of international law.[505]

(4) The second alternative was to indicate that subsidiary means are not an "autonomous" source of international law or that they are "distinct from" the sources of international law. While it was found that there was merit in each of those approaches, several questions were raised about each of the alternatives, including the possible need to explain them further. The Commission therefore opted for the more direct formulation, stating simply that they are not sources of international law. Still, a view was expressed that the proposition contained in the first sentence that subsidiary means are not a source of international law was too categorical in light of their use for other purposes and that some nuances of what actually occurs in practice regarding the subsidiary means risk being lost.

(5) The second sentence of paragraph 1 of draft conclusion 3 builds on the basic proposition contained in the first sentence by indicating that "[t]he function of subsidiary means is *to assist* with the determination of the existence and content of

[504] See second report on subsidiary means for the determination of rules of international law by the Special Rapporteur (A/CN.4/769), paras. 64–126.
[505] *Ibid*.

rules of international law" (emphasis added). Alternative formulations considered included specifying that subsidiary means are assistive or auxiliary in nature. For various reasons, the Commission did not choose those formulations. In this regard, it was observed that the term "auxiliary" is used to describe "subsidiary" in other languages. This means that, if the term auxiliary is used in the present draft conclusion, when translated into other official languages such as French, Spanish and Russian, it would not only be repetitive but also circular. Against that multilingual context, it was considered sufficient to simply provide that the function of subsidiary means is "to assist" in the process of determining the existence and content of rules of international law. That said, the Commission did not exclude, by this formulation, the possibility that materials used as subsidiary means could perform other functions as confirmed by paragraph 2 of draft conclusion 3.

Paragraph 2 – use of materials as subsidiary means is without prejudice to their other uses

(6) Paragraph 2 of draft conclusion 3 is a single sentence. It provides, in a simple statement, that "[t]he use of *materials* as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes" (emphasis added). This proposition takes as a point of departure the fact that materials used as subsidiary means, for example judicial decisions, may be used for multiple purposes.

(7) In the first place, such materials may be used to assist in determining the existence and content of rules of international law.[506] In the second place, they may be used for a wide variety of other purposes. For instance, when it comes to the decisions of national courts, the Commission has already determined in its previous works that they may serve a dual function: (*a*) either as evidence of the constituent elements of customary international law; or (*b*) as subsidiary means that are useful to assess whether there exists evidence of State practice and *opinio juris*.[507] Similarly, when it comes to general principles of law, judicial decisions – in particular those derived from national legal systems – may be used to determine the existence or lack thereof of general principles of law as well as their content.[508] Moreover, when identifying an international legal norm as constituting a peremptory norm of general international law (*jus cogens*), decisions of national courts may serve as subsidiary means. Such decisions may also constitute primary evidence of acceptance and recognition of a peremptory norm of general international law (*jus cogens*) by the State in question.[509]

[506] See para. (6) of the commentary to draft conclusion 1 above ("[subsidiary means] are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules").

[507] See first report on subsidiary means for the determination of rules of international law by the Special Rapporteur (A/CN.4/760), para. 286. See also para. (1) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66 ("decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as draft conclusions 6 and 10 indicate, they may serve as practice as well as evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules.").

[508] See para. (5) of the commentary to draft conclusion 5 of the draft conclusions on general principles of law, contained in chap. V of the present report.

[509] See para. (6) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44.

(8) The reference to the fact that different materials can be used for different purposes is additionally important for another reason. The Commission contemplated, in draft conclusion 2, subparagraph (*c*), the existence of other materials that could fall within the category of subsidiary means as part of "any other means generally used to assist in determining rules of international law".[510] Such materials can serve different purposes. Therefore, the purpose of and context in which the materials are being used should be taken into account.

Conclusion 4
General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(*a*) their degree of representativeness;

(*b*) the quality of the reasoning;

(*c*) the expertise of those involved;

(*d*) the level of agreement among those involved;

(*e*) the reception by States and other entities;

(*f*) where applicable, the mandate conferred on the body.

Commentary

(1) Draft conclusion 4, which concerns the general criteria for assessing subsidiary means for the determination of rules of international law, seeks to provide guidance to assess the weight to be given to those means.

Chapeau *of draft conclusion 4*

(2) The *chapeau* of draft conclusion 4 provides that reference should be made to various criteria or factors (terms which, for the purposes of the present commentaries, are used interchangeably) when assessing the weight of subsidiary means as part of the determination of rules of international law. Different subsidiary means will have varying levels of "weight". These may also vary between fields of international law. Also, some subsidiary means may have different weight in different contexts. For example, decisions by one international court or tribunal usually have great significance to that court or tribunal itself, but they may be considered less important by another, which may instead give priority to its own decisions.

(3) The six criteria are to be used as general factors for determining the relative weight to be given to materials that are already considered subsidiary means under one of the categories identified in draft conclusion 2. The Commission has, in identifying these general criteria, sought to provide guidance on how to assess the weight of the subsidiary means generally used in practice. At the same time, subsequent draft conclusions provide specific guidance on the weight of decisions of courts and tribunals, teachings, the works of expert bodies and resolutions and other texts produced by international organizations. All four specific conclusions on weight (draft conclusions 7, 9, 11 and 13) refer back to the general criteria in the present conclusion. Further, the specific conclusions on the weight of the above-mentioned

[510] Para. (17) of the commentary to draft conclusion 2 above ("The Commission has left the third category open (by using the 'any other means' formulation) in order not to foreclose the possibility of other subsidiary means, which may not be in widespread use now or that are in use but left out of the work on the present topic, from being covered by the present draft conclusions as the practice develops").

subsidiary means, with the sole exception of teachings, add supplementary factors for the assessment of the weight of the specific subsidiary means concerned.

(4) The general criteria for the assessment of the weight of subsidiary means are foundational to the draft conclusions. Nonetheless, they are not intended for determining whether a particular material is to be considered a subsidiary means within the meaning of the draft conclusions as a whole. This point is made explicit in the *chapeau*. The criteria listed in the draft conclusion, of which some have been explained in previous works of the Commission, are therefore possible elements contributing to assessing the weight to be given to subsidiary means, and the use of those elements would be dependent on the circumstances under which they are being used. The provision sets out the criteria in subparagraphs to enhance readability and help clarify that not all criteria would be applicable to all the categories of subsidiary means. Instead, which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances.

(5) The applicability of the rule is confirmed by the phrase stating that "regard should be had to, *inter alia*" in the *chapeau* of draft conclusion 4. Two elements are worth stressing. First, the use of the term "should" indicates that reference to the criteria is not mandatory, although in many cases it would plainly be desirable. The idea is to signal that what follows is not meant to be a prescriptive statement or to establish an obligation to use a particular subsidiary means. Second, the use of the term "*inter alia*" was also intended to convey that the list of criteria encompassed those that would likely be the most frequently encountered and could serve as a useful guide, but were illustrative instead of exhaustive.

*Subparagraph (*a*) – their degree of representativeness*

(6) Subparagraph (*a*) refers to the degree of representativeness of the materials being used as subsidiary means. This criterion entails, *inter alia*, that in assessing subsidiary means, recourse should be had to the decisions of courts and tribunals, teachings, the works of expert bodies, resolutions of international organizations and any other subsidiary means from various regions or legal systems of the world. Representativeness is here understood as focused on the universality of the subsidiary means in question. This criterion is applied differently if the rules of international law under consideration are bilateral or regional in nature. In such cases, the focus would instead be on the content and degree of specialization of the subsidiary means used to aid in the determination of the rules in question. This is an example of a flexible application of the criteria identified in draft conclusion 4.

*Subparagraph (*b*) – the quality of the reasoning*

(7) Subparagraph (*b*) refers to the quality of the reasoning. The Commission considered that, although the criteria in draft conclusion 4 were not listed hierarchically, the quality of the reasoning is probably the most important consideration. In this regard, the quality of the reasoning criterion speaks to the quality of the work in issue. For example, the quality of the reasoning of a judicial decision or the pronouncement of an expert body may usefully be assessed. This criterion therefore invites an assessment of the quality of the reasoning of the subsidiary means in question, for instance, whether a decision of a court or tribunal or the work of an expert body is sound or the scholarly work is of high quality. The quality assessment is a central but subjective criterion that may require testing over time through sustained debate. It should prevail over the renown of the author in the case of teachings. At the same time, the criterion is subjective and not necessarily applicable to the same degree in relation to all the subsidiary means.

*Subparagraph (*c*) – the expertise of those involved*

(8) Subparagraph (*c*) refers to the level of expertise of those involved. The Commission was of the view that this criterion referred to the background and the

qualifications of those involved in relation to the topic, which should demonstrate expertise on the subject matter in a number of ways, rather than focusing exclusively on the renown or academic titles of the particular author or actors. The expertise of the individuals involved in drafting a text is also mentioned by the Commission in the conclusions on identification of customary international law as a factor influencing the "value" of "the output of international bodies engaged in the codification and development of international law".[511]

*Subparagraph (*d*) – the level of agreement among those involved*

(9) Subparagraph (*d*) lists the level of agreement of those involved. This criterion is meant to refer to the internal consensus when a decision was made or among the authors of a text. Such a criterion would need to be applied flexibly. Accordingly, evaluating the level of agreement could be most appropriate when considering decisions of courts or tribunals and teachings, where the level of convergence among scholars in relation to a specific point of law would be of significance. At the same time, the criterion is also helpful in assessing the weight to attach to the works of expert bodies or to resolutions or other texts produced by international organizations or at intergovernmental conferences.

(10) The level of agreement may be reflected in the coinciding views of individual scholars, which is not a requirement that there be scholarly consensus, assuming that were even possible. However, where there appears to be a general trend evident from a review of a diverse and representative body of scholarly works, such trend would likely be a reliable indication, on balance, that those views are more likely to be correct. This is particularly the case where the general views follow objective individual assessments by the authors concerned.

(11) The Commission has previously noted "support … within the body" as a factor influencing the "value" of "[t]he output of international bodies engaged in the codification and development of international law" in its conclusions on identification of customary international law.[512] A high level of agreement may be particularly significant in terms of decisions of courts and tribunals, teachings, the works of expert bodies or resolutions if the concurring persons or States, as the case may be, represent different geographical regions or legal systems.

*Subparagraph (*e*) – the reception by States and other entities*

(12) An external component is addressed in subparagraph (*e*): the reception by States and other entities. It should be noted that, even when there is a measure of consensus among those who participated in producing a particular work or decision, the outcome can be subject to external criticism. The reactions and views of others in the field are also indications of how well received, or not, a particular subsidiary means might be. In other words, the external component is the reaction after the decision was made: "[t]he reception of the output by States and others", i.e. the level of agreement *outside* the relevant body (this was also mentioned by the Commission in the conclusions on identification of customary international law).[513] As addressed in draft conclusion 10 on expert bodies, the Commission has suggested that its own output merits special consideration in part due to its "close relationship with the General Assembly and States", but that its value depends "above all upon States' reception of its output". The stage of the work should be taken into account.[514]

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511 Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

512 *Ibid*.

513 Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

514 Para. (2) of the commentary to Part Five, *ibid*., and conclusion 10 of the conclusions on identification of customary international law and the commentaries thereto, *ibid*.

Subparagraph (f) – where applicable, the mandate conferred on the body

(13) Finally, subparagraph (*f*) refers to the significance of the mandate conferred on the body that took the decision being assessed. The opening qualifier "where applicable" was included to make it clear that what is being referred to are those situations where the subsidiary means being assessed were produced by a body operating under an official or intergovernmental mandate, such as human rights treaty bodies, or certain expert bodies, like the International Law Commission. In its previous work on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission described such entities as being "established by States or international organizations" and further clarified that they would encompass both the organs created by such entities and their subsidiary organs.[515]

(14) This criterion is useful in assessing whether particular regard should be had to decisions of a particular court and, if so, whether to give it greater weight: for example, because it is a specialist tribunal with particular competence, such as the International Tribunal for the Law of the Sea in relation to the law of the sea; the International Criminal Court in relation to matters of international criminal law; or the Dispute Settlement Body of the World Trade Organization in relation to matters of international trade law. These considerations are reflected in draft conclusion 7 on the weight of decisions of courts and tribunals. In any event, the criterion in question is not necessarily meant to apply to the works of purely private expert bodies, such as the Institute of International Law or the International Law Association. This is not, however, to imply that the "works of expert bodies without an intergovernmental mandate are irrelevant".[516] It is only to indicate that those works are necessarily going to be treated differently from those created by States or international organizations. The latter distinction is elaborated further in the draft conclusions on expert bodies (draft conclusion 10) and the weight of their works (draft conclusion 11).

(15) "Mandate" is mentioned by the Commission in its previous work as a factor influencing the "value" of "[t]he output of international bodies engaged in the codification and development of international law".[517] The works of universal and regional codification bodies would here be relevant to the extent that such bodies were created by and interact with States. In the same previous work, the Commission suggested that its own output "merits special consideration" in part owing to its "unique mandate".[518] Subsidiary means are often produced by organizations that have been given a mandate by States. Particular regard may be given to subsidiary means that fall squarely within such a mandate over those that fall outside it. Some institutions have a general mandate, such as the Commission, which is empowered to develop and codify "international law" whether public or private.[519] The United Nations Commission on International Trade Law (UNCITRAL) also has a special mandate in relation to matters of private international law, but unlike the Commission, it is comprised of representatives of States rather than experts serving in their individual or personal capacity.

(16) Other institutions may have a more specialized mandate. That the International Court of Justice in *Diallo* indicated "that it should ascribe great weight to the interpretation adopted by" the Human Rights Committee,[520] which was within the

[515] See draft conclusion 9, para. 2, and para. (8) of the commentary thereto of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44.

[516] Para. (8), *ibid*.

[517] Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

[518] Para. (2) of the commentary to Part Five, *ibid*.

[519] Statute of the International Law Commission, art. 1, para. 1.

[520] The Court explained that "[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee,

Committee's mandate, supports this view. In the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court, in its reasoning, "carefully considered the position taken by the … Committee" but did not follow it.[521] Such bodies will need to be considered separately. Their work, and other subsidiary means found in practice, are the subject of further analysis and specific draft conclusions on the present topic.

Part Three
Decisions of courts and tribunals

Commentary

Part Three offers detailed guidance on the first of the categories of the subsidiary means for the determination of rules of international law, namely, decisions of courts and tribunals. It establishes a general approach that is replicated throughout the parts of the draft conclusions that follow, with each category of subsidiary means addressed alongside the draft conclusion on its weight. Part Three, which comprises three draft conclusions, offers more detailed guidance on decisions of courts and tribunals and elaborates on the roles of international and national courts in determining subsidiary means, addresses the absence of legally binding precedent in international law unless otherwise provided for in a specific instrument or rule of international law, and provides specific criteria for the assessment of the weight of decisions of courts and tribunals.

Conclusion 5
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Commentary

(1) Draft conclusions 5 (decisions of courts and tribunals) and 8 (teachings) build on the prior work of the Commission. They both seek to clarify how decisions of courts and tribunals and teachings, the two principal subsidiary means derived from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, are to be used for the purpose of determining the existence and content of rules of international law.

(2) Draft conclusion 5 concerns the role of decisions of international and national courts and tribunals as subsidiary means for the determination of the existence and

it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled." In the same case, the Court referred to the interpretations of certain regional human rights provisions in various treaties by the African Commission on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. In relation to issues of compensation for human rights violations, it also took into careful account the practice of various international courts, tribunals and commissions. See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at pp. 331, 334, 339 and 342, paras. 13, 24, 40 and 49.

[521] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, at p. 104, para. 101; see also para. 100.

content of rules of international law. It consists of two paragraphs. Paragraph 1 addresses decisions of international courts and tribunals, especially those of the International Court of Justice, which are a subsidiary means for the determination of the existence and content of rules of international law. Paragraph 2 considers the more limited but enriching role of decisions of national courts as a subsidiary means for the determination of the existence and content of rules of international law. As indicated in draft conclusion 3, paragraph 2, and the commentary thereto, the latter use of decisions of national courts is without prejudice to their other uses. It is also without prejudice to the use of decisions in the writings of scholars and in other subsidiary means. Key elements of each of the two paragraphs of draft conclusion 5 are considered below.

Paragraph 1

"Decisions of international courts and tribunals, in particular of the International Court of Justice"

(3) The term "decisions", as used in the present commentaries, was already explained in the commentary to draft conclusion 2, subparagraph (*a*). It is therefore sufficient to recall here that the Commission there indicates that the narrow term "judicial decisions", found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, had been broadened by using the unqualified term "decisions" in order to reflect contemporary practice.[522] That contemporary practice confirms the use of a wider set of decisions from a wide variety of bodies, not just judicial ones, as part of the process of identifying or determining the existence and content of rules of international law.[523] The Commission has explained that this broader meaning of "decisions" would include final judgments, advisory opinions, awards and any other orders issued in incidental or interlocutory proceedings, including provisional measures.[524]

(4) In the commentary to draft conclusion 2, the term "courts and tribunals" was also explained as forming part of two broad types or categories of courts: first, "international courts and tribunals"; and second, "national courts". The distinction between international courts and tribunals, on the one hand, and national courts, on the other, in the present draft conclusion carries implications for the weight to be attached to the decisions of courts and tribunals and is further elaborated below in relation to paragraph 2.

(5) The current draft conclusion underscores that the decisions of "international courts and tribunals" should be understood broadly. The term is intended to cover "any international body exercising judicial powers"[525] and which is called upon to determine the existence and content of rules of international law. Examples of such international courts today abound. They would include permanent bodies such as the International Court of Justice, but also a wide variety of other specialist and regional courts and tribunals, some of which may be *ad hoc* instead of permanent and may be

[522] See para. (4) of the commentary to draft conclusion 2 above.

[523] See paras. (6)–(7) of the commentary to draft conclusion 2 above (note that the reference to courts and tribunals would also encompass regional judicial bodies, such as the African Court on Human and Peoples' Rights, the Caribbean Court of Justice, the Court of Justice of the European Union, the Court of Justice of the Economic Community of West African States, the East African Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights).

[524] See para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66 ("the term 'decisions' includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters").

[525] Para. (4) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

inter-State arbitral tribunals or other types of tribunals applying international law.[526] The body of law that they apply, as well as the skills and the breadth of evidence usually at the disposal of international courts and tribunals, may lend significant weight to their decisions, subject to the considerations mentioned in draft conclusion 4 providing general criteria for the assessment of subsidiary means and draft conclusion 7 identifying specific criteria to evaluate the weight of decisions of courts and tribunals.

(6) While paragraph 1 clarifies that decisions of all international courts and tribunals are a subsidiary means for the determination of the existence and content of rules of international law, the Commission expressly refers to the International Court of Justice. This understanding is captured by the formulation "in particular of the International Court of Justice". This language is identical to paragraph 1 of conclusion 13 (decisions of courts and tribunals) of the conclusions on identification of customary international law,[527] paragraph 1 of draft conclusion 9 (subsidiary means for the determination of the peremptory character of norms of general international law) of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)[528] and paragraph 1 of draft conclusion 8 (decisions of courts and tribunals) of the draft conclusions on general principles of law.[529]

(7) The Commission considers that highlighting the International Court of Justice in paragraph 1 of draft conclusion 5 is warranted for several reasons. First, Article 38, paragraph 1 (*d*), is the applicable law clause of the Statute of the International Court of Justice, which forms an integral part of the Charter of the United Nations and directs the judges when resolving disputes between States in accordance with international law or issuing advisory opinions, to "apply" subject only to the provisions of Article 59 "judicial decisions" as a "subsidiary means for the determination of rules of law". Naturally, a study such as the present one aimed at clarifying the practice in relation to a provision contained in the Statute of the Court ought to give due deference to that body's extensive judicial practice. In fact, the practice indicates that the Court routinely refers to its own previous decisions, and increasingly those of other courts and tribunals, although without necessarily characterizing them as "subsidiary means".[530] In this way, the Court does not only apply the applicable law provision as a function of its own Statute, now deemed to be part of customary international law, it also issues authoritative decisions that assist in upholding the unity and coherence of international law as a legal system.

(8) Second, under Article 92 of the Charter of the United Nations, the International Court of Justice is "the principal judicial organ of the United Nations".[531] Besides the fact that all Members of the United Nations are *ipso facto* "parties to the Statute of the International Court of Justice",[532] its members are elected

[526] *Ibid*. There is a burgeoning number of international courts and tribunals. For example, while studies show that around 1989 there were only six permanent international courts, over a dozen such bodies that had issued over 37,000 rulings existed as of 2014. See, in this regard, K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, Princeton University Press, 2014).

[527] *Yearbook ... 2018*, vol. II (Part Two), para. 65.

[528] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

[529] Contained in chap. V of the present report.

[530] See memorandum by the Secretariat on subsidiary means for the determination of rules of international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic (A/CN.4/759), para. 219.

[531] See Charter of the United Nations, Article 92: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

[532] See Charter of the United Nations, Article 93, paragraph 1: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

by the main political organs of the United Nations, namely, the General Assembly and the Security Council. The persons elected to the Court are not only required to individually possess the qualifications required by the Statute, but the body as a whole represents the main regions and legal systems of the world. The Court, in other words, is a truly universal body of jurists founded by a truly universal international organization that is broadly representative of the main regions and legal systems of the world. Its judicial findings therefore possess the legitimizing features that have rightly led to it be described as the "World Court".[533]

(9) Third, while some States have established courts to judicially settle disputes among themselves at the regional level,[534] the International Court of Justice remains the only international court to date with general subject matter jurisdiction. Although this power is not unique, the Court also possesses, under Article 96 of the Charter of the United Nations, the competence to give advisory opinions on any legal questions requested by the two main political organs, as well as by other United Nations organs and their specialized agencies. It follows that there is some merit in attaching significance to its case law, given its special status as the only standing international court of general subject matter jurisdiction.

(10) Fourth, and this point also flows from Article 94 of the Charter of the United Nations, each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.[535] Such decisions, including final judgments, are enforceable by the Security Council. The Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. This power has not been frequently invoked in practice. Yet, the option for States to resort to that provision for the enforcement of the decisions of the Court remains under the Charter of the United Nations.[536] Moreover, in accordance with Article 103, in the event of a

[533] For example, see United States of America, "The United States and the 'World Court'", Congressional Research Service, 17 October 2018, CRS Report No. LSB10206, available from https://crsreports.congress.gov/product/pdf/LSB/LSB10206 (noting that the International Court of Justice is "commonly called the 'World Court'").

[534] See, for example, Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 403, art. 211 and 212 (noting the court has jurisdiction to resolve contentious disputes between member States and to issue advisory opinions); Treaty for the Establishment of the East African Community (Arusha, 30 November 1999), *ibid*., vol. 2144, No. 37437, p. 255, art. 32, subpara. (*b*) (the East African Court of Justice has jurisdiction over disputes "[a]rising from a dispute between the Partner States regarding [the] Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned"); Statute of the Central American Court of Justice (Panama City, 10 December 1992), *ibid*., vol. 1821, No. 31191, p. 291, art. 22, subpara. (*a*) ("The Court's competence includes the following: … To hear, at the request of the Member States, the controversies that arise among them"); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid*., vol. 213, No. 2889, p. 221, as revised, art. 33 (referring to inter-State cases heard before the European Court of Human Rights: "Any High Contracting Party may refer to the court any alleged breach of the provisions of the Convention and the protocols thereto another High Contracting Party").

[535] See Charter of the United Nations, Article 94, paragraph 1: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

[536] The United Kingdom of Great Britain and Northern Ireland requested the Security Council to call upon Iran to act in conformity with provisional measures that the International Court of Justice indicated in the *Anglo-Iranian Oil Co. case*. For a discussion of the debate, see https://legal.un.org/repertory/art94/english/rep_orig_vol5_art94.pdf. The Court addressed the effect and the force of its judgment under Article 94 of the Charter of the United Nations in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*(footnote 485 above) p. 18, at para. 29. Similarly, Article 94 was relevant in: *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above), p. 14, at para. 178; *LaGrand Case (Germany v. the United*

conflict between the obligations of States Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail. These obligations would include the obligation to comply with binding decisions of the Security Council in support of decisions of the Court under Article 94, paragraph 2, of the Charter.

(11) Overall, taking into account the foregoing considerations, the Commission considered it appropriate to highlight the role of the International Court of Justice without implying that a hierarchy exists vis-à-vis other international courts and tribunals created by States or international organizations exercising specific competencies conferred on them by their constitutive instruments. For example, on matters of international criminal law, international human rights law, the law of the sea, and international economic law, decisions of the *ad hoc* or permanent international courts and tribunals created by States and international organizations should be taken into account and, in some cases, given considerable or even great weight compared to general courts. The legal value to attribute to such decisions from all such bodies will vary depending on the context and the quality of the reasoning and must be assessed on a case-by-case basis. Further examination of these elements can be found in draft conclusions 4 (general criteria for the assessment of the weight of subsidiary means) and 7 (specific criteria for assessing the weight of decisions of courts and tribunals).

"are a subsidiary means for the determination of the existence and content of rules of international law"

(12) In the final element of paragraph 1 of draft conclusion 5, the Commission has determined that decisions of international courts and tribunals, especially those of the International Court of Justice, "*are* a subsidiary means for the determination of the existence and content of rules of international law" (emphasis added). The decisions of such courts and tribunals on questions of international law, in particular those decisions in which treaty rules are interpreted and applied or the existence of rules of customary international law, general principles of law or peremptory norms of general international law (*jus cogens*) is identified and applied, may offer valuable guidance for determining the existence or content of rules of international law.

(13) The terms "subsidiary means" and "determination" were already explained in the commentary to draft conclusion 1 above. Reference can be had to that explanation in paras. (12)–(15) of the commentary to that draft conclusion. There, the Commission already established that the term "determination" relates to two main aspects. Consequently, the term "determination" encompasses different operations for the purposes of the draft conclusions. Similarly, the commentary also clarified the terms "existence and content" of rules of international law (para. (3) of the general commentary above). Thus, the reference to the "existence and content" reflects the fact that, while often in practice there may be a need to use such a subsidiary means to ascertain the existence of a rule, in some cases, it may already be accepted that the rule exists but its precise content is what is disputed and therefore needs to be determined. Both scenarios are captured by the formulation used.

(14) Regarding the term "rules of international law", the earlier commentary (para. (3) of the commentary to draft conclusion 1 above) explained the phrase, to the effect that "rules of law" is actually used in Article 38, paragraph 1 (*d*), of the Statute of the

States of America), I.C.J. Reports 2001, p. 466; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 311; *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Judgment, 11 September 1992, I.C.J. Reports 1992*, p. 350; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303.

International Court of Justice. The Commission notes that judicial decisions have explained that the reference to "rules" is meant to encompass all those rules that may be found in the sources of international law.[537] Importantly, the fact that the term "rules of law" is broader than the term "rules of international law" does not operate as a limitation on the substantive scope of the present draft conclusions.

(15) Furthermore, the Commission had previously determined that, as with the sources of international law referred to in the preceding paragraph, decisions of international courts and tribunals are a subsidiary means for determining the peremptory character of norms of general international law.[538] It was elucidated in previous work that there "is an abundance of [such] examples",[539] including in the case law of various international tribunals such as the International Criminal Tribunal for the Former Yugoslavia.[540] In short, consistent with the Commission's approach on recent topics and as clarified in the commentary to draft conclusion 1 on scope, decisions of international courts and tribunals are a subsidiary means for determining the existence and content of rules of international law.

Paragraph 2

Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law

(16) Paragraph 2 of draft conclusion 5 concerns decisions of national courts, which may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law. Two preliminary points appear necessary before explaining the text of the paragraph. First, the Commission recalls that Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice refers to "judicial decisions" without distinguishing the use of such decisions as emanating from international or national courts.[541] This means that decisions of both international and national courts could serve as subsidiary means that may be used to determine the existence and the content of rules of international law.

(17) Second, while it is usually not problematic to draw a distinction in practice between the decisions of international courts and tribunals, on the one hand, and the decisions of national courts, on the other, given the emergence of a new type of so-

[537] The International Court of Justice explained this in *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context, 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character").

[538] European Court of Human Rights: *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161; *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A No. 201; and *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

[539] Para. (3) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44.

[540] See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, *Judicial Reports 1998*, vol. 1, p. 467, at p. 569, paras. 153–154. The European Court of Human Rights later relied on this interpretation in *Al-Adsani v. the United Kingdom* [Grand Chamber (GC)], No. 35763/97, ECHR 2001-XI, para. 30. See also Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, Series C, No. 153, para. 128; and Inter-American Commission on Human Rights, *Michael Domingues v. United States*, Case 12.285, Merits, 22 October 2002, Report No. 62/02, para. 49.

[541] See para. (6) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

called "hybrid" [542] courts, the distinction is not always clear-cut. The decisions of such "hybrid" courts which operate in the particular fields of international criminal law may, depending on the legal nature of the tribunal in question, have been considered to fall into either the international or national category.

(18) The Commission places greater emphasis on the decisions of international courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law. However, the use of the decisions of national courts calls for some caution.[543] This caution is reflected in the use of the terms "may be used" and "in certain circumstances" in paragraph 2, qualifying the phrase "subsidiary means for the determination of the existence and content of rules of international law". Paragraph 1 definitively states that the decisions of international courts and tribunals "are" a subsidiary means. The use of "in certain circumstances" expresses essentially the same idea found in the Commission's prior work on the identification of customary international law (conclusion 13, para. 2[544]) and general principles of law (draft conclusion 8, para. 2[545]) – "[r]egard may be had, as appropriate" – or its work on the topic identification and legal consequences of peremptory norms of general international law (*jus cogens*) (draft conclusion 9, para. 1[546]) – "[r]egard may also be had, as appropriate".

(19) The Commission has emphasized that sound reasons exist to distinguish between the decisions of international courts and tribunals and those of national courts. The decisions of international courts and tribunals reflect the views of

[542] There are several types of such tribunals that are hybrid to varying degrees. Some of the "hybrid courts" form part of or operate within a national legal system, while others operate as independent institutions with their own distinct legal personality under international law. Often discussed in terms of the legal basis for their establishment and whether they have mixed composition in terms of staff or apply international or national law, at least three broad categories can be identified. First, courts established through a treaty between either a State or an international or regional organization. Second, tribunals established by an international transitional administration charged with administering a country in transition. Third, courts established by States under their national law with some level of international, including technical and funding, support. The Extraordinary African Chambers within the Senegalese judicial system and the Extraordinary Chambers in the Courts of Cambodia are examples of the latter. The Special Court for Sierra Leone and the Special Tribunal for Lebanon were created through bilateral treaties between the United Nations, on the one part, and, on the other part, the Governments of Sierra Leone and Lebanon, respectively. Other "hybrid" tribunals were established by international administrations such as the Special Panels for Serious Crimes in East Timor and the War Crimes Chamber in Bosnia and Herzegovina. Yet more examples are the internationally assisted national accountability efforts, such as those of the International Crimes Division of the High Court of Uganda, the War Crimes Chamber of the Belgrade District Court in Serbia supported by the Organization for Security and Cooperation in Europe and the Special Criminal Court in the Central African Republic. For more on hybrid courts, see: S. Williams, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues* (Oxford, Bloomsbury, 2012); L.A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, vol. 97 (2003), pp. 295–310; C.P.R. Romano, A. Nollkaemper and J.K. Kleffner, eds., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, Oxford University Press, 2004); C. Ragni, *I Tribunali penali internazionalizzati. Fondamento, giurisdizione, diritto applicabile* (Milan, Giuffrè Editore, 2012); H. Ascensio and others, eds., *Les juridictions pénales internationalisées (Cambodge, Sierra Leone, Timor Leste)* (Paris, Société de Législation Comparée, 2006); and A.-C. Martineau, *Les juridictions pénales internationalisées – Un nouveau modèle de justice hybride ?* (Paris, Pedone, 2007).

[543] On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, United Kingdom, Supreme Court, *Mohammed and others v. Ministry of Defence*, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

[544] *Yearbook ... 2018*, vol. II (Part Two), para. 65.

[545] Contained in chap. V of the present report.

[546] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

international tribunals that are constituted to interpret and apply international law and that are typically composed of benches that are reflective of the various legal systems and regions of the world. They are therefore an authoritative means for identifying the existence of and determining the scope and content of rules of international law.

(20) In contrast, national courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Unlike international courts and tribunals, national courts sometimes lack international law expertise. They may have also reached their decisions without the benefit of hearing arguments advanced by States, or even where such arguments are heard, they may reflect the views of one or two organs of only one State.[547] That said, even within the category of national courts, reference should be had to the quality of the reasoning in the decision which must be assessed on a case-by-case basis. Greater weight is often placed on the decisions of national higher courts, such as supreme or constitutional courts. Less weight will attach to decisions of lower national courts. Court decisions that have been overturned by a higher national court, or through the passage of domestic legislation, may not carry much or any weight.

(21) Draft conclusion 5 must be read together with draft conclusion 4, which indicates the *general criteria* for the assessment of subsidiary means for the determination of rules of international law, draft conclusion 6, which addresses the absence of legally binding precedent in international law unless otherwise provided for in a specific instrument or rule of international law, as well as draft conclusion 7, which sets out illustrative and more specific criteria for the assessment of the weight to be given to decisions of any court or tribunal, whether international, national or hybrid.

(22) Draft conclusion 7 on decisions of courts and tribunals, when read together with draft conclusion 4, indicates that the assessment of the weight of such decisions must take into account, in particular, whether the decisions are representative or address the same or similar issues as those under consideration, the quality of the reasoning in the decision, the expertise of those involved in making the decision, the level of agreement among those involved in deciding the case, whether the court or tribunal in question had specific competence regarding the application of the rule in question, the extent to which the decision is part of a body of concurring decisions and the extent to which the reasoning remains relevant when taking into account subsequent developments. The commentaries to these draft conclusions explain the general and specific criteria for assessing the weight of decisions further below.

(23) The Commission here underlines that the quality of the reasoning together with the degree of representativeness of the court decisions that are used in the determination of rules of international law are important considerations that ought to be taken into careful account. A well-reasoned decision of high quality will generally carry greater weight. Concerning representativeness, far too often, in practice, the decisions of certain national courts from certain regions or legal systems are given priority to the exclusion of others.[548] This may have the unintended effect of undermining the global acceptance of international law. In the view of the Commission, much as with teachings as a subsidiary means in draft conclusion 8, best efforts should be made to use a representative set of court decisions from the various legal systems, regions and languages of the world. This helps to enhance legitimacy and the development of a truly universally applicable body of international law.

Conclusion 6

[547] See para. (7) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two).

[548] See J. T. Gathii, "Promise of international law: a third world view (including a TWAIL bibliography 1996–2019 as an appendix)", *American Society of International Law Proceedings*, vol. 114 (2020), pp. 165–187.

Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Commentary

(1) Draft conclusion 6 deals with the question of precedent in international law. It confirms the existence of an extensive practice from which the Commission has established that there is no system of legally binding precedent, or *stare decisis*, under international law unless otherwise provided for in a specific instrument or rule of international law.[549] However, for reasons of legal security, stability and consistency, which is the essence of any rule of law-based legal system, international courts or tribunals routinely take into account the legal reasoning contained in their prior decisions or in the prior decisions of other courts and tribunals, although they are not obligated to apply them. As a general matter in international adjudication involving States, decisions of international courts are binding only on the parties to the case. This rule notwithstanding, the routine examination of decisions of international courts and tribunals, when deciding cases, as part of a wider judicial dialogue helps to preserve the essential unity and coherence of international law and to avoid fragmentation.

(2) The present draft conclusion consists of two interrelated sentences. The first sentence provides that "[d]ecisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration". The Commission considered that the term "decisions", as well as the phrase "international courts or tribunals", should be understood in the same way as described in the context of draft conclusion 4. The general proposition that decisions of international courts or tribunals "may be followed on points of law" requires fulfilment of a precondition triggering its application, namely, "where those decisions address the same or similar issues as those under consideration".[550]

(3) First, with regard to the formulation of the key elements of the first sentence of draft conclusion 6, the Commission selected the term "may". The idea is that the possibility exists for an international court or tribunal to follow other decisions on points of law, but also clarifies that doing so is not mandatory. Second, the term "points of law", which is a reference to the legal reasoning and legal conclusions, was used to describe what could potentially be followed. The formulation "points of law" explains that the object is not the decision, as such, but the reasons in support thereof.

(4) The distinction between the decision constituting the operative part of the judgment (i.e. the *dispositif*) and the reasons underlying it (i.e. the *motifs*) is well

[549] For example, see International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, p. 275, at para. 28; International Centre for Settlement of Investment Disputes, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on objections to jurisdiction, 29 January 2004, para. 97; and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić* et al., Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, para. 540 ("generally speaking, *and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers*, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries" (emphasis added)).

[550] See also Institute of International Law, Resolution adopted on 1 September 2023 (Angers Session) on precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings, para. 3: "A precedent or case law (*jurisprudence*) may be used in support of a judicial pronouncement if they concern legal issues comparable to the case at hand". Available from www.idi-iil.org.

settled in the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice. In the *Polish Postal Service in Danzig* case, for instance, the Permanent Court of International Justice explained that: "it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned."[551] In the *Readaptation of the Mavrommatis Jerusalem Concessions* case, the respondent State challenged the jurisdiction of the Permanent Court of International Justice to hear the case. However, in decisions adopted before, it had been determined that there was jurisdiction. The Court found that it had "no reason to depart from a construction which clearly flows from the previous judgments *the reasoning of which it still regards as sound*".[552]

(5) The International Court of Justice has, in a series of cases, established a similar position. For example, the Court in *Land and Maritime Boundary between Cameroon and Nigeria* held that: "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[553] By this formulation, the Court made clear that its general starting point to apply would be the reasoning and conclusions on points of law in earlier cases except if there are compelling reasons.

(6) A last and important consideration for the Commission when formulating the first sentence of draft conclusion 6 on the absence of legally binding precedent in international law was the notion that the decisions of the relevant tribunals, to be followed on the points of law, must address "the same or similar issues as those under consideration". This statement indicates, as is well established in jurisprudence, that there must be a level of comparability between the case at issue and the prior cases.[554] The point is that whether to follow the prior decision on points of law in a subsequent case requires a further assessment that it concerns the same or similar issue. Plainly, the earlier decision only applies to analogous cases. In practice, this "means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[555] The earlier decision must also be capable of generalization, as the International Court of Justice explained in *Barcelona Traction* that for the

[551] See *Polish Postal Service in Danzig, Advisory Opinion, P.C.I.J., Series B, No. 11*, p. 6, at pp. 29–30.

[552] *Readaptation of the Mavrommatis Jerusalem Concessions, P.C.I.J., Series A, 1927, No. 11*, p. 4, at p. 18 (emphasis added).

[553] *Land and Maritime Boundary …, Preliminary Objections* (footnote 549 above), para. 28.

[554] International Centre for Settlement of Investment Disputes, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 145 (holding that the Centre's tribunals "ought to follow solutions established in a series of consistent cases, *comparable to the case at hand*, but subject of course to the specifics of a given treaty and of the circumstances of the actual case"). See also, for instance, International Centre for Settlement of Investment Disputes: *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. the Argentine Republic*, Decision on Liability, 30 July 2010, para. 189; *Metal-Tech Ltd. v. the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 116; and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Case No. ARB/11/17, Award, 9 January 2015, para. 76. On the other hand, some caution is warranted. See, for example, Wolfgang Alschner, abstract for Chapter 6 of *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford, Oxford University Press, 2022).

[555] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zlatko Aleksovski*, No. IT-95-14/1-A, Judgment, 24 March 2000, Appeals Chamber, para. 110. See also Permanent Court of International Justice, *Case of the S.S. "Lotus", Judgment, 7 September 1927, Series A, No. 10*, p. 4, at p. 21; and International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at para. 105.

general arbitral jurisprudence cited by parties in that case to be followed, the decisions cited must be capable of "giv[ing] rise to generalization going beyond the special circumstances of each case".[556]

(7) There is practice of certain international courts or tribunals of following previous decisions unless there are "convincing reasons" [557] or "compelling reasons"[558] not to do so, or the existence of a provision to the effect that they "shall be guided by" their own previous decisions as in the statute of the Special Court for Sierra Leone or those of another international court or tribunal.[559] This practice of

[556] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at para. 63. For a more recent discussion, see also *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293.

[557] See, for example, the decision of the International Criminal Court where its Appeals Chamber held that it will not lightly depart from its previous decisions absent "convincing reasons" given "the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions" (Situation in the Republic of Côte d'Ivoire in the Case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15 OA 6, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo's detention (ICC-02/11-01/15-134-Red3)", 31 July 2015, Appeals Chamber, para. 14).

[558] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at para. 389 ("The Court considers that there is no compelling reason in the present case for it to depart from that approach. It accordingly finds that it is unnecessary to proceed any further with its examination of Croatia's allegations in order to establish the actus reus of genocide within the meaning of Article II (c) of the Convention").

[559] Article 20, paragraph 3, of the Statute of the Special Court for Sierra Leone, which was adopted by the United Nations and the Government of Sierra Leone pursuant to a bilateral treaty, sought to limit the prospect of conflicting judicial decisions and the fragmentation of international criminal law, by providing that the judges of the Appeals Chamber of that tribunal "*shall* be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone". The initial idea had been to avoid fragmentation of international criminal law by making the appeals court of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda the appellate court for the Special Court for Sierra Leone. But, for reasons of practicality and the workload and drawdown strategy of the former courts, it was felt that the same goal would be achieved by binding the Special Court for Sierra Leone to following the rulings of the joint International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda appellate chambers.

The Appeals Chamber of the Special Court for Sierra Leone, in interpreting the first part of that provision, took in the *Norman* case a more nuanced position that:

> [w]ithout meaning to detract from the precedential or persuasive utility of decisions of the [International Criminal Tribunal for Rwanda] and the [International Criminal Tribunal for the Former Yugoslavia], it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals.

The Appeals Chamber of the Special Court explained that the authority of another decision also turns on its persuasiveness, not just a formal statutory requirement, and further that, as the highest chamber in the Special Court's two-level system, it was duty bound to ensure interpretations from those other courts would be consistent with its own specific context. The Appeals Chamber also clarified that it supported, at the same time, the intention of its founders to maintain consistency and uniformity in the interpretation and application of international criminal law (Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, Decision on the Prosecutor's motion for immediate

certain international courts and tribunals could be seen, to some extent, as a functional equivalent to a rule of binding precedent. However, in these situations, there is no obligation under international law for the international courts or tribunals to follow previous decisions as legally binding precedents. For such an obligation to exist, it should be provided for in a specific instrument or a specific rule, as contemplated by the second sentence of draft conclusion 6.

(8) In the second sentence of draft conclusion 6, the Commission seeks to clarify the legal consequences that flow from the first sentence. It therefore expressly states that the fact that "[s]uch decisions" (i.e. those of international courts or tribunals) may in some circumstances be followed on points of law (as indicated by the first sentence) does not mean that they "constitute legally binding precedent". The only exceptions to the general rule that decisions do not constitute legally binding precedent is indicated by the phrase "unless otherwise provided for". The qualifier concerns two situations. First, where that possibility is contemplated in "a specific instrument" or, second, where it is provided for in a specific "rule of international law". A combined reading of these terms reflects the Commission's intention to capture the full range of situations where a system of bindingness to precedent in an international court or tribunal is provided for in instruments such as a treaty,[560] statute or other constitutive or founding document of a tribunal.

(9) For example, according to article 221 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, "[j]udgments of the [Caribbean Court of Justice] shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219". The title of article 221 is "judgment of the Court to constitute *stare decisis*".

(10) A second example is the Court of Justice of the European Union, which, in at least two situations under its statute regarding appeals and reviews, is empowered to quash the decision of the General Court in an appeal and even itself give final judgment in the matter or even choose to refer a case back to the General Court, in which case the latter tribunal "shall be bound by the decision of the Court of Justice on points of law".[561]

(11) A third example is the EFTA Court, which under the agreement on the European Economic Area is under an obligation to interpret its provisions "in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this agreement".[562]

(12) A fourth illustration could be the Inter-American Court of Human Rights. Although its founding treaties and rules do not expressly provide for this, in a rich jurisprudence that has developed and strengthened over the years, the Inter-American Court has determined on the basis of its interpretation of its constitutive documents that:

> the [j]udiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the

protective measures for witnesses and victims and for non-public disclosure, 23 May 2003, Trial Chamber, para. 11).

560 Permanent Court of Arbitration, *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Award on Issues of General Interpretation of the Indus Waters Treaty, 8 August 2025, paras. 294–299.

561 See articles 61, second paragraph, and 62*b* of the Statute of the Court of Justice of the European Union providing for the binding application of decisions including in relation to situations concerning a serious risk of the unity or consistency of Union law (available from https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf; containing the consolidated version of the Statute, incorporating the texts listed *ibid*., p. 2).

562 Agreement on the European Economic Area (Porto, 2 May 1992), United Nations, *Treaty Series*, vol. 1793, No. 31121, p. 3, arts. 6 and 108.

American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[563]

(13) Later judgments have held that the application by national court judges of the rulings of the Inter-American Court is obligatory. This implies that the binding nature of decisions may not be limited to the parties to the particular case. While this interpretation has led to a lively scholarly debate,[564] which need not be entered into by the Commission for the purpose of providing this example of a regional court where a specific rule providing for the binding nature of its decisions has been developed through judicial decisions, it can be noted that some States in the Americas have accepted or acquiesced to the judicial interpretation given by the Inter-American Court, while several[565] others have expressed some doubts.

(14) In the view of the Commission, given the above practice, the general proposition contained in draft conclusion 6 that there is no system of legally binding precedent in international law remains valid. However, in some circumstances, such as those discussed above, the obligation to follow prior decisions is established in either a specific instrument or a specific rule of international law.

Conclusion 7
Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 4, *inter alia*:

(*a*) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;

[563] See, for the seminal case, Inter-American Court of Human Rights, Case of *Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, Series C, No. 154, para. 124. For examples of subsequent application and expansion of this doctrine, and its expansion to apply to other public bodies not just courts, see Inter-American Court of Human Rights: *Case of Fermín Ramírez v. Guatemala and Case of Raxcacó Reyes et al. v. Guatemala*, Order (Monitoring Compliance with Judgment), 9 May 2008, para. 63; *Case of the "Five Pensioners" v. Peru*, Order (Monitoring Compliance with Judgment), 24 November 2009, para. 35; *Case of Bámaca Velásquez v. Guatemala*, Order (Monitoring Compliance with Judgment), 18 November 2010, para. 33; *Case of Loayza Tamayo v. Peru*, Order (Monitoring Compliance with Judgment), 1 July 2011, para. 35; *Case of Castillo Petruzzi et al. v. Peru*, Order (Monitoring Compliance with Judgment), 1 July 2011, para. 20; *Case of Lori Berenson Mejía v. Peru*, Order (Monitoring Compliance with Judgment), 20 June 2012, para. 18; *Case of Barrios Altos v. Peru*, Order (Monitoring Compliance with Judgment), 7 September 2012, para. 24; *Case of Castañeda Gutman v. Mexico*, Order (Monitoring Compliance with Judgment), 28 August 2013, para. 23; and *11 cases against Guatemala regarding the obligation to investigate, prosecute and, if applicable, punish those responsible for human rights violations*, Order (Monitoring Compliance with Judgment), 21 August 2014.

[564] See, for example, L. Burgorgue-Larsen, "Conventionality control: Inter-American Court of Human Rights (IACtHR)", *Max Planck Encyclopedias of International Law*, December 2018, available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3634.013.3634/law-mpeipro-e3634; P. González Domínguez, "La doctrina del control de convencionalidad a la luz del principio de subsidiaredad", *Estudos Constitutitucionales*, vol. 15 (2017), pp. 55–98; and P.G. Carozza and P. González, "The final word? Constitutional dialogue and the Inter-American Court of Human Rights: a reply to Jorge Contesse", *International Journal of Constitutional Law*, vol. 15 (2017), pp. 436–442.

[565] Chile, Press release of the Ministry of Foreign Affairs – Ministry of Justice and Human Rights on the Inter-American human rights system, 23 April 2019 (see declaration by the Permanent Representatives of Argentina, Brazil, Colombia, Paraguay and Chile). Available at https://www.minrel.gob.cl/minrel/noticias-anteriores/comunicado-de-prensa-ministerio-de-relaciones-exteriores-ministerio-de (Spanish only).

(*b*) the extent to which the decision is part of a body of concurring decisions; and

(*c*) the extent to which the reasoning remains relevant, taking into account subsequent developments.

Commentary

(1) Draft conclusion 7 sets out more specific criteria to provide guidance when employing decisions of courts and tribunals in the determination of the existence and content of rules of international law. It builds on the general criteria for the assessment of subsidiary means for determining rules of international law contained in draft conclusion 4. In other words, while draft conclusion 4 concerns the general criteria for assessing the weight to be given to all the subsidiary means, draft conclusion 7 serves the specific purpose of clarifying how the decisions of courts and tribunals are to be assessed by adding additional relevant criteria that should be considered to carry out a proper assessment.

(2) The general criteria recommended an assessment of the degree of representativeness of the body producing the materials being used as subsidiary means, the quality of the reasoning, the expertise of those involved, the level of agreement among those involved, the reception of States and other entities, and, where applicable, the mandate conferred on the body. The Commission considers that, in the specific context of the use of decisions of courts or tribunals, only some of these general criteria should be accorded weight. Indeed, para. (4) of the commentary to draft conclusion 4 above, stating the general criteria, foreshadowed this point by clarifying that "which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances". The present draft conclusion seeks to specify which additional criteria the Commission deems particularly appropriate to ensure that proper weight is given to decisions of courts or tribunals as subsidiary means.

Chapeau *of draft conclusion 7*

(3) The draft conclusion opens with a *chapeau* followed by three subparagraphs. For consistency reasons, the *chapeau* of draft conclusion 7 is formulated in analogous language to the *chapeau* of draft conclusion 4. With minor textual adjustments, the text provides that, "when assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 4, *inter alia*", three factors, contained in subparagraphs (*a*) to (*c*), when using decisions to determine the existence and content of rules of international law.

(4) Through their analogous formulation, although in this case referring specifically to the decisions of courts or tribunals only, instead of all subsidiary means, the *chapeau* incorporates the six substantive criteria established in draft conclusion 4. For the avoidance of doubt, the scope of application of the term "decisions of courts or tribunals" is intended to apply to decisions of all types whether of international courts and tribunals or those of national courts and, where applicable, hybrid courts.

(5) By expressly stating that "regard should be had to", the Commission indicates that the three specific factors that follow in the present draft conclusion, although in many cases desirable, are meant to serve as a form of guideline instead of being mandatory elements. The "*inter alia*" towards the end of the clause also confirms that the listed criteria are merely illustrative of the most likely scenarios to arise. It also seeks to account for the fact that some users, for example different courts and tribunals, may take different criteria into account and place different weight on them. For example, a tribunal may place greater weight on its own decisions than on those issued by another court or tribunal.

(6) Finally, as formulated, it is made clear that the three factors or considerations set out in draft conclusion 7 are to be read together with the six factors contained in

draft conclusion 4 and its commentary (see above). That is why the Commission states that they are additional criteria for the assessment of the weight to be given to decisions of courts and tribunals. Thus, the specific factors in the present draft conclusion are intended to supplement the general criteria for subsidiary means set out in draft conclusion 4. A discussion of each of the three more specific criteria applicable to the assessment of the weight of decisions of courts and tribunals follows.

(7) In terms of sequence, the Commission's intention here is that, as with all categories of subsidiary means, the users of the present draft conclusions should start with the application of each of the general criteria (in this case to assess the weight to ascribe to decisions of courts and tribunals) and exhaust those criteria before following that analysis with a consideration of the more specific criteria. That two-step operation, as indicated by the text of the general conclusion itself, would mandate an assessment of, among others, the quality of the reasoning, the expertise of those involved and their level of agreement or disagreement on the decision, the degree of representativeness of the subsidiary means in question, how States and others have received the decisions and, where applicable, the mandate of the body concerned. At the conclusion of that operation, the user of the draft conclusions should be in a better position to appreciate what weight, if any, to ascribe to the subsidiary means and, in this instance, to the decision of the court or tribunal concerned.

*Subparagraph (*a*) – whether the court or tribunal has a specific competence*

(8) Subparagraph (*a*) of draft conclusion 7 refers to the question "whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question". This formulation is similar to the criterion contained in draft conclusion 4, subparagraph (*f*), referring to the specific mandate conferred on a body. In that earlier context, the Commission's commentary already explained that a relevant consideration to take into account is whether a particular subsidiary means is produced by a body acting under an official mandate conferred by States.[566] It was further explained that this general criterion was to be used when determining, for instance, whether special regard should be given to decisions of a particular court and, if so, whether to confer greater weight on such decisions.[567] Several illustrations were given of specialist courts and tribunals with specific competencies in relation to various subject matter, such as those relating to the law of the sea (the International Tribunal for the Law of the Sea), international criminal and humanitarian law (the *ad hoc* international criminal tribunals and the International Criminal Court) and international trade law (Dispute Settlement Body of the World Trade Organization).[568]

(9) In the context of the present draft conclusion, which addresses the weight of decisions of courts and tribunals specifically, the Commission considered it appropriate to reflect more directly in the draft conclusion the practice of

[566] Para. (12), *ibid*.
[567] Para. (13), *ibid*.
[568] *Ibid*.

international,[569] regional[570] and national[571] courts or tribunals under which the specific competence given to a court or tribunal to apply a particular treaty is treated as a relevant consideration in assessing the authority to ascribe to its pronouncements. In this regard, for example, the International Court of Justice has referred on several occasions to the outputs, including decisions concerning individual cases, of both regional human rights courts and commissions, and human rights treaty bodies.[572] Thus, with this criterion, the Commission follows the practice suggesting an assessment of whether the body concerned has a specific competence with regard to the application of the rule in question. Before turning to a specific example, it is to be noted that, while for the most part assessment of the competence of a tribunal might be found in the treaty concerned, there may be jurisdictions that do not initially possess the competence referenced, but subsequent developments – including those found in a subsidiary means such as a judicial decision or a series of such decisions – may give rise to such competence.[573]

[569] International Court of Justice: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639; *Diallo, Compensation* (footnote 520 above); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422; *Application of the International Convention … (Qatar v. United Arab Emirates)* (footnote 521 above); and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13, at para. 188.

[570] Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C, No. 268, paras. 189 and 191; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decision, 7 May 2001, para. 24 ("In interpreting and applying the Charter, the Commission … is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by [United Nations] treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision, 27 October 2001, para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights"); European Court of Human Rights: *Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016, para. 141; *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 and 158; and *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see also International Law Association, Final report on the impact of findings of the United Nations Human Rights Treaty Bodies, *Report of the Seventy-first Conference, Berlin Conference (2004)*, pp. 29–38, paras. 116–155.

[571] International Law Association, *Report of the Seventy-first Conference* (see previous footnote), p. 43, para. 175; see, e.g., Germany, Federal Administrative Court, *Bundesverwaltungsgericht*, vol. 134, p. 1, at p. 22, para. 48; Colombia, Constitutional Court, Judgment T-077/13 (2013), 14 February 2013; India, High Court of Delhi, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, WP(C) No. 8853 of 2008 and No. 10700 of 2009 (2010), Judgment, 4 June 2010, para. 23; Bangladesh, High Court Division of the Supreme Court, *Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh*, Writ Petitions No. 5863 of 2009, No. 754 of 2010, No. 4275 of 2010, ILDC 1916 (BD 2010), 8 July 2010, para. 45; and Spain, Supreme Court of Spain, Judgment No. 1263/2018, 17 July 2018, pp. 23–24.

[572] See memorandum by the Secretariat on subsidiary means for the determination of rules of international law (A/CN.4/765), para. 151.

[573] Practice indicates that the basis for such a specific competence of a particular tribunal may not always be immediately apparent. Thus, greater investigation of the possible application of the rule in question may be warranted. For example, the East African Court of Justice determined, via a series of judicial decisions, that it was competent to exercise jurisdiction

(10) To illustrate, in the *Ahmadou Sadio Diallo* case, the International Court of Justice pointed out that, while it was in no way obliged to do so in the exercise of its judicial functions, when applying a human rights treaty, reference can be had to the works of the independent bodies that have been specifically established to supervise the application of the treaty in question for reasons of clarity, essential consistency of international law, as well as legal security for the individuals and States concerned.[574] Thus, the Court referred to the "considerable body of interpretative case law"[575] of the Human Rights Committee, which, though not a court, had been expressly mandated by States to monitor the application of the International Covenant on Civil and Political Rights.[576] The Court ultimately concluded "that it should ascribe *great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".[577]

(11) Similarly, in relation to the interpretation it had given to a specific provision of the African Charter on Human and Peoples' Rights, which was consistent with the "case law"[578] of the African Commission on Human and Peoples' Rights – a quasi-judicial body established by the African Charter, the International Court of Justice emphasized the importance of taking "*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".[579]

(12) Moreover, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court recalled that "in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation",[580] although it

over matters touching upon human rights complaints brought by individuals even though there were no direct provisions to that effect in its founding treaty. Similarly, the regional Court of Justice of the Economic Community of West African States initially established such competence by jurisprudence before the States concerned adopted a protocol establishing such jurisdiction. For a discussion of this issue in the context of the East African Court of Justice and the evolution of the *Katabazi* doctrine, see J.T. Gathii, "Mission creep or a search for relevance: the East African Court of Justice's human rights strategy", *Duke Journal of Comparative and International Law*, vol. 24 (2013), pp. 249–296.

574 *Diallo, Merits* (footnote 569 above), para. 66.

575 *Ibid.*

576 International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

577 *Diallo, Merits* (footnote 569 above), para. 66 (emphasis added).

578 *Ibid*., para. 67 (the International Court of Justice noted "[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").

579 *Ibid*., para. 67 (emphasis added), citing African Commission on Human and People's Rights *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, Decision, 26 May 2010, para. 204, and *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v. Rwanda*, Communications Nos. 27/89-46/91-49/91-99/93, Decision, 31 October 1996. See also M. Andenas and J.R. Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", *Heidelberg Journal of International Law*, vol. 77 (2017), pp. 907–972, for a discussion of Article 38 and the International Court of Justice approach to judicial decisions.

580 *Application of the International Convention … (Qatar v. United Arab Emirates)* (footnote 521 above), para. 77, citing *Diallo, Compensation* (footnote 569 above), paras. 13 and 24; *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (footnote 569 above), para. 101; *Diallo, Merits* (footnote 569 above), para. 66; and *Legal Consequences of the Construction of a Wall* (footnote 569 above), paras. 109 and 136.

also reiterated that it was not under an obligation to automatically adhere to the interpretations given by human rights treaty bodies.[581]

(13) It is clear that a close reading of the decisions of the International Court of Justice mentioned above might suggest drawing a distinction between "great weight" and "due account", depending on the type of body concerned: in the view of the Commission, the broader and more important point is that the decisions issued by bodies with specific competencies, however they may be characterized, deserve to be considered when interpreting instruments concerned, even if such decisions or interpretations are only used for their persuasive value.

*Subparagraph (*b*) – whether the decision is a part of a body of concurring decisions*

(14) Subparagraph (*b*) of draft conclusion 7 refers to a second more specific criterion for evaluating the weight of a decision: "the extent to which the decision is part of a body of concurring decisions". Here, the Commission accepts, based on practice, that, in some situations, a single or a few decisions could be particularly authoritative or even determinative of a particular legal question. First, the definition of a "dispute" for the purposes of adjudication before international tribunals given by the Permanent Court of International Justice is a case in point.[582] A second example, the case involving *Monetary Gold*, is so well known that the name of the case is associated with the principle it espoused following the 1954 judgment of the International Court of Justice.[583] The third example is the judgment in the *LaGrand* case, which recognized, for the first time, the binding effect of orders for provisional measures.[584] In all these cases, considerable weight is subsequently accorded to the decisions concerned given that they have been cited in a long line of later cases by the same court and even by other international tribunals.

(15) At the same time, while it seems evident that a single decision or a handful of decisions may sometimes carry considerable and even decisive weight, the Commission with this formulation of subparagraph (*b*) of draft conclusion 7 indicates that there is a greater likelihood in international law for a body of jurisprudence or line of authority to become authoritative. In other words, in some cases when assessing the weight of decisions of courts or tribunals, there might already be a wider body of concurring decisions (or *jurisprudence constante*) supporting a particular decision, thereby indicating that potentially the same legal reasoning could be useful to address the legal issue at hand or under consideration.

(16) In its practice, the International Court of Justice periodically refers to a basically equivalent notion of a body of concurring decisions by using terms such as "settled jurisprudence", [585] "consistent jurisprudence" [586] and "established case law".[587] Out of many possible examples, the Court has determined, for instance, that in accordance with its "consistent jurisprudence … only 'compelling reasons' may

[581] *Application of the International Convention … (Qatar v. United Arab Emirates)* (footnote 521 above), para. 101.

[582] Permanent Court of International Justice, *Mavrommatis Palestine Concessions, Jurisdiction, Series A, No. 2*, 30 August 1924, p. 6, at p. 11.

[583] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgement of June 15th, 1954: I.C.J. Reports 1954*, p. 19, at pp. 32–33.

[584] *LaGrand* (footnote 536 above), para. 109.

[585] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at para. 407.

[586] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, at para. 24.

[587] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, at para. 37; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at para. 30.

lead the Court to refuse [to give] its [advisory] opinion".[588] In a similar manner, it referenced the "consistent jurisprudence"[589] and "established case law"[590] to adduce the meaning of a "dispute" in the *Mavrommatis Palestine Concessions* case. The Court has also determined: that it was established that jurisdiction must be examined at the time of a State's filing of an application before it;[591] that, in establishing its methodology for effecting maritime delimitation, the "first stage of the Court's approach is to establish the provisional equidistance line";[592] that "a dispute must exist for a request for interpretation to be admissible";[593] and that "the Court … must examine *propio motu* the question of its own jurisdiction" to consider the application made by a State.[594]

(17) The Court has not always explained why it uses the language of "settled jurisprudence", or its equivalents described in the preceding paragraph, but when it has, it has underlined that reference to such jurisprudence is necessary because the application of justice "should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application".[595] The need to follow

[588] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at para. 65, citing *Legal Consequences of the Construction of a Wall* (footnote 569 above), para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at para. 30; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 14.

[589] *Certain Property* (footnote 586 above), para. 24.

[590] See *Obligations concerning Negotiations* (footnote 587 above), para. 37; and *Application of the International Convention … (Georgia v. Russian Federation)* (footnote 587 above), para. 30.

[591] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 266, at para. 41; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at para. 26.

[592] See *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, I.C.J. Reports 2009*, p. 61, para. 118. See also *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, at para. 98 ("In accordance with its established jurisprudence, the Court will proceed in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line"), citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 40, at para. 176; and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at para. 268.

[593] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) (footnote 536 above), para. 21, citing *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case*, *Judgment of November 27th, 1950: I.C.J. Reports 1950*, p. 395, at p. 402; and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192, at para. 56. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*), Preliminary Objections *(Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999*, p. 31, at para. 12.

[594] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Decision, 2 February 1973, General List No. 56, p. 49, at para. 13. See also *Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment, I.C.J. Reports 1973*, p. 3, at para. 12; and *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at para. 15.

[595] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at para. 45.

settled case law, for reasons of "legal certainty and predictability", has also been underlined by other international courts and tribunals.[596]

(18) Similarly, in the *Indus Waters* arbitration, the tribunal in the case observed that:

> fewer propositions in international law can be more confidently advanced than that the non-appearance of a party does not deprive a properly constituted court or tribunal of its competence. Whether a court has been properly constituted in a specific instance is not a matter that can be subjectively determined by a party to a dispute and then resolved simply through non-appearance by that party.[597]

In the same case, the tribunal determined it had a duty to satisfy itself that it had jurisdiction over the dispute, pointing out that "the wealth of judicial and arbitral decisions on the matter confirms that this duty is undoubtedly part of *jurisprudence constante*".[598]

(19) Based on the above sample of the extensive practice available, the Commission considers that, while it is not necessarily required that a decision in each case be part of a body of concurring decisions, where such concurring decisions exist and support the findings and conclusions of a particular decision, the fact that they do so will likely give it more weight, provided that such decision is well reasoned and persuasive to a later user.

*Subparagraph (*c*) – whether the reasoning remains relevant*

(20) Subparagraph (*c*), containing a third criterion for evaluating the decisions of courts and tribunals introduced by draft conclusion 7, indicates the requirement to take into consideration "the extent to which the reasoning remains relevant, taking into account subsequent developments". The Commission included this criterion in order to take into account the possible evolution of international law, which might result in less weight being given to previous decisions. It should be recalled that a decision issued by a court or tribunal may apply at a certain time, but does not necessarily freeze the law or its evolution.

(21) Developments may overtake a decision with the passage of time. The phrase "subsequent developments" was therefore chosen to introduce a measure of flexibility in allowing for changes to the weight to be given to a decision or group of decisions considering new events. These include not only decisions of courts and tribunals, but also factual or legal developments, such as the emergence of a different rule following, for example, the adoption of a treaty or the subsequent practice of States, that would limit the applicability or relevance of the reasoning of a court or

[596] In the *Semanza* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda stated that it "adopts the findings of [the International Criminal Tribunal for the Former Yugoslavia] Appeals Chamber in the *Aleksovski* case and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice" (*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-23-A, Decision, 31 May 2000, Appeals Chamber, para. 92.)

[597] *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, para. 126, citing *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above); *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015, *Reports of International Arbitral Awards* (UNRIAA), vol. XXXIII, pp. 1–152; and *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Award on Jurisdiction, 26 November 2014, UNRIAA, vol. XXXII, pp. 183–353.

[598] *Indus Waters* (see previous footnote), para. 135, citing *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above); *South China Sea* (see previous footnote); *Arctic Sunrise* (see previous footnote); and *Aegean Sea* (footnote 594 above), para. 15.

tribunal in an earlier decision.[599] Decisions may also change where a tribunal decides to change its stance to reflect more contemporary understandings of issues or as circumstances change, for example. Users of the present draft conclusions must therefore keep this in mind when evaluating the weight to accord to the decisions of courts and tribunals as subsidiary means for the determination of rules of international law.

Part Four
Teachings

Commentary

Part Four is comprised of two draft conclusions and follows on Part Three, which sets out the first category of subsidiary means addressing decisions of courts and tribunals and is complemented by this second established category of subsidiary means, namely, teachings. Draft conclusion 8 provides the most detailed guidance on the use of teachings as subsidiary means for the determination of rules of international law. Draft conclusion 9 provides an equivalent provision for the assessment of weight of teachings, with reference to the general criteria set out in Part One.

Conclusion 8
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

Commentary

(1) Draft conclusion 8 concerns the role of teachings or materials ("الفقه" in Arabic, "学说或材料" in Chinese, "*la doctrine*" in French, "доктрины" in Russian and "*la doctrina*" in Spanish) understood in a broad sense to include writings, recorded lectures and audiovisual materials, and, according to some views,[600] separate or

[599] One example, which is also relevant for draft conclusion 4, is the rejection by States of some part of the reasoning of the Permanent Court of International Justice in the *Lotus* case (footnote 555 above), where the Court identified customary international law in relation to the criminal jurisdiction of States in case of a high seas collision between two ships. The reasoning of the Court was successively reversed by the International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships (Brussels, 10 May 1952, United Nations, *Treaty Series*, vol. 439, No. 6330, p. 193), by the Commission in its draft articles on the law of the sea (see para. (1) of draft article 35 of the draft articles concerning the law of the sea, *Yearbook of the International Law Commission 1956*, vol. II, p. 265, at p. 281), and ultimately by the 1958 and 1982 United Nations Conventions on the Law of the Sea. In the said commentary to draft article 35, the Commission stated that the *Lotus* judgment, "which was carried by the President's casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred with the decisions of the conference" (*ibid.*). As the Arbitral Tribunal in *Enrica Lexie* put it in 2020, "[i]n its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea", which was "the precursor to Article 97 of the [United Nations Convention on the Law of the Sea concluded in 1982], the ILC explained that the provision was intended to reverse the judgment rendered by the PCIJ in the S.S. "*Lotus*" case" (Permanent Court of Arbitration, *The "Enrica Lexie" Incident*, PCA Case No. 2015-28, Award, 21 May 2020, paras. 644–645).

[600] *Barcelona Traction, Light and Power Company* (see footnote 292 above), Separate Opinion of Judge Ammoun, p. 286, at pp. 316–317; A. Pellet, "Decisions of the ICJ as Sources of International Law?", *Gaetano Morelli Lectures Series*, vol. 2 (Rome, International and European Papers Publishing, 2018), pp. 22–23. But see S. T. Helmersen, *The Application of*

dissenting opinions of judges of international courts and tribunals.[601] The term also generally encompasses teachings produced by an individual or collectives of individuals organized into *ad hoc* or permanent expert groups.[602] The draft conclusion takes up "teachings" whenever they are used in the process of determining the existence and content of rules of international law.

(2) The present draft conclusion comprises two sentences. The first sentence primarily sets out the general rule concerning teachings. The second sentence highlights particular aspects of the representativeness of teachings.

(3) The first sentence provides that "[t]eachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law". The Commission recalls that the present formulation differs from the approach taken to the formulation of the conclusion on "Teachings" in the topics relating to the sources of international law. The differences relate primarily to two elements. First, in draft conclusion 8, the Commission has replaced the identical albeit archaic language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which employs "teachings of the most highly qualified publicists of the various nations", with the more contemporary formulation used at the beginning of this paragraph. That said, for reasons of consistency, the much shorter title "Teachings", as used in the other topics, has been retained.

(4) Second, whereas in previous conclusions teachings of the most highly qualified publicists of the various nations "may serve as" a subsidiary means, the Commission employed in the present draft conclusion the more direct formulation that teachings "are" a subsidiary means.[603] Specifically with regard to teachings, the phrase "may serve as" was used in conclusions on teachings in the topic "Identification of customary international law" (conclusion 14)[604] and in draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[605] The same formulation of "may serve as" was initially used in the draft conclusions on general principles of law,[606] but was amended on second reading to align with the more direct formulation used in the present draft conclusions indicating that teachings "are" a subsidiary means (draft conclusion 9).[607]

(5) As with decisions of courts and tribunals, referred to above in draft conclusion 5, teachings are not themselves sources of international law. They may, however,

Teachings by the International Court of Justice (Cambridge, Cambridge University Press, 2021), p. 36.

601 In its prior work, the Commission has determined that "teachings" are "to be understood in a broad sense". It also considered that the category would include "teachings in non-written form, such as lectures and audiovisual materials". See para. (1) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

602 The inclusion of teachings produced by individuals as well as collectives whether created privately or by States or international organizations is consistent with the prior work of the Commission. See, *inter alia*, para. (4), *ibid.* Examples include the Institute of International Law (Institut de droit international) and the International Law Association.

603 See draft conclusion 14, *ibid.*, and para. 2 of draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44.

604 *Yearbook ... 2018*, vol. II (Part Two), para. 65.

605 *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

606 *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40.

607 See chap. V of the present report.

offer useful guidance for the determination of the existence and content of rules of international law. For instance, in the process of assessing the existence or not of a rule of customary international law, teachings may play a valuable role in collecting, assessing and synthesizing State practice and *opinio juris*. Teachings may also be used to examine convergence and divergence in the practices of States and the possible existence or lack of a rule as part of the evaluation of the state of the law on a given issue. Nevertheless, the fact that the Commission selected the formulation stating that teachings "are" a subsidiary means was not meant to alter the auxiliary role of teachings. Instead, it merely recognizes the value that teachings may have in the process of determining the existence and content of rules of international law.

(6) As regards the first part of the first sentence of draft conclusion 8, the Commission has previously indicated, including in the commentaries adopted at its seventy-fourth session, that the term "teachings" is a broad category. The word "especially" was included in the part of the first sentence, set off by commas, to emphasize that there could, in some situations, be an abundance of teachings that could be employed to determine the existence and content of rules of international law. Particular attention in such cases should be paid to "those [teachings] generally reflecting the coinciding views of persons with competence in international law".

(7) The preponderance of views contained in teachings from those with competence in international law from the various legal systems and regions of the world, expressed in the first sentence, may reflect a general trend when considered in totality against the body of scholarly work available. In such instances, this could be an indication that those views – to the extent that they are diverse and representative – are more likely to carry greater weight. The draft conclusion does not require scholarly consensus, let alone unanimity, for a high-quality teaching to be found valuable in determining the existence and content of rules of international law. On the other hand, the fact that there are diverging views among scholars could also be relevant to determining the weight to attach to a particular teaching. Where scholarly views are divided, and perhaps matched by uncertainty in the other subsidiary means such as in decisions, this could indicate that the law on the issue under consideration is unsettled.

(8) While there may be express preference for teachings that reflect special expertise or competence in international law, the Commission recognizes the possibility that there may be circumstances whereby teachings in disciplines other than international law could also be relevant for the determination of the existence and content of rules of international law. This may arise, for instance, in the case of related subject areas, such as comparative law.

(9) The formulation "especially those generally reflecting the coinciding views of persons with competence in international law from various legal systems and regions of the world" is an inclusive and broad phrasing. It seeks to ensure that the diversity of viewpoints and teachings from different parts of the world are fully considered when determining the existence and content of rules of international law. The reference to "various legal systems and regions of the world" also indicates that, on the whole, even the weight of a particular teaching would be enhanced where it engages in a survey demonstrating that a certain rule of international law is prevalent in various systems representing the legal traditions of the world.

(10) The formulation of "teachings" in the present draft conclusion speaks expressly to the critical issue of the need for their representativeness when they are being consulted and taken into account. The draft conclusion, as framed, underlines the particular value that might be placed on certain teachings that come, first, from the various legal systems and, second, from the various regions of the world. Such teachings will carry greater weight as subsidiary means for the determination of the existence and content of rules of international law. The intention of the Commission here is to stress that teachings that, on balance, reflect the rich array of legal traditions of a pluralistic world should be accorded greater weight in the process of determining

the existence and content of rules of international law. If the teachings consulted are of high quality but reflect only one legal system, instead of a wide variety of legal systems and regions of the world, then it could be harder though not impossible for them to enjoy persuasive authority.

(11) The second sentence of draft conclusion 8 develops, in an illustrative manner, the criterion of representativeness that ought to be taken into account, by indicating that "due regard should also be had to, *inter alia*, gender and linguistic diversity".

(12) The Commission considered that gender and linguistic diversity as well as viewpoint diversity are all important considerations that may need to be weighed when assessing the representativeness of the teachings being consulted. However, since the reference to various regions of the world already reflected various forms of diversity, such as that of race, and the idea was to develop an illustrative instead of exhaustive list of factors to take into account, it was felt necessary to highlight only gender and linguistic diversity which, in the view of members that ultimately prevailed, would not necessarily be covered by the phrase "from the various legal systems and regions of the world". The view was, however, expressed by several members, and two States[608] in the context of the Sixth Committee debate of the present draft conclusion, that racial diversity should have been included for the same reasons that linguistic and gender diversity were included. These reasons included the enumeration of race, alongside gender, as a prohibited ground of discrimination in international instruments such as the International Covenant on Civil and Political Rights[609] and in regional human rights treaties and most national constitutions from all the different parts of the world.

(13) The formula "due regard should also be had to, *inter alia*," would require users of the draft conclusion to undertake best efforts to ensure the representativeness of the teachings that they consider when using teachings as subsidiary means. The term "should" is used instead of "shall". The use of the term "also" indicates that the listing that follows is additional to what had been stated before. The last element, i.e. "*inter alia*", meaning among other things, clarifies that gender and linguistic diversity are not exhaustive of the forms of diversity that ought to be considered. Thus, the Commission here highlights some, though not all, of the considerations that may be relevant to the assessment of how representative teachings are, which, in addition to racial diversity, may include ethnic, cultural and religious diversity, as well as sexual orientation.

(14) The Commission considers that teachings do play a vital role in the process of determining and applying rules of international law. The importance of teachings notwithstanding, as indicated in the prior topics, there is a need for caution when drawing upon teachings because their actual value for the assessment of the existence and content of rules of international law may vary for different reasons. First, teachings sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate for its development (*lex ferenda*). Second, teachings may reflect the national or other individual viewpoints of their authors. Third, teachings differ greatly in quality. Assessing the authority of a given work is thus essential. This approach is well established in State practice. For instance, the Supreme Court of the United States of America referred, in its *Paquete Habana* ruling of 8 January 1900, to "the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their

608 See, in this regard, the statements by Sierra Leone and Uganda to the Sixth Committee at the seventy-eighth session of the General Assembly during the debate on the report of the Commission. Available from https://www.un.org/en/ga/sixth/78/summaries.shtml.

609 See, for instance, article 2 of the International Covenant on Civil and Political Rights, which, *inter alia*, provides for State recognition of the rights recognized in the Covenant for all individuals, without distinction of any kind, such as race, colour, sex, language or religion.

authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[610]

(15) Another more recent example shows not only how teachings are used in practice, but how they may interact with judicial decisions as subsidiary means. The Supreme Court of Appeal of South Africa,[611] in its March 2016 ruling, determined the narrow question of whether customary international law permitted exceptions to the immunity of Heads of State that might enable South Africa, including its courts, to disregard such immunity and authorize the execution of an arrest warrant by the International Criminal Court for then President of the Sudan, Omar Hassan Ahmed Al-Bashir.[612] The Court analysed the Rome Statute of the International Criminal Court before turning to customary international law and, faced with the difficulty of answering the question through analysis of those two sources contained in Article 38, paragraphs 1 (*a*) and (*b*), of the Statute of the International Court of Justice, considered that judicial decisions, including from the International Court of Justice, as well as teachings could offer "guidance" on whether an exception existed.[613]

(16) As part of that analysis, the Court examined the writings of several scholars and noted that their views were divided on the question of whether or not immunity applied. In the end, it rejected the appellant's submission that such an exception existed under international law in so far as national courts were concerned. The Court observed that the views of scholars on the immunity point could "inform future debate and contribute to the development of customary international law".[614] The latter observation addresses another role of teachings that must be borne in mind in the context of the present draft conclusion. It clarified that, instead of resolving academic debates, its own task was more limited to assessing the state of customary international law as it stood and to apply it without creating new law.[615]

(17) Concerning the weight to attach to teachings, as with the other subsidiary means, reference should be had to the general criteria contained in draft conclusion 4. In this instance, the reference to the general criteria is contained in draft conclusion 9. It is important to bear in mind that draft conclusion 9 provides that regard should be had to, as appropriate, the criteria set out in draft conclusion 4, focusing specifically on the high quality of the work.

Conclusion 9
Weight of teachings

When assessing the weight of teachings, regard should be had to, as appropriate, the criteria set out in draft conclusion 4.

Commentary

(1) Draft conclusion 9 provides guidance on how to assess the value of teachings, which are among the subsidiary means set out in draft conclusion 2, and which are further developed in draft conclusion 8 examining the role of teachings in the process of determining rules of international law. These interrelated provisions, and their commentaries, should be read together for a better appreciation of the nature and scope of teachings as well as of the methodology required for proper assessments of their weight.

[610] United States, Supreme Court, *The Paquete Habana and The Lola*, 175 U.S. 677 (1900), p. 700.
[611] South Africa, Supreme Court of Appeal, *Minister of Justice and Constitutional Development and others v. Southern African Litigation Centre and others*, 2016 (3) SA 317 (SCA) (15 March 2016).
[612] *Ibid*., para. 69.
[613] *Ibid.*, para. 70.
[614] *Ibid.*, para. 74.
[615] *Ibid.*

"When assessing the weight of teachings"

(2) The present draft conclusion points to the key criteria relevant to determining the weight of "teachings" by referring users back to draft conclusion 4. It opens with the conditional sentence "when assessing the weight" and continues with the positive statement specifying that "regard should be had to, as appropriate, the criteria set out in draft conclusion 4". This framing indicates that the significance of teachings, as defined in draft conclusion 8, is to be determined based on the application of the six general criteria for the assessment of the subsidiary means. The criteria or factors mentioned in draft conclusion 4 are to be used to assign weight to a wide range of scholarly materials, including teachings reflected in various types of publications such as treatises, books and monographs, articles in peer-reviewed journals, reports, commentaries and essays found on websites and online blogs.[616]

(3) Teachings are understood broadly, as indicated earlier in the commentary to draft conclusion 2, and also include lectures and audiovisual materials. Whatever form they may take, like the other subsidiary means, such as decisions of courts and tribunals, elucidated in draft conclusion 5, teachings are not themselves sources of international law. They play an auxiliary role and assist in the identification and determination of the existence and content of rules of international law.

"regard should be had to, as appropriate, the criteria set out in draft conclusion 4"

(4) In terms of textual formulation, the affirmative part of draft conclusion 9 is identical to the beginning of the specific draft conclusion on the weight of all the other categories of subsidiary means. It states that regard "should" be had to the criteria set out in draft conclusion 4, that is, the general criteria. The word "should" in the draft conclusion reflects the flexible nature of the assessment to be carried out when determining the weight of teachings. The criteria in draft conclusion 4 are to be considered taking into account the particular teaching under examination and the purpose for which it is invoked. Since teachings may vary considerably in form, purpose and methodology, not every criterion will necessarily be relevant in each case. The Commission uses the "as appropriate" formulation to clarify this point and, equally importantly, to explain that the factors listed are intended to serve as guidelines instead of mandatory requirements.

The link between the specific draft conclusion on the weight of teachings and the general criteria in draft conclusion 4

(5) The Commission recalls that draft conclusion 4, containing the general criteria, encourages all users of the present draft conclusions to assess the potential applicability of each of the six criteria. With regard to the various types of teachings, most of these six criteria will typically be relevant, although which ones apply will depend on the type of scholarly material under examination. When assessing the weight of any teaching, the quality of the reasoning and the scientific rigour of the work should be the most important criteria. The rigour of the work is assessed on the basis of various indications of quality, the question the teaching examines, the methodology used and whether or not it complies with the professional standards of the relevant field and the place of publication.[617]

(6) Also important is the expertise, especially in international law, of those involved in preparing the teaching under examination, the level of agreement among them, the extent to which the writing seeks to state the law (*lex lata*) rather than to advocate for its development (*lex ferenda*), the extent to which it takes into account the practices of States and international organizations and, where possible to assess, whether or not it was carried out by independent authors. Whether and how the

[616] See paras. (a)–(c) of draft conclusion 4 above.

[617] Paras. (7), (10) and (14) of the commentary to draft conclusion 8 above; paras. (7)–(11) of the commentary to draft conclusion 4 above.

writing is relied upon by others in the field, as indicated by citations to the teaching by others or in other subsidiary means, such as in a decision of a court or tribunal, are also considerations to bear in mind when assessing the weight to assign to the work.

(7) Draft conclusion 8 on teachings is also relevant to the question of weight. When considering the weight of a teaching, the fact that it reflects the coinciding views of persons with competence in international law should be taken into account and may offer guidance on the weight to assign to it. By referring both to the "various legal systems and regions of the world" and to "gender and linguistic diversity", in the first and second sentences, respectively, draft conclusion 8 confirms that diversity considerations including race may also be relevant to the assessment of weight, in view of the universal character of international law. The idea, as explained in the above commentary to draft conclusion 8, is to ensure that the diversity of viewpoints and teachings from different parts of the world are fully considered when determining the existence and content of rules of international law. This assists in promoting the inclusivity and legitimacy of international law.[618]

(8) Greater weight may be attributed to some teachings, depending on the circumstances. A teaching need not be endorsed by States or a tribunal for it to have validity. It may, however, subsequently be used or embraced by States and their organs or other entities such as courts or tribunals.[619] In practice, States or courts often cite the works of scholars in support of their arguments in both their written and oral pleadings before courts and tribunals or to confirm a certain interpretation of a legal rule. Against that backdrop, in some cases, depending on the particular teaching under examination, it might be possible to assess how States and other entities have viewed the writings concerned favourably or not and, where they were produced by an institution or entity, formal State reactions to the writings could also be assessed taking into account the mandate that was conferred on the body concerned. In the latter case, reference should also be made to draft conclusion 10 on expert bodies and 11 on the weight of the works of expert bodies, and their accompanying commentary, as they could also be relevant.

(9) The Commission considered whether to include additional specific factors in the conclusion on the weight of teachings. These considerations included the idea of highlighting the attention to be paid to the character and normative value of the teachings, whether the teachings purported to assess, reflect or examine existing law and the extent to which the teachings remained relevant in light of subsequent developments.[620] The Commission notes that the authority of teachings may be rendered obsolete by subsequent historical or political developments. Certain arguments advanced by a teaching may be overtaken by events through, for example, changes to societal or international community values that might make the teachings unhelpful to assessments of the contemporary state of the law. At the same time, there could be instances where the use of older but nonetheless authoritative teachings may still be relevant when assessing contemporary issues. However, taking into account the fact that draft conclusion 8 already included the second sentence, which speaks to criteria that essentially concern weight, the Commission decided that it should not include additional criteria specific to teachings as that might inadvertently restrict their use as a category of subsidiary means. The intention was to leave the category as open-ended as possible in order to encompass as wide a variety of scholarly works as possible.

Part Five
Other means generally used to assist in determining rules of international law

[618] Paras. (11)–(13) of the commentary to draft conclusion 8 above.
[619] See para. (14) of the commentary to draft conclusion 8 above.
[620] See, for an analogous point, albeit in relation to the weight of decisions of courts and tribunals, draft conclusion 7, paragraph (*c*).

Commentary

Part Five consists of four draft conclusions. Draft conclusions 10 and 11 address the works of expert bodies and their weight, respectively, whereas draft conclusions 12 and 13 address resolutions and other texts produced by international organizations or at intergovernmental conferences and their weight.

Conclusion 10
Expert bodies

The works of bodies consisting of experts serving in their personal capacity may serve as a subsidiary means for the determination of the existence and content of rules of international law.

Commentary

(1) Draft conclusion 10 addresses how the works of bodies consisting of experts serving in their personal capacity may serve as a subsidiary means for the determination of the existence and content of rules of international law. The draft conclusion is meant to encompass the "works" of all expert bodies, whether created privately or by States or international organizations, under domestic or international law, so long as the members act as experts serving in their personal capacity. Such bodies of experts, often comprised of the leading specialists in the relevant field, are prevalent across contemporary international law. Their qualification as "expert bodies" is intended to emphasize the quality of the works and the qualifications of the entities that prepared them.

"Works" of experts and their classification

(2) The Commission selected the term "works", sometimes referred to in previous works as "outputs" or "pronouncements", based on the understanding that the term "works" was broader, encompassing a wide variety of texts and other materials prepared by various entities, including academic institutions.[621] Care should be exercised in the use of the term "works". It describes not only the final outcomes of the expert bodies, but also their work leading up to the outcome. In other words, the stage of the work should always be borne in mind: whether, for example, it might carry different value because it is part of a preliminary process of engagement with the subject matter under consideration or the final outcome itself.[622]

(3) The term "experts serving in their personal capacity" means that the members of an expert body are independent and not subject to instructions from their Governments when they carry out their work.[623] The output of a body that is composed of State representatives acting as such, or that is an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework, without excluding the possibility that such works may also serve as a subsidiary means for the determination of rules of international law.[624] The Commission used the formulation "may serve as a subsidiary means" to distinguish the works of expert bodies from "teachings" as explicitly stated in the text of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. In

621 A/CN.4/SR.3727, p. 4.
622 *Ibid.*
623 *Ibid.*, p. 5; and A/CN.4/325, para. 4 ("The members of the Commission sit in their individual capacity and not as representatives of Governments"). See also Office of the United Nations High Commissioner for Human Rights, "Human rights treaty bodies and election of treaty body members" (2013), p. 4 ("The members of these bodies are independent experts who, although nominated and elected by States parties, serve in their personal capacity. They do not represent their country of origin nor their region.").
624 See para. (3) of the commentary to conclusion 6, para. 2 of conclusion 10, and paras. (6)–(7) of the commentary to conclusion 10 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two).

the final analysis, as with teachings discussed above, it is the scientific quality and rigour of the work produced that is the most important consideration.

(4) There are two main categories of expert bodies found in practice: first, those established without State or international organization involvement and, second, those created or empowered by States or international organizations.

Expert bodies established without State or international organization involvement

(5) The first category consists of expert bodies established by individuals or groups of individuals, usually academics or practitioners or both, acting independently of States or international organizations. Those expert bodies are typically legally established under the national law of one or more States and may be learned societies, public charities or not-for-profit organizations of international lawyers and are often described as "private bodies".[625] Often, they are permanent expert groups of international lawyers, but they can also be *ad hoc* in character and work on specific projects or questions for a particular period, alone or in conjunction with universities. They may also be established informally without necessarily being legally registered.

(6) In some cases, these expert bodies may have a particular focus on the codification of international law or certain aspects of it. Well-known examples of such bodies include the Institute of International Law and the International Law Association. All these entities, and many others of a similar nature from different regions of the world, may produce a wide variety of texts, in the form of studies, study reports, occasional papers and manuals, among others, that constitute "works" within the meaning of the present draft conclusion. The works produced by such bodies, which in some aspects may resemble teachings and in other cases resolutions, are often used widely by a broad range of actors, including States, international courts and tribunals, national courts, arbitral panels and others engaged in the process of determining the existence and content of rules of international law. The works may also be general or in specialized fields of international law.

Expert bodies created or empowered by States or international organizations

(7) The second main category comprises expert bodies that are affiliated with States or international organizations.[626] These bodies, sometimes referred to as public

[625] A/CN.4/SR.3727, p. 4. See also J.C. Hathaway, "International refugee law: the Michigan Guidelines on the Internal Protection Alternative", *Michigan Journal of International Law*, vol. 21 (1999), p. 131. National authorities have used the Michigan Guidelines; the first application was by the New Zealand Refugee Status Appeals Authority in Refugee Appeal No. 71684/99, Decision, 29 October 1999 (available at https://www.refworld.org/jurisprudence/caselaw/nzlrsaa/1999/96527) (arguing of the Michigan Guidelines that "the collective wisdom of an otherwise distinguished body of persons cannot be lightly ignored"); see also S. Sivakumaran, "Beyond States and non-State actors: the role of State-empowered entities in the making and shaping of international law", *Columbia Journal of Transnational Law*, vol. 55 (2017), p. 343, at p. 351.

[626] L. Mührel, *The Authority of the International Committee of the Red Cross: Determining What International Humanitarian Law Is* (Leiden, Brill, 2024), pp. 37 and 48–49. The International Committee of the Red Cross (ICRC) has been accorded a high level of authority, for example by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadić et al.*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Appeals Chamber, *Judicial Reports 1994–1995*, vol. I, p. 353, at para. 109 ("As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law …. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought

expert bodies, are created or empowered by States but consist of independent experts who serve in their personal capacity instead of as delegates of States. These bodies may be created by States or international organizations and conferred with authority to carry out particular functions or to study particular questions. They may include a wide range of actors, from intergovernmental organizations at the universal or regional levels to human rights treaty bodies and other actors. The organs of international organizations are therefore not, as such, covered by the present draft conclusion, although such bodies could also convene experts to carry out specific tasks. Such works would constitute subsidiary means.

(8) In terms of legal basis, the expert bodies in this second category consisting of members serving in their personal capacity could be created in a range of ways, including by treaties, statutes, resolutions or other instruments. A wide range of institutions produce a variety of materials in the preparatory phases of their work, even though their final works might have a different normative character. The bodies include those that are comprised of independent experts mandated to assist States with the codification and progressive development of international law. The Commission itself is one such example at the universal level, created through a resolution of the General Assembly (174 (II) of 21 November 1947), to which the Commission's statute, forming an integral part of the resolution, was annexed. The Commission's work is widely used, in practice, in the process of determining the existence and content of rules of international law.[627] While there is also a body with a similar status assisting Member States with the promotion and progressive development of international trade law, the difference between that body and the Commission lies in its composition of representatives of States, putting it outside the scope of the discussion for the present purposes.[628]

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therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.").

627 For instance, in the *Pulp Mills* case, the International Court of Justice cited, among others, the Commission's articles on responsibility of States for internationally wrongful acts and recalled that: "customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act." The Court further recalled that: "where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at para. 273). Similarly, in its judgement in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* the Court stated that: "even if the [wrongful] act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed… This rule is reflected in Article 35 of the International Law Commission's Articles " (*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at para. 137). Lastly, in paragraph 70 of its judgment on reparations in *Armed Activities in the Territory of the Congo* (footnote 569 above), the Court noted that article 31 of the articles on responsibility of States for internationally wrongful acts "reflects customary international law". In paragraph 98 of the same judgment, the Court, referring to the commentary to articles 31 and 47 of the articles on responsibility of States for internationally wrongful acts, noted that: "in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered … In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors." (The articles on responsibility of States for internationally wrongful acts adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.)

628 The Commission has similarly excluded, in another topic examining expert bodies, those entities, such as the United Nations Commission on International Trade Law, comprising "State representatives". As was pointed out in that context, which is similar to the situation here, the outputs of such bodies constituted a form of practice by those States. (See the

(9) Similarly, some regional bodies have also been created to assist States or international organizations with codification and progressive development at the regional level, such as the Inter-American Juridical Committee and the African Union Commission on International Law.[629] The members of such bodies are typically independent experts serving in their personal capacity rather than as State representatives.

(10) The unique place of the Commission in the codification of international law at the universal level warrants further discussion of its mandate to assist States with the promotion of (*a*) the progressive development of international law; and (*b*) its codification.[630] Both aspects of the mandate are defined in article 15 of the statute of the International Law Commission. Article 15 of the statute defines progressive development as follows: "the expression 'progressive development of international law' *is used for convenience* as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" (emphasis added).

(11) Similarly, "the expression 'codification of international law' is used *for convenience* as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine" (emphasis added).[631]

(12) The statute sets out different procedures for the Commission's work depending on whether the work stems from progressive development or codification. Thus, articles 16 and 17 addressed progressive development following referrals by the General Assembly or States, as well as by principal organs of the United Nations, specialized agencies or official bodies established by intergovernmental agreement. Articles 18 to 22 addressed codification, anticipating different procedures for the Commission's work. Under the latter, the Commission surveys the whole field of international law and then proposes to the General Assembly the codification of topics deemed suitable for study. In practice, however, the Commission has been

commentary to conclusion 13 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook … 2018*, vol. II (Part Two), para. 52).

629 See, e.g., statutes of the Inter-American Juridical Committee, April 1972 (Organization of American States resolution 89 (II-O/72)), as amended, June 2024 (document OEA/Ser.Q/I rev.4), arts. 1, 3 and 12 (establishing the Committee as an organ of the Organization of American States (art. 1) and providing that its purpose is to serve as an advisory body on juridical matters and "promote the progressive development and the codification of international law" (art. 3)); and statute of the African Union Commission on International Law, African Union, Decision 209 (XII), February 2009, arts. 4–5 (providing that the African Union Commission on International Law undertakes activities relating to the codification and progressive development of international law in Africa). Other bodies composed of State representatives may reflect some of the characteristics of independent bodies, but as they are comprised of State representatives they are thus not covered here. See, in this regard, the following statutes and terms of reference, which speak to the roles of the respective bodies as comprised of representatives of States: the statutes of the Asian-African Legal Consultative Organization, revised and adopted at the Bali Session, 2004 (see RES/43/ORG 7), art. 1 (setting out the Organization's functions, including deliberating on issues of international law referred by the member States, communicating the views of the Organization to the United Nations and other international organizations, and examining subjects under consideration by the International Law Commission); and the terms of reference of the Committee of Legal Advisers on Public International Law of the Council of Europe (document CM(2023)131-addfinal, p. 111) (establishing the Committee of Legal Advisers on Public International Law under the authority of the Committee of Ministers and instructing it to examine public international law questions, coordinate member State views, provide legal opinions, and engage with bodies dedicated to the development of public international law).

630 Charter of the United Nations, Article 13, paragraph 1 (*a*); and statute of the International Law Commission, art. 1, para. 1.

631 Statute of the International Law Commission, art. 15 (emphasis added).

unable to adhere to this formal statutory distinction between codification and progressive development.[632] This was the case from the earliest years of its work until now. Essentially, in practice, the Commission found the distinction too simple for the complex practical work required for successful codification and progressive development of the law. This gave rise to the so-called composite view of codification. States have come to recognize the necessity of a flexible interpretation of the Commission's statute and accepted its practice in that regard.

(13) Article 23 empowers the Commission, when finalizing its work, to make recommendations to the General Assembly, which could include taking note of or adopting texts produced by the Commission in a resolution; recommending drafts to States with the view to concluding a convention; or asking the General Assembly to convoke a conference to conclude a convention. Finally, under article 24 of its statute, the Commission was tasked with considering ways for making the evidence of customary international law more readily available. Various efforts have been made in that regard, including, in accordance with article 24, through the compilation of State practice and decisions of national and international courts on questions of international law.

(14) All the above aspects are relevant to understanding the role and symbiotic relationship between the Commission, as a body of independent experts, and the Sixth Committee, composed of delegates of States to the General Assembly. The two bodies, working together, have assisted the General Assembly in the discharge of its mandate under Article 13, paragraph 1 (*a*), of the Charter of the United Nations to promote international cooperation in the political field, and as part of that, have contributed significantly to the codification and progressive development of international law.[633]

(15) The Commission has previously concluded that some of its own works fall within the category of the works of independent experts which may serve as subsidiary means for the determination of rules of international law.[634] In the general commentary to Part Five of the conclusions on identification of customary international law,[635] the Commission referred to its own mandate to assist States in codifying and progressively developing international law, its status as a subsidiary organ of the General Assembly, its thorough working methods and its close relationship with the General Assembly and Member States among the relevant considerations (even though, it also stressed that, ultimately, the weight to be given to its works depends on various factors, including the quality and rigour of the sources relied upon by the Commission and, above all, upon States' reception of its output). These considerations remain as important for assessing the weight of the final work products of the Commission as they are for any other expert body, consistent with the criteria set out in draft conclusion 11 below.

(16) Much of the preparatory works of bodies of experts would fit into the category of teachings. For instance, the reports of special rapporteurs and reports of Chairs of study groups of the Commission may be classified as teachings. The final works of such bodies may reflect different normative value. In this regard, for example, the outcome of the Commission's deliberative process, whether styled as draft articles, draft principles or draft conclusions, carries different legal value depending on the topic. There are no one-size-fits-all definitions of each of those forms of output.

[632] *Ibid.*, arts. 15–22; and International Law Commission, "Methods of Work", first and second paragraphs (noting that, although the statute lays down separate procedures for progressive development and codification, the Commission's work on a topic usually involves both, with the balance varying by topic) (available at https://legal.un.org/ilc/methods.shtml).

[633] Charter of the United Nations, Article 13, paragraph 1 (*a*); and statute of the International Law Commission, art. 1.

[634] Para. (2) of the general commentary to Part Five of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

[635] *Ibid*.

However, depending on the content and the particular topic under examination, the output may reflect codification in the sense described above. In other cases, again depending on the content and the topic, the output could constitute progressive development of international law within the meaning discussed above.

(17) Either way, the final work would usually, in practice, be ascribed a measure of authority by international lawyers from Governments and in legal practice and academia, and by "the International Court of Justice and other courts and tribunals".[636] It should nonetheless be underlined that the attribution of any weight to the Commission's work is based on the merit of the question and the views of other entities that have used its work, rather than on a claim of special status for itself.

(18) In addition to expert bodies like the Commission and regional codification bodies, such as those mentioned above, there are human rights treaty bodies that may be established by States and/or international organizations at the universal or regional level and that produce works that are non-adjudicative in character, such as reports, general comments, concluding observations or recommendations. There are currently nine core human rights treaties, and one core optional protocol, reflecting a significant elaboration of a body of binding law that followed the adoption of the Universal Declaration of Human Rights,[637] which is now recognized as part of customary international law. Most of these treaties, some of which address human rights generally, such as the International Covenant on Civil and Political Rights, and others specific issues, such as the International Convention on the Elimination of All Forms of Racial Discrimination[638] or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[639] require States to adopt measures to implement their obligations.[640] These human rights "treaty bodies"[641] are a fundamental part of the post-Second World War international legal architecture that could not have been predicted by the drafters of Article 38 in the Advisory Committee of Jurists in 1920.

(19) These bodies, also comprised of independent experts, serve as monitoring bodies and perform a range of functions mandated under their respective instruments. They include the Human Rights Committee,[642] the Committee on Economic, Social

[636] *Ibid.*

[637] General Assembly resolution 217 (III).

[638] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.

[639] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85.

[640] The Commission notes that, while it has focused on human rights treaty bodies, there are also other treaties in international law for which expert bodies have been established at the regional and international levels. Key examples include the Commission on the Limits of the Continental Shelf, established under the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3); and the Implementation and Compliance Committee, established under article 15 of the Paris Agreement (Paris, 12 December 2015, United Nations, *Treaty Series*, vol. 3156, No. 54113), and decision 20/CMA.1 on modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, adopted at the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement in 2018 (FCCC/PA/CMA/2018/3/Add.2, p. 59). See, in this regard, the United Nations Convention on the Law of the Sea, art. 76, para. 8, and annex II to the Convention. These mechanisms may also exist at the regional level. For example in Africa, the African Charter on the Rights and Welfare of the Child, adopted on 1 July 1990 (Addis Ababa; available from the website of the African Union: https://au.int/, under "Treaties") provided the basis for the creation of the African Committee of Experts on the Rights and Welfare of the Child on 29 November 1999.

[641] These entities are widely referred to as "treaty bodies". However, technically, the treaties refer to them as committees.

[642] International Covenant on Civil and Political Rights.

and Cultural Rights,[643] the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women,[644] the Committee on the Rights of the Child,[645] the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,[646] the Committee on Enforced Disappearances[647] and the Committee on the Rights of Persons with Disabilities.[648] There are other expert bodies also created by States. Additional examples include the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization[649] and the International Narcotics Control Board.[650]

(20) Although the treaty provisions and working methods may differ, sometimes significantly, these expert bodies perform their mandates through a range of procedures that generate different types of material, some of which may serve as subsidiary means. As the Commission has observed in the past, various terms such as views, observations, recommendations, comments or measures are used alongside other terms, such as jurisprudence, to describe the types of materials described here as the "works" of such bodies. In a previous Commission topic, the broader term "pronouncements" was used to describe their final works in the context of evaluating whether the works may amount to subsequent practice of the Parties in the interpretation of treaties.[651] The pronouncements of such bodies, regardless of the specific context, may carry weight and are to be evaluated based on the elements contained in draft conclusion 11 below. The Commission has concluded that some – not all – of the works produced by those bodies of experts mentioned immediately above are in practice used as subsidiary means for the determination of rules of international law.

(21) The role of pronouncements of expert bodies in the determination and interpretation of rules of international law has been addressed by the International Court of Justice in its recent advisory opinion on the right to strike under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) of the International Labour Organization (ILO).[652] The Court, having interpreted the Convention by reference to article 31 of the 1969 Vienna Convention on the Law of Treaties, turned to article 32 of the same instrument in order to confirm its

643 International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

644 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid.*, vol. 1249, No. 20378, p. 13.

645 Convention on the Rights of the Child (New York, 20 November 1989), *ibid.*, vol. 1577, No. 27531, p. 3.

646 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), *ibid.*, vol. 2220, No. 39481, p. 3.

647 International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid.*, vol. 2716, No. 48088, p. 3.

648 Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid.*, vol. 2515, No. 44910, p. 3.

649 The Committee is an example of an expert body that is an organ of an international organization. It was established in 1926 to examine government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of the International Labour Organization for three-year terms. See www.ilo.org. See also International Court of Justice, *Right to Strike under ILO Convention No. 87*, paras. 41 and 118.

650 Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961), United Nations, *Treaty Series*, vol. 520, No. 7515, p. 151, art. 5.

651 Conclusion 13 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties: the conclusions adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2018*, vol. II (Part Two), paras. 51–52. See also General Assembly resolution 73/202 of 20 December 2018, annex.

652 *Right to Strike under ILO Convention No. 87*, Advisory Opinion, 21 May 2026, General List No. 191, paras. 101–102 and 118–119.

interpretation and observed that "the use of the term 'including' in article 32 of the Vienna Convention on the Law of Treaties indicates that the means mentioned therein do not constitute an exhaustive list".[653] On that basis, the Court identified the "pronouncements of competent supervisory bodies", as well as subsequent practice of the parties not meeting the conditions of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, as falling within article 32.[654] In that connection, the Court considered that, even though their specific characteristics differed from the expert treaty bodies, it could, *mutatis mutandis* with its approach in *Diallo*, ascribe "great weight" to the pronouncements of the ILO supervisory bodies "as a supplementary means of interpretation" of Convention No. 87.[655] By doing so, given the similarity of the functions that the ILO supervisory bodies perform to those of the expert treaty bodies it had cited before, the Court confirmed that the pronouncements of expert bodies of the kind addressed in the present draft conclusion may serve as supplementary means of interpretation under article 32 of the 1969 Vienna Convention.[656] The Court and some of the separate opinions of the judges state that the decisions and other pronouncements of courts, tribunals and other bodies established to supervise the implementation of treaties may, at least in certain situations, serve as "subsidiary means of interpretation".[657]

(22) The recognition of an interpretative role under article 32 of the 1969 Vienna Convention does not in any way displace the character of such pronouncements as subsidiary means for the determination of the existence and content of rules of international law within the meaning of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The Commission recalls that the use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.[658] Where pronouncements are used for the interpretation of a treaty under article 32 of the 1969 Vienna Convention, their use is bounded by the grounds set out in that provision, namely to confirm the meaning resulting from the application of article 31 of the same Convention or to determine the meaning where that application leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. It is appropriate in this sense to recall again that, even where great weight is ascribed to such pronouncements as subsidiary means, the Court has consistently held that it is "in no way obliged, in the exercise of its judicial functions, to model its own interpretation" on that of those bodies.[659] The weight to be accorded to a pronouncement in a given case is to be assessed in light of the general criteria set out in draft conclusion 4 and the more specific criteria set out in draft conclusion 11.

(23) It should be noted that, when discussing such expert bodies, there are different degrees of affiliation with States depending on whether they are directly created by States (State-created entities) or, having already been created by others or under domestic law, they are empowered to carry out certain functions by States (State-empowered entities). The latter bodies, although somewhat rare, can be seen as straddling the above categories.

Conclusion 11
Weight of the works of expert bodies

653 *Ibid.*, para. 102.
654 *Ibid.*
655 *Ibid.*, para. 118.
656 *Ibid.*; but see also *Right to Strike under ILO Convention No. 87* (footnote 652 above), Separate Opinion of Judge Tladi, paras. 2 and 20 *et seq.*, available at https://www.icj-cij.org/case/191.
657 *Right to Strike under ILO Convention No. 87* (footnote 652 above), Separate Opinion of Judge Cleveland, para. 12, and Separate Opinion of Judge Hmoud, para. 48.
658 See commentary to draft conclusion 3, para. 2.
659 *Diallo, Merits* (footnote 576 above), para. 66.

When assessing the weight of the works of expert bodies, regard should be had to, in addition to the criteria set out in draft conclusion 4:

(*a*) the character and normative value of the works produced by the expert body concerned;

(*b*) the methodology used in producing its works on a particular issue;

(*c*) the extent to which the works remain relevant, taking into account subsequent developments;

(*d*) the extent to which the body is comprised of experts with competence in international law; and

(*e*) the process and basis of selection of the experts.

Commentary

(1) Draft conclusion 11 concerns the weight of the works of expert bodies. The present draft conclusion, like the conclusion on the weight of decisions of courts and tribunals in draft conclusion 7 above, builds on the general criteria for assessing weight in draft conclusion 4, but outlines more specific criteria for the determination of the weight for such works when they are produced by bodies comprised of experts serving in their personal capacity within the meaning of draft conclusion 10. The criteria are additional to the ones contained in draft conclusion 4 – they are not alternatives or substitutes. The applicability of both should therefore be examined on a case-by-case basis.

(2) As formulated, the present draft conclusion consists of a *chapeau* and five subparagraphs containing criteria. The *chapeau* of draft conclusion 11 essentially reproduces the same opening text as the *chapeau* of draft conclusion 7. It provides that "when assessing the weight of the works of expert bodies, regard should be had to, in addition to the criteria set out in draft conclusion 4" a particular list of items. Here, the Commission chose to remove the *inter alia* language, as draft conclusion 11 is a specific provision that already references draft conclusion 4, which includes the same qualifier.[660] The use of the *inter alia* in draft conclusion 4 confirms that the list is meant to be illustrative instead of exhaustive. The same considerations apply to the present provision. Three specific additional points should be highlighted.

(3) First, the factors used to determine the weight of the works of expert bodies, irrespective of who created the bodies concerned, turn on the application of the general criteria already adopted by the Commission in draft conclusion 4. This is in essence the same methodology applied in all draft conclusions dealing with the weight to be given to all the subsidiary means mentioned in draft conclusion 2.[661]

(4) The Commission recalls the general criteria contained in draft conclusion 4. The application of that criteria depends on the specific subsidiary means in question. As those factors have been explained in the commentary to draft conclusion 4, it is repetitive to enter into detail on their meaning here. Reference should be made to the commentary to that draft conclusion above. In the main, regard should be had to the degree of representativeness of the body producing the expert work being used as subsidiary means, the quality of the reasoning contained in the work, the expertise of those involved, the level of agreement among them, the reception of States and other entities of that work and, where applicable, the mandate conferred on the body concerned.[662] All six criteria would be relevant indicators of weight depending on the type of expert body and the nature and stage of the work under consideration.

660 A/CN.4/SR.3727, p. 5.
661 See draft conclusions 2, 4 and 11.
662 Paras. (1)–(16) of the commentary to draft conclusion 4 above.

(5) Second, the "regard *should* be had to" (emphasis added) language is the same recommendatory language as is being used for the conclusions on weight for the other categories of subsidiary means, such as decisions of courts and tribunals and teachings. The explanation given above therefore applies.

(6) Third, the specific criteria in the present conclusion seek to complement the general criteria in draft conclusion 4. That is why the Commission states that they are additional or supplemental criteria for the assessment of the weight to be given to the works of expert bodies. A brief discussion of each of the five more specific criteria applicable to the assessment of the weight of the works of such bodies will follow below since these contain new elements.

*Subparagraph (*a*) – the character and normative value of the works produced by the expert body concerned*

(7) The first element of the additional criteria points users to the fact that the final works or outcomes of the works of expert bodies may differ based on their character and normative value. The term "character" was thought to more directly address the works being produced rather than the expert body that produced them. The term "normative value" was considered useful to distinguish between the different works produced by such bodies, for example, general comments or decisions on individual cases by human rights treaty bodies.[663]

(8) In each situation, a case-by-case assessment is required depending on the type of body and output under consideration and whether or not the work seeks to interpret or to apply existing international law. This aspect is closely connected to the mandate of the body concerned as found in its constitutive instruments or documents. For the works of the Commission that take the form of draft articles, for instance, various works could fit in different categories depending on their specific content, constituting either codification or progressive development, and other factors such as whether they were taken forward by States and formed the basis of subsequent treaties, in which case they could serve as a type of *travaux préparatoires*.[664] Where the output purports to state the law as it exists, the weight attached to it might be different than the weight attached to an output that is framed as a proposal for progressive development of the law. The extent to which the output accounts for State practice, from all regions of the world, should also be taken into account.

(9) In sum, the final outputs produced by an expert body, for example the decisions and recommendations produced by treaty bodies, will on balance have greater normative weight than the memorandums produced by their secretariats, or the preparatory reports produced by the experts in order to support the final output.[665] Therefore, when assessing the weight of the work produced by an expert body, it is important to verify the character and normative value of the work and whether it is a preliminary, intermediate or final work on the topic concerned.

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663 See Office of the United Nations High Commissioner for Human Rights, "What the treaty bodies do"; and Human Rights Committee, general comment No. 33 (2008) on obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V), paras. 11 and 13.

664 See International Law Commission, "Object of the Commission"; International Law Commission, "Methods of work"; and 1969 Vienna Convention, art. 32.

665 See paras. (7)–(8) of the commentary to conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44; and M. Wood, "The UN International Law Commission and customary international law", in *Discourses on Methods in International Law: An Anthology*, Gaetano Morelli Lectures Series, vol. 3, Enzo Cannizzaro and others, eds. (Rome, International and European Papers Publishing, 2020), p. 65, at p. 101.

*Subparagraph (*b*) – the methodology used in producing its works on a particular issue*

(10) The second element of the additional criteria introduced by the present draft conclusion considers whether the methodology used in producing the work conforms to the accepted methods, including full independence of the members of the body in the exercise of their functions and their ability to provide research results based solely on careful examinations of the law. The term "methodology", which was debated alongside other alternatives such as "thoroughness of the work", "procedures, techniques or processes followed" and "sources relied upon", was selected on the basis that it was appropriately neutral, objective and sufficiently flexible to include a wide range of factors relevant to assessments of the reliability of the work.[666] The focus on methodology emphasizes the thoroughness of the methods and seeks to advance the need for an objective rather than subjective standard. What matters more is the rigour of the work and the methodology used to determine the existence and content of rules of international law.

*Subparagraph (*c*) – the extent to which the works remain relevant, taking into account subsequent developments*

(11) Subparagraph (*c*), containing a third additional and more specific element for evaluating the works of expert bodies set out in draft conclusion 11, requires taking into account "the extent to which the work remains relevant, taking into account subsequent developments". The Commission included this criterion to take into account the possible evolution of international law, which might result in less weight being given to previous works or materials produced in a particular historical context.[667] As in draft conclusion 8, subsequent developments are not limited to the emergence of the same type of materials at a later stage, but include other changes in international law more broadly, including decolonization, globalization and other factors.

(12) As with decisions, discussed above, developments may overtake a particular work with the passage of time. This means the continued relevance of the work must be assessed at the time of its use, in order to assess whether there are additional considerations that might render it no longer as applicable. The assessment is made taking into account "subsequent developments", language chosen to introduce some flexibility. It accommodates changes to the weight to be given to a work considering a historical perspective. These include not only the works of expert bodies, but also factual or legal developments, such as the emergence of a different rule that would limit the applicability or relevance of the work of an expert body drawn from an earlier period or associated with a historical period reflecting ideas that would be put into serious question in a diverse and pluralistic world.

(13) As an example of a situation where the extent to which the work remains relevant has to be assessed, the 1956 work of the Commission on the law of the sea should be considered, as appropriate, taking into account the subsequent developments, such as the 1982 United Nations Convention on the Law of the Sea. Similarly, even in the admittedly different context of interpretation of treaties, the Commission no longer found it appropriate to use the anachronistic term "civilized nations" in Article 38, paragraph (1) (*c*), of the Statute of the International Court of

[666] A/CN.4/SR.3727, p. 6; see also para. (7) of the commentary to conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43–44.

[667] A/CN.4/SR.3727, p. 6; see also paras. (1)–(5) of the commentary to conclusion 8 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook ... 2018*, vol. II (Part Two), para. 52 (addressing the role of subsequent agreements and subsequent practice in determining whether the meaning of a treaty term is capable of evolving over time and noting that courts and tribunals have approached the issue on a case-by-case basis).

Justice in the context of its draft conclusions on general principles of law, preferring instead to refer to the more neutral term "community of nations".[668] Nearly all States that have addressed the issue in the Sixth Committee have endorsed the Commission's approach. This point, about reading works and even treaties in their contemporary context, should be borne in mind when evaluating the weight to accord to the works of expert bodies as subsidiary means for the determination of the existence and content of rules of international law.

*Subparagraph (*d*) – the extent to which the body is comprised of experts with competence in international law*

(14) This additional element of the present draft conclusion on the weight of the works of expert bodies is similar to the first sentence of the conclusion on teachings in draft conclusion 8. The present subparagraph requires that consideration be given to "the extent to which the body is comprised of experts with competence in international law". The basic thrust aims at ensuring that due account is taken of the expertise of those involved in producing the work under examination. In particular, whether the body is wholly or partially comprised of independent experts with competence in international law is a key aspect to account for when deciding the weight to attribute to the final work. Experts in the field would, on balance, produce a higher quality work when compared to non-experts. The expert bodies described in draft conclusion 10, for example the members of the Commission, are persons deemed to possess recognized competence in international law.[669] The same would be true of some private expert bodies even though the term "recognized" was removed in the Commission's work in this project to mention only competence. The removal of the term "recognized" is intended to establish a lower threshold of competence in international law of persons who may not already be as well known. The intended effect is to widen or broaden the category of scholars whose works will be examined, focusing on the quality of the work rather than the renown of the authors.

(15) The determination of the competence requirement requires an examination of the legal basis of each institution on a case-by-case basis. Such constitutive documents often spell out the formal criteria for membership. For example, some of the bodies, such as the treaty bodies and others created by States or international organizations, may require that the members possess formal training in law, and beyond that, to be among those deemed to have great expertise in the relevant field. In other cases, there may not be such a requirement for each member, with the possibility that professionals and others from other disciplines would be among the experts serving on the body.[670] The latter explains the Commission's selection of the wider term "comprised of" rather than "consists of" to accommodate the wide diversity of situations that may be found in practice, for example, in relation to some expert treaty bodies.[671]

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668 Draft conclusion 2 and commentary thereto, contained in chap. V of the present report, paras. 58–59.

669 "The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law." (Statute of the International Law Commission, art. 2, para. 1).

670 See Office of the United Nations High Commissioner for Human Rights, "Human rights treaty bodies and election of members: a guide for United Nations Delegates Based in New York" (2020), available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/ElectionsGuide.pdf; and Office of the United Nations High Commissioner for Human Rights, "Electing treaty body members", available at https://www.ohchr.org/en/treaty-bodies/electing-treaty-body-members.

671 A/CN.4/SR.3727, p. 6; see also, e.g., International Covenant on Civil and Political Rights, art. 28, paras. 2–3; Convention on the Rights of Persons with Disabilities, art. 34, para. 3; and Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1.

Subparagraph (e) – the process and basis of selection of the experts.

(16) The final additional criteria for evaluating the weight of the work of such bodies concern the process and method of selecting the experts, which vary considerably from institution to institution. The terms "process and basis" of selection were formulated to capture the method by which the experts are assembled. In some cases, the consideration for the position is rigorous and done by States or those with expertise in the area. This aspect also bears on legitimacy and the underlying distinction between those entities created by private or State-affiliated institutions.[672] The term "selection", which refers to how someone was chosen, was preferrable to the term "appointment".[673] The former was deemed much broader and more neutral. The term selection would encompass not only actual appointments, but also elections and other forms of designation by which experts were designated or chosen, depending on the nature of the body concerned.

(17) Typically, at least as concerns the works of State-created or State-affiliated entities, the persons elected to the positions must meet certain statutory requirements. These often include criteria mandating that those elected possess recognized competence in international law or in the field concerned. The criteria also usually require a nomination and election by States Parties to the treaty concerned.[674] Other expert bodies, of a more private character, may be composed similarly with their own nomination and election procedures. In some cases, the persons are elected by existing members or selected for the position and, in some cases, selections follow interview processes the results of which are made public. Examples include certain Human Rights Council special procedure working groups and expert mechanisms whose members are appointed following a process that includes shortlisting and interviews.

Conclusion 12
Resolutions and other texts produced by international organizations or at intergovernmental conferences

Resolutions and other texts produced by international organizations or at intergovernmental conferences may be used as subsidiary means for the determination of the existence and content of rules of international law.

Commentary

(1) Draft conclusion 12 concerns the role of one of the most practically used set of materials in contemporary international law: resolutions and other texts produced by international organizations or at intergovernmental conferences. Two sets of materials are contemplated within the provision: resolutions, specifically non-binding resolutions,[675] and other texts, such as reports, interpretative guidance or manuals produced by the secretariats of international organizations or at intergovernmental conferences.[676]

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672 A/CN.4/SR.3727, p. 7. See also, e.g., statute of the International Law Commission, art. 2, para. 1, and arts. 3 and 8; and International Covenant on Civil and Political Rights, art. 28, paras. 2–3, and art. 29.

673 A/CN.4/SR.3727, p. 7.

674 See, e.g., statute of the International Law Commission, art. 2, para. 1, and arts. 3 and 8; International Covenant on Civil and Political Rights, art. 28, paras. 2–3, and arts. 29–30; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, paras. 1–2.

675 Binding resolutions – for example, those adopted by the Security Council under Chapter VII of the Charter – are not covered by this conclusion.

676 See, e.g., Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex); Office of the United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures

(2) Both types of materials "may be used" as subsidiary means for identifying or determining the existence and content of a rule of international law. The use of "may" indicates the possibility that a resolution may be used as a subsidiary means, but since many resolutions are often driven by political rather than legal considerations, a careful assessment of the content and the context of adoption is required.

(3) The Commission has previously determined that resolutions can play a key role in the process of formation of international law. While resolutions cannot in and of themselves constitute rules of international law, "nor serve as conclusive evidence of their existence and content, they may have value in providing evidence of existing or emerging law and may contribute to the development of a rule".[677] At the same time, resolutions, like judicial decisions, can perform dual functions without undermining their value in the law formation process. Thus, by adopting the present draft conclusion, the Commission confirms that resolutions are primarily used in the law formation process but that, under certain circumstances, may also serve as subsidiary means within the scope of the "any other means generally used to assist in determining rules of international law" referred to in draft conclusion 2, subparagraph (*c*), above.[678]

(4) According to the present draft conclusion, resolutions "may be used as subsidiary means". This formulation differs from the formulation of draft conclusion 5 concerning decisions of courts and tribunals, and draft conclusion 8 regarding teachings, which indicate more affirmatively that such materials "are" subsidiary means for the determination of rules of international law. The Drafting Committee considered whether to include a specific paragraph indicating that the main use of these materials could be to serve as evidence of the constitutive elements of sources of international law. The Commission has, in its previous work, already explained that resolutions could serve as subsidiary means for the determination of rules of international law in relation to customary international law and general principles of law.

(5) A single resolution may, depending on the use to which it is put, serve different functions. It may constitute evidence of the practice or *opinio juris* of States in the formation of customary international law; it may evidence the recognition of a general principle of law; it may inform the interpretation of a treaty; and it may, separately, be used as a subsidiary means for the determination of the existence and content of a rule of international law. The present draft conclusion, without in any way diluting the important function of resolutions in the law formation or law determination process, concerns the last of these functions. This position aligns with the Commission view, already explained in draft conclusion 3, paragraph 2, above, that "the use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes". The first point, namely the role of resolutions in the formation and interpretation of law, will be addressed in paragraphs (6) to (13) below, before the limited role of resolutions as subsidiary means is addressed in paragraphs (14) to (21).

(6) For the purposes of the present draft conclusion, the word "resolution" refers to non-binding resolutions, decisions, declarations and other acts adopted by international organizations or at intergovernmental conferences.[679] Resolutions, so understood, may perform a function identical to individual teachings or the works of collectives of experts in the sense of demonstrating the opinion of States or signalling

and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (HCR/1P/4/ENG/REV.4); and Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission 2011*, vol. II (Part Three), p. 35.

677 See para. (1) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

678 *Ibid.*, paras. (1)–(5).

679 There is a wide range of designations, such as "declaration" or "declaration of principles".

the attitudes of States towards a given problem. Special attention should be given to resolutions of the General Assembly, which is a plenary organ of the United Nations with virtually universal participation, as they may be used as evidence for the determination of the collective opinion of Member States regarding the possible existence and the content of a rule of international law.[680]

(7) Binding resolutions or decisions[681] of the Security Council are not primarily considered within the scope of the present draft conclusion, as they constitute obligations for Member States under the Charter of the United Nations, in relation to which Article 103 applies, rather than materials used in the determination of rules of international law. Non-binding resolutions of the Security Council may, however, fall within the scope of the present draft conclusion. And, in such cases, the considerations that would apply would be the same as those that would apply for all other resolutions.

(8) The Commission has addressed the role of resolutions of international organizations in its work on the sources of international law, including the topics identification of customary international law and general principles of law. Conclusion 4, paragraph 2, of the conclusions on identification of customary international law acknowledges that, in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.[682]

(9) Thus, resolutions of international organizations may, in some circumstances, contribute to the development of international law, beyond simply serving as a forum for the development of State practice. The commentary to conclusion 4 of the conclusions on identification of customary international law clarifies that it primarily refers to the practice of international organizations that are entrusted by States with exercising their own competencies, such as the European Union. It also clarifies that the practice of organs consisting of State representatives within international organizations is to be assessed as practice of those States. The carefully circumscribed wording of that conclusion indicated that the practice of international organizations is not automatically relevant to the formation of customary international law and that a careful case-by-case assessment is required.[683]

(10) Conclusion 10 of the conclusions on identification of customary international law addresses forms of evidence of acceptance as law (*opinio juris*). Paragraph 2 of that conclusion provides a non-exhaustive list of such forms, including a range of subsidiary means including "decisions of national courts" and "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". The commentary to conclusion 10, in paragraph (6), elaborates on this point, stating that multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States. Paragraph (7) of the commentary clarifies that paragraph 2 applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations. This means that the conduct of international organizations in connection with resolutions can also be evidence of their own acceptance of a rule as law, to the extent that such acceptance is relevant to the identification of customary international law.[684]

(11) Conclusion 12 of the conclusions on identification of customary international law specifically addresses the role of resolutions adopted by international organizations or at intergovernmental conferences in the determination of customary

[680] Charter of the United Nations, Articles 9–10; and paras. (1)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66.

[681] Charter of the United Nations, Articles 25, 39 and 103. It is, however, possible for Security Council resolutions that are non-binding to be a form of subsidiary means.

[682] *Yearbook … 2018*, vol. II (Part Two), paras. 65–66.

[683] *Ibid*., para. 66.

[684] *Ibid*.

international law. Paragraph 1 of that conclusion states that a resolution "cannot, of itself, create a rule of customary international law" – nor can it serve as conclusive evidence thereof, as further clarified in paragraph (1) of the commentary to conclusion 12. However, paragraph 2 recognizes that a resolution "may provide evidence for determining the existence and content of a rule of customary international law or contribute to its development". This acknowledges that resolutions can play a dual role: in the first place, in the process of identifying or developing customary international law, even if they are not in and of themselves sources of law; and in the second place, as evidence of the law. Paragraph 3 further clarifies that a provision in a resolution "may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)".[685] Indeed, the International Court of Justice has determined that resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[686]

(12) A similar conclusion was reached in the Commission's draft conclusions on general principles of law. In that context, resolutions were seen as relevant to the identification of general principles of law that may be formed within the international legal system.[687] Resolutions can be one of the elements that evidence the recognition of a principle at the international level, although the mere existence of a principle in international instruments is not sufficient to establish it as a general principle of law.[688]

(13) In essence, the previous work of the Commission already accepts that resolutions of international organizations play a role in the law determination process. This is explained in the preceding paragraphs in relation to separate topics that have been concluded. In this regard, the Commission considers that resolutions play a role in the identification of general principles of law in a manner that is analogous, though not identical, to their role in the identification of customary international law. The point is that, in both contexts, if there is a debate as to whether there is a rule of international law on a particular point under consideration before the courts, reference is often made to the relevant resolutions to establish if they can serve as evidence, albeit not conclusive, of the recognition of a principle, much like they can provide evidence of both State practice and *opinio juris* on the formation of customary international law. The inclusion of that discussion here is intended to underline that the most important role of resolutions is in the law formation process.

(14) In the context of the present topic, resolutions may be relevant in a different way. The key to understanding the distinction between the role of resolutions in the development or formation of the law versus their role as subsidiary means lies in the phrase "for the determination of rules of law" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. This phrase indicates that subsidiary means are not sources of law, as confirmed by draft conclusion 3 above, but rather interpretive tools and materials. Thus, the Commission's review of practice indicates that like decisions of courts and tribunals or teachings, resolutions may be used to determine whether a rule of international law exists and, if so, its scope and content. That said, the view was also expressed that resolutions of international organizations or those adopted at intergovernmental conferences were better categorized as part of the process of the formation of law rather than in its determination. [689]

(15) Non-binding resolutions of international organizations, particularly those of the General Assembly of the United Nations, may serve as subsidiary means for the

[685] *Ibid*., paras. 65–66.
[686] *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70 (referring to General Assembly resolutions).
[687] Para. (4) of the commentary to draft conclusion 7, contained in chap. V of the present report.
[688] *Ibid.*; para. (2) of the commentary to draft conclusion 2, *ibid.*
[689] A/CN.4/SR.3727, p. 7.

determination of rules of law by illuminating legal principles and guiding judicial reasoning. The Commission accepts that, when resolutions are used, there is typically no express statement indicating that they are being invoked as subsidiary means. This means that it may often be the case that a degree of discernment with reference to the particular context of the use of the resolution may be required since it is not always easy to distinguish between their role in the identification or interpretation of rules of international law and their possible use as subsidiary means.

(16) For instance, in *Obligation to Negotiate Access to the Pacific Ocean*, the International Court of Justice referenced General Assembly resolution 2625 (XXV) of 24 October 1970 and resolution 37/10 of 15 November 1982 to affirm the "principle of free choice of means" for peaceful dispute settlement under Article 33 of the Charter of the United Nations. These resolutions, although non-binding, were treated as evidence of shared legal understandings, leading the Court to conclude that no obligation existed under the Charter requiring Chile to negotiate access by the Plurinational State of Bolivia to the Pacific Ocean.[690] Similarly, the Court did not find any such obligation arising from any of the 11 non-binding resolutions of the General Assembly of the Organization of American States, alone or taken together. The Court was unable to infer from the content of the resolutions and the prior positions of Chile the acceptance of such obligation. [691] This use of resolutions, to determine whether a rule existed that could be applied to the case, illustrates their role in clarifying or confirming interpretations of primary legal rules.

(17) In the *Bosnian Genocide* case, [692] the Court referred to General Assembly resolution 47/121 of 18 December 1992 to consider the legal significance of the term "ethnic cleansing", a term that was widely used to reference events in Bosnia and Herzegovina, including in the press and in the work of experts. The report of the United Nations Commission of Experts defined the term as "rendering an area ethnically homogenous by using force or intimidation to remove persons or given groups from the area". [693] The resolution had, in its preamble, alluded to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", and thus raised the question whether that practice would fall within the meaning of the definition of genocide under article II of the Convention on the Prevention and Punishment of the Crime of Genocide.[694] In that case, the Court reviewed the resolution to construe the correct legal understanding of a treaty rule (i.e. to mark the outer boundaries of the definition of genocide).[695] The Court determined that a rule criminalizing "ethnic cleansing" as a form of genocide did not exist as such. Consequently, although it was interpreting a treaty rule, the Court's approach demanded careful evaluation of the resolution's content and the conditions of its adoption, reflecting the distinct but complementary evidential and normative dimensions these instruments possess.[696] This decision illustrates that resolutions may serve as subsidiary means not only in support of the existence of a rule, but also in determining its scope, thereby confirming that a particular rule does not exist or does not in any event extend to addressing that particular situation.

(18) More recently, in its advisory opinion of 23 July 2025 on the obligations of States in respect of climate change,[697] the International Court of Justice responded to

690 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment*, *I.C.J. Reports 2018*, p. 507, at para. 166.

691 *Ibid.*, para. 171.

692 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 43.

693 S/1994/674/Add.2, para. 2.

694 Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) United Nations, Treaty Series, vol. 78, No. 1021, p. 277.

695 *Application of the Convention … (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 692 above), para. 190.

696 *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70.

697 General List, No. 187.

a request to determine whether there exists such a right as that to a clean, healthy and sustainable environment. Following its analysis of various instruments, starting with General Assembly resolution 2398 (XXIII) of 3 December 1968, which established the recognition of the close relationship between humans and their environment, also analysing the Rio Declaration on Environment and Development of 1992,[698] wherein principle 1 stated that "human beings … are entitled to a healthy and productive life in harmony with nature", and culminating with General Assembly resolution 76/300 of 28 July 2022, the Court explained that States had, through their resolution, affirmed the importance of the right. The Court pointed out that in the latter resolution, the General Assembly itself "[*r*]*ecognizes* the right to a clean, healthy and sustainable environment as a human right".[699] It characterized the recognition in the resolution as "evidence of the acceptance of this right",[700] and noted how the resolution had expressly confirmed, among other things, that "a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies" as well as the relationship between the right to a clean environment to other human rights.[701]

(19) According to the Court, "[i]n this sense, the resolution affirms the 'importance of a clean, healthy and sustainable environment for the enjoyment of all human rights'",[702] consistent with the preambular paragraph referenced above, and also demonstrated the significance that States attached to that right. Based on its careful analysis of the text of the General Assembly resolution, and observing that the resolution had been adopted with 161 votes in favour, with no votes against, the Court was of the view that, to the extent that States Parties to human rights treaties were required to guarantee the effective enjoyment of such rights, it was difficult to discern how those rights could be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment. It thus ultimately concluded that, under international law, the enjoyment of a "clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights" and that "[t]he human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights".[703] In this example, the opinion used the resolution as evidence of acceptance of the right to a clean environment; thus, the resolution contributed to the Court's reasoning rather than serving as the source of the right.

(20) Other International Court of Justice opinions reflect the complex evidentiary value of resolutions. In *Whaling in the Antarctic*, the Court considered that non-binding resolutions of the Contracting Parties to the International Convention for the Regulation of Whaling, when adopted by consensus or unanimous vote, "may be relevant for the interpretation of the Convention or its Schedule".[704] This interpretative role is closely related to the function of subsidiary means for the determination of the content of rules of international law. Such resolutions can play a critical role in clarifying, developing and confirming the existence and scope of legal norms.

(21) In addition to resolutions, other "texts" produced by international organizations "may be used as subsidiary means". The word "may" indicates that

[698] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

[699] *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, General List, No. 187, paras. 390–392.

[700] *Ibid.*, paras. 392–393.

[701] *Ibid.*, para. 392.

[702] *Ibid*.

[703] *Ibid.*, para. 393.

[704] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports*, p. 226, para. 46.

caution is warranted, since not all texts play such a role. The latter, as already indicated above, differs from the formulations in draft conclusion 5 on decisions of courts and tribunals and draft conclusion 8 on teachings. In both of those scenarios, those materials carry the affirmative description that they "are" a subsidiary means for the determination of rules of international law.[705] Other texts, such as reports, memorandums or interpretative guidance produced by the secretariats of international organizations collecting or synthesizing the views of States on a given issue could also serve as useful subsidiary means for the determination of rules of international law.[706]

Conclusion 13
Weight of resolutions and other texts produced by international organizations or at intergovernmental conferences

When assessing the weight of resolutions and other texts produced by international organizations or at intergovernmental conferences, regard should be had to, as appropriate, in addition to the criteria set out in draft conclusion 4, the circumstances surrounding their production.

Commentary

(1) Draft conclusion 13 is intended to accompany draft conclusion 12 in the same manner that draft conclusion 7 accompanies the weight of decisions of courts and tribunals and draft conclusion 11 follows the works of expert bodies, and concerns the distinct question of the weight to be given to those materials when they are so used. The text essentially follows the *chapeau* of draft conclusions 7 and 9 dedicated to the weight of specific categories of subsidiary means, while adding the specific reference to "the circumstances surrounding their production".

(2) The assessment of the weight of resolutions as subsidiary means starts with the application of the general criteria established in draft conclusion 4 of the present draft conclusions. The additional element of "circumstances" surrounding their production speaks differently to different issues, depending on whether the consideration is of resolutions that are adopted by bodies themselves or of the development of texts or reports by, for example, the secretariats of such organizations.

(3) The need for a flexible formulation is highlighted because of the wide variety of materials covered by draft conclusion 13. These include resolutions, final acts, reports, memorandums, studies, statements, interpretative guides, manuals and other forms of work produced by international organizations or at intergovernmental conferences. Criteria appropriate to one type of material may not be equally applicable to all the others. The statement indicating that regard "should be had to" and "as appropriate" therefore confirms that the general criteria in draft conclusion 4 are not mechanical requirements, but considerations to be applied in light of the specific material under examination.[707]

(4) The additional element of "circumstances surrounding their production" was deemed sufficiently wide to encompass adoption in the case of resolutions, but also the production of other types of documents, such as statements and studies. It also takes into account the possible evolution of international law, which might result in less weight being given to resolutions and other texts that have been created under

[705] Draft conclusions 5, 8, 10 and 12 above; and A/CN.4/SR.3727, p. 7.

[706] A/CN.4/SR.3727, p. 8. See also, e.g., *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations publication, Sales No. E.16.V.7), 2016 edition; and International Maritime Organization, Explanatory Manual to the Convention on Facilitation of International Maritime Traffic, 1965, as amended (document FAL.3/Circ.220, annex).

[707] A/CN.4/SR.3727, pp. 8–9; see also paras. (1)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

different circumstances.[708] It also permits consideration of the function that the material is said to perform in a particular case, including whether a resolution is more appropriately understood as part of the formation or development of law rather than as a subsidiary means for its determination. It should be recalled that a resolution or other texts created by international organizations or at intergovernmental conferences may be reflective of the period of their creation, and that their application does not necessarily freeze the law or its evolution.[709]

(5) The term "production", in the sense of development or preparation, was selected to consider texts that are not necessarily adopted by international organizations or at intergovernmental conferences, but may still serve an important purpose in reflecting the work of the body (or their secretariat).[710] Other texts, such as concept notes, background papers, non-papers, issue papers, studies, reports or draft outcome documents, may be noted, circulated, issued on the occasion of a particular event or prepared at the request of a competent body without being formally adopted by States or by an organ composed of State representatives.

(6) For example, memorandums or other documents produced by regional codification bodies, such as the Inter-American Juridical Committee, the African Union Commission on International Law and the Committee of Legal Advisers on Public International Law of the Council of Europe, may not necessarily be formally adopted by States.[711] Similarly, memorandums and other texts produced for the Commission by its secretariat[712] are not adopted by the Commission, but may still carry some weight to the extent that they constitute an accurate synthesis of the practice of States and thereby shed light on the existence, or not, of a rule of international law. The absence of formal adoption does not preclude such materials from being relevant, although it may bear on the degree of weight to be accorded to them.

(7) To address the weight of resolutions as subsidiary means, recourse should be had, by analogy and insofar as it is relevant, to the views of the Commission regarding the role that resolutions may play in the determination of the existence and content of customary international law. In regard to the general criteria set out in draft conclusion 4 above, it is important to note that they may take on special significance in different ways when examining resolutions specifically. First, regarding the quality of reasoning (criterion (*b*)), resolutions must not be mere political statements or aspirational declarations.[713] Second, the institutional factors – including the expertise

[708] A/CN.4/SR.3727, pp. 8–9; see also paras. (4)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law *Yearbook … 2018*, vol. II (Part Two), para. 66.

[709] Para. (1) of the commentary to Part Five of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66; *Legal Consequences of the Separation of the Chagos Archipelago* (footnote 588 above), paras. 150–155; and Convention on the Prevention and Punishment of the Crime of Genocide.

[710] See, e.g., Office of the United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.

[711] See, e.g., Organization of American States, Inter-American Juridical Commission, "Annual reports", at https://www.oas.org/en/sla/iajc/annual_reports.asp; Organization of American States, Inter-American Juridical Commission, "Recommendations and reports", at https://www.oas.org/en/sla/iajc/Recommendations_Reports.asp; and Council of Europe, Commission of Legal Advisers on Public International Law, "Documents", at https://www.coe.int/en/web/cahdi/documents, and "Opinions", at https://www.coe.int/en/web/cahdi/opinions.

[712] See statute of the International Law Commission, art. 14; and *Ways and Means for Making the Evidence of Customary International Law More Readily Available: Preparatory Work within the Purview of article 24 of the Statute of the International Law Commission (Memorandum Submitted by the Secretary-General)* (United Nations publication, Sales No. 1949.V.6).

[713] See paras. (4)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66; *Military and*

of those involved (criterion (*c*)), level of agreement (criterion (*d*)) and the mandate of the body (criterion (*f*)) – require careful scrutiny.[714] The adoption procedures followed, including opportunities for deliberation, bear directly on these criteria.[715] For example, whether there is a vote or consensus (the meaning of which may vary from institution to institution and in some cases may not be formally defined) and the statements of States in explanation of their positions in favour of or against a given resolution are helpful indications of the rationale and goal for its adoption.[716]

(8) In the case of resolutions, the circumstances surrounding their production may include, among other things, the text and legal basis of the resolution, the rationale for its adoption, whether the resolution purports to state existing law or to recommend future conduct, the process by which it was negotiated, the opportunities for deliberation afforded to States and whether the resolution was negotiated over an extended period of time.[717] The fact that a resolution has been adopted by consensus, or by a near unanimous vote, may be relevant, but is not by itself determinative. Negative votes, abstentions and explanations of position before or after the adoption may also be relevant, especially where they show that States accepted or resisted the purported legal character of the proposition set out in the resolution.

(9) Third, the reception by States and other entities (criterion (*e*)) provides a crucial indication of a resolution's utility in determining rules of international law. Evaluations of reception by States and other entities include assessments of whether votes were taken, or if not, whether the resolution was adopted by consensus. The States' use of such resolutions subsequent to adoption could also be an important indication of their views of them.[718] Evaluation of such use includes consideration of how courts and tribunals may have used, relied upon or referenced the resolution, especially if it served as evidentiary material relevant to the identification of, for example, a rule of customary international law.[719]

(10) Statements of States before and after the adoption of a resolution may be particularly useful in assessing the nature and weight of the resolution in question.[720] Such statements, in explanation of votes, may shed light on whether States understood the text as legal, political, aspirational or recommendatory in character.[721] Statements subsequent to adoption may indicate whether States have continued to rely on the resolution as an articulation of law, have treated it as a policy instrument

Paramilitary Activities in and against Nicaragua (footnote 484 above), paras. 188 and 191–93; and *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70.

714 See paras. (4)–(7) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66; *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above), paras. 188 and 191–93.

715 See paras. (4)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law.

716 A/CN.4/SR.3727, p. 9; and O. Sender and M. Wood, *Identification of Customary International Law* (Oxford, Oxford University Press, 2024), pp. 241–242.

717 *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70.

718 See paras. (3) and (5)–(8) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66; *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), paras. 70–71; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above), para. 188.

719 See, for example, *Military and Paramilitary Activities in and against Nicaragua* (footnote 484 above), paras. 188–191; and *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70.

720 See paras. (1)–(4) of the commentary to conclusion 10 and para. (6) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 588 above), para. 188.

721 *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), para. 70.

or have distanced themselves from the legal proposition reflected in the text.[722] Thus, the weight to be accorded to a resolution is not determined by the fact of adoption alone, but also by the surrounding circumstances of its adoption and the subsequent engagement with it by States and other relevant actors.[723]

(11) The degree of representativeness (criterion (*a*)) of the body remains significant but takes on specific characteristics in the context of resolutions, requiring assessment of both geographic representation and diversity of legal systems in the adoption process.[724] These considerations collectively inform the determination of the weight to be accorded to resolutions as subsidiary means. The universal nature of the body concerned, such as that of the General Assembly, will give a resolution greater weight. Only those resolutions demonstrating wide support and a strong legal basis, emerging from bodies with the relevant mandate and expertise, and receiving meaningful engagement from the international community of States might warrant being accorded significant weight in determining rules of international law.[725]

(12) The circumstances surrounding production can also affect the contemporary authority of a resolution or other text. A material produced in a particular historical setting may be overtaken by subsequent developments in international law or by later practice.[726] Conversely, it may acquire additional significance if it is subsequently relied upon, reaffirmed or refined by States and other actors. In this respect, a series of resolutions dealing with the same subject matter may become especially relevant.[727] Repetition alone does not transform such resolutions into rules of international law. But the progressive refinement of their reasoning and formulation, together with their reception by States and other entities, may assist in determining the weight to be accorded to them as subsidiary means.[728]

(13) A different set of considerations, similar to the factors that guide teachings and, to some extent, the works of expert bodies, would be helpful in assessing the weight to attach to other texts and reports produced by international organizations or at intergovernmental conferences.[729] Such materials do not necessarily result from the collective expression of States in the same way as resolutions do.[730] In those cases, particular attention should be paid to the mandate under which the text was prepared, the methodology used, the sources relied upon, whether the text collects or synthesizes the views of States or other relevant actors, the quality of its reasoning, the expertise of those involved, and the extent to which the competent body, States

[722] See paras. (5)-(6) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

[723] See paras (6)–(8) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *ibid.*

[724] Paras. (6)–(7) of the commentary to draft conclusion 4 above.

[725] Paras. (5)–(8) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

[726] *Ibid.*; and paras. (1)–(5) of the commentary to conclusion 8 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook ... 2018*, vol. II (Part Two), para. 52.

[727] Paras. (1)–(5) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66; and A/CN.4/781, paras. 198–199.

[728] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 588 above), paras. 70–73; and paras. (5)–(8) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Yearbook ... 2018*, para. 66.

[729] See para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66; and paras. (2) and (4) of the commentary to conclusion 13 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, para. 52.

[730] See paras. (3)–(6) of the commentary to conclusion 12, and para. (5) of the commentary to conclusion 14, of the conclusions on identification of customary international law, *Yearbook ... 2018*, vol. II (Part Two), para. 66.

or other relevant actors have taken note of or otherwise engaged with the text.[731] To the extent that such materials resemble or adopt the views contained in teachings or the works of expert bodies, reference may also be made, as appropriate, to the considerations discussed in draft conclusions 9 and 11 above in relation to those categories of subsidiary means. For such materials, the criteria set out in draft conclusions 9 and 11 may be applied by analogy, as appropriate.

(14) The circumstances identified above are not exhaustive.[732] They are intended only as guidance for the interpretation and application of draft conclusion 13. As with all subsidiary means, the ultimate assessment of weight must be carried out on a case-by-case basis, taking account of the material under consideration, the purpose for which it is invoked, and the relationship between that material and the relevant rule of international law whose existence and content are being determined.[733]

[731] See para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *ibid.*

[732] See para. (5) of the commentary to conclusion 12 and para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *ibid.* (identifying non-exhaustive factors relevant to assessing the value of resolutions and institutional outputs, including content, circumstances of adoption, mandate, expertise, care and objectivity, support within the body and reception by States and others).

[733] See para. (5) of the general commentary, and para. (5) of the commentary to conclusion 14, of the conclusions on identification of customary international law, *ibid.*; and paras. (11)–(14) of the commentary to conclusion 2 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook … 2018*, vol. II (Part Two), para. 52 (emphasizing case-specific assessment and the need to place appropriate weight on different materials in light of their relevance and function in the interpretive process).

Chapter VII
Settlement of disputes to which international organizations are parties

A. Introduction

70. The Commission, at its seventy-third session (2022), decided to include the topic "Settlement of international disputes to which international organizations are parties" in its programme of work[734] and appointed Mr. August Reinisch as Special Rapporteur for the topic. Also at its seventy-third session,[735] the Commission requested the Secretariat to prepare a memorandum providing information on the practice of States and relevant international organizations which may be of relevance to its future work on the topic, including both international disputes and disputes of a private law character. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and their views for the purposes of the memorandum.[736]

71. The General Assembly, in paragraph 7 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

72. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur.[737] The Commission provisionally adopted draft guidelines 1 and 2, together with commentaries thereto, and decided to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties".[738]

73. At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur,[739] as well as the memorandum by the Secretariat providing information on the practice of States and relevant international organizations which may be of relevance to the future work of the Commission on the topic, including both international disputes and disputes of a private law character.[740] At the same session, the Commission provisionally adopted four additional draft guidelines and commentaries thereto.[741]

74. At its seventy-sixth session (2025), the Commission had before it the third report of the Special Rapporteur.[742] As a consequence of the reduction of the length of the seventy-sixth session, the Commission was unable to consider the third report of the Special Rapporteur in plenary. The Commission established a Working Group

[734] See *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 238. 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 an annex to the report of the Commission (*Yearbook … 2016*, vol. II (Part Two), annex I).

[735] See *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 241-242.

[736] *Ibid*., paras. 31 and 242.

[737] A/CN.4/756. See also *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), chap. V.

[738] See A/78/10, paras. 44–49.

[739] A/CN.4/766.

[740] A/CN.4/764.

[741] See *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 58–63.

[742] A/CN.4/782 and Add.1.

of the Whole on the topic to allow for a preliminary exchange of views on the third report and appointed the Special Rapporteur as Chair of the Working Group.[743] The Commission subsequently took note of the oral report of the Chair of the Working Group.[744]

B. Consideration of the topic at the present session

75. The Commission had no new report of the Special Rapporteur at the present session. At its 3731st to 3735th meetings, from 29 April to 6 May 2026, the Commission considered the third report of the Special Rapporteur. The Commission had before it the revised bibliography on the topic and the sample clauses on dispute settlement, illustrating the practice of international organizations, submitted by the Special Rapporteur (A/CN.4/782/Add.2 and A/CN.4/782/Add.3).

76. In his third report, the Special Rapporteur focused on the discussion of disputes between international organizations and private parties. He provided an analysis of the practice of settling such disputes, as well as of policy issues relevant to the work of the Commission on the topic. The Special Rapporteur also outlined his plans for the future work on the topic. He proposed five draft guidelines on: the scope of the relevant part of the draft guidelines; resort to means of dispute settlement; the jurisdictional immunity of international organizations; access to justice; and dispute settlement and procedural rule of law, as well as human rights requirements.

77. At is 3735th meeting, on 6 May 2026, the Commission referred draft guidelines 7, 8, 9, 10 and 11, as contained in the third report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the debate in the plenary.

78. At its 3748th meeting, on 29 May 2026, the Chair of the Drafting Committee introduced the report of the Committee on the topic (see A/CN.4/L.1035).[745] At the same meeting, the Commission adopted the draft guidelines on settlement of disputes to which international organizations are parties on first reading (see sect. C.1 below).

79. At its 3776th meeting, on 23 July 2026, the Commission adopted the commentaries to the aforementioned draft guidelines (see sect. C.2 below).

80. At the same meeting, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines (see sect. C below), through the Secretary-General, to Governments and relevant international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2027.

81. Also at the same meeting, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. August Reinisch, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines on settlement of disputes to which international organizations are parties.

[743] See *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), paras. 361–376.

[744] *Ibid*., para. 364.

[745] For the statement of the Chair of the Drafting Committee, see https://legal.un.org/ilc/documentation/english/statements/2026_dc_chair_statement_sidio.pdf . Statements made at the 3748th meeting are reflected in A/CN.4/SR.3748.

C. Text of the draft guidelines on settlement of disputes to which international organizations are parties adopted by the Commission on first reading

1. Text of the draft guidelines

82. The text of the draft guidelines on settlement of disputes to which international organizations are parties, adopted by the Commission on first reading, is reproduced below.

Settlement of disputes to which international organizations are parties

Part One
Introduction

Guideline 1
Scope

The present draft guidelines concern the settlement of disputes to which international organizations are parties.

Guideline 2
Use of terms

For the purposes of the present draft guidelines:

(*a*) "international organization" means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members;

(*b*) "private party" means a person or entity other than a State or an international organization;

(*c*) "dispute" means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial;

(*d*) "means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes.

Part Two
Disputes between international organizations as well as disputes between international organizations and States

Guideline 3
Scope of the present Part

The present Part addresses disputes between international organizations as well as disputes between international organizations and States.

Guideline 4
Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute.

Guideline 5
Accessibility of means of dispute settlement

Means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the

settlement of disputes between international organizations or between international organizations and States.

Guideline 6
Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

Part Three
Disputes between international organizations and private parties

Guideline 7
Scope of the present Part

The present Part addresses disputes between international organizations and private parties.

Guideline 8
Resort to means of dispute settlement

Disputes between international organizations and private parties should be settled in good faith and in a spirit of cooperation by means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute, with due regard for the respective positions of the parties and possible disparity between them.

Guideline 9
Immunity of international organizations

Serving the purpose of ensuring the independent and effective performance of their functions, the immunity of international organizations is to be respected.

Guideline 10
Immunity and dispute settlement

International organizations, which enjoy immunity, shall endeavour to settle disputes with private parties. In this context, they shall make provision for appropriate modes of settlement of disputes. Such modes shall ensure the right of access to justice of private parties.

Guideline 11
Access to justice

In order to ensure the right of access to justice, judicial settlement or reasonable alternative means of dispute settlement, which may include arbitration or administrative tribunals, shall be made more widely accessible for the settlement of disputes between international organizations and private parties. Such means shall be effective and in no circumstances amount to arbitrariness or denial of justice.

Guideline 12
Requirements for means of dispute settlement of an adjudicatory character

Means of dispute settlement of an adjudicatory character shall conform to procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process.

2. Text of the draft guidelines and commentaries thereto

83. The text of the draft guidelines and commentaries thereto adopted by the Commission on first reading is reproduced below.

Settlement of disputes to which international organizations are parties

Part One
Introduction

Guideline 1
Scope

The present draft guidelines concern the settlement of disputes to which international organizations are parties.

Commentary

(1) Draft guideline 1 concerns with the scope of application of the draft guidelines. The provision should be read together with draft guideline 2, which sets out the use of the terms "international organization", "private party", "dispute" and "means of dispute settlement". These terms also contribute to delimiting the scope of the topic.

(2) International organizations may be parties to a variety of disputes at both the international and the national levels. Their disputes with members and host States, but also with third States or other international organizations, will most often arise under international law, whereas their disputes with private parties are likely to arise under national law or specifically stipulated applicable rules. Disputes with international organizations may also arise under the rules of the organization.

(3) Examples of the former type of disputes are those concerning rights and obligations under headquarters or seat agreements, such as those addressed in the *UNESCO Tax Regime*[746] or the *EMBL-Germany* arbitrations,[747] or the issues giving rise to the advisory opinions of the International Court of Justice in the *WHO Regional Office*[748] or the *PLO Mission* cases.[749] Other examples of disputes at the international level are international claims raised by international organizations for injuries suffered by their agents, such as the dispute which formed the background to the International Court of Justice's *Reparation for Injuries* advisory opinion,[750] or claims raised against an international organization by States on behalf of their nationals, such as those addressed in the Belgium-United Nations settlement.[751]

(4) Examples of disputes at the national level are those of a delictual or tort character brought against an international organization by a private party being harmed by an international organization, such as the dispute giving rise to the *Starways* arbitration,[752] or disputes brought by an international organization against private parties for harm occurring, for instance, through the unauthorized use of the organization's logo or Internet domain.[753] Furthermore, the most frequent types of

[746] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, *Reports of International Arbitral Awards* (UNRIAA), vol. XXV (United Nations publication, Sales No. E.05.V.5), pp. 231–266.

[747] *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *International Law Reports*, vol. 105 (1997), pp. 1–74.

[748] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73.

[749] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12.

[750] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[751] Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, No. 7780, p. 197.

[752] *Starways Limited v. United Nations*, 24 September 1969 (Bachrach, Sole Arbitrator), *International Law Reports*, vol. 44 (1972), pp. 433–437.

[753] *International Bank for Reconstruction and Development d/b/a The World Bank v. Yoo Jin Sohn*, Case No. 2002-0222, Administrative Panel Decision, 7 May 2002, WIPO [World

disputes to which international organizations are parties, those concerning contractual rights and obligations, which are often governed by a specific national law or general principles of contract law,[754] fall under the category of disputes at the national level. Contractual and tort claims are often seen as giving rise to disputes of a "private law character" in the sense of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations[755] or similar treaty provisions.[756]

(5) The former type of disputes may be qualified as "international disputes" and the latter as "non-international" or as disputes arising under "national" law,[757] or as disputes of a "private law character". However, such distinctions may be difficult to draw in practice, especially because the nature of a dispute may change. A tort claim for personal injury or property damage, giving rise to a dispute of a "private law character", may be transformed into an international claim through its espousal by the victim's home State exercising diplomatic protection.[758] Similarly, like States, international organizations can choose whether they want to regulate their mutual rights and obligations in the form of an instrument governed by international law or in the form of a private law contract.[759] The relationship between individuals working for an international organization may be governed by a contract or by staff rules and

Intellectual Property Organization] Arbitration and Mediation Center. Available at https://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0222.html.

754 See "Legal opinion of the Secretariat of the United Nations on law applicable to contracts concluded by the United Nations with private parties – procedures for settling disputes arising out of such contracts – relevant rules and practices", *United Nations Juridical Yearbook 1976* (United Nations publication, Sales No. E.78.V.5), p. 159, at p. 165; "Legal opinion of the Secretariat of the United Nations on determination of the applicable law to contracts concluded between the United Nations and private parties – 'service contracts' and 'functional contracts' – UNCITRAL [United Nations Commission on International Trade Law] arbitral rules", *United Nations Juridical Yearbook 1988* (United Nations publication, Sales No. E.99.V.1), p. 285. See also August Reinisch, "Contracts between international organizations and private law persons", in Anne Peters and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (online, Oxford University Press, 2021). Available at http://www.mpepil.com/.

755 Art. VIII, sect. 29, of 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 ("The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party").

756 Art. IX, sect. 31, of the Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), *ibid*., vol. 33, No. 521, p. 261.

757 The Commission's terminology has varied. In addition to referring in other topics to "national" law (see, e.g., draft art. 2, para. 3, and draft art. 6 of the draft articles on prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45; draft arts. 14 and 15 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), p. 26, para. 48), it has used the expressions "municipal" law (see, e.g., draft arts. 29 and 38 of the draft articles on consular relations, *Yearbook ... 1961*, vol. II, at pp. 109 and 113–114; para. (3) of the commentary to art. 1 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 47 (see also General Assembly resolution 66/100 of 9 December 2011, annex)), "internal" law (see, e.g., arts. 3, 4 and 32 of the articles on responsibility of States for internationally wrongful acts and commentaries thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, at pp. 36–38, 40–42 and 94 (see also General Assembly resolution 56/83 of 12 December 2001, annex)), as well as "domestic" law (see, e.g., paras. (1), (2) and (4) of the commentary to draft art. 9 of the draft articles on consular relations, *Yearbook ... 1961*, vol. II, at pp. 99–100).

758 Jean-Pierre Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), pp. 427–456.

759 See para. (3) of the commentary to draft art. 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), para. 63, at p. 18.

regulations, the latter often considered part of an international organization's internal administrative law.[760]

(6) Furthermore, "non-international" disputes, such as contractual or delictual/tort disputes, may raise important issues determined by international law, such as legal personality, jurisdictional immunity, human rights obligations, in particular the duty to provide for access to justice, or the treaty-based duty to make provision for appropriate modes of settlement of disputes of a private law character.[761]

(7) As a consequence, a sharp distinction between international disputes and non-international ones is often not feasible. To ensure that disputes of a "private law character" and any disputes that may be qualified as "non-international" fall within the scope of the present draft guidelines, the Commission decided not to maintain the word "international" before "disputes" in the present draft guideline 1. As a result, the Commission also decided, on 25 May 2023, to change the title of the topic by deleting the word "international" before "disputes" to make it clear that the draft guidelines would address all kinds of disputes to which international organizations are parties.[762]

(8) International organizations may be subject to various obligations concerning the settlement of disputes to which they are parties. These may be found in, among others, their constituent instruments,[763] multilateral privileges and immunities treaties,[764] or headquarters agreements.[765] Furthermore, international organizations may have agreed to specific forms of dispute settlement in contracts with third parties.[766] It is thus not feasible to design across-the-board draft articles that may eventually form the basis for a treaty. Instead, it seems more apt to restate the existing practices of international organizations concerning the settlement of their disputes and to develop recommendations for the most appropriate way of handling them.[767]

(9) For this purpose, the elaboration of a set of draft guidelines appears to be the most suitable form for the Commission's output, which is intended to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice.[768] While the guidelines

[760] C.F. Amerasinghe, *The Law of the International Civil Service as Applied by International Administrative Tribunals*, 2 vols. (Oxford, Clarendon Press; New York, Oxford University Press, 1988); and Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 6th ed. (Leiden, Brill Nijhoff, 2018), pp. 382 *et seq*.

[761] See, for the United Nations, report of the Secretary-General on procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (A/C.5/49/65), para. 5.

[762] At its 3631st meeting, held on 25 May 2023.

[763] Art. XVIII, paragraph (a), of the Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, 20 August 1971), United Nations, *Treaty Series*, vol. 1220, No. 19677, p. 21.

[764] Art. 32 of the Agreement on the Privileges and Immunities of the International Criminal Court (New York, 9 September 2002), United Nations, *Treaty Series*, vol. 2271, No. 40446, p. 3.

[765] Art. VIII, sect. 21, of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, No. 147, p. 11.

[766] See footnote 761 above.

[767] See para. (2) of the introduction to the Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol II (Part Three), at p. 35 ("The purpose of this Guide is not – or, in any case, not only – to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most appropriate for the progressive development of such rules").

[768] See para. (1) of the general commentary to the Guide to Provisional Application of Treaties, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 52 ("The objective of the Guide is to direct States, international

concern only the settlement of disputes to which international organizations are parties, they may also provide direction for entities that do not strictly fall within the definition of draft guideline 2, subparagraph (*a*). Such entities include regional cooperation forums, which may not possess international legal personality in the same manner as international organizations. However, they may, under national law, be accorded not only legal personality, but also privileges and immunities, including immunity from jurisdiction and enforcement measures, which may affect dispute settlement in a similar way as the immunity enjoyed by international organizations. The guidelines will be mainly concerned with the availability and adequacy of means for the settlement of disputes to which international organizations are parties. They are not intended to elaborate detailed sets of procedural rules.

(10) In addition to the guidelines, the Commission considered whether it should also develop a set of model clauses that may be used in treaties or other instruments governed by international law, as well as in contracts or other national law instruments. It ultimately found, however, that such model clauses would be difficult to agree upon and prone to being misunderstood as too directive. It was thus preferred that the Special Rapporteur prepare a document containing sample clauses on dispute settlement, illustrating the practice of international organizations.[769]

Guideline 2
Use of terms

For the purposes of the present draft guidelines:

(*a*) "international organization" means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members;

(*b*) "private party" means a person or entity other than a State or an international organization;

(*c*) "dispute" means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial;

(*d*) "means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes.

Commentary

(1) Draft guideline 2 provides for the use of four core terms found in draft guideline 1. These terms contribute to delimiting the scope of the draft guidelines.

Subparagraph (a)

(2) The definition of "international organization" in draft guideline 2, subparagraph (*a*), builds on the definition contained in article 2, subparagraph (*a*), of the articles on the responsibility of international organizations, adopted by the Commission in 2011. Draft guideline 2, subparagraph (*a*), outlines the commonly accepted characteristic features of an international organization and stresses the possession of its "own international legal personality" as the paramount characteristic relevant for purposes of dispute settlement.

organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice").

769 Addendum to the third report on the settlement of disputes to which international organizations are parties by the Special Rapporteur (A/CN.4/782/Add.3).

(3) The Commission initially defined "international organizations" merely as "intergovernmental organizations" in its 1966 draft articles on the law of treaties.[770] This definition can be found in several conventions, such as the Vienna Convention on the Law of Treaties,[771] the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[772] the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[773] and the Vienna Convention on Succession of States in respect of Treaties.[774] This definition mainly served the purpose of excluding non-governmental organizations (NGOs). However, the question of the adequacy of merely identifying "international organizations" as "intergovernmental organizations", without further defining them, was raised within the Commission.[775]

(4) With the articles on the responsibility of international organizations, the Commission adopted a more elaborate definition.[776] The simple reference to their "intergovernmental" nature in the previous definition was criticized as too narrow because several organizations consisted of members other than States: in particular, other international organizations.[777] Article 2, subparagraph (*a*), of the articles on the responsibility of international organizations defined an "international organization" as

> an organization established by treaty or other instrument governed by international law and possessing its own international legal personality.

[770] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, at pp. 177–274.

[771] Art. 2, para. 1 (*i*), of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 ("'international organization' means an intergovernmental organization").

[772] Art. 2, para. 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference)*, vol. II, document A/CONF.129/15 (reproduced in A/CONF.129/16/Add.1 (Vol. II)) ("'international organization' means an intergovernmental organization").

[773] Art. 1, para. 1, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), A/CONF.67/16; or *United Nations Juridical Yearbook 1975* (United Nations publication, Sales No. E.77.V.3), p. 87 ("'international organization' means an intergovernmental organization").

[774] Art. 2, para. 1 (n), of the Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3 ("'international organization' means an intergovernmental organization").

[775] Para. (23) to draft art. 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), para. 63, at p. 21 ("the Commission has wondered whether the concept of international organization should not be defined by something other than the 'intergovernmental' nature of the organization").

[776] The Commission's Special Rapporteur, Giorgio Gaja, originally suggested the use of the term "international organization" for "an organization which includes States among its members insofar as it exercises in its own capacity certain governmental functions". See *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532 (first report on responsibility of international organizations), p. 105, para. 34.

[777] Para. (3) of the commentary to art. 2 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 49 ("First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term 'intergovernmental organization' refers to the constituent instrument or to actual membership. Second, the term 'intergovernmental' is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than Governments. Third, an increasing number of international organizations include among their members entities other than States as well as States").

> International organizations may include as members, in addition to States, other entities.[778]

In this definition, the Commission emphasized that the legal basis of an international organization was to be found at the international level, by referring to an "organization established by treaty or other instrument governed by international law". It did not explicitly refer to the common characteristic feature of organs through which an organization acts, although the existence of "organs" was arguably inherent in the notion of an "organization" and the articles on the responsibility of international organizations even contain a definition of organs,[779] which appears to indicate that organs are integral features of international organizations. The definition in the articles on the responsibility of international organizations further expressly reflected the fact that, in addition to States, other entities might become members of international organizations.[780] Finally, it highlighted that a core feature of an international organization is the possession of its own international legal personality, i.e., a legal personality on the international plane distinct from that of its members. This is particularly important for incurring international responsibility.[781]

(5) Most international organizations are established by treaties regardless of how they may be referred to: they include instruments designated as treaties, conventions, charters, constitutions, statutes, or articles of agreement.[782] In order to cover organizations established on the international plane without a treaty, draft guideline 2, subparagraph (*a*), refers, as an alternative to treaties, to any "other instrument governed by international law". Some international organizations have been set up by resolutions adopted by an international organization[783] or by decisions at conferences of States. An example of the former is the establishment of the United Nations Industrial Development Organization (UNIDO)[784] which was originally a subsidiary organ of the General Assembly of the United Nations.[785] After decisions taken within the United Nations in 1979,[786] it became a United Nations specialized agency when the relationship agreement, accepted by the General Assembly in 1985,[787] entered into force. Examples of organizations established by decisions of conferences include the Asian-African Legal Consultative Organization,[788] the

[778] Art. 2 (a), *ibid*., at p. 49.

[779] Art. 2 (c), *ibid*. ("'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization").

[780] See para. (8) of the commentary to draft guideline 2 below.

[781] Para. (10) of the commentary to article 2 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 50.

[782] Schermers and Blokker, *International Institutional Law* (see footnote 760 above), p. 15.

[783] Institute of International Law, resolution on limits to evolutive interpretation of the constituent instruments of the organizations within the United Nations system by their internal organs, online session (2021), 4 September 2021, first preambular paragraph ("Noting that international organizations are established by multilateral agreements or by decisions of other international organizations").

[784] Constitution of the United Nations Industrial Development Organization (Vienna, 8 April 1979), United Nations, *Treaty Series*, vol. 1401, No. 23432, p. 3. See also Abdulqawi A. Yusuf, "The role of the legal adviser in the reform and restructuring of an international organization: the case of UNIDO", in United Nations (ed.), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999), pp. 329–350.

[785] General Assembly resolution 2152 (XXI) of 17 November 1966.

[786] General Assembly resolution 34/96 of 13 December 1979.

[787] General Assembly resolution 40/180 of 17 December 1985; United Nations, *Treaty Series*, vol. 1412, No. 937, p. 305.

[788] The Asian-African Legal Consultative Organization (originally known as the Asian-African Legal Consultative Committee) was constituted by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria on 15 November 1956, as an outcome of the Asia-Africa Conference, held in Bandung, Indonesia, in April 1955. Asian Legal Consultative Committee Statutes (1956), in "Asian Legal Consultative Committee: first session – New

Organization of the Petroleum Exporting Countries,[789] the Association of Southeast Asian Nations,[790] the Southern African Development Community,[791] and the Nordic Council.[792]

(6) The establishment of international organizations based on an instrument governed by international law is crucial for distinguishing them from NGOs[793] as well as from transnational corporations or multinational enterprises.[794] NGOs and business entities are created on the basis of national law and usually take the various forms available to non-profit entities, such as associations, foundations or charities,[795] or to corporate entities with a profit-making purpose.[796] These entities are not international

Delhi: India, April 18 to 27, 1957" (New Delhi, Caxton Press), p. 7, available at https://www.aalco.int/First%20Session%20New%20Delhi.pdf.

789 See Agreement concerning the creation of the Organization of [the] Petroleum Exporting Countries (OPEC) (Baghdad, 14 September 1960), United Nations, *Treaty Series*, vol. 443, No. 6363, p. 247, Resolution I. 2, para. 1 ("With a view to giving effect to the provisions of Resolution No. I the Conference decides to form a permanent Organization called the Organization of the Petroleum Exporting Countries, for regular consultation among its Members with a view to …").

790 The Association of Southeast Asian Nations (ASEAN) was established by a declaration of the foreign ministers of five States in 1967 (Bangkok Declaration). ASEAN was transformed into an organization through the Charter of the Association of Southeast Asian Nations (ASEAN Charter) (Singapore, 20 November 2007), United Nations, *Treaty Series*, vol. 2624, No. 46745, p. 223.

791 The predecessor of the Southern African Development Community was the Southern African Development Co-ordination Conference. The Southern African Development Co-ordination Conference was established through a series of decisions adopted at conferences of States with incremental institutionalization. On 17 August 1992, the Southern African Development Community was founded at a summit held in Windhoek. See Declaration and Treaty of the Southern African Development Community, available at https://www.sadc.int/sites/default/files/2021-11/Declaration__Treaty_of_SADC_0.pdf.

792 Denmark, Iceland, Norway and Sweden were the founding members of the Nordic Council when it was formed in 1952. See Nordic Co-operation, "The Nordic Council", available at https://www.norden.org/en/information/nordic-council.

793 See Economic and Social Council resolution 1996/31 of 25 July 1996, on the arrangements for consultation with NGOs, para. 12 ("Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements").

794 In United Nations terminology, the notion of "transnational corporations" prevails (see Commission on Transnational Corporations, established by the Economic and Social Council, pursuant to its resolution 1913 (LVII), *Yearbook of the United Nations 1974* (United Nations publication, Sales No. E.76.I.1), vol. 28, part 1, p. 485), whereas the Organisation for Economic Co-operation and Development (OECD) uses the expression "multinational enterprises" (see OECD, *Guidelines for Multinational Enterprises* (2011 ed.)). See also Peter T. Muchlinski, *Multinational Enterprises and the Law*, 3rd ed. (Oxford, Oxford University Press, 2021), pp. 3 *et seq*.

795 A useful definition of NGOs is found in article 1 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (Strasbourg, 24 April 1986), *European Treaty Series*, No. 124 (NGOs are "associations, foundations and other private institutions which …: (a) have a non-profit-making aim of international utility; (b) have been established by an instrument governed by the internal law of a Party; (c) carry on their activities with effect in at least two States; and (d) have their statutory office in the territory of a Party and the central management and control in the territory of that Party or of another Party"). See also Bas Arts, Math Noortmann and Bob Reinalda (eds.), *Non-State Actors in International Relations* (Aldershot, Ashgate, 2001); Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), *Non-State Actors in International Law* (Oxford, Bloomsbury, 2015); Stephan Hobe, "Non-governmental organizations", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. VII (Oxford, Oxford University Press, 2012), p. 716.

796 The Code of Conduct on Transnational Corporations refers to transnational corporations as enterprises "comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making

organizations as understood for the purposes of the present draft guidelines since they are not established by an instrument governed by international law.

(7) Even in the rare instances where an NGO is transformed into an international organization, that international organization is created by an international agreement. For instance, the International Union of Official Travel Organizations was originally an NGO under Swiss law that was subsequently transformed into the World Tourism Organization.[797] Today, the World Tourism Organization is a specialized agency of the United Nations.[798] It was created by States "whose official tourism organisations are Full Members of [the International Union of Official Travel Organizations] at the time of adoption of these Statutes" through ratifying a treaty.[799]

(8) The reference to "a treaty or other instrument governed by international law" reflects the fact that only States, other *sui generis* subjects of international law, such as the Sovereign Order of Malta, and international organizations which possess treaty-making capacity can be parties to an international organization's constituent treaty. It is not intended to exclude entities other than States from subsequently becoming members of an international organization.

(9) The reference to "other entities" than States as potential members of international organizations affirms that even entities not possessing treaty-making capacity may be accepted as members of an organization if the rules of that organization so provide. In this sense, some – in particular technical – international organizations have members that are not sovereign States, but territories or entities with capacities relevant to the respective organizations. For instance, certain territories have been able to become members of the World Trade Organization[800] or of the World Meteorological Organization.[801]

(10) The fact that subparagraph (*a*) considers that an international organization "may include as members, in addition to States, other entities" does not necessarily imply that a plurality of States as members is required. Thus, an international organization may be established by a State and an international organization, as was the case with the Special Court for Sierra Leone.[802] It is also not meant to imply that it always requires States as members. Although rare in practice, international

centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others" (E/1988/39/Add.1, para. 1) and the OECD *Guidelines for Multinational Enterprises* indicate that "multinational enterprises … operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed" (sect. I. Concepts and Principles, para. 4).

797 Statutes of the World Tourism Organization (Mexico City, 27 September 1970), United Nations, *Treaty Series*, vol. 985, No. 14403, p. 339.

798 General Assembly resolution 58/232 of 23 December 2003.

799 Art. 36 of the Statutes of the World Tourism Organization.

800 Art. XII, para. 1, of the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vols. 1867–1869, No. 31874 (permitting membership of "[a]ny … separate customs territory possessing full autonomy in the conduct of its external commercial relations").

801 Art. 3 of the Convention of the World Meteorological Organization (Washington, D.C., 11 November 1947), United Nations, *Treaty Series*, vol. 77, No. 998, p. 143 (permitting membership of "[a]ny territory or group of territories maintaining its own meteorological service").

802 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

organizations may be established by and entirely consist of international organizations, as evidenced by the Joint Vienna Institute.[803]

(11) Nevertheless, the most frequent cases of entities other than States becoming members of international organizations are international organizations. This is particularly true for regional (economic) integration organizations. A number of constituent instruments of international organizations expressly provide for such membership.[804]

(12) Subparagraph (*a*) further specifically mentions the possession of "at least one organ capable of expressing a will distinct from that of its members". This characteristic feature of an international organization is only implicitly found in the 2011 definition of the Commission.[805]

(13) The inclusion of this element in the text of the definition makes explicit the generally accepted view that an international organization must have at least one organ that is capable of expressing the organization's will ("will of its own" or "*volonté distincte*")[806] in order to perform the tasks or functions entrusted to the organization. The concept of an international organization's own will is closely related to the idea that an international organization has a legal personality separate

[803] Agreement for the Establishment of the Joint Vienna Institute (Vienna, 27 and 29 July 1994 and 10 and 19 August 1994), United Nations, *Treaty Series*, vol. 2029, No. 1209, p. 391. The Joint Vienna Institute was established by the Bank for International Settlements, the European Bank for Reconstruction and Development, the International Bank for Reconstruction and Development, the International Monetary Fund and the Organisation for Economic Co-operation and Development. Subsequently, the World Trade Organization also joined.

[804] Art. II, para. 3, of the Constitution of the Food and Agriculture Organization of the United Nations (Quebec, 16 October 1945), *British and Foreign State Papers*, vol. 145, p. 910, provides for the possibility "to admit as a Member of the Organization any regional economic integration organization meeting the criteria set out in paragraph 4 of this Article". That paragraph specifies that "a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters". To date, only the European Union has made use of this option. See *Basic texts of the Food and Agriculture Organization of the United Nations, vols. I and II*, 2017 ed., p. 240. See also art. 4 of the Agreement Establishing the Common Fund for Commodities (Geneva, 27 June 1980), United Nations, *Treaty Series*, vol. 1538, No. 26691, p. 3 ("Membership in the Fund shall be open to: … [a]ny intergovernmental organization of regional economic integration which exercises competence in fields of activity of the Fund").

[805] See text at footnote 779 above.

[806] Éric David, *Droit des Organisations Internationales* (Brussels, Bruylant, 2016), p. 582; Manuel Diez de Velasco Vallejo, *Las Organizaciones Internacionales*, 14th ed. (Madrid, Tecnos, 2006), pp. 46–47; Rosalyn Higgins *et al.*, *Oppenheim's International Law: United Nations* (Oxford, Oxford University Press, 2017), p. 385; Jan Klabbers, *An Introduction to International Organizations Law*, 4th ed. (Cambridge, Cambridge University Press, 2022), p. 12; Shigeru Kozai *et al.*, *Introduction to International Law*, 3rd ed. (Tokyo, Yuhikaku Publishing Co. Ltd., 1988), p. 101; Pierre-Yves Marro, *Rechtsstellung internationaler Organisationen* (Zürich, Dike, 2021), p. 29; Francisco Rezek, *Direito internacional público*, 16th ed. (São Paulo, Editora Saraiva, 2016), pp. 301–302; Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht. Das Recht der Internationalen Organisationen und seine wichtigsten Anwendungsfelder,* 2nd ed. (Munich, C.H. Beck, 2015), p. 4; Schermers and Blokker, *International Institutional Law* (see footnote 760 above), pp. 48 and 1031; Kirsten Schmalenbach, "International organizations or institutions, general aspects", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. V (Oxford, Oxford University Press, 2012), p. 1128; Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 7th ed. (Köln, Carl Heymanns, 2000), p. 7.

from its members,[807] or, as the International Court of Justice put it, "a certain autonomy", and that through such organs international organizations can pursue "common goals".[808]

(14) International organizations regularly possess numerous organs, such as plenary organs, in which all members are represented, executive ones with a more restricted composition, secretariats and often expert or judicial organs with individuals serving in their personal capacities.[809] That a minimum of one organ is required to distinguish an organization from a mere treaty-based form of cooperation seems inherent in the notion of "organization".[810]

(15) The will of organizations is formed through the decision-making procedures to be adhered to by their organs pursuant to the rules of the various organizations. These decision-making procedures may range from different forms of majority voting to unanimity, consensus or other techniques. So-called member-driven or forum-like organizations, operating on the basis of unanimity and expressing the collective will of their members, can also be considered to express the organizations' own will.

(16) Subparagraph (*a*) reaffirms the requirement of the possession of international legal personality as found in the 2011 definition of the Commission in the articles on the responsibility of international organizations. Such personality is required for the purposes of entering into treaties, incurring international responsibility or, in the present context, for raising international claims or being the respondent to such claims, or more generally being a party before an international dispute settlement mechanism.

(17) There exists a long-standing scholarly debate about the source of such personality.[811] According to the "will theory",[812] international organizations derive their international legal personality from the express or implied will of the entities

[807] See para. (10) of the commentary to art. 2 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 50 (referring to "the requirement in article 2, subparagraph (*a*), that the international legal personality should be the organization's 'own', a term that the Commission considers as synonymous with the phrase 'distinct from that of its member States'").

[808] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19 (characterizing the object of constituent instruments of international organizations as "to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals").

[809] See Celso D. de Albuquerque Mello, *Curso de Direito Internacional Público*, vol. I, 12th ed. (Rio de Janeiro, Renovar, 2000), pp. 577–579; José E. Alvarez, *International Organizations as Law-makers* (Oxford, Oxford University Press, 2005), p. 9; Jean Combacau and Serge Sur, *Droit international public*, 13th ed. (Paris, LGDJ, 2019), pp. 782 *et seq*.; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (see footnote 806 above), pp. 101–109.

[810] Antônio Augusto Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2nd ed. (Brasília, Fundação Alexandre de Gusmão, 2017) p. 336; Mathias Forteau *et al.*, *Droit international public*, 9th ed. (Paris, LGDJ, 2022), p. 861; Inés Martínez Valinotti, *Derecho Internacional Público* (Asunción, Colección de Estudios Internacionales, 2012), p. 229.

[811] Heber Arbuet-Vignali, "Las organizaciones internacionales como sujetos del derecho internacional", in Eduardo Jiménez de Aréchaga, Heber Arbuet-Vignali and Roberto Puceiro Ripoll (eds.), *Derecho Internacional Público: Principios, normas y estructuras*, vol. I (Montevideo, Fundación de Cultura Universitaria, 2005), pp. 154–156; David J. Bederman, "The souls of international organizations: legal personality and the lighthouse at Cape Spartel", *Virginia Journal of International Law*, vol. 36, No. 2 (1996), pp. 275–377; Chris Osakwe, "Contemporary Soviet doctrine on the juridical nature of universal international organizations", *American Journal of International Law*, vol. 65, No. 3 (July 1971), pp. 502–521; Manuel Rama-Montaldo, "International legal personality and implied powers of international organizations", *The British Yearbook of International Law*, vol. 44 (1970), pp. 111–155.

[812] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 6th ed. (London, Sweet and Maxwell, 2009), p. 479; Ruffert and Walter, *Institutionalisiertes Völkerrecht* (see footnote 806 above), p. 58. See also Grigory I. Tunkin, "The legal nature of the United Nations", *Recueil des Cours*, vol. 119 (1966-III), pp. 1–68.

creating them. Pursuant to the "objective personality theory", their international legal personality stems from their mere existence.[813] A third, compromise approach[814] asserts that the international legal personality of an international organization can be presumed, when it performs acts that require such separate personality.

(18) In the past, international legal personality was only rarely explicitly conferred upon an international organization in its constituent instrument. Since the 1990s, however, the practice of including explicit clauses seems to have become more common.[815] Thus, the international legal personality of international organizations regularly had to be deduced from the powers conferred upon them.

(19) This was the approach of the International Court of Justice in the *Reparation for Injuries* advisory opinion.[816] Therein, the Court derived the international legal personality of the United Nations from the Charter-based rights of the Organization, which required its Members to assist it and to accept and carry out Security Council decisions, as well as from its privileges and immunities and its powers to conclude international agreements. The Court found that

> the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.[817]

Since most international organizations perform at least some similar acts, having been either explicitly or implicitly empowered to do so, it seems safe to conclude that most international organizations enjoy international legal personality as a result. In fact, without possessing such personality, an international organization could not carry out

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[813] Originally developed in a series of contributions by Finn Seyersted. See Finn Seyersted, "International personality of intergovernmental organizations: do their capacities really depend upon their constitutions?", *Indian Journal of International Law*, vol. 4 (1964), pp. 1–74; Finn Seyersted, "Is the international personality of intergovernmental organizations valid vis-à-vis non-members?", *ibid*., pp. 233–268; Finn Seyersted, "Objective international personality of intergovernmental organizations: do their capacities really depend upon the conventions establishing them?", *Nordisk Tidsskrift for International Ret*, vol. 34 (1964), pp. 1–112. See also Pierre d'Argent, "La personnalité juridique de l'organisation internationale", in Evelyne Lagrange and Jean-Marc Sorel (eds.), *Droit des organisations internationales* (Paris, LGDJ, 2013), p. 452; Dapo Akande, "International organizations", in Malcolm D. Evans (ed.), *International Law*, 6th ed. (Oxford, Oxford University Press, 2024), pp. 254–256.

[814] Jan Klabbers, "Presumptive personality: the European Union in international law", in Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer Law International, 1998), p. 231; Angelo Golia Jr and Anne Peters, "The concept of international organization", in Jan Klabbers (ed.), *The Cambridge Companion to International Organizations Law* (Cambridge, Cambridge University Press, 2022), p. 37.

[815] See, e.g., art. 10, sect. 1, of the Agreement Establishing the International Fund for Agricultural Development (Rome, 13 June 1976), United Nations, *Treaty Series*, vol. 1059, No. 16041, p. 191 ("The Fund shall possess international legal personality"); art. 176 (with regard to the International Seabed Authority) of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3 ("The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes"); art. 34 of the Additional Protocol to the Asunción Treaty on the Institutional Structure of Mercosur [Southern Common Market] (Ouro Preto, 17 December 1994), *ibid*., vol. 2145, annex A, No. A-37341, p. 298 ("Mercosur shall possess legal personality of international law"); art. 4, para. 1, of the Rome Statute of the International Criminal Court (Rome, 17 July 1998), *ibid.*, vol. 2187, No. 38544, p. 3 ("The Court shall have international legal personality"); art. I, para. 2, of the Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization (Vienna, 2 September 2010), *ibid*., vol. 2751, No. 48545, p. 81 ("The Academy shall possess full international legal personality").

[816] *Reparation for injuries suffered in the service of the United Nations* (see footnote 750 above).

[817] *Ibid.*, p. 179.

its functions.[818] Therefore, it is generally accepted that international organizations possess international legal personality.[819]

(20) In the *Reparation for Injuries* advisory opinion, the Court, which was asked whether the United Nations had the power to bring an international claim against a non-Member State, also found that it had "objective international personality",[820] implying that the personality of the United Nations had effect not only for its members, but also for third States. While it was argued that such "objective international personality" appertained only to the United Nations, allowing non-Member States to refuse to recognize other international organizations,[821] recent practice indicates that other international organizations are also generally considered to possess such personality.[822] Nevertheless, formal or implied recognition, e.g.,

[818] See also the opinion of the International Court of Justice in the International Fund for Agricultural Development (IFAD) case, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, *Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 36, para. 61, in which it found that "the Global Mechanism [of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa,] had no power and has not purported to exercise any power to enter into contracts, agreements or 'arrangements', internationally or nationally". This led the Court to conclude that in the absence of a separate legal personality, the Global Mechanism had to "identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations", which included IFAD employing staff members working for the Global Mechanism.

[819] See paras. (7) *et seq*. of the commentary to art. 2 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 50; Schermers and Blokker, *International Institutional Law* (see footnote 760 above), pp. 1031 *et seq*.; James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford, Oxford University Press, 2019), p. 157; Paola Gaeta, Jorge E. Viñuales and Salvatore Zappalà, *Cassese's International Law*, 3rd ed. (Oxford, Oxford University Press, 2020), pp. 143–145; Golia Jr and Peters, "The concept of international organization" (see footnote 814 above), p. 37. See also Tarcisio Gazzini, "Personality of international organizations", in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar Publishing, 2011), p. 33; Zewei Yang (ed.), *Liang Xi's International Organization Law–Principles and Practices*, 7th ed. (Wuhan, Wuhan University Press, 2022), pp. 4–5. There remains controversy over the international legal personality and the status of organizations such as the Organization for Security and Cooperation in Europe (OSCE). See Niels M. Blokker and Ramses A. Wessel, "Revisiting questions of organisationhood, legal personality and membership in the OSCE: the interplay between law, politics and practice", in Manteja Steinbrück Platise, Carolyn Moser and Anne Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, 2019), pp. 135–164.

[820] *Reparation for injuries suffered in the service of the United Nations* (see footnote 750 above), p. 185.

[821] See, e.g., the Soviet Union policy of non-recognition of the European Economic Community. Sands and Klein, *Bowett's Law of International Institutions* (see footnote 812 above), p. 480; Schermers and Blokker, *International Institutional Law* (see footnote 760 above), pp. 1238 *et seq*.

[822] See Akande, "International organizations" (see footnote 813 above), pp. 255 ("Thus, international organizations with a membership consisting of the vast majority of the international community possess objective international personality. However, it is important to note that the Court did not say that only such organizations possess objective personality and there are good reasons of practice and principle for concluding that the personality possessed by any international organization is objective and opposable to non-members. In practice, 'no recent instances are known of a non-member State refusing to acknowledge the personality of an organization on the ground that it was not a member State and had not given the organization specific recognition' (Amerasinghe, 2005, p. 87)"); and Crawford, *Brownlie's Principles of Public International Law* (see footnote 819 above), p. 160 ("Although the Court conditioned its opinion on the quantity and standing of the founding Members of the [United Nations], there are good reasons for applying this proposition to *all* international organizations, and in practice this has occurred").

through the conclusion of treaties or the establishment of official relations, may serve as supporting evidence of the international legal personality of international organizations.[823]

(21) The existence of organs through which an international organization will perform the powers entrusted to it is usually easier to ascertain than the possession of international legal personality.

(22) In doctrine concerning international organizations, the correlation between the possession of organs and of international legal personality is sometimes regarded as a consequential one, in the sense that the possession of organs permitting an international organization to express an independent will results in its possession of international legal personality.[824] Others take the view that the two should be treated as totally separate.[825] The present draft guideline 2, subparagraph (*a*), does not prejudge either position.

Subparagraph (b)

(23) The definition of "private party" in draft guideline 2, subparagraph (*b*), mirrors article 33, paragraph 2, of the articles on the responsibility of international organizations, adopted by the Commission in 2011.[826]

(24) The comprehensive nature of this definition, which encompasses all persons and entities other than States or international organizations, corresponds to the aim of the guidelines to cover all kinds of disputes to which international organizations are parties. This has been made clear through the change to the title of the topic.[827] While Part Two addresses disputes between international organizations as well as disputes between international organizations and States, not excluding disputes between international organizations and other subjects of international law,[828] Part Three addresses disputes between international organizations and private parties.

(25) "Private parties" primarily comprise natural and legal persons under national law, such as individuals, corporations, including transnational corporations or multinational enterprises, associations, foundations, charities, NGOs and similar entities.

(26) In practice, the most frequent disputes between international organizations and private parties concern employment[829] or similar relationships between international organizations and individuals through which the latter provide services on a permanent or temporary basis.[830] Equally, individuals routinely provide professional services, such as consulting work, which may give rise to disputes.

(27) Furthermore, individuals may be harmed by the operational activities of international organizations, ranging from vehicle collisions or slip-and-fall accidents on the premises of international organizations to life- and health-threatening harm

[823] The practice at the United Nations of granting observer status to international organizations can be regarded as a recognition of the status of an entity as an international organization. See Miguel de Serpa Soares, "Responsibility of international organizations", *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, International and Comparative Law Research Center, 2022), p. 100.

[824] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), pp. 10–11; August Reinisch, *International Organizations Before National Courts* (Cambridge, Cambridge University Press, 2000), p. 6.

[825] See Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge, Cambridge University Press, 2018), pp. 72–79.

[826] *Yearbook ... 2011*, vol. II (Part Two), para. 87, at p. 43.

[827] See para. (7) of the commentary to draft guideline 1 above.

[828] See para. (9) of the commentary to draft guideline 3 below.

[829] See para. (5) of the commentary to art. 33 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 79.

[830] Third report on the settlement of disputes to which international organizations are parties by the Special Rapporteur (A/CN.4/782), paras. 15 and 188.

caused by peacekeeping or military operations,[831] such as in the dispute between Belgium and the United Nations concerning harm suffered by Belgian nationals in the course of United Nations military operations,[832] *Haiti cholera*[833] and the *Srebrenica* case.[834] The latter situations, in particular, raise difficult questions in terms of qualifying the type of claims and disputes,[835] but they clearly involve individuals as private parties in disputes with international organizations.

(28) Individuals and groups may also be harmfully affected by other operational activities of international organizations, such as the financing of infrastructure projects that threaten their habitats and livelihoods, as in *Jam et al. v. International Finance Corporation*.[836] Other examples include claims before the World Bank Inspection Panel concerning inadequate consultation, loss of livelihoods and food security,[837] involuntary or economic displacement,[838] impoverishment during resettlement and harm to Indigenous Peoples.[839]

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[831] See para. (5) of the commentary to art. 33 of the articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), paras. 87–88, at p. 79.

[832] Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals. See para. (12) of the commentary to draft guideline 7 below. See also Kristen E. Boon, "The United Nations as Good Samaritan: immunity and responsibility", *Chicago Journal of International Law*, vol. 16, No. 2 (2016), pp. 341–385; and A. Walter Dorn and David J. H. Bell, "Intelligence and peacekeeping: the UN Operation in the Congo, 1960–1964", *International Peacekeeping*, vol. 2, No. 1 (Spring 1995), pp. 11–33.

[833] United States, Court of Appeals for the Second Circuit, *Georges and others v. United Nations and others*, Case No. 15-455, 834 F.3d 88 (2nd Cir. 2016), Appeal Judgment, 18 August 2016; United States, Supreme Court, *LaVenture et al. v. United Nations et al.*, 279 F.Supp.3d 394 (E.D.N.Y. 2017), aff'd 746 F.App'x 80 (2d Cir. 2018), cert. denied, 140 S.Ct. 108, 7 October 2019; United States, District Court of the Southern District of New York, *Jean-Robert et al. v. United Nations et al.*, No. 14 CV 1545, 2014 WL 883601 (S.D.N.Y. 2014), 6 March 2014. See also Kristina Daugirdas, "Reputation and the responsibility of international organizations", *The European Journal of International Law*, vol. 25, No. 4 (November 2014), pp. 991–1018; Melina Garcin, "The Haitian cholera victims' complaints against the United Nations", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 75 (2015), pp. 671–705; Riccardo Pavoni, "Choleric notes on the *Haiti Cholera Case*", *Questions of International Law*, vol. 19 (2015), pp. 19–41; Mara Pillinger, Ian Hurd and Michael N. Barnett, "How to get away with cholera: the UN, Haiti, and international law", *Perspectives on Politics*, vol. 14, No. 1 (March 2016), pp. 70–86. See also A/HRC/25/71.

[834] Netherlands, Supreme Court, *Stichting Mothers of Srebrenica and others v. Netherlands and United Nations*, LJN: BW1999, ILDC [International Law in Domestic Courts] 1760 (NL 2012) (available at http://opil.ouplaw.com), Final Appeal Judgment, 13 April 2012. See also Kristen Boon, "The State of the Netherlands v. Respondents & Stichting Mothers of Srebrenica", *American Journal of International Law*, vol. 114, No. 3 (July 2020), pp. 479–486; and Cedric Ryngaert and Otto Spijkers, "The end of the road: State liability for acts of UN peacekeeping contingents after the Dutch Supreme Court's judgment in *Mothers of Srebrenica*", *Netherlands International Law Review*, vol. 66, No. 3 (December 2019), pp. 537–553.

[835] See para. (5) of the commentary to draft guideline 10 below.

[836] United States, Supreme Court, *Jam et al. v. International Finance Corporation*, 139 S. Ct. 759 (2019), 27 February 2019. See also Chimène I. Keitner and Scott Dodson, "*Jam v. International Finance Corp.*", *American Journal of International Law*, vol. 113, No. 4 (October 2019), pp. 805–811; Clemens Treichl and August Reinisch, "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals: the case of *Jam v. International Finance Corporation*", *International Organizations Law Review*, vol. 16, No. 1 (January 2019), pp. 105–136.

[837] See, e.g., Amaravati Sustainable Infrastructure and Institutional Development Project (Project No. P159808), request for inspection No. 17/04, received 25 May 2017.

[838] See, e.g., Nachtigal Hydropower Project (Project No. P157734) and Hydropower Development on the Sanaga River Technical Assistance Project (Project No. P157733), request for inspection No. 22/03, received 30 June 2022.

[839] See, e.g., Natural Resource Management Project (Project No. P095050), Kenya Climate Smart Agriculture Project (Project No. P154784) and Urban Support Program (Project No. P156777), request for inspection No. 19/03, received 15 April 2019.

(29) Legal persons created under national law, such as corporations and other business entities, including transnational corporations or multinational enterprises,[840] frequently enter into commercial relations with international organizations, providing services ranging from construction, supply of office equipment and catering services to the lease of office space. Such relationships equally give rise to disputes.[841]

(30) Some legal persons established under national law, such as State-owned companies, may be viewed as State instrumentalities rather than as private parties under certain circumstances. This has been particularly relevant in the context of State immunity[842] and access to investor–State dispute settlement.[843] In the context of the present draft guidelines, this distinction – though intellectually inspiring – is of lesser practical relevance because it appears that State-owned companies rarely enter into relations with international organizations that trigger disputes, and, if they were to be qualified as States rather than private parties, their disputes with international organizations would be covered by Part Two of the present draft guidelines.

(31) Legal persons pursuing non-profit goals, such as associations, foundations, charities, or NGOs, [844] may also be involved in disputes with international organizations. In some cases, they contract with international organizations in order to provide services, such as in the area of humanitarian relief operations. In other cases, they support affected individuals suffering harm from the activities of international organizations.

Subparagraph (c)

(32) Draft guideline 2, subparagraph (*c*), explaining the term "dispute", builds on the definition contained in the *Mavrommatis Palestine Concessions* judgment[845] and is sufficiently general to encompass legal disputes arising at the international level and under national law whether of a public or private law nature.

(33) Pursuant to the *Mavrommatis* definition, endorsed by the International Court of Justice in numerous cases,[846] a legal dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[847]

(34) The International Court of Justice further clarified that a mere "conflict of … interests" will not necessarily amount to a legal dispute, and that "[i]t must be shown that the claim of one party is positively opposed by the other".[848] Thus, the core

[840] See, para. (6) of the commentary to draft guideline 2 above.

[841] Settlement of disputes to which international organizations are parties, memorandum by the Secretariat (A/CN.4/764), chap. III, sect. B 2. See also para. (6) of the commentary to draft guideline 7 below.

[842] See, art. 2, para. 1 (b), of the United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38 of 2 December 2004, annex.

[843] See, Stephan W. Schill *et al.* (eds.), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd ed. (Cambridge, Cambridge University Press, 2022), pp. 291–293.

[844] See, para. (6) of the commentary to draft guideline 2 above.

[845] *The Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 7.

[846] See, e.g., *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 74; *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, at p. 18, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 40, para. 90; and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 700, para. 130.

[847] *The Mavrommatis Palestine Concessions* (see footnote 845 above), p. 11.

[848] See, e.g., *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 328; *Certain Property*

element of the *Mavrommatis* definition, a disagreement on a point of law or fact, is coupled with the "opposition of views" which can be generally expressed by "claims" that are met with "refusal" in regard to legal points and "assertions" that are met by "denial" in regard to factual points.[849] Many national legal systems rely on similar concepts when defining "disputes".[850]

(35) As in the *Mavrommatis* definition, draft guideline 2, subparagraph (*c*), only refers to disagreements on a point of law or fact and not to mere policy disputes, although it is acknowledged by the Commission that legal disputes may have policy underpinnings. Likewise, the fact that a dispute on a point of law may have political aspects does not deprive it of its legal character.[851]

(36) A disagreement on a point of fact will amount to a legal dispute if the factual assertions and denials are relevant in a legal context, i.e., relate to a point of law.[852]

(37) Given that a dispute implies a disagreement and involves claims and assertions that are positively opposed, it is not necessary to include any reference to potential parties to a dispute. A dispute stems from the fact that at least two persons disagree. Since the topic refers to disputes to which international organizations are parties, it is evident that at least one party to the relevant disagreements will be an international organization. Being a party to a dispute is without prejudice to the question of whether an international organization can be a party to specific legal proceedings at the international or national level.[853] In light of the broad scope of the present draft guidelines, as explained in the commentary to draft guideline 1 above, the other parties may be other international organizations, States, *sui generis* subjects of international law or private parties, including individuals or legal persons under national law, such as companies, associations or NGOs.

(Liechtenstein v. Germany) (see footnote 846 above), p. 18, para. 24 ("for the purposes of verifying the existence of a legal dispute it falls to the Court to determine whether 'the claim of one party is positively opposed by the other'"); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, at p. 26, para. 50 ("It does not matter which one of them advances a claim and which one opposes it. What matters is that 'the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).").

849 See John Merrills and Eric De Brabandere, *Merrills' International Dispute Settlement*, 7th ed. (Cambridge, Cambridge University Press, 2022), p. 1 ("a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another").

850 Jeffrey Lehman and Shirelle Phelps (eds.), *West's Encyclopedia of American Law*, vol. 3, 2nd ed. (Farmington Hills, Thomson Gale, 2005), p. 461 ("DISPUTE: A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other").

851 See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 20, para. 37 ("legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned").

852 See, in particular, Art. 36, para. 2 (c), of the Statute of the International Court of Justice (indicating the jurisdiction of the Court in all legal disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation").

853 Since international organizations cannot be parties before the International Court of Justice, some treaties provide that their disputes with States be settled through requesting an advisory opinion from the Court which the parties agree to accept as binding. See, e.g., art. VIII, sect. 30, of the Convention on the Privileges and Immunities of the United Nations.

Subparagraph (d)

(38) Draft guideline 2, subparagraph (*d*), is inspired by Article 33 of the Charter of the United Nations.[854] It does not define dispute settlement. Rather, it lists the available means of dispute settlement in international and national law. This is also reflected by the use of the verb "refers" instead of "means". The draft guideline's wording follows closely the provision found in the Charter of the United Nations. Its broad formulation, including the open-ended element of "other peaceful means of resolving disputes", is meant to ensure that all potential means of dispute settlement both at the international level as well as at the national level are covered.

(39) Article 33 of the Charter of the United Nations captures the scope of possible settlement methods from purely *inter partes* attempts to settle a dispute, starting with negotiations, to increased involvement of non-disputing third parties.[855] As the International Court of Justice has held, in its advisory opinion in *Reparation for Injuries*, these forms of dispute settlement are generally also available to international organizations.[856] Of course, especially in the case of arbitration and adjudication, the applicable jurisdictional requirements will have to be fulfilled in order to allow international organizations to sue or to be sued.

(40) In order to preserve all means referenced in Article 33, draft guideline 2, subparagraph (*d*), maintains the wording "resort to regional agencies or arrangements", although it is most likely that such resort would take the form of one of the other means of dispute settlement listed. To date, such resort appears to have been limited in practice, but it does not seem excluded that, in a specific situation, a subregional organization may be subject to dispute settlement under a regional arrangement.

(41) Draft guideline 2, subparagraph (*d*), contains only a list of available means and does not imply an order in which dispute settlement means have to be resorted to. This is also underlined by the fact that draft guideline 2, subparagraph (*d*), "refers to" these means and does not state that the parties to a dispute "shall … seek a solution by" resorting to them. Therefore, it is not necessary to keep the words "of their own choice" as contained in Article 33 of the Charter.

(42) The phrase "of their own choice" is also deliberately omitted because, in some situations, international organizations may be subject to specific dispute settlement obligations pursuant to their constituent instruments, headquarters agreements or private law contracts.[857]

(43) Draft guideline 2, subparagraph (*d*), lists "means of dispute settlement" and does not refer to an obligation to seek a solution of certain disputes, as Article 33 of the Charter does. It is clear that such a provision, found in a draft guideline entitled "Use of terms", cannot be understood as such to lead to an obligation to seek a solution or to actually resolve a dispute.

Part Two
Disputes between international organizations as well as disputes between international organizations and States

Guideline 3

[854] Art. 33, para. 1, of the Charter of the United Nations ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

[855] Christian Tomuschat, "Article 33", in Bruno Simma *et al*. (eds.), *The Charter of the United Nations: A Commentary*, vol. II, 3rd ed. (Oxford, Oxford University Press, 2012), p. 1076, para. 23.

[856] *Reparation for injuries suffered in the service of the United Nations* (see footnote 750 above), p. 178.

[857] See para. (8) of the commentary to draft guideline 1 above.

Scope of the present Part

The present Part addresses disputes between international organizations as well as disputes between international organizations and States.

Commentary

(1) Draft guideline 3 sets out the scope of Part Two of the draft guidelines. Part Two is entitled "Disputes between international organizations as well as disputes between international organizations and States". Draft guideline 3 is not intended to be a definition of certain types of disputes. Rather, it lays out the scope of Part Two by outlining which disputes are addressed therein.[858]

(2) Disputes between international organizations have been rare in practice. They concern matters arising from joint projects, issues concerning operational activities and/or their funding.[859] Few instances have led to third-party dispute settlement procedures.[860]

(3) Disputes between international organizations and States occur more frequently.[861] They range from headquarters-related disputes between organizations and their host States, to disputes involving the privileges and immunities enjoyed by international organizations and persons connected with them, to disputes concerning the withdrawal from membership. They may also relate to the scope of the powers of organizations or the compliance of member States with their obligations.

(4) An example of a dispute between international organizations and States concerning rights and obligations under headquarters or seat arrangements can be found in the advisory opinion of the International Court of Justice in the *WHO Regional Office* case,[862] which addressed the question under what conditions and modalities a specialized agency's regional office might be transferred. Another example is the *PLO Mission* case,[863] which determined whether a dispute had arisen between the United Nations and the United States of America that had triggered the obligation to arbitrate under the Headquarters Agreement. Privileges and immunities of international organizations, their officials and State representatives may give rise to disputes between international organizations and States. They are routinely handled through direct consultations, including in host country committees.[864] Sometimes, however, they may lead to arbitration. Examples of this are the *EMBL-Germany* case,[865] assessing the scope of tax privileges of an international organization,

[858] The reasons for which the Commission has decided to introduce a distinction between two categories of disputes (those between international organizations and international organizations and States on the one hand, and those between international organizations and private parties on the other hand) are presented in the statement of the Chair of the Drafting Committee delivered on 31 May 2024 (https://legal.un.org/ilc/documentation/english/statements/2024_dc_chair_statement_sidio.pdf).

[859] Second report on the settlement of disputes to which international organizations are parties by the Special Rapporteur (A/CN.4/766), para. 15.

[860] See, e.g., Permanent Court of Arbitration, *International Management Group v. European Union, represented by the European Commission*, Cases No. 2017-03 and No. 2017-04. See https://pca-cpa.org/ en/cases/157/ and https://pca-cpa.org/en/cases/158/.

[861] A/CN.4/764, chap. II, sect. B 1.

[862] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 748 above).

[863] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (see footnote 749 above).

[864] See, e.g., Committee on Relations with the Host Country, established pursuant to General Assembly resolution 2819 (XXVI) of 15 December 1971.

[865] *European Molecular Biology Laboratory (EMBL) v. Germany* (see footnote 747 above).

and the *UNESCO Tax Regime* case,[866] concerning the tax privileges of an international organization's retired officials. They also may result in judicial pronouncements, such as in the advisory opinion with binding effect[867] of the International Court of Justice in the *Cumaraswamy* case,[868] wherein the Court found that Malaysia had to respect the jurisdictional immunity of the Special Rapporteur on the independence of judges and lawyers when acting in the course of the performance of his mission.

(5) In some regional economic integration organizations, disputes between international organizations and their member States arise with more frequency than in organizations with a lesser degree of integration. Their constituent treaties sometimes provide for recourse to courts before which members can challenge the legality of acts of the organs of organizations in proceedings often termed "annulment actions"[869] and where the compliance of member States with the law of the respective organizations can be tested by their organs in "infringement actions".[870]

(6) To the extent that regional economic integration organizations exercise powers conferred by their member States, they may also act as substitute for them in disputes with third States. This is the case in the World Trade Organization, where the European Union, a founding member of the organization,[871] regularly takes part in the quasi-judicial dispute settlement system offered by the organization to settle its trade disputes with third countries.[872] Since the World Trade Organization is open to any "separate customs territory",[873] other regional economic integration

[866] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 746 above).

[867] Art. VIII, sect. 30, of the Convention on the Privileges and Immunities of the United Nations; and art. IX, sect. 32, of the Convention on the Privileges and Immunities of the Specialized Agencies. See also Roberto Ago, "'Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85 (1991), pp. 439–451; Guillaume Bacot, "Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I. et de la C.I.J.", *Revue générale de droit international public*, vol. 84 (1980), pp. 1027–1067.

[868] *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.

[869] See, e.g., art. 263 of the Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, No. C 115 (9 May 2008), p. 162; art. 22, para. (b), of the Convention on the Statute of the Central American Court of Justice (Panama City, 10 December 1992), United Nations, *Treaty Series*, vol. 1821, No. 31191, p. 279; arts. 17 *et seq*. of the Treaty Creating the Court of Justice of the Cartagena Agreement (Cartagena, 28 May 1979), *International Legal Materials*, vol. 18 (1979), p. 1203 (concerning the Andean Community), as amended by the Protocol of Cochabamba Amending the Treaty Creating the Court of Justice of the Cartagena Agreement (Cochabamba, 28 May 1996), available at https://www.wipo.int/wipolex/en/treaties/details/401; art. 9, para. 1 (c), of the Protocol on the Community Court of Justice (Abuja, 6 July 1991), United Nations, *Treaty Series*, vol. 2375, No. 14843, p. 178 (concerning the Economic Community of West African States – ECOWAS), as amended by the Supplementary Protocol Amending the Protocol on the Community Court of Justice (Accra, 19 January 2005), ECOWAS document A/SP.1/01/05; art. 15, para. 2, of Règlement n°1 1/96/CM portant Règlement des procédures de la Cour de Justice de l'Union Économique et Monétaire Ouest Africaine (Rules of Procedure of the Court of Justice of the West African Economic and Monetary Union) (5 July 1996).

[870] See, e.g., arts. 258 and 259 of the Consolidated version of the Treaty on the Functioning of the European Union; arts. 23 *et seq*. of the Protocol of Cochabamba Amending the Treaty Creating the Court of Justice of the Cartagena Agreement; art. 9, para. 1 (d), of the Protocol on the Community Court of Justice (ECOWAS), as amended by the Supplementary Protocol; art. 15, para. 1, of the Rules of Procedure of the Court of Justice of the West African Economic and Monetary Union. See, in detail, A/CN.4/766, paras. 159 *et seq*.

[871] Art. XI, para. 1, of the Marrakesh Agreement Establishing the World Trade Organization.

[872] World Trade Organization, "The European Union and the WTO: disputes involving the European Union (formerly EC) – cases", available at https://www.wto.org/english/thewto_e/countries_e/ european_communities_e.htm.

[873] Art. XII, para. 1, of the Marrakesh Agreement Establishing the World Trade Organization.

organizations may also become members of this organization and thus participate in this form of dispute settlement. International organizations may also become parties to the United Nations Convention on the Law of the Sea[874] and take part in the dispute settlement procedures provided for therein.[875] To date, few disputes to which international organizations are parties have been brought before the International Tribunal for the Law of the Sea.[876]

(7) Most disputes between international organizations or disputes between international organizations and States arise under international law.[877] They may concern questions of treaty interpretation and application. Disputes between international organizations and States may also concern customary international law, such as the dispute that formed the background to the advisory opinion of the International Court of Justice in the *Reparation for Injuries* case[878] or the dispute between Belgium and the United Nations concerning harm suffered by Belgian nationals in the course of United Nations military operations.[879]

(8) While the disputes addressed in Part Two generally arise under international law, that does not exclude the possibility that disputes may also arise under domestic law. International organizations and States may subject agreements that they have entered into to domestic law.[880] There does not appear to be frequent practice in this regard, but examples of a service[881] and a loan[882] agreement between international organizations and sub-State entities that have given rise to arbitration and judicial settlement illustrate this possibility.[883]

(9) The formulation of draft guideline 3, specifying that Part Two addresses disputes between international organizations as well as disputes between international organizations and States, does not exclude the possibility that disputes may arise between international organizations and *sui generis* subjects of international law.[884]

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874 Art. 305, para. 1 (f), and annex IX, art. 1, of the United Nations Convention on the Law of the Sea; 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), United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

875 Annex IX, art. 7, of the United Nations Convention on the Law of the Sea.

876 See, e.g., *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000*, p. 148.

877 See paras. (2)–(7) of the commentary to draft guideline 1 above. See also *Yearbook ... 2016*, vol. II (Part Two), annex I, para. 3.

878 *Reparation for injuries suffered in the service of the United Nations* (see footnote 750 above).

879 Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals.

880 See para. (3) of the commentary to draft art. 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), para. 63.

881 Permanent Court of Arbitration, *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)*, Case No. 2014-38. Available at https://pcacases.com/web/view/109.

882 Community Court of Justice of the Economic Community of West African States, *ECOWAS Bank for Investment and Development v. Cross River State*, Judgment No. ECW/CCJ/JUD/01/21, 5 February 2021.

883 See A/CN.4/766, para. 21.

884 For instance, the Sovereign Order of Malta, which has retained treaty-making powers and the right to send and receive diplomatic representatives (see second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752), paras. 126–137), as well as other entities that may have treaty-making capacity in certain circumstances, such as insurgents, have traditionally been considered to be *sui generis* subjects of international law. See Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague, T.M.C. Asser Press, 2004); Roland Portmann, *Legal Personality in International Law* (Cambridge, Cambridge University Press, 2010), pp. 5–28; Crawford, *Brownlie's Principles of Public International Law* (see footnote

Since there appears to be hardly any practice concerning disputes between international organizations and such subjects of international law, it does not seem necessary to expressly mention them in the text of draft guideline 3. It is, however, understood that, should such disputes arise, they would also be covered by Part Two.

(10) Private parties, including individuals or legal persons under national law such as corporations or associations, can also be viewed as subjects of international law to the extent that they are direct bearers of rights and/or obligations under international law, as in the fields of international human rights law or international criminal law.[885] Private parties regularly enjoy certain rights with regard to the settlement of disputes stemming from treaty or customary international law guaranteeing access to justice and due process.[886] Their disputes with international organizations are addressed in Part Three of the present draft guidelines.

Guideline 4
Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute.

Commentary

(1) Draft guideline 4 generally recommends that the disputes covered by Part Two be settled by resorting to appropriate means of dispute settlement.

(2) In practice, international organizations settle their disputes with other international organizations and States by having recourse to all means of dispute settlement referred to in draft guideline 2, subparagraph (*d*).[887] Since disputes are often settled in a confidential manner, it is difficult to precisely assess the actual use and frequency of specific dispute settlement means. However, both international organizations and States often express a preference for "amicable" methods of dispute settlement, in the form of direct negotiations and/or having recourse to diplomatic

819 above), pp. 105–116; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 14th ed. (Paris, Dalloz, 2018), pp. 27–30.

885 See, e.g., Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 3rd revised ed. (Leiden/Boston, Brill Nijhoff, 2020), pp. 213–273; Louis Henkin, "International law: politics, values and functions", *Recueil des Cours*, vol. 216 (1989), pp. 33–35; Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), pp. 27–72; Manuel Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), pp. 301–302; José E. Alvarez, "Are corporations 'subjects' of international law?", *Santa Clara Journal of International Law*, vol. 9, No. 1 (2011), pp. 1–36; Hernán Valencia Restrepo, *Derecho Internacional Público*, 4th ed. (Medellín, Librería Jurídica Sánchez R Ltda., 2016), paras. 371–377; Raymond Ranjeva and Charles Cadoux, *Droit international public* (Vanves, Edicef, 1992), p. 127.

886 Art. 10 of the Universal Declaration of Human Rights, General Assembly resolution 217 (III) [A] of 10 December 1948; art. 6, para. 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221; art. 14, para. 1, of the International Covenant on Civil and Political Rights (New York, 16 December 1966), *ibid*., vol. 999, No. 14668, p. 171; art. 8 para. 1, of the American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), *ibid*., vol. 1144, No. 17955, p. 123; art. 7, para. 1, of the African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid*., vol. 1520, No. 26363, p. 217. See also Francesco Francioni, "The rights of access to justice under customary international law", in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1–55; Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2021).

887 See the overview in A/CN.4/766, paras. 27–198; see also A/CN.4/764.

means.[888] This suggests that they aim at settling disputes without resorting to independent third-party adjudication, in the form of arbitration or judicial settlement. To what extent the availability of the latter types of dispute settlement facilitates amicable dispute settlement is difficult to assess empirically, although it appears that such availability may increase the willingness to find a negotiated settlement.[889]

(3) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States by means of peaceful dispute settlement. Draft guideline 2, subparagraph (*d*), encompasses all peaceful means of dispute settlement contained in Article 33 of the Charter of the United Nations, as reaffirmed by the Manila Declaration on the Peaceful Settlement of International Disputes.[890] By broadly referring to means of peaceful dispute settlement, draft guideline 4 makes clear that the recommendation does not prioritize any specific means of dispute settlement.

(4) The free choice of dispute settlement means is reinforced by the additional language of draft guideline 4 referring to means "that may be appropriate to the circumstances and the nature of the dispute". This language is inspired by paragraph 5 of the Manila Declaration, which refers to "such peaceful means as may be appropriate to the circumstances and the nature of their dispute". Depending on the nature of the dispute and the circumstances, certain forms of dispute settlement may be more appropriate than others. Where a dispute mainly involves a disagreement over facts, enquiry or fact-finding may be a more appropriate method of dispute settlement, while a dispute concerning the existence of a legal obligation may be more aptly settled through arbitration or judicial settlement.

(5) Draft guideline 4 recommends resorting to dispute settlement but avoids using language that could be understood as creating a legally binding obligation. Therefore, the term "should" is more appropriate than the expression "shall" in this context.

(6) The recommendatory language is also an acknowledgment that, in some situations, specific means of dispute settlement may be legally provided for in treaties. A number of constituent documents of international organizations,[891] some multilateral privileges and immunities treaties[892] and many bilateral headquarters agreements[893] contain express obligations with regard to the settlement of specific types of disputes to which international organizations are parties. The draft guidelines

[888] De Serpa Soares, "Responsibility of international organizations" (see footnote 823 above), p. 125. See also A/CN.4/764, chap. II, sect. B.

[889] Gerald Fitzmaurice, "The future of public international law and of the international legal system in the circumstances of today", in Institute of International Law (eds.), *Livre du Centenaire 1873–1973. Evolution et perspectives du droit international* (Basel, Editions S. Karger S.A., 1973), pp. 196–363, at p. 276; C. Wilfred Jenks, *The Prospects of International Adjudication* (London, Stevens, 1964), p. 107.

[890] General Assembly resolution 37/10 of 15 November 1982, annex.

[891] See, e.g., art. XIV, para. 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization (London, 16 November 1945), United Nations, *Treaty Series*, vol. 4, No. 52, p. 275; art. XVIII (a) of the Agreement relating to the International Telecommunications Satellite Organization "INTELSAT".

[892] See, e.g., art. VIII, sect. 30, of the Convention on the Privileges and Immunities of the United Nations; art. IX, sect. 32, of the Convention on the Privileges and Immunities of the Specialized Agencies; art. X, sect. 34, of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, No. 5334, p. 147; art. 32 of the Agreement on the Privileges and Immunities of the International Criminal Court.

[893] See, e.g., art. VIII, sect. 21, of the Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11; art. XVII, sect. 35, of the Agreement regarding the Headquarters of the Food and Agriculture Organization of the United Nations (Washington, 31 October 1950), *ibid.*, vol. 1409, No. 23602, p. 521; and art. 29, para. 1, of the Agreement (with annexes) regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory (Paris, 2 July 1954), *ibid.*, vol. 357, No. 5103, p. 3.

do not intend to alter such obligations. By recommending resorting to appropriate means, they acknowledge that, in some situations, specific means may be obligatory.

(7) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States in good faith and in a spirit of cooperation, which is also language inspired by paragraph 5 of the Manila Declaration. This clarifies that good faith and cooperation are underlying obligations that should guide the efforts to settle disputes covered by Part Two.

Guideline 5
Accessibility of means of dispute settlement

Means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.

Commentary

(1) Draft guideline 5 addresses the accessibility of dispute settlement means. While draft guideline 4 recommends the use of appropriate means of peacefully settling disputes to which international organizations are parties, draft guideline 5 addresses the separate issue of whether dispute settlement means are actually available and accessible.

(2) Draft guideline 5 recommends the wider accessibility of means of dispute settlement as referred to in draft guideline 2, subparagraph (*d*). The expression "accessible" has been chosen to emphasize practical issues, such as costs and legal remedies available, and not only the legal availability of means of dispute settlement. The recommendation that means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely "accessible" is intended to focus on the practical use of the different forms of settling disputes to which international organizations are parties.

(3) While amicable forms of dispute settlement, such as negotiations or consultations, are practically always available, other means of dispute settlement, especially those involving neutral third parties, may not be easily available. Whether international organizations or States have, for instance, access to arbitration or judicial settlement in practice mostly depends upon whether such means of dispute settlement have been expressly stipulated.[894] International organizations and States are always free to agree on any form of dispute settlement in an *ad hoc* fashion once a dispute has already arisen. Practice demonstrates, however, that such forms of *ex post* agreement to resolve disputes by arbitration or judicial settlement rarely occur.[895] Thus, to make them practically available, a recommendation to make such forms of dispute settlement more widely accessible appears useful.

(4) Like draft guideline 4, draft guideline 5 does not establish a hierarchy of different means of dispute settlement. This is stressed by the use of the words "as appropriate" after "[m]eans of dispute settlement, including arbitration and judicial settlement". The words "as appropriate" also align with the idea expressed in draft

[894] See para. (6) of the commentary to draft guideline 4 above. See also A/CN.4/766, paras. 52 *et seq*.

[895] See the rare example of such a *compromis* in Exchanges of Notes Constituting an Agreement for the Settlement of a Dispute Concerning the Taxation Liability of the European Atomic Energy Community (EURATOM) Employees Working in the United Kingdom on the Dragon Project (Brussels, 11 July 1966), United Nations, *Treaty Series*, vol. 639, No. 9147, p. 99, which led to the arbitral award in *Taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, 25 February 1967, UNRIAA, vol. XVIII, p. 503.

guideline 4 that different means of dispute settlement may be appropriate for the settlement of different disputes.

(5) Draft guideline 5 recommends the wider accessibility of all means of dispute settlement and does not prioritize any particular means. The phrase "including arbitration or judicial settlement" was inserted because these methods of dispute settlement are particularly inaccessible if not expressly stipulated. The Commission has noted the problem of limited access to justice for international organizations several times.[896]

(6) The limited access of international organizations to dispute settlement in general, and to the International Court of Justice in particular, has led to repeated calls for broader access of the United Nations and its specialized agencies, as well as international organizations generally, to the Court, including to its contentious jurisdiction.[897]

(7) The recommendation to make means of dispute settlement, including arbitration and judicial settlement, more widely accessible for the settlement of disputes covered by Part Two of the draft guidelines is not intended to encourage resort to specific forms thereof, especially to litigation or arbitration. Rather, it is premised on the notion that the availability and accessibility of such means will contribute to the settlement of disputes by alternative means.[898]

Guideline 6
Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

Commentary

(1) Draft guideline 6 addresses core requirements of the rule of law for the settlement of disputes through arbitration or judicial settlement.

(2) The concept of the rule of law has developed at the national level. Its relevance at the international level, namely with regard to States and international organizations, is strongly supported by the 2012 declaration of the high-level meeting of the General

[896] See, e.g., *Yearbook ... 2002*, vol. II (Part Two), para. 486, noting the inadequacy of available dispute settlement options for international organizations, in particular in regard to responsibility issues. Further, the topics "Arrangements to enable international organizations to be parties to cases before the International Court of Justice" (*Yearbook ... 1968*, vol. II, document A/7209/Rev.1, at p. 233) and "Status of international organizations before the International Court of Justice" (*Yearbook ... 1970*, vol. II, document A/CN.4/230, p. 268, para. 138) have been proposed to be included in the long-term programme of work of the Commission; *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/679, para. 58.

[897] See report of the Secretary-General on a review of the role of the International Court of Justice (A/8382). See also Philippe Couvreur, "Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice", in Emile Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999), pp. 293–323; Ignaz Seidl-Hohenveldern, "Access of international organizations to the International Court of Justice", in A.S. Muller, D. Raič and J.M. Thuránszky (eds.), *The International Court of Justice* (The Hague, Kluwer Law International, 1997), pp. 189–203; Jerzy Sztucki, "International organizations as parties to contentious proceedings before the International Court of Justice?", in Muller, Raič and Thuránszky (eds.), *The International Court of Justice*, pp. 141–167; Tullio Treves, "International organizations as parties to contentious cases: selected aspects", in Laurence Boisson de Chazournes, Cesare P.R. Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsley, New York, Transnational Publishers, 2002), pp. 37–46; International Law Association, final report on accountability of international organisations, *Report of the Seventy-first Conference, held in Berlin, 16–21 August 2004*, pp. 164–234, at pp. 231–233.

[898] See para. (2) of the commentary to draft guideline 4 above.

Assembly on the rule of law at the national and international levels,[899] as well as by the resolutions on the same topic that the General Assembly has adopted annually since the rule of law was put on its agenda in 2006.[900] The General Assembly recognized in its 2012 declaration "that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities".[901]

(3) Draft guideline 6 focuses on arbitration and judicial settlement because it is in these forms of third-party dispute settlement that independence and impartiality, as well as compliance with due process, are most crucial and well established. This does not affect the requirement of independence and impartiality of some other forms of dispute settlement, such as conciliation or mediation.[902]

(4) By requiring the "independence and impartiality of adjudicators", draft guideline 6 refers to the core requirement of the rule of law for those who have been empowered to settle a dispute by adjudication.[903] Independence primarily refers to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of organizational, personal, financial or other close connection to them, whereas impartiality relates more to the views and opinions held by an adjudicator, requiring a lack of bias.[904]

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899 General Assembly resolution 67/1 of 24 September 2012.

900 See, for example, General Assembly resolutions 80/167 of 15 December 2025, 79/126 of 4 December 2024, 78/112 of 7 December 2023, 77/110 of 7 December 2022 and 76/117 of 9 December 2021.

901 General Assembly resolution 67/1, para. 2.

902 See, e.g., arts. 4 and 7, para. 1, of the Permanent Court of Arbitration Optional Conciliation Rules (1996); arts. 12–14 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965), United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159; art. 5 of the Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe (Stockholm, 15 December 1992), *ibid.*, vol. 1842, No. 31413, p. 121; art. 7 of the United Nations Model Rules for the Conciliation of Disputes between States, General Assembly resolution 50/50 of 11 December 1995, annex; art. 3 of the UNCITRAL Mediation Rules, Report of the United Nations Commission on International Trade Law, Fifty-fourth Session (28 June–16 July 2021) (A/76/17), annex III. See also Christian Tomuschat and Marcelo Kohen (eds.), *Flexibility in International Dispute Settlement: Conciliation Revisited* (Leiden, Brill Nijhoff, 2020), pp. 25 *et seq*.

903 General Assembly resolution 67/1, para. 13 ("We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 209, para. 92 (identifying "the right to an independent and impartial tribunal established by law" as an element of the right to a "fair hearing"); Bangalore Principles of Judicial Conduct, document E/CN.4/2003/65, annex (adopted by the Judicial Group on Strengthening Judicial Integrity, The Hague, 25–26 November 2001, and recognized by the Economic and Social Council, in its resolution 2006/23 on strengthening basic principles of judicial conduct (E/2006/99(SUPP), para. 2, as a further development and as complementary to the Basic Principles on the Independence of the Judiciary), fifth preambular paragraph ("WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law") and value 1 ("Judicial independence is a prerequisite to the rule of law"). See also Hélène Ruiz-Fabri and Jean-Marc Sorel (eds.), *Indépendance et impartialité des juges internationaux* (Paris, Pedone, 2010); Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Cambridge, Intersentia, 2023).

904 See, e.g., Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, 2011, General Assembly resolution 66/106 of 9 December 2011, paras. 1–2; UNCITRAL, "Draft code of conduct for arbitrators in international investment dispute resolution and commentary" (A/CN.9/1148), sect. II. C., text of the draft commentary, para. 19.

(5) Independence and impartiality of judges and arbitrators are required in the applicable rules.[905] The core meaning and substantive content of the requirements of independence and impartiality are made more precise by various non-binding instruments[906] or by provisions contained in the statutes of international courts and tribunals,[907] as well as in their rules of procedure.[908] In addition to independence and impartiality, some instruments also refer to integrity, propriety, competence and/or diligence as requirements for adjudicators[909] – concepts that often overlap with and/or complement independence and impartiality.

(6) By requiring "due process", draft guideline 6 refers to the core procedural requirements of adjudicatory third-party dispute settlement.[910] Due process or a fair trial/hearing specifically entails the right to be heard and the right to be heard equally.[911]

(7) Both the independence and impartiality of adjudicators and due process are core elements of the rule of law relevant to dispute settlement. In the practice of the International Court of Justice, these elements are also referred to as requirements of

[905] See, e.g., Arts. 2 and 20 of the Statute of the International Court of Justice (respectively, "The Court shall be composed of a body of independent judges" and "Every member of the Court shall, before taking up [their] duties, make a solemn declaration in open court that [they] will exercise [their] powers impartially and conscientiously"); art. 2, para. 1, of the Statute of the International Tribunal for the Law of the Sea ("The Tribunal shall be composed of a body of 21 independent members"); art. 21, para. 4, of the European Convention on Human Rights ("During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office"); art. 17 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 10 June 1998), available on the website of the African Commission: https://au.int/ (under "Treaties") ("The independence of the judges shall be fully ensured in accordance with international law"); art. 71 of the American Convention on Human Rights ("The position of judge of the [Inter-American Court of Human Rights] or member of the [Inter-American Commission on Human Rights] is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes"); art. 6, para. 7, of the UNCITRAL Arbitration Rules (2021), available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf, and art. 6, para. 3, of Permanent Court of Arbitration, Arbitration Rules (2012), available at https://docs.pca-cpa.org/2025/12/69a3b4e8-pca-arbitration-rules.pdf (referring to an "independent and impartial arbitrator"); art. 18, para. 1, of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 January 2017) ("Every arbitrator must be impartial and independent").

[906] See, e.g., Burgh House Principles on the Independence of the International Judiciary, adopted in 2004 by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals; Bangalore Principles of Judicial Conduct; International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the Council of the International Bar Association on 23 October 2014); A/CN.9/1148.

[907] See, e.g., Arts. 16–17 of the Statute of the International Court of Justice.

[908] See, e.g., rule 4, para. 1, of the Rules of Court of the European Court of Human Rights (15 September 2025). Available from https://prd-echr.coe.int/web/echr/rules-of-court.

[909] See, e.g., values 3, 4 and 6 of the Bangalore Principles of Judicial Conduct.

[910] See Arman Sarvarian *et al.* (eds.), *Procedural Fairness in International Courts and Tribunals* (London, British Institute of International and Comparative Law, 2015), pp. 108–109; Clooney and Webb, *The Right to a Fair Trial in International Law* (see footnote 886 above).

[911] Institute of International Law, resolution on the equality of parties before international investment tribunals, Institute of International Law, *Yearbook*, vol. 80 (2018–2019), Session of The Hague (2019), pp. 1–11 (referring in the preamble to "the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication") (also available from www.idi-iil.org); European Commission for Democracy through Law (Venice Commission), "Report on the rule of law", document CDL-AD(2011)003rev, 4 April 2011, para. 60 ("The rights most obviously connected to the rule of law include … the right to be heard").

the "good administration of justice".[912] The Court, for instance, found that "[t]he principle of equality of the parties follows from the requirements of good administration of justice".[913] It further determined that "the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; [and] the right to equality in the proceedings vis-à-vis the opponent" are elements of the well-recognized right to a fair hearing.[914] It also considered "the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case" as well as "the right to equality in the proceedings vis-à-vis the opponent" to be "elements of the right to a fair hearing".[915]

(8) In light of the general acceptance that the independence and impartiality of adjudicators and due process are not merely aspirations, but legal obligations under applicable rules of international law, draft guideline 6 is formulated in obligatory language, stating that arbitration and judicial settlement "shall" conform to these requirements of the rule of law.

(9) Draft guideline 6 only refers to the requirements of the rule of law pertinent once international organizations and States have access to arbitration or judicial settlement and does not encompass a right of access to justice for such organizations or States. Such a right of access to justice is often considered to be part of the rule of law with regard to private parties.[916]

(10) The formulation of draft guideline 6 does not alter the fact that wider accessibility of all means of dispute settlement, including arbitration and judicial settlement, is to be recommended, as provided for in draft guideline 5.

Part Three
Disputes between international organizations and private parties

Guideline 7
Scope of the present Part

The present Part addresses disputes between international organizations and private parties.

Commentary

(1) Draft guideline 7 mirrors draft guideline 3 in laying out the scope of Part Three of the draft guidelines.

[912] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 77, at p. 85; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 903 above); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (see footnote 818 above), p. 30, para. 47.

[913] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see previous footnote), p. 86.

[914] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 903 above), p. 209, para. 92.

[915] *Ibid.* See also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, (see footnote 818 above), pp. 23–24, para. 30.

[916] General Assembly resolution 67/1, para. 14. See also European Court of Human Rights, *Golder v. United Kingdom*, No. 4451/70, Judgment, 21 February 1975, Series A, No. 18, para. 36; European Court of Human Rights, *Waite and Kennedy v. Germany*, No. 26083/94, Judgment, 18 February 1999, para. 50. See also Francioni, "The rights of access to justice under customary international law" (see footnote 886 above), p. 3; Tom Bingham, *The Rule of Law* (London, Penguin, 2010), p. 85.

(2) The Commission decided to address disputes according to the parties involved, and not according to the law applicable to them.[917] Draft guideline 7 makes clear that the draft guidelines that follow concern disputes between international organizations and private parties. It has been recognized that disputes between international organizations and private parties are the most frequent ones to which international organizations are parties.[918]

(3) Part Two, on the other hand, addresses disputes between international organizations as well as disputes between international organizations and States, not excluding disputes between international organizations and other subjects of international law.[919]

(4) In practice, the majority of disputes between international organizations and private parties arise out of contractual relationships, which are usually governed by the law chosen by the parties.[920] This choice of law may refer either to a specific national law,[921] or to general principles of international commercial law,[922] the latter of which are chosen often with the intent of delocalizing the contractual relationship. [923] Employment relations between international organizations and individuals are most frequently governed by internal staff rules and staff regulations of the organization.[924]

(5) Employment disputes between individuals and international organizations are routinely settled before internal administrative tribunals, where available.[925] Among

[917] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 19.

[918] Report of the International Law Commission on the work of its seventy-third session (2022), topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, prepared by the Secretariat (A/CN.4/755), para. 82. See the statements in the Sixth Committee, during the seventy-seventh session of the General Assembly, by Armenia (24th plenary meeting, 26 October 2022) and Netherlands (Kingdom of the) (23rd plenary meeting, 26 October 2022, para. 10), available at https://www.un.org/en/ga/sixth/77/summaries.shtml. See also A/CN.4/764.

[919] See para. (9) of the commentary to draft guideline 3 above.

[920] See C. Wilfred Jenks, *The Proper Law of International Organisations* (London, Stevens, 1962); Finn Seyersted, "Applicable law in relations between intergovernmental organizations and private parties", *Recueil des Cours*, vol. 122 (1967-III), pp. 427–616; Nicolas Valticos, "Les contrats conclus par les organisations internationales avec des personnes privées", *Annuaire de l'Institut de Droit International*, vol. 57, No. 1 (1977), pp. 1–191; Reinisch, "Contracts between international organizations and private law persons" (see footnote 754 above); Orfeas Chasapis Tassinis, "The problem of applicable law in the contractual relations between international organizations and private parties", in Jan Klabbers (ed.), *International Organizations Engaging the World* (Cambridge, Cambridge University Press, 2025), pp. 204–220.

[921] See, e.g., A/CN.4/764, chap. III, sect. B 9 (Permanent Court of Arbitration).

[922] See, e.g., *ibid.* (United Nations Office of Legal Affairs).

[923] "Law applicable to contracts concluded by the United Nations with private parties—Procedures for settling disputes arising out of such contracts—Relevant rules and practices", *United Nations Juridical Yearbook 1976*, pp. 159–176, at p. 165.

[924] Michael B. Akehurst, *The Law Governing Employment in International Organizations* (Cambridge, Cambridge University Press, 1967); C.F. Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, vol. 2, 2nd ed. (Oxford, Clarendon Press, 1994); Olufemi Elias (ed.), *The Development and Effectiveness of International Administrative Law* (Leiden, Nijhoff, 2012); Peter Quayle (ed.), *The Role of International Administrative Law at International Organizations* (Leiden/Boston, Brill Nijhoff, 2021); Shin-ichi Ago, "A few thoughts about the concepts of international administrative tribunals and international administrative law", *Asian Journal of International Law,* vol. 12 (2022), pp. 207–215.

[925] August Reinisch and Christina Knahr, "From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – reform of the administration of justice system within the United Nations", *Max Planck Yearbook of United Nations Law*, vol. 12 (2008), pp. 447–483; Anna Riddell, "Administrative boards, commissions and tribunals in international

the first of these was the League of Nations Administrative Tribunal, established in 1927,[926] which had the power to adjudicate claims based on service contracts or staff regulations made by officials or former officials of the League of Nations Secretariat and the International Labour Office. After the demise of the League of Nations, it continued as the International Labour Organization (ILO) Administrative Tribunal,[927] which has jurisdiction to hear employment disputes brought by ILO staff and the staff of numerous other specialized agencies and other international organizations.[928] The United Nations established the United Nations Administrative Tribunal in 1949,[929] which, in 2009, was replaced by the two-tiered United Nations internal justice system consisting of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal.[930] These tribunals have also been given competence by some specialized agencies to hear their staff disputes. In addition, many other international organizations, including international financial institutions and regional economic integration organizations, have established their own administrative tribunals or made their internal courts competent to hear staff disputes.[931]

(6) There is considerable practice of settling commercial disputes between international organizations and private parties through arbitration, ranging from

organizations", in Anne Peters and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (online, Oxford University Press, 2010), available at http://www.mpepil.com/; C.F. Amerasinghe, "International administrative tribunals", in Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford, Oxford University Press, 2013), pp. 316–336; Santiago Villalpando, "International administrative tribunals", in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford, Oxford University Press, 2016), pp. 1085–1104; George P. Politakis, "Administrative Tribunal: International Labour Organization (ILO)", in Anne Peters and Hélène Ruiz Fabri (eds.), *Max Planck Encyclopedia of Public International Law* (online, Oxford University Press, 2021), available at http://www.mpepil.com/.

926 Resolution adopted by the Assembly of the League of Nations on 26 September 1927 on the establishment of an Administrative Tribunal, League of Nations, *Official Journal*, Special Supplement No. 54, pp. 201 and 478.

927 See Statute of the Administrative Tribunal of the International Labor Organization (9 October 1946) (as amended).

928 See a complete list with the organizations recognizing the jurisdiction of the Tribunal, available at https://www.ilo.org/ilo-administrative-tribunal/organizations-recognizing-jurisdiction.

929 General Assembly resolution 351 (IV) [A] of 24 November 1949 on "Establishment of a United Nations Administrative Tribunal".

930 General Assembly resolution 63/253 of 24 December 2008 on administration of justice at the United Nations, annex I, "Statute of the United Nations Dispute Tribunal", and annex II, "Statute of the United Nations Appeals Tribunal".

931 See the detailed overview in A/CN.4/782, paras. 188 *et seq*.

construction,[932] lease,[933] maintenance,[934] sales[935] and service provision[936] to tort[937] disputes.[938] In addition, individuals who are not staff members but are working as independent contractors for international organizations, and who therefore do not have access to administrative tribunals, usually bring their claims before arbitral tribunals.[939] The internal courts of several regional economic integration organizations may also, by agreement of the parties, have jurisdiction over contractual claims.[940]

(7) Disputes arising not from contractual relationships but from the allegedly delictual causing of harm are most likely to be governed by national tort law.[941] To the extent that they are not covered by insurance, as is usual for vehicle accidents,[942] such disputes are settled through arbitration[943] or claims boards. The "standing claims

[932] See, e.g., *Société des Nations c. L'Entreprise du Palais de Nations (EPN)*, unpublished arbitral decision, 25 July 1938, cited in Stéphanie Bellier, *Le recours à l'arbitrage par les organisations internationales* (Paris, L'Harmattan, 2011), p. 21, footnote 4.

[933] See, e.g., Permanent Court of Arbitration, *Polis Fondi Immobiliari Di Banche Popolare SGR. p.A. (Italy) v. International Fund for Agricultural Development (IFAD)*, Case No. 2010-08, Award, 17 December 2010, available at https://pcacases.com/web/sendAttach/495.

[934] See, e.g., *Equipe '90 v. Food and Agricultural Organization of the United Nations*, *ad hoc* arbitration under UNCITRAL Rules, Award, 4 December 2001, summarized in Food and Agricultural Organization of the United Nations document CCLM 73/2, Committee on Constitutional and Legal Matters, seventy-third session, Rome, 3–4 June 2002, available at http://www.fao.org/3/y6612e/y6612e.htm.

[935] See, e.g., International Chamber of Commerce Court of Arbitration, *Food and Agriculture Organization of the United Nations v. BEVAC Company*, Case No. 5003/JJA, Arbitral Award, 29 July 1986, summarized in *United Nations Juridical Yearbook 1986* (United Nations publication, Sales No. E.94.V.2), pp. 347–349.

[936] See, e.g., *Boulois v. UNESCO*, unpublished arbitral award, 4 May 2000, referred to in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/583 (fifth report on responsibility of international organizations), para. 26, footnote 22. This case was related to the following cases, in which the French courts ordered the organization to pursue arbitration: Paris Court of First Instance, *UNESCO v. Boulois*, 20 October 1997, *Revue de l'arbitrage* (1997), p. 575, at p. 577; Paris Court of Appeal, *UNESCO – United Nations Educational, Scientific and Cultural Organisation, in the person of its legal representatives, v. Boulois*, 19 June 1998, summarized in Albert Jan van den Berg (ed.), International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, vol. XXIV-a (1999) (The Hague, Kluwer Law International, 1999), pp. 294–295.

[937] See, e.g., *Starways Limited v. United Nations* (see footnote 752 above).

[938] See also the detailed overview in A/CN.4/782, paras. 75 *et seq*.

[939] See, e.g., Permanent Court of Arbitration, *Mr. Mohamed Ismail Reygal (Somalia) v. The United Nations High Commissioner for Refugees (UNHCR)*, Case No. 2016-28, Award, 27 March 2017, available at https://pca-cpa.org/en/cases/138/; Permanent Court of Arbitration, *A v. UN Organisation*, Case No. 2019-04, Final Award, 5 December 2019, available at https://pca-cpa.org/en/cases/201/.

[940] See, e.g., art. 272 of the Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, No. C 202 (7 June 2016), p. 47; art. 9, para. 6, of the Protocol on the Community Court of Justice (ECOWAS), as amended by the Supplementary Protocol; art. 22, para. (ch), of the Convention on the Statute of the Central American Court of Justice.

[941] Henry Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity*, 7th ed. (Leiden/Boston, Brill Nijhoff, 2025), pp. 491–492. See also August Reinisch, "Accountability of international organizations according to national law", *Netherlands Yearbook of International Law*, vol. XXXVI (2005), pp. 119–167.

[942] A/CN.4/764, chap. III, sect. B 2 (World Health Organization). See also Patrick J. Lewis, "Who pays for the United Nations' torts?: immunity, attribution, and 'appropriate modes of settlement'", *North Carolina Journal of International Law and Commercial Regulation*, vol. 39, No. 2 (winter 2014), pp. 259–332, at p. 320.

[943] See Secretary-General's bulletin on resolution of tort claims (ST/SGB/230), para. 6 ("In the event that negotiations with a claimant do not result in an amicable settlement of the claim, the claimant shall be offered the option to submit the claim to arbitration. Such arbitration shall be held under the auspices of the American Arbitration Association, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force,

commissions" envisaged in the model status-of-forces agreement for each United Nations peacekeeping mission have never been established to date.[944] Rather, "local claims review boards", which are composed of United Nations staff members only and which make unpublished recommendations to the Organization on the settlement of compensation claims,[945] have been set up.[946] Similar claims settlement mechanisms have been established by other international organizations.[947] Furthermore, the internal courts of a number of regional economic integration organizations have jurisdiction to hear "non-contractual liability" claims brought by private parties against those organizations.[948]

and taking into account, as appropriate, Headquarters Regulation No. 4 on limitation of damages in respect of acts occurring within the Headquarters district (General Assembly resolution 41/210 of 11 December 1986). The place of arbitration shall be New York City. Any award pursuant to such arbitration shall be binding on the parties as the final adjudication of the claim.").

944 A/CN.4/764, chap. III, sect. B 9 (United Nations Office of Legal Affairs).

945 International Law Association, final report on accountability of international organisations, *Report of the Seventy-first Conference*, p. 216.

946 De Serpa Soares, "Responsibility of international organizations" (see footnote 823 above), pp. 131 *et seq*.

947 See A/CN.4/782, paras. 67 *et seq*.

948 See, e.g., art. 268 of the Consolidated version of the Treaty on the Functioning of the European Union; art. 9, para. 2, of the Protocol on the Community Court of Justice (ECOWAS), as amended by the Supplementary Protocol; art. 15, para. 5, of the Rules of Procedure of the Court of Justice of the West African Economic and Monetary Union; art. 27, para. 2, of the Treaty Establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993), United Nations, *Treaty Series*, vol. 2314, No. 41341, p. 265.

(8) In particular, in the case of regional economic integration organizations with broad powers, private parties may be able to challenge such organizations' legislative and/or administrative acts before their internal courts and/or tribunals.[949] Examples of such disputes include private companies challenging decisions of organs on competition law,[950] unsuccessful bidders questioning procurement decisions[951] and individuals requesting their removal from targeted sanctions lists.[952]

(9) The precise nature and legal character of such internal law of international organizations, sometimes characterized as quasi-administrative or even quasi-constitutional law, has been controversial.[953]

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[949] See, e.g., art. 263, fourth para., of the Consolidated version of the Treaty on the Functioning of the European Union; art. 22, paras. (b) and (g), of the Convention on the Statute of the Central American Court of Justice (concerning the Central American Integration System); art. 26 of the Treaty Establishing the Common Market for Eastern and Southern Africa; art. 30 of the Treaty for the Establishment of the East African Community (Arusha, 30 November 1999), United Nations, *Treaty Series*, vol. 2144, No. 37437, p. 255; para. 39 (2) of the Statute of the Court of the Eurasian Economic Union, annex II to the Treaty on the Eurasian Economic Union (Astana, 29 May 2014), *ibid.*, vol. 3049, No. 52764, p. 3, at p. 167; arts. 17 and 19 of the Protocol of Cochabamba Amending the Treaty Creating the Court of Justice of the Cartagena Agreement (concerning the Andean Community); arts. 211, para. 1 (d), and 222 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 293. See also Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen (eds.), *International Court Authority* (Oxford, Oxford University Press, 2018); Robert Howse *et al.* (eds.), *The Legitimacy of International Trade Courts and Tribunals (*Cambridge, Cambridge University Press, 2018); James Thuo Gathii (ed.), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (Oxford, Oxford University Press, 2020); Marco Odello and Francesco Seatzu (eds.), *Latin American and Caribbean International Institutional Law* (The Hague, T.M.C. Asser Press, 2015).

[950] Alexander Kornezov, "Judicial review of Commission decisions and judicial protection", in Ekaterina Rousseva (ed.), *EU Antitrust Procedure* (Oxford, Oxford University Press, 2020), pp. 591–686*;* Luis Ortiz Blanco (ed.), *EU Competition Procedure*, 4th ed. (Oxford, Oxford University Press, 2022); Hugo R. Gómez Apac, "La jurisprudencia reciente del Tribunal de Justicia de la Comunidad Andina en materia de defensa de la libre competencia", in Hugo R. Gómez Apac *et al.* (eds.), *Tribunal de Justicia de la Comunidad Andina: 1979–2024* (Quito, Court of Justice of the Andean Community, 2024), pp. 417–456; Johan W. van de Gronden and Catalin S. Rusu, *Competition Law in the EU : Principles, Substance, Enforcement*, 2nd ed. (Cheltenham, Edward Elgar Publishing, 2024).

[951] Joint Inspection Unit of the United Nations system, note on procurement reforms in the United Nations system (JIU/NOTE/2011/1), paras. 195–200. See also Elisabetta Morlino, *Procurement by International Organizations: A Global Administrative Law Perspective* (Cambridge, Cambridge University Press, 2019), pp. 96–203.

[952] See, e.g., Antonios Tzanakopoulos, "Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, 21 September 2005, [2005] ECR II-3649 (Kadi I CFI); cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, Court of Justice of the EC [2008] ECR I-6351 (Kadi I ECJ); case T-85/09, Kadi v Commission [2010] ECR II-5177 (Kadi II GCEU); joined cases C-584/10 P, C-593/10 P and C-595/10 P, Commission and United Kingdom v Kadi, Judgment of the Court (Grand Chamber) of 18 July 2013 (Kadi II CJEU)", in Cedric Ryngaert *et al.* (eds.), *Judicial Decisions on the Law of International Organizations* (Oxford, Oxford University Press, 2016), pp. 204–232. See also Alexandre Sztulman, *EU Sanctions Litigation: Fundamental Rights and International Security* (London, Routledge, 2025), pp. 49–77; Francesca Finelli, "Sanctions litigation before the European Union's Court of Justice", *The International Spectator: Italian Journal of International Affairs* (published online 5 January 2026).

[953] See para. (5) of the commentary to art. 10 of the articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 63. See also Pierre Klein, "International organizations or institutions, internal law and rules", in Peters and Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (see footnote 925 above); Giorgio Balladore Pallieri, "Le droit interne des organisations internationales",

(10) In certain situations, disputes between international organizations and private parties may arise from a relationship governed by international law. Examples are human rights claims brought by private parties against international organizations. The possibility of bringing such claims before human rights treaty bodies and courts will depend on the acceptance by international organizations not only of substantive human rights obligations, but also of the jurisdiction of these bodies and courts.[954] Furthermore, alleged human rights violations may also be raised by private parties on the basis of customary international law.[955] With regard to some forms of territorial administration by international organizations, specific bodies, such as the Human Rights Advisory Panel of the United Nations Interim Administration Mission in Kosovo (UNMIK), [956] preceded by the Ombudsperson Institution, [957] and the Ombudsperson under United Nations Transitional Administration in East Timor,[958]

Recueil des Cours, vol. 127 (1969-II), pp. 1–38; Rudolf Bernhardt, "The nature and field of application of the internal law of international organizations", *Law and State*, vol. 10 (1974), pp. 7–26; Schermers and Blokker, *International Institutional Law: Unity Within Diversity* (see footnote 941 above), p. 9; Riccardo Monaco, "Le caractère constitutionnel des actes institutifs d'organisations internationales", in *Mélanges offerts à Charles Rousseau: la communauté internationale* (Paris, A. Pedone, 1974), pp. 153–172, at p. 154; Jorge Enrique Santos Rodríguez, "El derecho administrativo del sistema comunitario Andino", *Revista Digital de Derecho Administrativo*, vol. 10 (2013), pp. 21–44; Christiane Ahlborn, "The rules of international organizations and the law of international responsibility", *International Organizations Law Review*, vol. 8, No. 2 (2011), pp. 397–482. This is also reflected in scholarly approaches such as global administrative law (Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The emergence of global administrative law", *Law and Contemporary Problems*, vol. 68, No. 3 and No. 4 (2005) pp. 15–61; Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham, Edward Elgar Publishing, 2016)) and constitutionalism (Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna and Berlin, Springer, 1926); Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin, Duncker and Humblot, 1984); Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford/New York, Oxford University Press, 2009)).

954 See art. 6, para. 2, of the Consolidated version of the Treaty on European Union, *Official Journal of the European Union*, No. C 326 (26 October 2012); art. 17, para. 1, of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004), United Nations, *Treaty Series*, vol. 2677, No. 2889, p. 3.

955 Council of Europe, Parliamentary Assembly, "Accountability of international organisations for human rights violations", resolution 1979 (2014) of 31 January 2014. See also Olivier De Schutter, "Human rights and the rise of international organisations: the logic of sliding scales in the law of international responsibility", in Jan Wouters *et al.* (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp/Oxford/Portland, Intersentia, 2010), pp. 51–128; Frédéric Mégret and Florian Hoffmann, "The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities", *Human Rights Quarterly*, vol. 25, No. 2 (May 2003), pp. 314–342; Kristina Daugirdas and Sachi Schuricht, "Breaking the silence: why international organizations should acknowledge customary international law obligations to provide effective remedies", in Quayle (ed.), *The Role of International Administrative Law at International Organizations* (see footnote 924 above), pp. 54–87.

956 UNMIK, regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel (UNMIK/REG/2006/12), 23 March 2006; Human Rights Advisory Panel, *The Human Rights Advisory Panel History and Legacy Kosovo, 2007–2016: Final Report*, 30 June 2016.

957 UNMIK, regulation No. 2000/38 on the establishment of the Ombudsperson Institution in Kosovo (UNMIK/2000/38), 30 June 2000; Ombudsperson Institution in Kosovo, "First annual report: 2000–2001", 18 July 2001, pp. 1–24, available at https://oik-rks.org/en/2001/07/18/1-st-annual-report-2000-2001-2/.

958 The Ombudsperson was established briefly for the conduct of the United Nations Transitional Administration in East Timor, between 2001 and 2002, until it was succeeded by the United Nations Mission of Support in East Timor. See United Nations Transitional Administration in East Timor, "Daily briefing", 1 June 2001, available at https://reliefweb.int/report/timor-leste/untaet-daily-briefing-01-jun-2001. See also Eric De Brabandere, "Human rights accountability of international administrations: theory and

have been established to hear human rights complaints of private parties against international organizations.[959]

(11) Another example of claims based on international law are investment claims brought against regional economic integration organizations that have entered into bilateral or multilateral investment agreements with States,[960] providing for consent to arbitrate disputes with their nationals.[961]

(12) Where claims arising from harm caused by delicts to private parties are espoused by their home States against an international organization, such disputes will be governed by international law.[962] With the exception of the espousal of claims for damage suffered by nationals of Belgium, and subsequently other nationals, as a result of acts committed in the Congo by forces of the United Nations Operation in the Congo, which led to a lump-sum payment and final settlement of claims,[963] the espousal of claims against international organizations is rare.[964] The Government of Haiti, for example, did not espouse the claims of its citizens who had fallen victim to a cholera epidemic caused by United Nations peacekeepers.[965]

(13) Relying on a distinction based on the parties to disputes, rather than the nature of disputes, allows the elaboration of guidelines that not only apply to all kinds of disputes between international organizations and private parties, regardless of the applicable law, but also focus on specific entitlements of private parties to access to justice and to due process or a fair trial.[966]

Guideline 8
Resort to means of dispute settlement

Disputes between international organizations and private parties should be settled in good faith and in a spirit of cooperation by means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute, with due regard for the respective positions of the parties and possible disparity between them.

practice in East Timor", in Wouters *et al*. (eds.), *Accountability for Human Rights Violations by International Organisations* (see footnote 955 above), pp. 331–354.

959 Christine Chinkin, "United Nations accountability for violations of international human rights law", *Recueil des Cours*, vol. 395 (2019), pp. 199–319; Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge, Cambridge University Press, 2020).

960 Art. 26, para. 3, of the Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95; Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ECSC, Euratom), *Official Journal of the European Communities*, No. L 69 (9 March 1998), p. 1.

961 See, e.g., Permanent Court of Arbitration, *Nord Stream 2 AG v. The European Union*, Case No. 2020-07, pending; International Centre for Settlement of Investment Disputes, *Klesch Group Holdings Limited and others v. European Union*, Case No. ARB(AF)/23/1, pending.

962 See para. (5) of the commentary to draft guideline 1 above.

963 Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals. See also A/CN.4/764, chap. III, sect. B 2 (World Health Organization); A/CN.4/782, para. 72.

964 Karel Wellens, *Remedies against International Organizations* (Cambridge, Cambridge University Press, 2002), at p. 74; Ritter, "La protection diplomatique à l'égard d'une organisation internationale" (see footnote 758 above), p. 427.

965 Mara Pillinger, Ian Hurd and Michael N. Barnett, "How to get away with cholera: the UN, Haiti, and international law" (see footnote 833 above), p. 75.

966 See para. (10) of the commentary to draft guideline 3 above.

Commentary

(1) Draft guideline 8 is based on the empirical finding that disputes between international organizations and private parties are settled by all the various means of dispute settlement referred to in draft guideline 2, subparagraph (*d*). The confidentiality of most methods of dispute settlement makes it difficult to assess the precise frequency of their use. However, the written replies provided to the questionnaire, as reflected in the memorandum by the Secretariat providing information on the practice of States and international organizations,[967] indicate broad usage of all means of dispute settlement, including non-adjudicatory means.[968] In addition, available information on national and international adjudication and on arbitration shows that both types of dispute settlement are resorted to in practice.[969]

(2) The hortatory language of draft guideline 8 acknowledges that international organizations and private parties may subject themselves to binding obligations on dispute settlement. To the extent that they are free to choose the means of dispute settlement, they often contractually provide for arbitration or other means.[970] This freedom follows from the principle of party autonomy. The draft guidelines do not intend to alter such obligations. By recommending resorting to appropriate means, they acknowledge that, in some situations, specific means may be obligatory.

(3) The language of draft guideline 8 is also without prejudice to any dispute settlement clause in treaties that may refer such disputes to adjudication and/or arbitration.[971] It is equally without prejudice to the possibility that certain types of

[967] See A/CN.4/764. The content of the questionnaire is reproduced in the first report on the settlement of international disputes to which international organizations are parties by the Special Rapporteur (A/CN.4/756), para. 2.

[968] See A/CN.4/764. See also the extensive overview in A/CN.4/782, paras. 25 *et seq*.

[969] See Reinisch, *International Organizations Before National Courts* (see footnote 824 above); Bellier, *Le recours à l'arbitrage par les organisations internationales* (see footnote 932 above); Rishi Gulati and Thomas John, "Arbitrating employment disputes involving international organizations", in Quayle, (ed.), *The Role of International Administrative Law at International Organizations* (see footnote 924 above), pp. 141–157.

[970] See, e.g., the standard arbitration clause for contracts to be performed outside the United States of America, A/C.5/49/65, para. 5 (b) ("Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall, unless it is settled amicably by direct negotiation, be settled by arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. Such arbitration shall be conducted under the auspices of the International Chamber of Commerce (ICC) which shall also serve as the Appointing Authority under the Rules. The Parties agree to be bound by the arbitration award rendered in accordance with such arbitration, as the final adjudication of any such dispute, controversy or claim."). See also the detailed overview in A/CN.4/782, paras. 75 *et seq*.

[971] See, e.g., art. 21 of the General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949), United Nations, *Treaty Series*, vol. 250, No. 3515, p. 12 ("Any dispute between the Council and private persons regarding supplies furnished, services rendered, or immovable property purchased on behalf of the Council, shall be submitted to arbitration, as provided in an administrative order issued by the Secretary General with the approval of the Committee of Ministers."); art. 24, para. 1, of the Agreement between the International Criminal Police Organization (INTERPOL) and the Government of the French Republic Regarding INTERPOL's Headquarters in France (24 April 2008), available at https://www.interpol.int/content/download/6815/file/Agreement%20between%20ICPO-INTERPOL%20and%20France.pdf, replacing the Agreement between the Government of the French Republic and the International Criminal Police Organization Concerning the Headquarters of INTERPOL and Its Privileges and Immunities in French Territory (Paris, 3 November 1982), United Nations, *Treaty Series*, vol. 2387, No. 43105, p. 255 ("Unless the Parties in the dispute decide otherwise, any dispute between the Organization and a private party shall be settled in accordance with the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration by a tribunal composed either of one or of three members appointed by the Secretary General of the Permanent Court of Arbitration"); Additional Protocol in the form of an exchange of letters between the Government of the French Republic and INTERPOL on the interpretation

disputes may be subjected to internal courts or tribunals, such as administrative tribunals in the case of employment disputes with staff members[972] or courts of regional economic integration organizations in the case of constitutional and/or administrative challenges against acts of an international organization.[973]

(4) Further limitations on the freedom to choose any means of dispute settlement may result from the immunity from the jurisdiction of national courts regularly enjoyed by international organizations, as well as from entitlements to access to justice enjoyed by private parties. These specific considerations will be addressed in separate draft guidelines below.[974]

(5) Draft guideline 8 recommends that, depending on the nature of the dispute and other circumstances, the appropriate means of dispute settlement should be chosen. This recommendation is especially important in cases where no advance agreement on any specific form of dispute settlement is present. Where a dispute concerns primarily factual questions, fact-finding may be a particularly appropriate form of dispute settlement; where it concerns political or policy demands, negotiations may be the preferred means of dispute settlement; when a dispute concerns legal entitlements claimed by one party, adjudication or arbitration may be the most appropriate form of dispute settlement.[975] The modalities of access or participation by private parties may be another factor in selecting the appropriate means of dispute settlement.[976] Since the parties are generally free to choose the means of dispute settlement, they are also free to adopt and often have adopted multi-tiered dispute settlement clauses, pursuant to which they first use forms of amicable settlement and only subsequently turn to adjudicatory forms of dispute settlement.[977]

(6) Draft guideline 8 recommends that disputes be settled in good faith. Although good faith may have different meanings in different legal systems, some decisions suggest that there is a general duty of procedural good faith underlying any form of dispute settlement.[978]

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and application of article 24 of the Agreement of 14 and 24 April 2008 regarding INTERPOL's Headquarters in France (Paris, 9 February 2016, and Lyon, 12 February 2016) (promulgated by Decree No. 2016-326 of 17 March 2016 of the Ministry of Foreign Affairs and International Development).

[972] See para. (5) of the commentary to draft guideline 7 above.

[973] See paras. (8) and (9) of the commentary to draft guideline 7 above.

[974] See draft guidelines 9, 10 and 11 below.

[975] See para. (4) of the commentary to draft guideline 4 above.

[976] See, e.g., Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.

[977] See, e.g., United Nations Procurement Division, "General Conditions of Contract: Contracts for the Provision of Goods and Services", April 2012, available at https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf.

[978] See, e.g., in the context of disputes between States and private parties: UNCITRAL Tribunal under chap. XXI of the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) (Mexico City, Ottawa and Washington, D.C., 17 December 1992), *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, part II, chap. I, para. 54 ("the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings"); International Centre for Settlement of Investment Disputes, *Libananco Holdings Co. Limited v. Republic of Turkey*, Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 78 ("The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers)"). See also Robert Kolb, "General principles of procedural law", in Andreas Zimmermann *et al.* (eds.), *The Statute of the International Court*

(7) The draft guideline further recommends that disputes be settled in a spirit of cooperation. Such an obligation is particularly pertinent with regard to disputes between international organizations or between international organizations and States. It is, however, also relevant to the settlement of disputes between international organizations and private parties, because dispute settlement generally requires the disputing parties to cooperate with each other in order to achieve the goal of settling a dispute.[979]

(8) In view of the fact that there will often be a power imbalance between international organizations and private parties, draft guideline 8 recommends settling disputes between them not only "in good faith and in a spirit of cooperation" but also "with due regard for the respective positions of the parties and possible disparity between them". While in most instances private parties will be the "weaker" party, such as in employment or service provision relationships as well as in situations of harm suffered from operational activities, this need not always be the case.[980] The recommendation is intended to contribute to counterbalancing such disparity.[981] To the extent that procedural equality of the parties is a requirement of a rule of law-based settlement of disputes in binding third-party adjudication, such equality is specifically addressed in the fair trial or due process obligation restated in draft guideline 12.

(9) The requirements of good faith and in a spirit of cooperation, as well as with due regard for the respective positions of the parties, apply both to the choice of appropriate means of dispute settlement and to when such a choice is made.[982]

Guideline 9
Immunity of international organizations

Serving the purpose of ensuring the independent and effective performance of their functions, the immunity of international organizations is to be respected.

Commentary

(1) There is general consensus that the rationale for immunity of international organizations is the protection of their independent functioning and the exclusion of

of Justice: A Commentary, 3rd ed. (Oxford, Oxford University Press, 2019), pp. 963–1006, at p. 998 ("The principle of good faith … requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. … Thus, a party may not deliberately present false or forged pieces of evidence. It may not impede the production of evidence by the other party by having recourse to pressure or any other equivalent device either.").

979 Anne Peters, "International dispute settlement: a network of cooperational duties", *European Journal of International Law*, vol. 14, No. 1 (February 2003), pp. 1–34, at pp. 9–10; Rüdiger Wolfrum, "Cooperation, international law of", in Peters and Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (see footnote 925 above), para. 38.

980 See *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 369.

981 See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (see footnote 818 above), Declaration of Judge Greenwood, p. 94, at p. 96, para. 5 (referring to disputes "between a staff member and an international organization and … the obvious disparity between the financial resources available to each of them").

982 Peters, "International dispute settlement" (see footnote 979 above), p. 11 ("one might argue that the principle of free choice is tempered by the antagonistic principle of cooperation, which might force or at least direct parties to reach an agreement on a single dispute settlement procedure"); Andrew D. Mitchell, "Good faith in WTO dispute settlement", *Melbourne Journal of International Law*, vol. 7, No. 2 (October 2006), pp. 339–371, at pp. 351–356.

undue influence by individual (member) States exercising jurisdiction.[983] This is expressed in the introductory phrase of draft guideline 9. It refers to the rationale of the immunity of international organizations and is not intended to limit the scope of their immunity.

(2) This functional rationale underlies the privileges and immunities of international organizations in general. The jurisdictional immunity of international organizations and the immunity from execution or enforcement measures against their assets form part of such privileges and immunities.

(3) Privileges and immunities of international organizations are regularly provided for in constituent treaties, multilateral privileges and immunities agreements, bilateral headquarters agreements and, sometimes, in national legislation.[984]

(4) The precise scope of immunity varies. Constituent treaties often confer functional privileges and immunities.[985] Agreements establishing development banks usually do not provide for jurisdictional immunity. Rather, they stipulate where national court proceedings can be instituted and clarify that such organizations, though not enjoying jurisdictional immunity, benefit from enforcement immunity.[986] While

[983] International Court of Justice, *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Advisory Opinion, 22 October 2025, General List No. 196, para. 183 ("The purpose of Article 105 of the Charter, as indicated in the *travaux préparatoires*, is to safeguard the independent and effective performance of the mandate entrusted to the Organization and its personnel and to ensure that 'no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens'"). See also Edwin H. Fedder, "The functional basis of international privileges and immunities: a new concept in international law and organization", *American University Law Review*, vol. 9, No. 1 (January 1960), pp. 60–69; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford, Oxford University Press), 2018; David P. Stewart and Ingrid Wuerth, "The jurisdictional immunities of international organizations: recent developments and the challenges of the future", in Paul B. Stephan and Sarah H. Cleveland (eds.), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (New York, Oxford University Press, 2020), pp. 411–432.

[984] C. Wilfred Jenks, *International Immunities* (London, Stevens, 1961), pp. 3–12; A.S. Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (The Hague, Kluwer Law International, 1995); August Reinisch, "Privileges and immunities", in Katz Cogan, Hurd and Johnstone (eds.), *The Oxford Handbook of International Organizations* (see footnote 925 above), pp. 1048–1068; Ramses A. Wessel, "Jurisdictional immunity of regional organisations – substantive unity in instrumental diversity?", in Tom Ruys and Nicolas Angelet (eds.), *The Cambridge Handbook of Immunities and International Law* (Cambridge, Cambridge University Press, 2019), pp. 214–242; Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, 2nd ed. (Leiden/Boston, Brill Nijhoff, 2025), pp. 134–161.

[985] See, e.g., Art. 105, para. 1, of the Charter of the United Nations ("The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."); art. 67, para. (a), of the Constitution of the World Health Organization (New York, 22 July 1946), United Nations, *Treaty Series*, vol. 14, No. 221, p. 185; art. 103 of the Charter of the Organization of American States (Bogotá, 30 April 1948), *ibid.*, vol. 119, No. 1609, p. 3; art. VIII, para. 2, of the Marrakesh Agreement Establishing the World Trade Organization; art. 40, Statute of the Council of Europe (London, 5 May 1949), United Nations, *Treaty Series*, vol. 87, No. 1168, p. 103.

[986] See, e.g., art. VII, sect. 3, of the Articles of Agreement of the International Bank for Reconstruction and Development (Washington, D.C., 27 December 1945), United Nations, *Treaty Series*, vol. 2, No. 20 (b), p. 134, at p. 180 ("Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."); art. XI,

most privileges and immunities treaties provide for absolute immunity from jurisdiction and enforcement measures in the form of immunity "from every form of legal process",[987] others provide for certain exceptions, such as for traffic accidents.[988] Immunity "from every form of legal process" is understood to refer to both jurisdictional immunity and immunity from execution or enforcement measures.[989]

(5) In a few States, legislation[990] as well as jurisprudence[991] tend to equate the scope of the jurisdictional immunity accorded to international organizations with that

sect. 3, of the Agreement Establishing the Inter-American Development Bank (Washington, 8 April 1959), *ibid.*, vol. 389, No. 5593, p. 69; art. 50 of the Agreement Establishing the Asian Development Bank (Manila, 4 December 1965), *ibid.*, vol. 571, No. 8303, p. 123.

[987] See, e.g., art. II, sect. 2, of the Convention on the Privileges and Immunities of the United Nations; art. III, sect. 4, of the Convention on the Privileges and Immunities of the Specialized Agencies; art. 3 of the General Agreement on Privileges and Immunities of the Council of Europe; art. 2 of the Agreement on Privileges and Immunities of the Organization of American States (Washington, 15 May 1949), United Nations, *Treaty Series*, vol. 1438, No. 24376, p. 79; art. VIII, sect. 16, of the Agreement regarding the Headquarters of the Food and Agriculture Organization of the United Nations; art. 8 of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council (London, 9 February 1972), United Nations, *Treaty Series*, vol. 834, No. 11943, p. 287.

[988] See, e.g., art. 3, para. 1 (b), of the Protocol on Privileges and Immunities of the European Patent Organisation (Munich, 5 October 1973), United Nations, *Treaty Series*, vol. 1065, No. 16208, p. 199, at p. 501 (providing for no immunity "in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle"); art. IV, para. 1 (b), of annex I to the Convention for the Establishment of a European Space Agency (Paris, 30 May 1975), *International Legal Materials*, vol. 14 (1975), p. 855.

[989] See August Reinisch, "Immunity of property, funds, and assets (article II section 2 General Convention)", in August Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford, Oxford University Press, 2016), pp. 63–98.

[990] See, e.g., title I, sect. 2 (b), of United States, International Organizations Immunities Act (United States Code, title 22, sect. 288a) (1945) ("International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.").

[991] See, e.g., United States, Supreme Court, *Jam et al. v. International Finance Corporation* (see footnote 836 above); United States, Court of Appeals for the Third Circuit, *OSS Nokalva, Inc. v. European Space Agency*, Cases No. 09-3601 and No. 09-3640, 617 F.3d 756 (3d Cir. 2010), Opinion, 29 January 2010; Italy, Supreme Court of Cassation, *Intergovernmental Committee for European Migration v. Di Banella Schirone*, Case No. 1266, Judgment, 8 April 1975, *Italian Yearbook of International Law*, vol. 77 (1988), pp. 572–577; Italy, Supreme Court of Cassation, *Allied Headquarters in Southern Europe v. Capocci Belmonte*, Case No. 2054, Decision, 5 June 1976, *Italian Yearbook of International Law*, vol. III (1977), pp. 328–330; Netherlands, Local Court of The Hague, *A.S. v. Iran–United States Claims Tribunal*, Judgment, 8 June 1983, *International Law Reports*, vol. 94 (1994), pp. 321–330; Italy, Supreme Court of Cassation, *Food and Agriculture Organization of the United Nations v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)*, Case No. 5399, Decision, 18 October 1982, *United Nations Juridical Yearbook 1982* (United Nations publication, Sales No. E.89.V.1), pp. 234–237, and *International Law Reports*, vol. 87 (1992), pp. 1–10. See also Charles H. Brower, II, "Immunity of international organizations in United States courts", in August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford, Oxford University Press, 2013), pp. 304–327; Beatrice I. Bonafè, "Italian courts and the immunity of international organizations", in Niels Blokker and Nico Schrijver, *Immunity of International Organizations* (Leiden/Boston, Brill Nijhoff, 2015), pp. 246–278; Riccardo Pavoni, "Italy", in Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (see above), pp. 155–171.

granted to foreign States,[992] excluding commercial activities from their immunity.[993] In a similar vein, some national courts have upheld their jurisdiction over employment claims, as long as the individuals involved performed merely secretarial or supportive functions, and were not directly involved in the official functions of the organizations.[994]

(6) A further limitation of the jurisdictional, and sometimes even the enforcement,[995] immunity of international organizations has been applied by some national courts, denying such immunity where it may deprive private parties of their right of access to justice.[996] On the basis of the jurisprudence of human rights courts and bodies,[997] as well as of national constitutional law,[998] national courts have permitted lawsuits by private parties against international organizations where those private parties would otherwise lack access to other reasonable means of dispute settlement. However, in most cases courts have accepted the adequacy of alternative remedies, often in the form of internal mechanisms for the settlement of staff disputes.[999]

(7) Draft guideline 9 states that, in general, the immunity of international organizations is to be respected. The reference to "immunity" indicates that not only jurisdictional immunity but also enforcement immunity are covered by draft guideline 9. Both are important to secure the independent functioning of international organizations, and issues of access to justice may arise in regard to both.

(8) The compromise language "is to be", deviating from the hortatory "should" and the obligatory "shall" used in the other draft guidelines, has been chosen for two reasons.

(9) While international organizations regularly enjoy immunity as a result of treaty obligations, its exact scope may differ. Where no treaty obligations apply, the extent to which they can be considered to enjoy such immunity as a matter of

[992] See, however, *Obligations of Israel* (see footnote 983 above), para. 183 ("The privileges and immunities accorded to the United Nations and its personnel are functional in nature. Such privileges and immunities must be distinguished from the sovereign immunity enjoyed by States, which is based on the principle of sovereign equality of States in international law").

[993] See art. 10 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

[994] See, e.g., Netherlands, District Court of the Hague, *Iran–US Claims Tribunal v. A.S.*, Judgment, 9 July 1984, *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 472; Greece, Court of Appeal of Crete, *Anonymous v. International Centre for Advanced Mediterranean Agronomic Studies*, Appeal No. 479/1991, Judgment, ILDC 1596 (GR 1991); Italy, Supreme Court of Cassation, *Paola Pistelli v. European University Institute*, Case No. 20995, Appeal Judgment, 28 October 2005, ILDC 297 (IT 2005); Russian Federation, Supreme Court, *SN Ryabov v. Eurasian Development Bank*, N 5-B10-49, Supervisory Review, 9 July 2010, ILDC 1559 (RU 2010); Bangladesh, Supreme Court, High Court Division, *World Bank Office Dhaka and another v. Ismet Zerin Khan*, 2018(1) LNJ 82, Civil Revision No. 3352 of 2011, Judgment, 12 March 2017, unofficial English translation available at https://www.lawyersnjurists.com/lawyer_ci/case/world-bank-office-dhaka-and-another-vs-ismet-zerin-khan-2018-1-lnj-82.

[995] See, e.g., Belgium, Court of Cassation, *General Secretariat of the ACP Group v. Lutchmaya*, Cass Nr C 03 0328 F, Final Appeal Judgment, 21 December 2009, ILDC 1573 (BE 2009).

[996] See Michael Singer, "Jurisdictional immunity of international organizations: human rights and functional necessity concerns", *Virginia Journal of International Law*, vol. 36, No. 1 (autumn, 1995), pp. 53–166; Ige Dekker and Cedric Ryngaert, "Immunity of international organisations: balancing the organisation's functional autonomy and the fundamental rights of individuals", *Making Choices in Public and Private International Immunity Law*, No. 138 (2011), pp. 83–109.

[997] See paras. (4)–(6) of the commentary to draft guideline 11 below.

[998] See para. (8) of the commentary to draft guideline 11 below.

[999] See para. (7) of the commentary to draft guideline 11 below.

customary international law has remained contentious.[1000] The draft guideline is therefore without prejudice to such obligations and merely states that, as a matter of principle, immunity is to be respected.

(10) Furthermore, the fact that according immunity to international organizations may deprive private parties of their right of access to justice implies that respect for such immunity should not necessarily prevail in all cases. Since the right of access to justice is enshrined in human rights instruments and forms part of customary international law,[1001] it always has to be taken into account when deciding on the immunity of an international organization.

(11) Draft guideline 9 is therefore closely linked to draft guideline 11, addressing private parties' access to justice. Both draft guidelines have to be read concurrently, and together with the bridging draft guideline 10 on immunity and dispute settlement.

Guideline 10
Immunity and dispute settlement

International organizations, which enjoy immunity, shall endeavour to settle disputes with private parties. In this context, they shall make provision for appropriate modes of settlement of disputes. Such modes shall ensure the right of access to justice of private parties.

Commentary

(1) In practice, the immunity enjoyed by international organizations before national courts often constitutes the major obstacle to effective access to justice for private parties who neither have agreed to arbitration nor have access to administrative tribunals or other courts and tribunals. The reference to international organizations "which enjoy immunity" is intended to refer to situations where international organizations actually enjoy immunity, which depends upon the legal bases discussed in the commentary to the previous draft guideline.[1002] It does not suggest that international organizations would generally enjoy immunity.

(2) The draft guideline calls for an attempt to settle disputes with private parties by methods other than before national courts, notably through "appropriate modes of settlement". Draft guideline 10 provides not for an obligation of result, but for an obligation of conduct by using the word "endeavour".[1003] The draft guideline also requires international organizations to make provision for appropriate modes of settlement of disputes, ensuring the right of access to justice of private parties.

(3) Draft guideline 10 thus serves as a bridge between draft guideline 9, which calls for respect for the immunity of international organizations, and draft guideline 11, which demands access to justice.

[1000] For cases in favour, see Netherlands, Supreme Court, *A.S. v. Iran–United States Claims Tribunal*, 483 NJ 1691-1702 (1985), Judgment, 20 December 1985, *Netherlands Yearbook of International Law*, vol. 18 (1987), *International Law Reports*, vol. 94 (1994) p. 327; Netherlands, Supreme Court, *Supreme Site Service GmbH and others v. Supreme Headquarters of the Allied Powers in Europe and Allied Joint Force Command Headquarters Brunssum*, ECLI:NL:HR:2021:1956, Judgment, 24 December 2021. For cases against, see Canada, Supreme Court, *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 [2013] 3 SCR 866, Judgment, 29 November 2013. See also Michael Wood, "Do international organizations enjoy immunity under customary international law?", *International Organizations Law Review*, vol. 10, No. 2 (2014), pp. 287–318; Andreas R. Ziegler, "Article 105", in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary, Volume II*, 4th ed. (Oxford, Oxford University Press, 2024), pp. 2805–2828, at p. 2810.

[1001] See para. (1) of the commentary to draft guideline 11 below.

[1002] See paras. (3) *et seq*. of the commentary to draft guideline 9 above.

[1003] See draft art. 15, para. 1, of the draft articles on prevention and punishment of crimes against humanity (A/74/10, para. 44).

(4) That respecting immunity would only be legitimate and proportionate where international organizations provide reasonable alternative means of settling their disputes with private parties has become largely accepted in international and national jurisprudence.[1004] It is also reflected in various privileges and immunities treaties. Many of them oblige international organizations to make available "appropriate modes of settlement" of "disputes arising out of contracts or other disputes of a private law character" to which the organizations are parties,[1005] while some refer more broadly to "disputes arising out of contracts or other disputes to which the organization is a party".[1006]

(5) The precise delimitation of the notion of "disputes of a private law character" has posed practical problems.[1007] While it appears that the original intention was to exclude only matters relating to the actual performance of the constitutional functions of international organizations,[1008] the requirement of a "private law" dispute has been controversially invoked to reject tort claims in the context of United Nations peacekeeping operations because they involved "political and policy matters".[1009]

(6) The need for a more precise characterization of "disputes of a private law character", and of the related concept of "civil rights and obligations", primarily depends upon whether the obligations to make available "appropriate modes of settlement", or reasonable and effective alternative means of dispute settlement, respectively, are limited to such "private law" disputes. There are good reasons to consider that the human rights obligation to provide access to justice is broader.[1010] Similarly, the treaty-based obligations to provide for "appropriate modes of settlement"

[1004] See para. (6) of the commentary to draft guideline 11 below.

[1005] See, e.g., art. VIII, sect. 29, of the Convention on the Privileges and Immunities of the United Nations; art. IX, sect. 31, of the Convention on the Privileges and Immunities of the Specialized Agencies; art. 12 of the Agreement on Privileges and Immunities of the Organization of American States; art. 24 of the Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff (Ottawa, 20 September 1951), United Nations, *Treaty Series*, vol. 200, No. 2691, p. 3; art. 31 of the Agreement on the Privileges and Immunities of the International Criminal Court.

[1006] See the broader formulation in art. 33 of the Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization (Calgary, 9 October 1990, and Montreal, 9 October 1990), United Nations, *Treaty Series*, vol. 1669, No. 28718, p. 105 ("The Organization shall make adequate provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes to which the organization is a party").

[1007] See, e.g., Netherlands, Supreme Court, *Stichting Mothers of Srebrenica and others v. Netherlands and United Nations* (see footnote 834 above).

[1008] Final report of Sub-Committee 1 of the Sixth Committee on coordination of the privileges and immunities of the United Nations and of the specialized agencies (A/C.6/191 and A/C.6/91/Corr.1) (November 1947), para. 32 ("it was observed that this provision applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instruments and not to the actual performance of its constitutional functions").

[1009] Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Brian Concannon, 21 February 2013, available at https://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf, at p. 2 ("With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations"). See also Frédéric Mégret, "La responsabilité des Nations Unies aux temps du choléra", *Revue belge de droit international*, vol. 46, No. 1 (2013), pp. 161–189; Kristina Daugirdas, "Reputation and accountability: another look at the United Nations' response to the cholera epidemic in Haiti", *International Organizations Law Review*, vol. 16, No. 1 (January 2019), pp. 11–41.

[1010] See paras. (3) and (4) of the commentary to draft guideline 11 below. See also Thomas S.M. Henquet, *The Third-Party Liability of International Organisations: Towards a "Complete Remedy System" Counterbalancing Jurisdictional Immunity* (Leiden/Boston, Brill Nijhoff, 2023), pp. 496 *et seq*.

are likely to exclude only claims preventing organizations from the actual performance of their "constitutional functions". From a rule of law perspective, too, it appears necessary to demand access to justice in regard to all forms of disputes between international organizations and private parties.[1011]

(7) While most privileges and immunities treaties require international organizations to make available appropriate "modes" of dispute settlement, some use the term "methods".[1012] Both terms broadly overlap with "means" of dispute settlement, as defined in draft guideline 2, subparagraph *(d)*. However, the term "mode" may even convey a more flexible and broader meaning than the notion of "means" of dispute settlement.

(8) By emphasizing that the modes of dispute settlement made available "shall" ensure the right of access to justice of private parties, draft guideline 10 points to draft guideline 11.

Guideline 11
Access to justice

In order to ensure the right of access to justice, judicial settlement or reasonable alternative means of dispute settlement, which may include arbitration or administrative tribunals, shall be made more widely accessible for the settlement of disputes between international organizations and private parties. Such means shall be effective and in no circumstances amount to arbitrariness or denial of justice.

Commentary

(1) Private parties are entitled to access to justice in the form of access to courts or alternative, effective third-party dispute settlement mechanisms, as a matter of human rights. Some universal and regional human rights treaties expressly provide for such a right of access to justice.[1013] Where it is not explicit, human rights bodies and

[1011] Netherlands Advisory Committee on Issues of Public International Law, "Settlement of disputes to which international organisations are parties", advisory report No. 47, 13 August 2024, p. 9; Institute of International Law, resolution on judicial redress against the decisions of international organs, Institute of International Law, *Annuaire*, vol. 47, Session of Amsterdam (1957), Part II, pp. 488–491, para. II (c) ("judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration, notably: … the rules established by that organ or organization whether they concern the States members, the agents and officials of the organ or organization, or private persons to the extent that their rights and interests are involved") (also available from www.idi-iil.org); Institute of International Law, resolution on review of measures implementing decisions of the Security Council in the field of targeted sanctions, Institute of International Law, *Annuaire*, vol. 78, Session of Hyderabad (2017), Part II, pp. 94–98 (approving of the practice of review of Security Council decisions by national and regional courts and noting in preambular para. 4 "that in general the rule of law includes a principle according to which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated") (also available from www.idi-iil.org).

[1012] See, e.g., art. 24 of the Agreement between the Swiss Federal Council and the International Telecommunication Union Concerning the Legal Status of that Organization in Switzerland (Geneva, 22 July 1971), United Nations, *Treaty Series*, vol. 793, No. 663, p. 317; art. XIV of the Agreement between the Republic of Austria and the United Nations Industrial Development Organization regarding the Headquarters of the United Nations Industrial Development Organization, Austrian Official Gazette BGBl. III 100/1998.

[1013] See, e.g., art. 47 of the Charter of Fundamental Rights of the European Union (13 December 2007), *Official Journal of the European Union*, No. C 326 (26 October 2012) ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. … Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."); art. 7, para. 1, of the African

courts have clarified that access to justice is inherent in fair trial or due process provisions.[1014] They have equally emphasized that access to justice is a core requirement of rule of law.[1015] Access to justice is also regarded as a right contained in customary international law.[1016] This obligatory nature justifies the formulation of the draft guideline in obligatory terms.

(2) While most human rights treaties primarily envisage national courts as the means of dispute settlement by which access to justice is to be provided, alternative mechanisms, including arbitration or administrative tribunals, may also satisfy this requirement, provided that they offer guarantees of adjudicatory independence and impartiality and of a fair trial or due process.[1017] These guarantees are addressed in draft guideline 12.

Charter on Human and Peoples' Rights ("Every individual shall have the right to have his cause heard"); art. 13, para. 1, of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), United Nations, *Treaty Series*, vol. 2515, No. 44910, p. 3 ("States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations"). See also the report of the Office of the United Nations High Commissioner for Human Rights on the right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities (A/HRC/37/25), para. 9 ("The right to access to justice has developed over time in international and regional human rights instruments, although it was not explicitly formulated as such until the adoption of the Convention").

1014 See, e.g., Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), paras. 9 and 17; European Court of Human Rights, *Golder v. United Kingdom* (see footnote 916 above), para. 36; African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/02, 15 May 2006, para. 213; Inter-American Court of Human Rights, *Case of Genie-Lacayo v. Nicaragu*a, Series C, No. 30, Judgment, 29 January 1997, para. 74; Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos at al.) v. Ecuador*, Series C, No. 268, Judgment, 28 August 2013, para. 181.

1015 See, e.g., African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v. Zimbabwe*, communication No. 294/04, 3 April 2009, para. 118; European Court of Human Rights, *Golder v. United Kingdom* (see footnote 916 above), para. 34.

1016 Francioni, "The rights of access to justice under customary international law" (see footnote 886 above), p. 55; Clooney and Webb, *The Right to a Fair Trial in International Law* (see footnote 886 above), p. 13.

1017 See, e.g., European Court of Human Rights, *Suovaniemi and others v. Finland*, Application No. 31737/96, Decision, 23 February 1999; European Court of Human Rights, *Suda v. Czech Republic*, Application No. 1643/06, Judgment, 28 October 2010; European Court of Human Rights, *Klausecker v. Germany*, Application No. 415/07, Judgment, 6 January 2015; European Court of Human Rights, *Perez v. Germany*, Application No. 15521/08, Decision, 29 January 2015; European Court of Human Rights, *Mutu and Pechstein v. Switzerland*, Applications No. 40575/10 and No. 67474/10, Judgment, 2 October 2018; European Court of Human Rights, *Ali Rıza and Others v. Turkey*, Applications No. 30226/10 and four others, Judgment, 28 January 2020; European Court of Human Rights, *Beg S.p.a. v. Italy*, Application No. 5312/11, Judgment, 20 May 2021. The jurisprudence of the European Court of Human Rights distinguishes between voluntary and compulsory arbitration. In the case of a voluntary, lawful and unequivocal waiver of the right to access a court, as usually present in commercial arbitration, only a minimum of the guarantees under art. 6 of the European Convention on Human Rights has to be met by such arbitration, whereas in case of arbitration provided for in legislation or other binding rules, the resulting arbitration has to fully comply with the guarantees under art. 6 of the Convention. See also Olivier Jacot-Guillarmod, "L'arbitrage privé face à l'article 6§1 de la Convention européenne des Droits de l'Homme", in Franz Matscher and Herbert Petzold (eds.), *Protection des droits de l'homme: la dimension européenne. Mélanges en l'honneur de Gérard J. Wiarda* (Cologne, Carl Heymann, 1988), pp. 281–294; Massimo V. Benedettelli, "Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience", *Arbitration International*, vol. 31, No. 4 (December 2015), pp. 631–659, at pp. 639–640; Ursula Kriebaum, "The European Court of Human Rights and arbitration", in Stefan Kröll, Andrea K. Bjorklund and

(3) In practice, the non-accessibility of national courts as a result of jurisdictional immunity is predominantly compensated for by the contractual agreement to submit to arbitration or the establishment of administrative tribunals for staff disputes.[1018] This is the reason why the phrase "which may include arbitration or administrative tribunals" was added. It is not meant to suggest that administrative tribunals are not forms of judicial settlement. In addition, internal courts and accountability mechanisms, including ombuds institutions, may be accessible for a wider range of complaints by private parties.[1019]

(4) Some human rights treaties and instruments guarantee access to courts only in regard to civil rights and obligations;[1020] others refer more broadly to any rights and obligations of private parties.[1021] While most human rights treaties only view individuals as potential rights holders,[1022] others encompass any private parties, including legal persons.[1023]

(5) Furthermore, human rights treaties and instruments regularly contain a right to an effective remedy which specifically relates to violations of the human rights enshrined in the respective treaties.[1024]

Franco Ferrari (eds.), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge, Cambridge University Press, 2023), pp. 1981–2005.

[1018] See para. (3) of the commentary to draft guideline 8 above. See also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 47, at p. 57 (finding that it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals ... that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."); *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 pp. 88-89 (stating the "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.").

[1019] See para. (8) of the commentary to draft guideline 7 above. See also Linda C. Reif, *Ombuds Institutions, Good Governance and the International Human Rights System*, 2nd ed. (Leiden/Boston, Brill Nijhoff, 2020); Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford, Oxford University Press, 2017); Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (see footnote 959 above); Bardo Fassbender, "Targeted sanctions imposed by the UN Security Council and due process rights: a study commissioned by the UN Office of Legal Affairs and follow-up action by the United Nations", *International Organizations Law Review*, vol. 3, No. 2 (2006), pp. 437–485; Andrej Lang, "Alternatives to adjudication in international law: a case study of the Ombudsperson to the ISIL and Al-Qaida sanctions regime of the UN Security Council", *American Journal of International Law*, vol. 117, No. 1 (January 2023), pp. 48–91.

[1020] See art. 6 of the European Convention on Human Rights.

[1021] See art. 10 of the Universal Declaration of Human Rights ("rights and obligations"); art. 8, para. 1, of the American Convention on Human Rights ("rights and obligations of a civil, labor, fiscal, or any other nature").

[1022] See art. 1, para. 2, of the American Convention on Human Rights; art. 2, para. 1, of the International Covenant on Civil and Political Rights. See also Human Rights Committee, general comment No. 31 (2004), para. 9.

[1023] See, e.g., European Court of Human Rights, *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France*, Application No. 75218/01, Decision, 28 March 2006, para. 4 (regarding an association); European Court of Human Rights, *Tre Traktörer Aktiebolag v. Sweden*, Application No. 10873/84, Judgment, 7 July 1989, paras. 7 and 50 (regarding a company).

[1024] See, e.g., art. 8 of the Universal Declaration of Human Rights; art. 2, para. 3, of the International Covenant on Civil and Political Rights; art. 13 of the European Convention on

(6) Human rights bodies have acknowledged the inherent tension between the jurisdictional immunity of international organizations and the right of access to justice by private parties in situations where their claims against organizations are barred by such immunity.[1025] They have also suggested that upholding jurisdictional immunity would only be legitimate and proportionate where international organizations provide reasonable alternative means of dispute settlement.[1026]

(7) On this basis, some national courts have withheld the immunity granted to international organizations, in cases where no alternative remedies were accessible[1027] or even where alternative remedies were available but did not provide a reasonable alternative.[1028] However, most national courts have accepted the adequacy of

Human Rights; art. 25, para. 1, of the American Convention on Human Rights; art. 7, para. 1 (a), of the African Charter on Human and Peoples' Rights.

[1025] See, e.g., European Court of Human Rights, *Perez v. Germany* (see footnote 1017 above), para. 93 ("The Court limits itself to reiterate that it would be incompatible with the purpose and object of the [European Convention on Human Rights] if the Contracting States, by attributing immunities to international organisations, were absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. This applies, in particular, to the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial"); European Court of Human Rights, *Waite and Kennedy v. Germany* (see footnote 916 above), para. 67 ("The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights"); European Court of Human Rights, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Application No. 65542/12, Decision, 11 June 2013, paras. 138 ("It is undeniable that where immunity from jurisdiction is granted to any person, public or private, the right of access to court, guaranteed by Article 6 § 1 of the Convention, is affected"), 139 (e)–(g), 163 and 164; Human Rights Committee, *M.L.D. v. Philippines* (CCPR/C/141/D/3581/2019), para. 9.4 ("The role of functional immunity is to achieve independent and impartial exercise of the mandate of such international organization. … This functional immunity is not intended, however, to prevent access by staff to justice, before the internal grievance mechanisms or, alternatively, before the national courts."). See also Edward Chukwuemeke Okeke, "The tension between the jurisdictional immunity of international organizations and the right of access to court", in Quayle (ed.), *The Role of International Administrative Law at International Organizations* (see footnote 924 above), pp. 25–53.

[1026] See Human Rights Committee, *M.L.D. v. Philippines*, para. 8.6 ("Taking into account the jurisprudence of international judicial bodies, the Committee observes that while international organizations have an international legal personality and enjoy jurisdictional immunities, the host State party may still have jurisdiction under the [International Covenant on Civil and Political Rights] if the international organization does not provide a reasonable alternative means of dispute resolution"); European Court of Human Rights, *Waite and Kennedy v. Germany* (see footnote 916 above), para. 68 ("a material factor in determining whether granting … immunity from … jurisdiction is permissible … is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the [European Convention on Human Rights].").

[1027] See, e.g., France, Paris Court of First Instance, *UNESCO v. Boulois* (see footnote 936 above); France, Paris Court of Appeal, *UNESCO v. Boulois* (see footnote 936 above), p. 295; Belgium, Court of Cassation, *General Secretariat of the ACP Group v. Lutchmaya* (see footnote 995 above); Austria, Constitutional Court, *Anonymous v. Organization of the Petroleum Exporting Countries (OPEC)*, SV 1/2021-23, ILDC 3402 (AT 2022), Decision, 29 September 2022; France, Paris Court of Appeal, *F.L. et T.L. v. Agence Spatiale Européenne*, RG No. 20/17725, Decision, 16 January 2024.

[1028] See, e.g., Belgium, Brussels Labour Court of Appeal (4th chamber), *Siedler v. Western European Union*, *Journal des tribunaux* (2004), 617, ILDC 53 (BE 2003), Appeal Judgment, 17 September 2003; Italy, Supreme Court of Cassation, *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Case No. 3718, Giustizia Civile Massimario, 2007, 2, ILDC 827 (IT 2007), Final Appeal Judgment, 19 February 2007.

alternative remedies, often in the form of internal mechanisms for the settlement of staff disputes.[1029]

(8) In some States, courts have developed a similar jurisprudence on the basis of guarantees under national constitutional law of access to justice, or on the basis of international public policy, and linked the granting of jurisdictional immunity to international organizations to the availability of adequate alternative means of dispute settlement. [1030] This conditionality has even been codified in some national legislation.[1031]

(9) The similar rationale found in various privileges and immunities treaties, which oblige organizations enjoying broad jurisdictional immunity to make available "appropriate modes of settlement" of "disputes arising out of contracts or other disputes of a private law character", is addressed in the commentary to draft guideline 10.[1032]

(10) Draft guideline 11 stipulates that means of dispute settlement that satisfy the requirements of the obligation to grant access to justice must be made more widely accessible.

(11) While there are different views on whether the non-availability of alternative forms of dispute settlement entails the loss of jurisdictional immunity,[1033] it is clear

[1029] See, e.g., Argentina, Supreme Court, *Basgall c. Delegación Argentina (CTMSG)*, SAIJ No FA91000487, Extraordinary Appeal Judgment, 5 November 1991; Argentina, Labour Court No. 55, *García Campos c. Comisión Técnica Mixta de Salto Grande*, No. 74/92, Interlocutory Judgment, 8 July 1992; Argentina, Labour Court No. 59, *Vidal c. Comisión Técnica Mixta de Salto Grande*, No. 134/92, Interlocutory Judgment, 30 October 1992; Switzerland, Federal Supreme Court, *Consortium X v. Switzerland*, BGE 130 I 312, ILDC 344 (CH 2004), Final Appeal Judgment, 2 July 2004; Italy, Supreme Court of Cassation, *Paola Pistelli v. European University Institute* (see footnote 994 above); Belgium, Brussels Court of First Instance (Civ. Bruxelles) (4th chamber), *SA Energies nouvelles et environnement v. Agence spatiale européenne*, *Journal des tribunaux* (2006), p. 171, ILDC 1229 (BE 2005), 1 December 2005; Italy, Supreme Court of Cassation, *Drago v. International Plant Genetic Resources Institute* (see previous footnote); France, Court of Cassation, *X v. Organisation for Economic Co-operation and Development*, No. 09-41030, ILDC 1749 (FR 2010), Appeal Judgment, 29 September 2010; Germany, Hesse Higher Administrative Court, *A v. European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)*, 7 E 2900/09, NJW 2010, 2680, ILDC 2247 (DE 2010), Appeal Order, 17 February 2010.

[1030] See, e.g., Germany, Federal Constitutional Court, Second Chamber, *Hetzel v. EUROCONTROL*, BVerfG 59, 63, Decision, 10 November 1981; Italy, Supreme Court of Cassation, *Food and Agriculture Organization v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)* (see footnote 991 above); Argentina, Supreme Court, *Washington Cabrera c. Comisión Técnica Mixta de Salto Grande*, *CSJN Fallos*: 305:2150, 5 December 1983; France, Court of Cassation (Chambre sociale), *Banque africaine de développement v. M.A. Degboe*, 04-41012, 25 January 2005, *Journal du droit international,* vol. 132 (2005), p. 1142; Russian Federation, Supreme Court, *SN Ryabov v Eurasian Development Bank* (see footnote 994 above); Austria, Constitutional Court, *Anonymous v. OPEC* (see footnote 1027 above). See also Eyal Benvenisti, "When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 85 (2025), pp. 627–648, at p. 642.

[1031] See Spain, Organic Act No. 16/2015 of 27 October 2015 on the privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, art. 35, para. 1.

[1032] See paras. (4) *et seq*. of the commentary to draft guideline 10 above.

[1033] For cases affirming such a consequence, see footnotes 1028 and 1029 above For cases rejecting such conditionality, see, e.g., United Kingdom, England and Wales High Court (Commercial Court), *Entico Corporation Limited v. United Nations Educational, Scientific and Cultural Association* [sic] *(UNESCO)*, EWHC 531 (Comm), Judgment, 18 March 2008; Netherlands, Supreme Court, *Stichting Mothers of Srebrenica and others v. Netherlands and United Nations* (see footnote 834 above); United States, Court of Appeals for the Second

that private parties are entitled to access to justice. Draft guideline 9, affirming the principle of immunity, and draft guideline 11, affirming the corresponding requirement of international organizations to ensure that immunity does not operate as a bar to access to justice, are parallel and complementary. They do not require international organizations to waive their immunity. Rather, they encourage them to seek the settlement of disputes with private parties as affirmed in draft guideline 10.

(12) Thus, the draft guideline stresses that "judicial settlement or reasonable alternative means of dispute settlement, which may include arbitration or administrative tribunals, shall be made more widely accessible". The term "more widely" is used to make clear that the provision is not a jurisdictional clause or meant to suggest that international organizations have an obligation to waive immunity or to open recourse to national courts. As in draft guideline 5, the expression "accessible" has been chosen to emphasize practical issues, such as costs and legal remedies available, and not only the legal availability of means of dispute settlement.[1034] In order to provide effective access to justice, means of dispute settlement also have to be affordable.[1035]

(13) Furthermore, these forms of dispute settlement must comply with the requirements of a fair trial or due process in order to meet the requirements of access to justice demanded by human rights courts and bodies. The second sentence of draft guideline 11, according to which the means made accessible "shall be effective and in no circumstances amount to arbitrariness or denial of justice", is based on language used by the Human Rights Committee, summarizing such demands.[1036] This language also reflects the content of draft guideline 12.

Guideline 12
Requirements for means of dispute settlement of an adjudicatory character

Means of dispute settlement of an adjudicatory character shall conform to procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process.

Commentary

(1) Private parties are entitled to receive a certain standard of treatment before adjudicatory bodies under most international human rights instruments as well as under customary international law.[1037] The core of such guarantees encompasses both

Circuit, *Brzak and Ishak v. United Nations and others*, Docket No. 08-2799-CV, ILDC 2152 (US 2010), 597 F 3d 107 (2d Cir. 2010), Appeal Judgment, 2 March 2010; United States, Court of Appeals for the Second Circuit, *Georges and others v. United Nations and others* (see footnote 833 above).

1034 See para. (2) of the commentary to draft guideline 5 above.

1035 Food and Agriculture Organization of the United Nations, "Note on modes of settlement of disputes", reprinted in *United Nations Juridical Yearbook 1986*, chap. III, sect. B. 2, annex I, pp. 156–158, at p. 157 (referring to "the practicality of the proceedings and the possibility of having recourse to them at reasonable cost").

1036 Human Rights Committee, *M.L.D. v. Philippines*, para. 9.7 ("The Committee considers that it is incumbent on international organizations … to provide for reasonable alternative means of dispute resolution such as in labour disputes between the international organization and its staff. Where the internal affairs of the international organization are concerned, the jurisprudence of international judicial bodies accepts that the standard of fair trial guarantees applicable to the resolution of internal disputes might differ depending on the type of dispute. Such doctrine accepts, for example, that oral hearings and witness testimonies are not required when the dispute concerns internal matters of the international organization, without external impact, and that the organization has discretion as to the reasonable alternative means of dispute resolution, taking into account the principles of objectivity, necessity and impartiality, and not amounting to arbitrariness or denial of justice.").

1037 See para. (1) of the commentary to draft guideline 10 above.

procedural due process or a fair trial and the independence and impartiality of adjudicators. These requirements also stem from the demands of the rule of law.[1038]

(2) Since these obligations are enshrined in human rights instruments and form part of customary international obligations to accord due process or a fair trial, the draft guideline is formulated in obligatory language.

(3) Draft guideline 12 expressly refers to means of dispute settlement of an adjudicatory character. This is understood to encompass arbitration and judicial settlement.[1039] It thus corresponds to draft guideline 6, which also refers to arbitration and judicial settlement.

(4) Like draft guideline 6, draft guideline 12 focuses on means of dispute settlement of an adjudicatory character because it is in these means of third-party dispute settlement that independence and impartiality, as well as compliance with due process, are most crucial and well established. This is without prejudice to the existence of a requirement of independence and impartiality for other means, such as conciliation or mediation.[1040]

(5) Since rule of law and human rights requirements particularly protect private parties in case they have disputes with other parties, including international organizations, these requirements are expressly highlighted in draft guideline 12. The qualification "procedural" emphasizes that it is the requirements applicable to dispute settlement that are relevant in the present context.

(6) The independence and impartiality of adjudicators are crucial rule of law requirements for the proper administration of justice.[1041] They are also core elements of the fair trial guarantees in human rights instruments.[1042] Arbitration rules and the institutional rules of judicial bodies regularly require the independence and impartiality of adjudicators.[1043]

(7) Independence primarily refers to the structural "independence of the judiciary from political interference by the executive branch and legislature"[1044] and to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of structural, personal, financial or other close connection to them,[1045]

[1038] See paras. (2) *et seq*. of the commentary to draft guideline 6 above.

[1039] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 455, at p. 478, para. 83 (contrasting among the means of dispute settlement provided for in Article 33 of the Charter "political and diplomatic means, and … adjudicatory means such as arbitration or judicial settlement").

[1040] See para. (3) of the commentary to draft guideline 6 above.

[1041] Bangalore Principles of Judicial Conduct, value 1 ("Judicial independence is a prerequisite to the rule of law"); Venice Commission, "Report on the rule of law" (see footnote 911 above), para. 41 ("it seems that a consensus can now be found for the necessary elements of the rule of law …. These are: … (4) Access to justice before independent and impartial courts").

[1042] See art. 10 of the Universal Declaration of Human Rights ("an independent and impartial tribunal"); art. 14, para. 1, of the International Covenant on Civil and Political Rights ("a competent, independent and impartial tribunal established by law"); art. 6 of the European Convention on Human Rights ("an independent and impartial tribunal established by law"); art. 8, para. 1, of the American Convention on Human Rights ("a competent, independent, and impartial tribunal, previously established by law").

[1043] See, e.g., art. 6, para. 7, of the UNCITRAL Arbitration Rules (2021) and art. 6, para. 3, of Permanent Court of Arbitration, Arbitration Rules (2012) (referring to an "independent and impartial arbitrator"). See also paras. (3) *et seq*. of the commentary to draft guideline 6 above.

[1044] Human Rights Committee, general comment No. 32 (2007), para. 19.

[1045] A/CN.9/1148, sect. II. C., text of the draft commentary, para. 19; European Court of Human Rights, *Findlay v. United Kingdom*, Application No. 22107/93, Judgment, 25 February 1997, para. 73 ("in order to establish whether a tribunal can be considered as 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence"); Manfred Nowak, *U.N. Covenant on Civil and*

whereas impartiality relates more to the views and opinions held by an adjudicator, thus requiring a lack of bias or undue predisposition.[1046]

(8) The content of the requirements of independence and impartiality of arbitrators are often made more precise by additional rules, such as the International Bar Association Guidelines on Conflicts of Interest[1047] or various codes of conduct.[1048] For adjudication, the statutes of courts and tribunals,[1049] as well as their rules of procedure[1050] or codes of conduct,[1051] also provide for more detail.

(9) That the independence and impartiality of adjudicators is specifically addressed in this draft guideline is without prejudice to the requirement that other third parties, empowered to settle a dispute or contribute to its settlement, as in the case of mediation, conciliation and the like, also have to be independent and impartial.[1052]

(10) Due process, or a fair trial, particularly requires adjudicators to afford the parties the right to be heard and the right to be heard equally. It derives from the

Political Rights: CCPR Commentary, 2nd ed. (Kehl am Rhein, N.P. Engel, 2005), pp. 319–322; Loretta Malintoppi, "Independence, impartiality, and duty of disclosure of arbitrators", in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008), pp. 789–829, at p. 807.

1046 Human Rights Committee, general comment No. 32 (2007), para. 21 ("judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other"); A/CN.9/1148, sect. II. C., text of the draft commentary, para. 19 ("'Independence' refers to the absence of any external control, in particular the absence of relations with a disputing party that might influence an Arbitrator's decision. 'Impartiality' refers to the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceeding."); European Court of Human Rights, *Findlay v. United Kingdom* (see previous footnote), para. 73 ("As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect").

1047 International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the Council of the International Bar Association on 23 October 2014).

1048 See, e.g., A/CN.9/1148.

1049 See, e.g., arts. 14 and 15 of the Convention on the Statute of the Central American Court of Justice; art. 4 of the Protocol on the Community Court of Justice (ECOWAS), as amended by the Supplementary Protocol; art. 4 of the statute of the United Nations Dispute Tribunal, General Assembly resolution 63/253, annex I (as amended).

1050 See, e.g., rule 4, para. 1, of the Rules of Court of the European Court of Human Rights. See also European Court of Human Rights, "Practice direction issued by the President of the [European Court of Human Rights] in accordance with Rule 32 of the Rules of Court", 22 January 2024.

1051 See, e.g., code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, General Assembly resolution 66/106 of 9 December 2011.

1052 Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules (A/CN.9/180), *Yearbook of the United Nations Commission on International Trade Law,* vol. XI (1980), pp. 100–109, at para. 5 ("Conciliation is one out of various methods of dispute settlement. It may be defined as a method used by parties to a dispute to reach an amicable settlement with the assistance of an independent third person or institution."); Kishore Shyam, "The evolving concepts of neutrality and impartiality in mediation", *Commonwealth Law Bulletin,* vol. 32, No. 2 (June 2006), pp. 221–225; Jean-Pierre Cot, "Conciliation", in Anne Peters and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (online, Oxford University Press, 2006), available at http://www.mpepil.com/; Omer Shapira, *A Theory of Mediator's Ethics: Foundations, Rationale, and Application* (Cambridge, Cambridge University Press, 2016), pp. 207–230.

broader principle of equality[1053] and is linked to the general principle of *audiatur et altera pars*.[1054]

(11) The principle of equality, or equality of arms, is crucial to any form of adjudication that is based on the rule of law[1055] and conforms to human rights demands.[1056] It comprises the right of each party to respond to the submissions of the other and the right to equal treatment in regard to procedural issues such as timing, pleading, documents production and evidentiary considerations.[1057]

(12) The principle of equality may also require steps to avoid factual inequality as a result of a lack of resources. While national legislation often provides for legal aid schemes, permitting indigent claimants to pursue their rights,[1058] international courts and tribunals have also created legal aid schemes and/or trust funds.[1059] In arbitration, third-party funding is a frequent, though not uncontroversial, device to ensure equality of resources of the parties.[1060]

[1053] Clooney and Webb, *The Right to a Fair Trial in International Law* (see footnote 886 above), pp. 719–776.

[1054] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, reprinted 2006), p. 290.

[1055] Human Rights Committee, general comment No. 32 (2007), para. 2 ("The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law"); Venice Commission, "Report on the rule of law" (see footnote 911 above), para. 60 ("The rights most obviously connected to the rule of law include … the right to be heard").

[1056] See art. 10 of the Universal Declaration of Human Rights ("Everyone is entitled in full equality to a fair and public hearing"); art. 14, para. 1, of the International Covenant on Civil and Political Rights ("All persons shall be equal before the courts and tribunals …everyone shall be entitled to a fair and public hearing"); Inter-American Commission on Human Rights, "Access to justice as a guarantee of economic, social and cultural rights: a review of the standards adopted by the inter-American system of human rights", document OEA/Ser.L/V/II.129, 7 September 2007, para. 19 ("The [inter-American system of human rights] has identified the principle of equality of arms as an integral part of the right to a fair trial").

[1057] Human Rights Committee, general comment No. 32 (2007), para. 13; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 903 above), p. 209, para. 92; Institute of International Law, resolution on the equality of parties before international investment tribunals (see footnote 911 above), art. 8, para. 1 ("The equality of the parties includes the principle of the equality of arms, namely that: (a) Each party shall have the right to be heard on the submissions of the other (*audi alteram partem*); and, (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading, production of documents and evidence.").

[1058] Human Rights Committee, general comment No. 32 (2007), para. 10 ("While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it").

[1059] Art. 34 of the European Convention on Human Rights, and rules 105–110 of the Rules of Court of the European Court of Human Rights; art. 10, para. 2, of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, and rule 31 of African Court on Human and Peoples' Rights, Rules of Court (1 September 2020); art. 12 (on representation) of the rules of procedure of the United Nations Dispute Tribunal, General Assembly resolution 64/119 of 16 December 2009, annex I; sect. 7 (on the Office of Staff Legal Assistance) of the Secretary-General's bulletin on "Organization and terms of reference of the Office of Administration of Justice" (ST/SGB/2010/3). See also "The Office of Staff Legal Assistance", available at https://www.un.org/en/internaljustice/osla/ (accessed 23 June 2026).

[1060] Mohamed F. Sweify, *Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal* (Cheltenham, Edward Elgar Publishing, 2023); Valentina Frignati, "Ethical implications of third-party funding in international arbitration", *Arbitration International*, vol. 32, No. 3 (September 2016), pp. 505–522; Derric Yeoh, "Third party funding in international arbitration: a slippery slope or levelling the playing field?", *Journal of International Arbitration*, vol. 33, No. 1 (February 2016), pp. 115–122.

(13) Given the factual inequality and possible power imbalance between private parties and international organizations,[1061] securing equality of arms is of particular importance.[1062] In practice, this has led to the establishment of administrative tribunals for the settlement of staff disputes between international organizations and their employees with various procedural advantages offered to private parties as potential claimants.[1063] Arbitration institutions have also contributed to securing *de facto* equality, e.g., by offering cost-sensitive case administration.[1064] This is particularly useful in disputes involving private parties that render services to international organizations without becoming staff members. Since they do not have access to administrative tribunals, their contracts usually provide for arbitration.[1065] Recent discussions within the United Nations have addressed the need for an expedited and less costly approach to arbitration for disputes involving consultants and individual contractors, including through simplified procedures based on the UNCITRAL Expedited Arbitration Rules and the provision of reduced-cost administrative support by the Permanent Court of Arbitration.[1066]

[1061] See para. (8) of the commentary to draft guideline 8 above.

[1062] Rishi Gulati, "An international administrative procedural law of fair trial: reality or rhetoric?", *Max Planck Yearbook of United Nations Law*, vol. 21 (2018), pp. 210–270.

[1063] See para. (5) of the commentary to draft guideline 7 above.

[1064] See, e.g., A/CN.4/764, chap. III, sect. B 6 (Permanent Court of Arbitration) ("The mechanisms that PCA has observed used in these cases include, but are not limited to (*i*) the appointment of a sole arbitrator rather than a panel; (*ii*) dispensing with a hearing, and having a decision made on the basis of written submissions alone; (*iii*) dispensing with document production procedures; (*iv*) conducting meetings and/or hearings by videoconference rather than in person; (*v*) choosing an experienced appointing authority for arbitrators; (*vi*) using expedited appointment procedures for arbitrators (for instance, dispensing with a list procedure for the appointment of a sole arbitrator in favour of a direct appointment by the appointing authority); (*vii*) using a registry that can help reduce the time spent by the tribunal on routine tasks; and (*viii*) using an electronic file only, without paper copies").

[1065] See, for the United Nations, the administrative instruction on consultants and individual contractors (ST/AI/2013/4/Rev.1), annex II, "General conditions of contract for the services of consultants and individual contractors", sect. 16 ("Any dispute, controversy or claim between the parties arising out of the contract, or the breach, termination or invalidity thereof, unless settled amicably, as provided above, shall be referred by either of the parties to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining"). See also A/CN.4/782, paras. 92 *et seq.*; Gulati and John, "Arbitrating employment disputes involving international organizations" (see footnote 969 above).

[1066] See Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, statement to the Commission at its seventy-fifth session, Geneva, 2 July 2024 (see A/CN.4/SR.3675; statement text available at https://www.un.org/ola/sites/www.un.org.ola/files/documents/2024/07/mss-ilc-opening-02072024.pdf), in which he noted that, in response to a request for information from the General Assembly about options for an expedited and less costly approach to arbitration for disputes between the Organization and non-staff personnel, the Office of Legal Affairs was developing an expedited and simplified arbitration procedure for United Nations consultants and individual contractors based on the UNCITRAL Expedited Arbitration Rules, and had established an arrangement with the Permanent Court of Arbitration to provide arbitrator appointment, registry and administrative support at a reduced fee. See also Elinor Hammarskjöld, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, statement to the Commission at its seventy-seventh session, Geneva, 1 May 2026 (see A/CN.4/SR.3733), in which she informed the Commission that the Office had revised the dispute settlement clause in the standard form of contract between the Organization and consultants and individual contractors to provide for an expedited and simplified arbitration procedure, which would shortly enter into force. That development was important both for improving access to justice for non-staff personnel and for addressing a point of tension affecting respect for the Organization's privileges and immunities: a perceived lack of access to effective remedies, which had underlain decisions of national courts in certain jurisdictions not to uphold those privileges and immunities against claims by such individuals. The new procedure, conducted with the support of the Permanent Court of Arbitration, would be faster and less expensive than ordinary arbitration.

(14) The notion of a fair trial or due process also comprises additional elements,[1067] such as the right to a public hearing,[1068] the right to be tried within a reasonable time,[1069] the requirement to provide reasons[1070] and the finality of judgments.[1071]

(15) These demands have been clearly stated by the International Court of Justice in its advisory opinion in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*. With regard to staff disputes, the most frequent disputes between international organizations and private parties, the Court considered that due process or the good administration of justice entailed "the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision".[1072]

(16) The use in draft guideline 12 of the language "procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process" indicates that the references to "independence and impartiality of adjudicators and due process" are illustrative and not exhaustive, ensuring that other rule of law and human rights requirements of a procedural nature are also included.

[1067] See Agustín Ruiz Robledo, "Due process", *Max Planck Encyclopedia of Comparative Constitutional Law* (April 2022); Damir Banović, "Procedural justice", *Max Planck Encyclopedia of Comparative Constitutional Law* (June 2024).

[1068] See, e.g., Human Rights Committee, general comment No. 32 (2007), paras. 28–29; European Court of Human Rights, *Helmers v. Sweden*, Application No. 11826/85, Judgment, 29 October 1991, para. 36; Inter-American Court of Human Rights, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Series C, No. 182, Judgment, 5 August 2008, para. 75; African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Communication No. 224/98, 6 November 2000, para. 54.

[1069] See the express references in art. 6 (1) of the European Convention on Human Rights; art. 8, para. 1, of the American Convention on Human Rights; art. 14, para. 3 (c), of the International Covenant on Civil and Political Rights; art. 7, para. 1 (d), of the African Charter on Human and Peoples' Rights. See also, e.g., Human Rights Committee, general comment No. 32 (2007), para. 35; European Court of Human Rights, *Di Pede v. Italy*, Application No. 15797/89, Judgment, 26 September 1996, para. 27; European Court of Human Rights, *Menéndez García and Álvarez González v. Spain*, Applications No. 73818/11 and No. 19420/12, Judgment, 15 March 2016, para. 18; Inter-American Court of Human Rights, *Suárez Rosero v. Ecuador*, Series C, No. 35, Judgment, 12 November 1997, para. 72; Inter-American Court of Human Rights, *Muelle Flores v. Peru*, Series C, No. 375, Judgment, 6 March 2019, para. 154; African Commission on Human and Peoples' Rights, *Odjouoriby Cossi Paul v. Benin*, Communication No. 199/97, 4 June 2004, para. 28.

[1070] See, e.g., European Court of Human Rights, *Hadjianastassiou v. Greece*, Application No. 12945/87, Judgment, 16 December 1992, para. 33; African Commission on Human and Peoples' Rights, *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, Communications No. 274/03 and No. 282/03, 5 November 2013, para. 68.

[1071] See, e.g., European Court of Human Rights, *Brumărescu v. Romania*, Application No. 28342/95, Judgment, 28 October 1999, para. 61; European Court of Human Rights, *Ryabykh v. Russia*, Application No. 52854/99, Judgment, 24 July 2003, paras. 51–52.

[1072] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 903 above), p. 209, para. 92.

Chapter VIII
Succession of States in respect of State responsibility

A. Introduction

84. 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.[1073] The General Assembly, in its resolution 72/116 of 7 December 2017, subsequently took note of the decision of the Commission to include the topic in its programme of work.

85. From its sixty-ninth to seventy-third (2017–2022) sessions, the Commission considered[1074] five reports by the Special Rapporteur,[1075] as well as a memorandum by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[1076] Following the debate on each report, the Commission decided to refer the proposals for draft articles made by the Special Rapporteur to the Drafting Committee. The Commission heard interim reports and statements from the successive Chairs of the Drafting Committee on succession of States in respect of State responsibility at the sixty-ninth to seventy-third sessions.

86. At its seventy-third session, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee (including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur's fifth report.[1077]

87. Also at its seventy-third session, the Commission provisionally adopted, with commentaries, draft guidelines 6, 10, 10 *bis* and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, as well as draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, which were provisionally adopted by the Drafting Committee in 2022. As a result of the change of the proposed form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.[1078]

88. At its seventy-fourth session (2023), the Commission had no report before it on the topic, as the Special Rapporteur was no longer a member of the Commission. The Commission decided to establish a Working Group on the topic and appointed Mr. August Reinisch as its Chair. The Working Group recommended that the Commission continue its consideration of the topic, while refraining, at that stage, from proceeding with the appointment of a new Special Rapporteur. It further recommended that the Working Group be re-established at the seventy-fifth session

[1073] 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 II to the report of the Commission (*Yearbook … 2016*, vol. II (Part Two)).

[1074] *Ibid.*, *Seventy-second Session, Supplement No. 10* (A/72/10), chap. IX; *ibid.*, *Seventy-third Session, Supplement No. 10* (A/73/10), chap. X; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. VII; *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), chap. VII; and *ibid.*, *Seventy-seventh Session, Supplement No. 10* (A/77/10), chap. VII.

[1075] A/CN.4/708, A/CN.4/719, A/CN.4/731, A/CN.4/743 and Corr.1, and A/CN.4/751, respectively.

[1076] A/CN.4/730.

[1077] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 75.

[1078] *Ibid.*, para. 76.

(2024) of the Commission, with the same open-ended composition, with a view to undertaking further reflection on the way forward for the topic and making a recommendation thereon. The Commission subsequently took note of the oral report of the Chair of the Working Group, including the recommendations contained therein.[1079]

89. At its seventy-fifth session, the Commission re-established the Working Group, with Mr. Reinisch as Chair. Having considered and taken note of the report of the Working Group,[1080] at the same session, the Commission decided:[1081]

(*a*) to establish at its seventy-sixth session (2025) a Working Group on succession of States in respect of State responsibility for the purpose of drafting a report that would bring the work of the Commission on the topic to an end;

(*b*) that the report would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work; and

(*c*) to appoint Mr. Bimal N. Patel as Chair of the Working Group to be established at the seventy-sixth session of the Commission and recommended that the Chair be encouraged to prepare the draft report of the Working Group in advance of the session, in close collaboration with interested members.

90. At its seventy-sixth session, the Commission decided to establish a Working Group of the Whole on the topic, further to the decision taken at its seventy-fifth session, and appointed Mr. Bimal N. Patel as Chair. The Commission subsequently took note of the oral report of the Chair of the Working Group.[1082]

B. Consideration of the topic at the present session

91. At its 3729th meeting, on 27 April 2026, the Commission re-established the Working Group of the Whole with Mr. Patel as Chair. The Working Group had before it a revised draft report prepared by its Chair (A/CN.4/L.1004/Rev.1). The revised draft report contained, in its annex, a proposal by the Chair for the final report of the Working Group. The Working Group was not able to consider and did not adopt the Chair's proposed final report. The Working Group decided that the Chair's proposed final report would be reissued as a separate document (A/CN.4/L.1004/Rev.2). The document included three annexes containing, respectively, a summary of the evolution of the draft provisions from draft articles to draft guidelines, a table reflecting the status of the draft articles and draft guidelines and a multilingual selected bibliography on the topic.

92. The Working Group held five meetings, on 14 and 21 May and 2, 4 and 29 June 2026.

93. At its 3760th meeting, on 13 July 2026, the Commission considered and took note of the Report of the Working Group (A/CN.4/L.1038), which, *inter alia*, contained the recommendation of the Working Group.

94. At its 3781st meeting, on 28 July 2026, the Commission, on the recommendation of the Working Group:

(*a*) adopted the report of the Working Group on the topic "Succession of States in respect of State responsibility", as amended (see sect. C below); and

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1079 *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 237–246.

1080 *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 309–330.

1081 *Ibid.*, para. 308.

1082 *Ibid.*, *Eightieth Session, Supplement No. 10* (A/80/10), paras. 425–435.

(*b*) decided not to pursue consideration of the topic further.

C. Report of the Working Group

1. Introduction, methodology and scope of the report

95. The Working Group had before it a revised draft report prepared by its Chair in advance of the present session (A/CN.4/L.1004/Rev.1), comprising a draft summary report of the Working Group and an annex containing a proposed final report of the Working Group. At its first meeting, on 14 May 2026, the Working Group decided to proceed in its work on the basis of the draft summary report.

96. The Working Group expressed its deep appreciation to the Chair of the Working Group, for his very valuable contribution and the work done in an efficient and expeditious manner. The Working Group also recalled, with gratitude, the work of the former Special Rapporteur on the topic, Mr. Pavel Šturma, and the Chair of the previous Working Group on the topic, Mr. August Reinisch.

97. Section C.2 of the present report contains a summary of the debates on the topic and includes work undertaken based on five reports of the Special Rapporteur, work undertaken by the Working Groups on the topic and the summary of the transition in outcome from draft articles to draft guidelines.[1083] Section C.3 summarizes the major difficulties faced by the Commission during the consideration of the present topic.

98. The Commission's prior work on the topic was received positively by States[1084] and was intended to fill gaps[1085] that remain after the codification of succession of States in respect of treaties (Vienna Convention on Succession of States in respect of Treaties of 1978), State property, archives and debts (Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983), and nationality (articles on nationality of natural persons in relation to the succession of States of 1999), on the one hand, and State responsibility, on the other. However, the Commission faced challenges in debates on whether to continue work on the topic. Concerns were raised regarding its usefulness and universal acceptance, its contemporary relevance, and the consequent difficulty in building consensus among States on the topic. The Commission began consideration of the topic with the draft articles proposed by the Special Rapporteur in his first report in 2017.[1086] The present report summarizes the difficulties that the Commission would face if it were to continue its work on the topic and explains the reasons for discontinuing it. It has identified issues and questions of substance and procedure and of an institutional nature and indicated whether and how they have been addressed by the Commission thus far.

2. Summary of the debates on the topic

(a) Work undertaken at the sixty-ninth session (2017) on the basis of the first report of the Special Rapporteur

99. At its 3354th meeting, the Commission decided to include the topic "Succession of States in respect of State Responsibility" in its programme of work

[1083] The draft texts that were provisionally adopted by the Commission in the course of these reports and debates are discussed in sect. C 2 (i), below.

[1084] See the statements by Togo, Slovakia and Slovenia as described in the first report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur, *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708, paras. 3 and 4, respectively.

[1085] See the statements by Mongolia, Egypt and the Czech Republic, *ibid.*, para. 5. See also *ibid.*, vol. II (Part Two), para. 216.

[1086] *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708.

and appointed Mr. Pavel Šturma as Special Rapporteur.[1087] At the same session, the Special Rapporteur introduced his first report exploring the existence of rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States for wrongful acts in situations of State succession.[1088] In that report, he found that traditional doctrine generally denied the possibility of transferring responsibility to a successor State, i.e., that the theory of non-succession prevailed.[1089] He conducted a preliminary survey of existing State practice, stating that international law did not support the general thesis of non-succession in respect of State responsibility.[1090] Members of the Commission, during consideration of the Special Rapporteur's first report, discussed the succession of States and the traditional rule of non-succession and suggested that any shift away from that rule must be supported by clear evidence of State practice and court decisions.[1091] Members also noted that agreements between States or unilateral declarations on matters of succession could not depend on a sense of obligation arising from general international law and might support the traditional rule as opposed to any new trend.[1092] They also expressed concerns about the lack of clarity on whether the examination of the topic should be codification or progressive development, potentially hindering wide acceptance by States.[1093] The first report also explored whether wrongful acts would fall within the rules on succession in respect of State debts and whether any possible transfer of obligations or rights would be governed by the rules on succession of States in respect of State responsibility.[1094] Support was expressed by several members for the Special Rapporteur's indication that he would examine the topic by focusing on different categories of State succession. At the same time, some members underscored that such an examination required a clear and detailed explanation of the factual differences between those categories of succession.[1095]

(b) Work undertaken at the seventieth session (2018) on the basis of the second report of the Special Rapporteur

100. In his second report, the Special Rapporteur addressed issues including the legality of succession, the general rules on succession of States in respect of State responsibility in relation to attribution, the distinction between continuing and past breaches, and certain special categories of succession to obligations arising from responsibility.[1096] He suggested a flexible approach, focusing on the principles and rules of a secondary character governing internationally wrongful acts and addressing their attribution, content, forms and invocation.[1097] In their discussions of the report, members of the Commission emphasized the scarcity of State practice on succession and expressed support for a realistic and flexible approach.[1098] They also questioned

[1087] 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 II to the report of the Commission (*Yearbook ... 2016*, vol. II (Part Two), para. 36 and annex II). Concerns were expressed within the Commission about the decision, which had been followed immediately by the introduction of a first report containing draft articles with commentaries, which had then been referred to the Drafting Committee at the same session.

[1088] While most delegations commenting on the topic in the Sixth Committee welcomed the decision to move the topic to the programme of work, a minority voiced doubt. First report of the Special Rapporteur, *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708, para. 19.

[1089] *Ibid.*, para. 32.

[1090] *Ibid.*, chap. II, sect. B and para. 83.

[1091] *Yearbook ... 2017*, vol. II (Part Two), para. 231.

[1092] *Ibid*., para. 232.

[1093] *Ibid*., paras. 228–252.

[1094] *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708, paras. 19–36 and 73–80.

[1095] *Yearbook ... 2017*, vol. II (Part Two), para. 234.

[1096] *Yearbook ... 2018*, vol. II (Part Two), para. 222.

[1097] *Ibid.*, para. 227.

[1098] *Ibid.*, para. 234.

the methodology of separating the succession into obligations arising from the internationally wrongful act of a predecessor State from the issues concerning the rights and claims arising from an internationally wrongful act injuring a predecessor State, as it could lead to unnecessary duplication of work.[1099] Some members also proposed changing the title of the topic to "State responsibility problems in cases of succession of States".[1100]

(c) Work undertaken at the seventy-first session (2019) on the basis of the third report of the Special Rapporteur

101. In his third report, the Special Rapporteur examined reparation for injury resulting from internationally wrongful acts committed against the predecessor State, considering claims for reparation in different categories of State succession and various approaches to reparation.[1101] The Special Rapporteur clarified his approach to the topic, which excluded the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States.[1102] It also addressed the passive aspect of State responsibility where succession occurs in relation to the injured State. The Special Rapporteur distinguished between situations where the predecessor State continued to exist after the date of succession and those where the predecessor State ceased to exist. When the predecessor State continued to exist, succession would not affect its right to claim reparation from the wrongdoing State for acts committed before the date of succession.[1103]

102. During the debates, members expressed caution against over-reliance on academic literature and the work of the Institute of International Law. The scarcity of State practice was recalled, and members agreed that the available State practice was diverse, context-specific and sensitive.[1104] Several members emphasized the general rule of non-succession, with possible exceptions, and suggested that any flexible approach should be clearly framed as progressive development based on limited State practice, solid grounds, and rules of general application rather than policy preferences or pending disputes.[1105] The question of changing the title of the topic arose again, with suggestions including "State responsibility problems/aspects in cases of succession of States", "Succession of States in matters of international responsibility", and "Reparation for injury arising from internationally wrongful acts in State succession", while several members preferred retaining the current title.[1106]

(d) Work undertaken at the seventy-second session (2021) on the basis of the fourth report of the Special Rapporteur

103. Due to the coronavirus disease (COVID-19) pandemic, the General Assembly, by its decision 74/566 of 12 August 2020, decided to postpone the seventy-second session of the International Law Commission to 2021, at which the fourth report of the Special Rapporteur was presented. In that report, the Special Rapporteur discussed 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.[1107] He acknowledged lump sum agreements as State practice that varied and was driven by many non-legal considerations; although such agreements were valid international agreements, it could be difficult to draw inferences on customary international law

[1099] *Ibid.*, para. 237.
[1100] *Ibid.*, para. 239.
[1101] *Yearbook ... 2019*, vol. II (Part Two), para. 76.
[1102] *Ibid.*, para. 81.
[1103] *Ibid.*, para. 83.
[1104] *Ibid.*, para. 89.
[1105] *Ibid.*, para. 91.
[1106] *Ibid.*, para 93.
[1107] Fourth report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur, A/CN.4/743 and A/CN.4/743/Corr.1, paras. 13–22.

therefrom.[1108] He emphasized the importance of consistency with the Commission's previous work, the role of equity, equitable proportion and distribution of rights and obligations, and the need to combine codification with progressive development of international law.[1109] The report respected the continuing applicability of general rules of State responsibility with respect to a predecessor State, but considered special circumstances that warranted certain forms of reparation by a successor State or States. Additionally, various situations such as (*a*) situations of actual succession of States to international rights and obligations arising from State responsibility; and (*b*) situations where the State incurred responsibility for its own internationally wrongful acts, even in the case of succession of States, were analysed by the Special Rapporteur.[1110] Different views were expressed during the discussion of the report by the Commission on whether the general rule was the "clean slate" rule or automatic succession.[1111] Members cautioned against drawing general conclusions on matters of reparation based on lump-sum agreements or inconsistent State practice.[1112]

(e) Work undertaken at the seventy-third session (2022) on the basis of the fifth report of the Special Rapporteur

104. The Special Rapporteur, in his fifth report, examined the issue of a plurality of injured successor States and a plurality of responsible successor States.[1113] He concluded that not all categories of succession were equally relevant, with examples illustrating the dissolution of a State and the separation of parts. In cases of dissolution, the priority was specific agreements and equitable apportionment was used. The responsible State could not refuse a claim by one successor State due to a plurality of injured States, as it would contravene article 46 of the articles on responsibility of States for internationally wrongful acts.[1114] In cases of a plurality of responsible successor States, only one successor typically bore responsibility.[1115] During the plenary debate, some members expressed a view that a provision on the plurality of States was unnecessary, emphasizing that particular aspects of the existence of a plurality of States in cases of continuing or composite acts could be resolved on the basis of the general rules of State responsibility.[1116]

105. According to another view, it was advisable to include such a provision, along the lines of article 7, "Plurality of successor States", of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility,[1117] or to include a reference thereto. Some members were also of the view that it was unnecessary to include a "without prejudice" clause in relation to articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.[1118]

106. Several members questioned whether draft articles were the most appropriate outcome, given the relative paucity of State practice available to justify their adoption. It was suggested that the Commission consider changing the format of its work on the topic from draft articles to draft guidelines or draft conclusions, which would

[1108] *Yearbook ... 2021*, vol. II (Part Two), para. 121.
[1109] *Ibid.*, para. 126.
[1110] *Ibid.*, para. 127.
[1111] *Ibid.*, para. 135.
[1112] *Ibid.*, para. 136.
[1113] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 73.
[1114] *Ibid.*, para. 80. The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.
[1115] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 81.
[1116] *Ibid.*, para. 83.
[1117] *Yearbook of Institute of International Law*, Tallinn Session, vol. 76 (2015), p. 711, at p. 715.
[1118] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 83.

serve as general guidance for States. The Commission referred the previously adopted draft articles to the Drafting Committee, based on the recommendation of the Special Rapporteur, on the understanding that it would proceed with their transformation into draft guidelines. The Special Rapporteur subsequently revised the commentaries to the draft guidelines, which were noted by the Commission. A proposal was also made to discontinue work on the set of draft articles and, instead, to convene a Working Group, chaired by the Special Rapporteur, with the aim of producing a report on the topic to be annexed to the Commission's report.[1119]

(f) Work undertaken at the seventy-fourth session (2023)

107. At its seventy-fourth session, as the Special Rapporteur was no longer a member of the Commission, the Commission constituted an open-ended working group, chaired by Mr. August Reinisch, to discuss the way forward on the topic. The Working Group decided to recommend that the Commission continue its consideration of the topic, but not proceed with the appointment of a new Special Rapporteur. The Working Group discussed the future of the Commission's draft guidelines on the topic and whether to continue developing a text or to convene a dedicated working group for the topic to prepare a final report for submission to the General Assembly.[1120] According to one approach, it was preferable to proceed in an incremental manner such that the Working Group would be reconstituted at the seventy-fifth session in 2024 to continue its deliberations on the way forward and with a clear mandate to take a decision, as far as possible, within a defined time period and on the basis of a working paper to be prepared by the Chair of the Working Group. The alternative approach was to take a decision, at the seventy-fifth session, to discontinue the Special Rapporteur-led format of the work and instead opt for a Working Group-driven process aimed at preparing a final report to be adopted by the Commission, for eventual submission to the General Assembly. The Working Group considered a proposal to that effect, which would have involved recommending the reconstitution of an open-ended Working Group with a new mandate, and possibly with a restricted membership, precisely to prepare such a final report on the topic, within two years.[1121]

(g) Work undertaken at the seventy-fifth session (2024)

108. The Chair of the Working Group convened an online informal intersessional meeting to discuss issues requiring further reflection. Key concerns included whether there was sufficient State practice in the field and the representativeness of current State practice.[1122] The need for a more thorough examination of the distinction between the transfer of responsibility and the transfer of rights and obligations arising from the responsibility of a predecessor State was also acknowledged.[1123] It was suggested that the Commission should distinguish between codification and progressive development of international law in State succession regarding State responsibility and emphasize the policy justifications for proposed guidelines.[1124]

109. At its seventy-fifth session, the Commission re-established the Working Group, with Mr. August Reinisch as Chair.[1125] The Working Group considered the various possible ways forward to complete the work of the Commission on the topic. On the recommendation of the Working Group, the Commission decided to establish

[1119] *Ibid.*, para. 86.
[1120] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 237.
[1121] *Ibid.*, para. 239.
[1122] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 312.
[1123] *Ibid.*, para. 313.
[1124] *Ibid.*, para. 314.
[1125] *Ibid.*, para. 306.

at its seventy-sixth session a Working Group on the topic for the purpose of drafting the present report.[1126]

(h) Work undertaken at the seventy-sixth session (2025)

110. At its seventy-sixth session, the Commission established the present Working Group,[1127] which had before it a draft report prepared by the Chair of the Working Group.[1128] Owing to a lack of time, the Working Group was unable to consider the report in full. The members of the Commission made suggestions with regard to the substantive elements of the draft report and the methodology for adopting the draft report to complete the consideration of the topic. Some States, during the discussion on the topic in the Sixth Committee at the eightieth session of the General Assembly, expressed their belief in the importance of continuing the work on the topic. Several States expressed a desire to conclude the consideration of the topic and remove the topic from the agenda of the Commission.[1129]

(i) Summary of the transition in outcome from draft articles to draft guidelines

111. The Commission provisionally adopted draft articles and commentaries thereto over the course of its work on the topic.[1130] The Drafting Committee, at the seventy-third session, understood the Commission's instructions as requiring the conversion of previously adopted draft articles into draft guidelines.[1131] This involved more than simply changing terminology; it required adapting the substance and drafting style to reflect the different nature of the two instruments. The Drafting Committee considered the difference between the two forms of outcomes, namely that draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, often suitable for incorporation in a treaty.[1132] As a result, expressions such as "shall be" were replaced with "is" and other less directive formulations. Although the Drafting Committee undertook this conversion and revised several provisions, it did not have sufficient time to conduct a complete review of all the reformulated texts. Consequently, the draft guidelines remained subject to further examination and final editorial refinement (*toilettage*) before adoption on first reading.

3. Major difficulties faced during the consideration of the topic

112. The present section summarizes the difficulties that were faced during the consideration of the topic and that decisively impacted the continuation of the work on the topic. These are arranged into three categories: (*a*) methodological problems sects. C.3 (a) and (b)); (*b*) substantive problems (sects. C.3 (c) to (h)); and (*c*) problems of form (sect. C.3 (i)).

(a) Issues relating to State practice

113. The limited examination of State practice, especially from African and Asian States, continued to pose a significant challenge for the Commission. Member States highlighted the importance of ensuring a geographically representative assessment of State practice in the Commission's work. State practice, judicial precedents and

[1126] *Ibid.*, para. 308.
[1127] See para. 90 above.
[1128] A/CN.4/L.1004.
[1129] Report of the International Law Commission on the work of its seventy-sixth session (2025): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its eightieth session, prepared by the Secretariat, A/CN.4/788, paras. 112–113.
[1130] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 117–118; *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 164–165.
[1131] See sect. C 2 (e) above.
[1132] See the statement of the Chair of the Drafting Committee at the 2022 session at: https://legal.un.org/ilc/documentation/english/statements/2022_dc_chair_statement_sosr.pdf.

doctrine serve as a crucial foundation for the codification process. The lack of detailed enumeration and analysis of State practice resulted into the Commission and Member States expressing reservations regarding the general framework and substance of the recommendations. The diverse and context-specific nature of State practice, giving rise to doubts about the establishment of general rules, was also emphasized by several States, as was the need for a more inclusive review of practices globally, including from regional courts.

(b) Negotiated solutions and agreements as evidence of rules of customary international law

114. The study of negotiated solutions and agreements as evidence of rules of customary international law has been crucial. States have attempted to resolve succession issues through bilateral or multilateral negotiations, or referrals to domestic or international courts, in addition to addressing the issues in constitutional provisions. Injured States and successor States have usually carried out negotiations on the basis of States' own free will and the injured State retains the right to seek reparation. However, the dissolution of a State may lead to different legal relations and it has been emphasized that there is a need for agreement on addressing injuries that may not be equally relevant to all successor States. Therefore, a need for flexibility regarding other factors was also emphasized in coming up with an effective solution between the injured State and the relevant successor State or States.

115. The discussion considered whether negotiated solutions have any impact on customary international law in the succession of States in respect of State responsibility, particularly in relation to either the traditional "clean slate" principle or a rule of automatic succession. In that context, consideration was given to the relevance of negotiated solutions to the ascertainment of customary international law. States have the freedom to opt for negotiation and select the terms of an agreement, resulting in the application of either option. In this regard, the draft guidelines proposed by the Special Rapporteur aimed to provide legal certainty by protecting the rights of the injured State in the context of State succession. The question arises of the interpretation of a negotiated settlement in establishing whether succession or non-succession is a rule of customary international law. The States concerned may agree that they consider either succession or non-succession[1133] to apply to their particular case. This issue prompted a more in-depth discussion within the Commission on forms of reparation with regard to the different categories of State succession.[1134] Member States emphasized that succession should be carried out on the basis of committed negotiations, of States' own free will and in an appropriate time frame. States have preferred to resolve questions or disputes through bilateral agreements. Agreements between States should be given priority and States may even consent to exclude general rules of responsibility to arrive at a mutually agreed solution. However, owing to lack of sufficient information on treaties, the Commission found its investigation into their value as evidence for the existence of general rules of customary international law to be inconclusive.

116. The Special Rapporteur proposed draft articles, which suggested that injured States and successor States should agree on addressing the injury, with negotiations focusing on the modalities of reparation and its distribution between successor States,

[1133] E.g., Agreement on the Claims of United States Nationals (Egypt-United States) (Cairo, 1 May 1976), *United States Treaties and Other International Agreements*, vol. 27, p. 4214, arts. I–II and V.

[1134] Such an in-depth discussion was also called for by States. For example, Cameroon noted that there is "a clear distinction between reparation, on the one hand, and cessation and assurances and guarantees of non-repetition, on the other" and that "a more in-depth discussion on the forms of reparation with regard to the different categories of State succession is necessary, in particular on the circumstances leading to different solutions". See the statement made before the Sixth Committee at the seventy-seventh session of the General Assembly by Cameroon (available from www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg_cameroon_3.pdf).

while the objective remained the elimination of the injurious effects of the predecessor State's actions.

(c) Automatic succession or "clean slate" rule

117. The Commission's work with regard to clarifying the issue of automatic succession and the "clean slate" rule remained inconclusive. One view held in this respect was that inconclusiveness of State practice did not imply the use of the "clean slate" rule. This was in accordance with the previous work of the Commission, namely, the work which led to the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts, which adopted the "clean slate" rule only for category of newly independent States.[1135] In this regard, a suggestion was made to study the interaction between this area of law and State responsibility, which might fill a gap in international law.[1136] State responsibility for internationally wrongful acts was essential to ensure the effectiveness of international law. Therefore, responsibility should not disappear in every single case where the legal personality of a State ceased to exist. In cases of State succession, the "clean slate" rule might not be the appropriate answer. At the same time, States had held that automatic succession should not be a general rule, as it did not reflect broad State practice. Application of the general rules of State responsibility in situations of succession of States should depend on a case-by-case analysis.[1137]

118. Owing to the aforementioned problems concerning the adequacy and the interpretation of available State practice, the Commission's work to clarify the issue of automatic succession or non-succession remained inconclusive. The inconclusiveness of the investigation by the Commission into State practice does not imply the application by default of a rule of non-succession. Rather, it means that the applicability of a default rule of succession or non-succession to the various categories of succession remains open.

(d) Distinction between the transfer of responsibility and the transfer of rights and obligations arising from the responsibility of a predecessor State

119. The Commission attempted to clarify the distinction between the transfer of responsibility and the transfer of rights and obligations arising from the responsibility of a predecessor State. The Commission's work focused on case-by-case analysis to determine if a successor State would be responsible for a wrongful act that began with the predecessor State and continued with the successor State. The Commission noted that the rights and obligations triggered by an internationally wrongful act concerned only the State that committed it and were not transferable as a result of State succession. Some States expressed a need to conduct further research to determine if the disappearance of a State that has committed an internationally wrongful act would lead to a situation where such internationally wrongful act remained without remedy.[1138] The Commission's work has not shown why the succession to rights would be recognized whereas succession to obligations would not, or the difference between the two. The territorial element is also important, as obligations are transferred to a successor State along with the transfer of territory.

[1135] See the statement made before the Sixth Committee at the seventy-fourth session of the General Assembly by Slovenia (available from www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_3.pdf).

[1136] See the statement made before the Sixth Committee at the seventy-seventh session of the General Assembly by Brazil (available from www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_brazil_3.pdf.

[1137] See the statement made before the Sixth Committee at the seventy-fourth session of the General Assembly by Slovenia (available from www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_3.pdf).

[1138] See the summary of the views of States in A/CN.4/L.1004/Rev.2, paras. 79 and 81.

120. Due to divergence of views within the Commission and States, it remained inconclusive whether a successor State is responsible for an internationally wrongful act that starts with the predecessor State and continues with the successor State. However, compensation remains due from the wrongdoing predecessor State. The Commission's work notes that rights and obligations triggered by an internationally wrongful act concern only the State that committed it and the disappearance of a State that has committed an internationally wrongful act should not lead to a situation where such internationally wrongful act remains without remedy.

(e) Codification or progressive development

121. The examination of the topic raised concerns about whether the work was primarily codification or progressive development of international law. States felt that the evidence of State practice on the topic was not sufficiently established and that it would have been useful to indicate which draft guidelines were based on State practice and which reflected the progressive development of international law.[1139] The draft guidelines referred to an agreement between injured and wrongdoing States and lacked guidance on what circumstances should be considered relevant.[1140]

122. The debate surrounding codification or progressive development and the methodology used to distinguish between the two remained continuous, which also affected the Commission's draft guidelines and commentaries thereto. State succession remains a politically sensitive topic. The deliberations in the Sixth Committee showed that States were reluctant for the Commission to draft general legal norms given the politically and fact-sensitive nature of the available practice.

(f) State responsibility versus State debts

123. The relationship between the Commission's work on the present topic and the 1978 and 1983 Vienna Conventions, as well as the articles on nationality of natural persons in relation to the succession of States, remained a question of importance to members of the Commission and States regarding the succession of States. While there is a view that financial obligations, often the outcome of reparation, could be transmitted during a succession, the insufficiency of State practice leads to the conclusion that there is no conclusive evidence of an emerging rule of customary international law providing for the devolution of the obligation of reparation. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice stated that "Slovakia … may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct by Hungary".[1141] The Court thus answered in the affirmative both the question of succession in respect of secondary obligations and secondary rights resulting from respective internationally wrongful acts. The Court based this conclusion on the agreement by "the Parties [in the preamble to the Special Agreement] that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project".[1142] It was uncertain whether, at least in some cases, there might be devolution under international law of secondary obligations or rights deriving from a breach of an international obligation from the predecessor to the successor State.

124. The 1983 Vienna Convention is closely connected to the questions related to the effects of a succession of states on the transfer of rights and obligations arising from internationally wrongful acts. State debts may represent a form of financial liability and their transfer entail the "extinction of the obligations of the predecessor

[1139] See the summary of the views of States, *ibid.*, paras. 84 and 86.
[1140] Draft guidelines 11 and 14.
[1141] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 151.
[1142] *Ibid.*

State and the arising of the obligations of the successor State" (art. 34 of the 1983 Vienna Convention). If an agreement exists between predecessor and successor States, the agreement on the passing of the debt prevails. However, in the absence of an agreement, various issues arise, including whether debt transferred should be proportionate to the property, rights and interests acquired by the successor State. The rules in the 1983 Vienna Convention mirror those of the 1978 Vienna Convention, with the territorial element influencing debt calculation.

(g) Unjust enrichment and internationally wrongful acts

125. The concept of unjust enrichment in relation to internationally wrongful acts had been raised in cases where an internationally wrongful act is attributed to the predecessor State. The Commission's work suggests that a successor State and an injured State should agree on how to address the injury, as an alternative to the rule of automatic succession or the "clean slate" principle. The relationship between the principles of State responsibility and unjust enrichment is emphasized in the context of State succession, where factors like territorial links, benefits derived and equitable apportionment are considered. The concept is central in cases where successor States might be obligated to provide reparation for internationally wrongful acts committed by the predecessor State, especially when they benefit from those acts. However, the application of unjust enrichment in international law is under debate, with some scepticism expressed about its precision and status as a stand-alone principle.

(h) Continuing acts and composite acts

126. The potential relevance of continuing acts and composite acts had been raised in the Commission and the Sixth Committee[1143] but the inconsistency of the available State practice did not allow a firm conclusion to be drawn as to the content of the law.[1144]

(i) Outcome

127. The Commission, taking the views of States into account, changed the final form of the outcome on the topic from draft articles to draft guidelines due to the relative paucity of State practice to justify them. This resulted in a set of draft guidelines that required fresh examination. When the Commission changed the form from draft articles to draft guidelines at its seventy-third session, more time was needed than was available to examine their suitability as a set of nonbinding guidelines for States, leading to concerns about their eventual acceptance by States.

[1143] See the statements made before the Sixth Committee at the seventy-sixth session of the General Assembly by: Denmark on behalf of the Nordic countries (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_nordic_3.pdf); Estonia (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_estonia_3.pdf); Greece (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_greece_3.pdf); India (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_india_3.pdf); Turkey (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_turkey_3.pdf); and the United States (available from www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_us_3.pdf).

[1144] See para. (8) of the commentary to draft guideline 7 *bis*, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 89.

Chapter IX
Non-legally binding international agreements

A. Introduction

128. The Commission, at its seventy-fourth session (2023), decided to include the topic "Non-legally binding international agreements" in its programme of work and appointed Mr. Mathias Forteau as Special Rapporteur.[1145]

129. The General Assembly, in paragraph 7 of its resolution 78/108 of 7 December 2023, subsequently took note of the decision of the Commission to include the topic in its programme of work.

130. The Commission, at its seventy-fifth session (2024), had before it the first report of the Special Rapporteur. The Commission considered the first report of the Special Rapporteur at its 3681st to 3687th meetings, from 10 to 19 July 2024.[1146]

131. At the seventy-sixth session (2025), the Commission had before it the second report of the Special Rapporteur.[1147] Owing to the reduction of the length of the session, the Commission was unable to consider in plenary the second report of the Special Rapporteur. The Commission decided to establish a Working Group of the Whole on the topic, to allow for a preliminary exchange of views on the second report and appointed Mr. Mathias Forteau, Special Rapporteur, as Chair of the Working Group.[1148] The Commission subsequently took note of the oral report of the Chair of the Working Group.[1149]

B. Consideration of the topic at the present session

132. The Commission undertook its consideration of the second report of the Special Rapporteur (A/CN.4/784), submitted at the seventy-sixth session. It also had before it the third report of the Special Rapporteur (A/CN.4/790).

133. In the second report, the Special Rapporteur addressed general elements of the topic: its purpose, the use of terms, the scope of the project, the form of the outcome and the matters to be addressed through a "without prejudice" clause. He also addressed the distinction between treaties and non-legally binding international agreements. The Special Rapporteur proposed six draft conclusions on: purpose (draft conclusion 1); use of terms (draft conclusion 2); scope (draft conclusion 3); a without prejudice clause to rules or practices applicable at the national level (draft conclusion 4); assessment of whether an agreement is legally binding or not (draft conclusion 5); and existence of an express indication (draft conclusion 6).

134. In the third report, the Special Rapporteur addressed the comments of States made in the Sixth Committee regarding, *inter alia*, terminology, the form of the output, comments on the draft conclusions proposed in the second report and developments in the jurisprudence of the International Court of Justice related to the

[1145] At its 3656th meeting, on 4 August 2023. The topic had been included in the long-term programme of work of the Commission during its seventy-third session (2022), on the basis of the proposal contained in an annex to the report of the Commission (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), annex I).

[1146] A/CN.4/772. For the consideration, see *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), chap. VIII, paras. 215–300.

[1147] A/CN.4/784.

[1148] See *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 381.

[1149] *Ibid*., para. 383.

topic. He outlined an adjusted schedule of work and explored aspects that would be discussed in his fourth report, including a list of indicators to address non-legally binding international agreements and the possible legal implications of such agreements.

135. The Commission considered the second and third reports of the Special Rapporteur at its 3735th to 3740th and 3742nd meetings, from 6 to 19 May 2026.

136. At its 3742nd meeting, on 19 May 2026, the Commission referred draft conclusions 1 to 6, as contained in the second report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the debate in the plenary.

137. At its 3749th meeting, on 5 June 2026, the Chair of the Drafting Committee introduced the report of the Committee on the topic (A/CN.4/L.1036).[1150] At the same meeting, the Commission provisionally adopted the title of Part One and draft conclusions 1 to 5 (see sect. C.1 below).

138. At its 3780th meeting, on 27 July 2026, the Commission adopted the commentaries to draft conclusions 1 to 5 provisionally adopted at the current session (see sect. C.2 below).

C. Text of the draft conclusions on non-legally binding international agreements provisionally adopted thus far by the Commission

1. Text of the draft conclusions

139. The text of the title of Part One and draft conclusions 1 to 5 as provisionally adopted by the Commission at its seventy-seventh session is reproduced below.

Part One
Introduction

Conclusion 1
Scope and purpose

1. The present draft conclusions concern non-legally binding international agreements.

2. The purpose of the present draft conclusions is to provide elements of clarification in relation to non-legally binding international agreements.[a]

Conclusion 2
Rules or procedures followed by States and international organizations

The present draft conclusions do not affect rules or procedures followed by States and international organizations in relation to the drafting and adoption of non-legally binding international agreements.

Conclusion 3
Use of terms

1. For the purposes of the present draft conclusions, the term "non-legally binding international agreement" is used to refer to any agreement made in writing between States, between States and international organizations, or between international organizations, whether bilateral or multilateral, which, as such, does not create any rights or obligations, or have other binding legal effects, under international law.

[1150] For the statement of the Chair of the Drafting Committee, see https://legal.un.org/ilc/documentation/english/statements/2026_dc_chair_statement_nlbia.pdf .

2. The term "non-legally binding international agreement" under paragraph 1 includes, in relation to States, agreements entered into by organs of the government, territorial units and agencies or instrumentalities of the State which may enter into such agreements.

3. The use of the term "agreement" in the present draft conclusions does not affect:

(*a*) the meaning which may be given to this term in the internal law or the practice of a State or in the rules or the practice of an international organization;

(*b*) the meaning given to this term in any international instrument.

Part Two

…

Conclusion 4
Assessment of whether an international agreement is legally binding or not

1. Whether an international agreement is legally binding or not depends on the intention of the participants thereto. In the absence of an intention of the participants to be legally bound by the agreement, it is not legally binding.

2. The intention of the participants in the agreement to be or not to be legally bound may be expressly stated.

3. In the absence of such an express indication, the intention of the participants in the agreement to be or not to be legally bound can be established by recourse to the relevant elements identified in draft conclusions [… to …].[b] These elements are assessed as a whole.

4. Whether an international agreement is legally binding or not is assessed on a case-by-case basis.

Conclusion 5
Express indication of intention

The fact that an international agreement expressly indicates that it is not legally binding under international law is normally sufficient to identify the intention of the participants thereto.

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[a] The Drafting Committee will revert to paragraph 2 at a later stage, in light of the work undertaken on subsequent draft conclusions.

[b] To be finalized at a future session.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-seventh session

140. The text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-seventh session is reproduced below.

Non-legally binding international agreements

Part One
Introduction

Commentary

Part One of the draft conclusions is introductory in nature. It consists of three draft conclusions. The first one explains the scope and purpose of the draft conclusions. The second concerns the rules or procedures followed by States and international organizations that are not affected by the draft conclusions. The third clarifies the use of terms for the purposes of the draft conclusions.

Conclusion 1
Scope and purpose

1. The present draft conclusions concern non-legally binding international agreements.

2. The purpose of the present draft conclusions is to provide elements of clarification in relation to non-legally binding international agreements.[a]

[[a] The Drafting Committee will revert to paragraph 2 at a later stage, in light of the work undertaken on subsequent draft conclusions.]

Commentary

(1) In line with the Commission's usual practice, the first draft conclusion defines the subject matter of the topic in simple terms, stating in the first paragraph that the draft conclusions "concern non-legally binding international agreements". The second paragraph states what the Commission intends to achieve with the draft conclusions.[1151]

(2) As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries. Furthermore, the term "non-legally binding international agreement" – the very subject of this topic – must be understood in the light of draft conclusion 3, which clarifies the meaning of the term for the purposes of the draft conclusions and specifies the limits within which the term "agreement" is used in this context.

(3) Given the unique nature of the present topic, which does not concern a source of international law but rather agreements by which States and international organizations intend *not* to be bound under international law, the standard wording found in paragraph 1 of draft conclusion 1 is supplemented by paragraph 2 specifying that the purpose of the draft conclusions is "to provide elements of clarification in relation to non-legally binding international agreements". This formulation is meant to explicitly signal the modest ambition of the present draft conclusions.

(4) The present draft conclusions are aimed at addressing the legal issues that may arise from the use of non-legally binding international agreements and the practices that have developed in relation thereto, with a view to providing "elements of clarification". Since this is an area in which States and international organizations have considerable freedom and in which practices are not uniform, the objective is to support these practices (rather than replace them) by clarifying what can or should be clarified. In other words, the present draft conclusions are indicative, rather than prescriptive, in nature. They are not intended to provide detailed guidelines or instructions, or to identify or create a "regime" or a "law" of non-legally binding international agreements, as there exists a law of treaties, nor are they intended to challenge or dilute the law of treaties by blurring the fundamental distinction between treaties and non-legally binding international agreements.[1152] Nor is the aim to present the practice in all its infinite diversity. As stated in draft conclusion 1, paragraph 2, the aim is to provide "elements of clarification", with the necessary flexibility, in order to contribute to legal certainty.

(5) The present draft conclusions are primarily designed to facilitate the work of practitioners, particularly legal experts working for States and international

[1151] The Arabic, Chinese, English and Russian titles of draft conclusion 1 use two terms to describe the content of the two paragraphs in draft conclusion 1. A single term, which is sufficient to cover both of these aspects, is used in French and Spanish.

[1152] For this same reason, in the present draft conclusions, the Commission uses the terms "adoption" and "enter into" (rather than "conclusion", which is the term used in the title of Part II of the 1969 Vienna Convention on the Law of Treaties and in many of its provisions) and "participants" (rather than "parties"), in order to avoid any confusion and any terminological parallels with the law of treaties.

organizations, and are aimed at those who may be called upon to draft, negotiate or adopt non-legally binding international agreements, as well as those who may need to review them or take them into account after their adoption. They are intended to provide general indications on current practice and jurisprudence and to highlight the difficulties that may arise in connection with the use of non-legally binding international agreements. The aspects of contemporary practice discussed in the present commentaries in support of the draft conclusions may also, where necessary, serve as a source of inspiration for practitioners, for example when drafting such agreements.

(6) These "elements of clarification" take account of the fact that the adoption of non-legally binding international agreements, although a long-standing practice, has intensified in recent years. The existence of international agreements that do not create rights or obligations for States under international law was noted in the Commission's work on the law of treaties [1153] and at the subsequent Vienna Conference, which led to the adoption of the 1969 Vienna Convention on the Law of Treaties.[1154] The expansion of this practice in recent decades has raised questions among practitioners regarding its possible implications in the area of international law.[1155] This in turn has led a number of States and international organizations to adopt texts that regulate or guide their own practices in this area, which the commentary to draft conclusion 2 seeks to describe in a succinct manner. States have shared detailed information on their practice through their statements in the Sixth Committee on this topic or through written comments submitted to the Commission, which are available on its website.[1156]

(7) Several international organizations have recently taken up this issue. The Inter-American Juridical Committee of the Organization of American States carried out work culminating in the adoption of a set of guidelines on binding and non-binding agreements in August 2020.[1157] The Committee of Legal Advisers on Public International Law of the Council of Europe has been considering the issue since March 2021 and is basing its work specifically on the responses to a questionnaire sent to its members.[1158] The Association of Southeast Asian Nations (ASEAN)

[1153] See, in particular, A/CN.4/23, p. 15, para. 29 (and *Yearbook of the International Law Commission, 1950*, vol. II, p. 228); A/CN.4/63, p. 23 (and *Yearbook ... 1953*, vol. II, pp. 96 and 97); *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 117; *Yearbook ... 1959*, vol. II, document A/4169, pp. 96 and 97, para. (8).

[1154] See, in particular, *United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 4th meeting of the Committee of the Whole, p. 21, para. 3; *United Nations Conference on the Law of Treaties*, *Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 87th meeting of the Committee of the Whole, pp. 226 and 227, para. 24; *ibid.*, 87th meeting of the Committee of the Whole, pp. 225 and 226, paras. 13–16 (for the text of the proposed amendment, see A/CONF.39/11/Add.2, p. 234, para. 20).

[1155] See, for example, M. Mändveer, "Non-legally binding agreements in international relations: an Estonian perspective", *Baltic Yearbook of International Law* (2021), pp. 7–24, in particular p. 22.

[1156] The written information submitted by States is available at https://legal.un.org/ilc/guide/1_17.shtml#govcoms.

[1157] Inter-American Juridical Committee, *Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements*, available at https://www.oas.org/en/sla/iajc/docs/Guidelines_on_Binding_and_Non-Binding_Agreements_publication.pdf.

[1158] The questionnaire and the replies are available at https://www.coe.int/en/web/cahdi/the-practice-of-states-and-international-organisations-regarding-non-legally-binding-instruments.

adopted "Rules of procedure for conclusion of non-legally binding agreements by ASEAN" in 2023.[1159]

(8) Due attention has been given to this work and these documents, although care has been taken not to limit the Commission's work to the views expressed within these regional frameworks. The Commission's objective is to produce a set of draft conclusions that reflects as faithfully as possible, based on the information available to it and the information submitted to it, the diversity of practices that have developed and the positions that have been expressed. These practices and positions provide essential background information for this topic.

(9) A number of international and national courts have heard cases involving non-legally binding international agreements. Their views are duly taken into account in the commentaries to the draft conclusions. Legal scholars have also studied this topic. The Institute of International Law carried out in-depth research on this subject some forty years ago,[1160] and authors are showing a growing interest in it, as evidenced by the legal articles and publications devoted to it.[1161]

(10) The Commission has touched on the subject of non-legally binding agreements in the course of earlier work on other topics.[1162] For instance, in 2018, in its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, it held that an "agreement" need not be "legally binding" for it to be taken into account for the purposes of treaty interpretation.[1163] The Commission will need to revisit this issue in the context of the present topic.

(11) The Commission deemed it appropriate – at this stage of its work, in any event – to adopt texts in the form of draft conclusions. Although this format has generally been used for topics related to the sources of law, which definitely do not include non-legally binding international agreements, the practice has not been systematic.[1164] The reason that draft conclusions were chosen over draft guidelines in the present instance is that they appeared to better serve the Commission's objective, namely to reflect current practice, as informed by jurisprudence and teachings, in order to provide States and international organizations with useful indications to enable them to better identify problems that may arise, to define or reassess their practices in this area and, where necessary, to anticipate the responses of dispute settlement bodies that might be called upon to address issues related to the topic. Under no circumstances, however, does the Commission intend to adopt an approach that would have the effect of limiting the development of practice in this area.[1165]

(12) The Commission is fully aware of the important role that non-legally binding international agreements play in the materialization, development and strengthening of international cooperation. Governments and international organizations must be able to continue cooperating easily using flexible tools. Although flexibility is not necessarily an inherent feature of every non-legally binding international agreement, this type of agreement offers advantages that treaties do not necessarily provide and it plays an important role in contemporary international relations. It is generally argued that among the reasons why States and international organizations resort to

[1159] Available at https://asean.org/wp-content/uploads/2023/09/Final-RPCA_adopted-by-the-34th-ACC-on-4-Sep-2023.pdf.

[1160] For a description of the Institute's research, see the first report of the Special Rapporteur (A/CN.4/772), paras. 57–60.

[1161] See the select bibliography included in the syllabus reproduced in annex I to the report of the Commission (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10)). An updated bibliography could be attached to the draft conclusions at the time of their final adoption.

[1162] See A/CN.4/772, paras. 29–55.

[1163] *Yearbook … 2018*, vol. II (Part Two), para. 52, at p. 63, conclusion 10 (1).

[1164] See the draft conclusions on subsidiary means for the determination of rules of international law.

[1165] See, in particular, draft conclusion 2 in this regard.

non-legally binding international agreements is the fact that such agreements allow them to respond more promptly to new challenges and to enter into commitments more quickly, more easily and with minimum formality, or that they can be more readily adapted to changing political realities.[1166] This does not mean, however, that they are treated less seriously than treaties or that they are less strictly observed. In some cases, negotiating or adopting non-legally binding international agreements may in fact prove more difficult than concluding a treaty. Non-legally binding international agreements can also serve as precursors of legally binding commitments that are adopted subsequently. Since the motives for using non-legally binding international agreements are numerous and varied, and since it is up to States and international organizations to define the terms of their international cooperation, these motives fall outside the scope of the present draft conclusions.

(13) The footnote in paragraph 2 of draft conclusion 1 states that the Drafting Committee will revert to that paragraph "at a later stage, in light of the work undertaken on subsequent draft conclusions". At the current stage of its work, the Commission has not yet formed a definitive view on the various components of the draft conclusions and is therefore unable to lay out in draft conclusion 1 all the aspects on which clarifications will be provided. The draft conclusions will address the important question of how to distinguish between legally binding and non-legally binding international agreements (see Part Two below). The question of whether to adopt draft conclusions on other issues, in particular the possible legal implications of non-legally binding international agreements, depends on the discussions that the Commission will hold on this subject at future sessions.

Conclusion 2
Rules or procedures followed by States and international organizations

The present draft conclusions do not affect rules or procedures followed by States and international organizations in relation to the drafting and adoption of non-legally binding international agreements.

Commentary

(1) A number of States and international organizations have adopted rules or established procedures at the constitutional, legislative or other levels that define or specify the processes by which they draft and adopt non-legally binding international agreements. Draft conclusion 2, which states that the present draft conclusions "do not affect" such rules or procedures, is meant to take this into account. It comes immediately after draft conclusion 1 to clearly indicate that the work on the topic is intended to provide elements of clarification that complement the practice of States and international organizations.

(2) Draft conclusion 2 is not worded as a "without prejudice" clause, which could have been interpreted to mean that the present draft conclusions are intended to be prescriptive. The more neutral phrasing "do not affect" was preferred for this reason, in line with the purpose of the draft conclusions as set out above. The purpose of the

[1166] See, for example, A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (October 1986), pp. 788 *ff.*; C. Lipson, "Why are some international agreements informal?", *International Organization*, vol. 45 (1991), pp. 495–538; C.A. Bradley *et al*., "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", *The University of Chicago Law Review*, vol. 90 (2023), pp. 1309 *ff.*; P. Gautier, "Non-binding agreements", *Max Planck Encyclopedia of Public International Law* (May 2022), para. 6; M. Hayashi, "Benefits of a legally non-binding agreement: the case of the 2013 US-Russian agreement on the elimination of Syrian chemical weapons", *International Community Law Review*, vol. 20 (2018), pp. 262 *ff.* and pp. 270 *ff.*; J. Hill, *Aust's Modern Treaty Law and Practice*, 4th ed. (Cambridge, Cambridge University Press, 2023), pp. 56 *ff.*; T. Meyer, "Alternatives to treaty-making – informal agreements", in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed. (Oxford, Oxford University Press, 2020), pp. 66–73.

draft conclusions is to provide elements of clarification to better support the practice. They are not intended to replace the rules or procedures in force in national legal systems or within international organizations regarding the drafting and adoption of non-legally binding international agreements.

(3) Each State has the discretion to determine the internal procedures to be followed for the drafting and adoption of non-legally binding international agreements, and the competent authorities that may do so. As the Commission has stated in another context: "It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government."[1167] The same applies to international organizations, within the limits set out in their constituent instruments and other rules adopted by their founders to govern their operations. The Commission does not intend to restrict this freedom, as indicated in draft conclusion 2. Draft conclusion 2 is further clarified and supplemented by draft conclusion 3, paragraph 3, subparagraph (*a*), concerning the meaning which may be given to the term "agreement" in the internal law or the practice of a State or in the rules or the practice of an international organization.

(4) The phrase "rules or procedures followed" is used in draft conclusion 2 to broadly encompass those rules and procedures applicable in the internal order of a given State or international organization and, by extension, even if not expressly mentioned, the practice followed in application of those rules or procedures. Furthermore, the use of the word "followed" allows for a certain degree of flexibility, as it covers not only formally adopted rules or procedures but also internal documents and standard administrative or diplomatic practices. Draft conclusion 2 should not be interpreted as being intended to make practices in this area more rigid or more flexible than they are, or as preventing their evolution.

(5) States and international organizations are free to decide whether or not to establish rules or procedures governing the drafting and adoption of non-legally binding international agreements and, if they deem it necessary to do so, it is for them to determine the content of such rules or procedures. The following paragraphs are limited to providing a very brief overview of the practices that have been identified in this area and are not meant to be exhaustive. This overview, including references to relevant legal texts, may, if necessary, serve as a point of reference for States and international organizations that would wish to define, further develop, clarify or reassess their own practices.[1168]

(6) The States and international organizations that have established practices in this area have put in place various rules or procedures governing the drafting and adoption of non-legally binding international agreements. The use of the plural in the draft conclusion ("by States and international organizations") reflects a general and inclusive approach that does not favour any of the world's existing legal systems and respects their diversity. The use of the plural also makes it possible to cover situations in which States or international organizations coordinate their practices at the international level with regard to the drafting and adoption of non-legally binding international agreements.

[1167] Paragraph (6) of the commentary to chapter II (Attribution of conduct to a State) of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), para. 77, at p. 39.

[1168] For its part, the Inter-American Juridical Committee recommended in its guidelines on binding and non-binding agreements (see footnote 1157 above) that States should "develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions" and considered that "[a]lthough non-binding agreements, political commitments could benefit from a practice where States have procedures" regarding certain aspects, such as "notification to – and coordination with – relevant State institutions, including a State's Foreign Ministry" (see guideline 4.2).

(7) Some of the rules or procedures referred to in draft conclusion 2 are of a constitutional, legislative or regulatory nature.[1169] They are the primary focus of the draft conclusion. Other legal texts take the form of more flexible instruments or instructions, such as administrative circulars, guidelines or practical manuals, which

[1169] See, for example, Bosnia and Herzegovina, Law on Conclusion and Implementation Procedure of International Treaties (available at https://www.mft.gov.ba/Content/OpenAttachment?id=94652ec9-0273-4f50-aa19-0f7e64e530c4&lang=bs); Republic of Korea, Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree), reply to the questionnaire of the Committee of Legal Advisers on Public International Law (available at https://rm.coe.int/questionnaire-response-korea-updated-12-dec-2024/1680b2e1ac); Croatia, Law on the Conclusion and Execution of Treaties, art. 3, reply to the questionnaire of the Committee of Legal Advisers on Public International Law (available at https://rm.coe.int/questionnaire-response-croatia/48802a1bc3); Spain, Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales (available at https://www.boe.es/buscar/act.php?id=BOE-A-2014-12326); United States of America, 1 U.S. Code sect. 112b, "United States international agreements and non-binding instruments; transparency provisions" (available at https://www.law.cornell.edu/uscode/text/1/112b); Russian Federation, Decree No. 79 of 7 February 2003 approving regulations governing the procedure for the drafting and signing of international intergovernmental acts that are not international treaties (available at https://www.consultant.ru/document/cons_doc_LAW_40980/); Slovenia, Foreign Affairs Act, chap. V (available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.gov.si%2Fassets%2Fministrstva%2FMZEZ%2FDokumenti%2Fjavne-objave%2Fdrugi-dokumenti%2FEN-2018-01-1347-2001-01-2549-Foreign_Affairs_Act.doc&wdOrigin=BROWSELINK).

may be publicly available[1170] or intended solely for internal use.[1171] In this connection, States have shared a substantial amount of information on their internal law or practice in their statements in the Sixth Committee, [1172] as well as in the information

[1170] See, for example, South Africa, *Directive for the Conclusion of International Agreements (Annex A) issued by the Department of International Relations and Cooperation*, 2019, para. 4.4, "Non-binding agreements" (available at https://www.dirco.gov.za/wp-content/uploads/2022/12/directive_conclusion_international_agreements_2019.pdf); Germany, *Guidelines for the treatment of treaties under international law*, para. 4 on instruments that are not contractual and treaties that are not international, supplemented by section E (para. 41) on non-contractual instruments (available at https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm); Australia, *Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments* (available at https://www.dfat.gov.au/international-relations/treaties/australias-practice-concluding-less-than-treaty-status-instruments); Canada, *Policy on Tabling of Treaties in Parliament* (available at https://www.treaty-accord.gc.ca/procedures.aspx?lang=eng); Cyprus, *Practical Guide for the Conclusion of International Agreements and the Signing of Memoranda of Understanding* (available at https://share.google/YAaQQfCqjKoDL8GQq); Colombia, *Guía jurídica de tratados y otros instrumentos* (available at https://www.calameo.com/books/001105399cd5d62d12233); Denmark, *Guidance on the conclusion of treaties* (2023), annex 10 (available at https://um-dk.translate.goog/udenrigspolitik/folkeretten/dk-traktater/bilagsfortegnelse?_x_tr_sl=da&_x_tr_tl=fr&_x_tr_hl=fr&_x_tr_pto=sc); Finland, *Guide to treaties* (available at https://um.fi/valtiosopimusopas); France, *Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France* (2020) (available at https://www.diplomatie.gouv.fr/files/files/le-ministere/administration/direction-des-affaires-juridiques/guide-bonnes-pratiques-negociation-et-engagements-internationaux-de-la-france.pdf); India, *Guidelines/SoP on the conclusion of International Treaties in India* (2017) (available at https://www.mea.gov.in/images/SOP-forwarding-letter-to-Ministries-with-revised-SOPs.pdf); New Zealand, *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements* (September 2021) (available at https://www.mfat.govt.nz/assets/About-us-Corporate/Treaties-Model-instruments/International-Treaty-Making-Guide-2021.pdf); Philippines, *Treaties: Guidance on Practices and Procedures* (available at https://dfa.gov.ph/resource-book-on-treaties-launches-at-dfa/); Poland, *Guidelines on Treaties*, chap. II.7 (available at https://www.gov.pl/web/dyplomacja/wytyczne-traktatowe-ministerstwa-spraw-zagranicznych); United Kingdom, *Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures* (15 March 2022) (available at https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures); Switzerland, *Practice Guide to International Treaties* (2023), sect. I.E and annex B (available at https://www.eda.admin.ch/dam/en/sd-web/U3S1B7gHeC8q/Practice-Guide-to-International-Treatie-2023_EN.pdf).

[1171] See, for example, the reply of Estonia to the questionnaire of the Committee of Legal Advisers on Public International Law, question 19 (available at https://rm.coe.int/questionnaire-response-estonia-ok-nov-2024/1680b2e1a3); written information from Guatemala, p. 2 (available at https://legal.un.org/docs/?path=../ilc/sessions/76/pdfs/english/nlba_guatemala.pdf&lang=ES); the reply of Hungary to the questionnaire of the Committee of Legal Advisers on Public International Law, question 19 (available at https://rm.coe.int/questionnaire-response-hungary-updated-nov-2024/1680b2e1a9); *Practical Guide for Departments on entering into international agreements*, written information from Ireland, p. 3 (available at https://legal.un.org/ilc/sessions/76/pdfs/english/nlba_ireland.pdf); the reply of Norway to the questionnaire of the Committee of Legal Advisers on Public International Law, question 19 (available at https://rm.coe.int/questionnaire-response-norway-ok-nov-2024/1680b2e1b2); the brochure on *Memoranda of Understanding* (October 2021), written information from the Kingdom of the Netherlands, annex, pp. 6 *ff.* (available at https://legal.un.org/ilc/sessions/76/pdfs/english/nlba_netherlands.pdf); the reply of Portugal to the questionnaire of the Committee of Legal Advisers on Public International Law, question 19 (available at https://rm.coe.int/questionnaire-response-portugal/1680b2e1b5).

[1172] See, for example, the statements made in the Sixth Committee by Brunei Darussalam on 7 November 2025 (A/C.6/80/SR.36), para. 40; by Cyprus on 7 November 2025 (A/C.6/80/SR.35); by Israel on 6 November 2025 (A/C.6/80/SR.34), paras. 10–12; by Japan

they have submitted in writing to the Commission, which is available on its website. In addition, information on relevant rules and procedures has been submitted in the course of the work of the Inter-American Juridical Committee[1173] and the Committee of Legal Advisers on Public International Law.[1174] International organizations have also adopted internal rules, procedures or guidelines on this subject.[1175]

(8) In terms of content, texts adopted at the internal level may aim to clarify the distinction between treaties and non-legally binding international agreements.[1176] In this regard, they often contain detailed information on the terminology and drafting methods that negotiators of these agreements should use or should prefer over others (for example: glossaries or comparative terminology tables to avoid, in non-legally binding international agreements, the use of terms reserved for treaties; model clauses; indications on whether or not to include a specific provision stating that the agreement does not create any rights or obligations under international law[1177]). They may also, with varying degrees of precision or legally binding force, identify the internal procedures to be followed for the negotiation and adoption of such non-legally binding international agreements. These procedures may relate, in particular, to the designation or identification of the competent authorities under internal law; to information, authorizations or notifications that must be provided or consultations that must take place internally prior to the negotiation or adoption of the agreement; to the preliminary legal review of the text by the authorities competent to bind the

on 7 November 2025 (A/C.6/80/SR.36), para. 36; or by Malaysia on 7 November 2025 (A/C.6/80/SR.35).

1173 See the practice compiled by the Inter-American Juridical Committee, summarized in "Binding and Non-Binding Agreements: Second Report" (Dr. Duncan B. Hollis), 6 February 2018 (CJI/doc.553/18).

1174 Many of the questions in the questionnaire of the Committee of Legal Advisers on Public International Law concern aspects of the internal procedures of States and international organizations on the drafting and adoption of non-legally binding international agreements. The questionnaire and the responses submitted to the Committee are available at https://www.coe.int/en/web/cahdi/the-practice-of-states-and-international-organisations-regarding-non-legally-binding-instruments.

1175 See, for example, ASEAN, "Rules of procedure for conclusion of non-legally binding agreements by ASEAN" (2023), available at https://asean.org/wp-content/uploads/2023/09/Final-RPCA_adopted-by-the-34th-ACC-on-4-Sep-2023.pdf; Council of Europe, "Rule No. 1318 of 20 October 2010 on Guidelines for concluding agreements between the Council of Europe and other international intergovernmental organisations or public international entities", available at https://rm.coe.int/1680781d8e.

1176 See C. Chaux, "Distinguer les accords juridiquement contraignants des accords juridiquement non contraignants : étude des lignes directrices nationales", *Revue générale de droit international public*, vol. 128 (2024), pp. 39–70.

1177 For example, the Russian Federation has noted that, for its part, the text of an international act that is not a treaty must include a clause specifying that the act is not a treaty and does not create rights or obligations governed by international law. See the written information from the Russian Federation, para. 5, last point (available at https://legal.un.org/ilc/sessions/76/pdfs/english/nlba_russia.pdf). New Zealand follows a different practice: "New Zealand's practice is not to include express provisions as to the status of an international instrument in arrangements (for example, '*this Arrangement is not intended to be legally binding*'). Such provisions are unnecessary as the status of an international instrument should be clear from the form and language used in the text, and to include such provisions in some, but not all, arrangements could cause potential interpretation issues for New Zealand." See *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements* (September 2021), p. 35 (available at https://www.mfat.govt.nz/assets/About-us-Corporate/Treaties-Model-instruments/International-Treaty-Making-Guide-2021.pdf). See, in a similar vein, the comments by the United States on the *Guidelines* of the Inter-American Juridical Committee, p. 3 (comments available at https://www.oas.org/en/sla/iajc/themes_recently_concluded_Binding_and_Non-Binding_Agreements.asp). See also draft conclusion 5, and the commentary thereto, below.

State internationally; or to the archiving of the original text, or even its official publication, after adoption.

(9) Draft conclusion 2 applies only to rules and procedures followed in relation to "the drafting and adoption" of non-legally binding international agreements. Without this clarification, the draft conclusion might have implied that all matters relating to non-legally binding international agreements fall exclusively within the internal sphere of States and international organizations. This could have been misinterpreted as implying, for instance, that a subject of international law is able to decide, solely on the basis of its internal law, whether an international agreement that it has concluded with another subject of international law is legally binding or not, thereby unilaterally imposing its own assessment of the nature of the agreement on the other participant (or participants) in the agreement. Having made this clarification, the question of whether draft conclusion 2 should also apply to other rules or procedures, such as those governing the interpretation, application or possible legal implications of non-legally binding international agreements, remains open at this stage. The Commission will pay particular attention to the views expressed by States and international organizations regarding what should or should not be included within the scope of draft conclusion 2.

Conclusion 3
Use of terms

1. For the purposes of the present draft conclusions, the term "non-legally binding international agreement" is used to refer to any agreement made in writing between States, between States and international organizations, or between international organizations, whether bilateral or multilateral, which, as such, does not create any rights or obligations, or have other binding legal effects, under international law.

2. The term "non-legally binding international agreement" under paragraph 1 includes, in relation to States, agreements entered into by organs of the government, territorial units and agencies or instrumentalities of the State which may enter into such agreements.

3. The use of the term "agreement" in the present draft conclusions does not affect:

(*a*) the meaning which may be given to this term in the internal law or the practice of a State or in the rules or the practice of an international organization;

(*b*) the meaning given to this term in any international instrument.

Commentary

(1) Terminological issues are an important aspect of this topic. States and international organizations pay close attention to the words they use depending on whether they are drafting a legally binding agreement or a non-legally binding agreement. For this reason, it is necessary to clarify the use of the terms that are central to the present draft conclusions in order to dispel any ambiguity regarding their use in the context of the present topic and to preserve the diversity of existing practices in this area. These clarifications also serve to shed light on terminological practices in connection with the topic.

(2) Draft conclusion 3 is not intended to establish general definitions. As its title and the body of the text indicate, it seeks to clarify the "use of terms" "for the purposes" of the present draft conclusions.

(3) Draft conclusion 3 consists of three paragraphs. Paragraph 1 explains how the term "non-legally binding international agreement" is used for the purposes of the topic. Paragraph 2 specifies the types of organs or entities that are covered by the agreements entered into by "States" within the meaning of paragraph 1. By providing

these clarifications, the first two paragraphs indirectly help define the scope of the topic. Paragraph 3 specifies the "meanings" of the term "agreement" that the term's use in the draft conclusions "does not affect".

Paragraph 1

(4) Paragraph 1 deals with the term "non-legally binding international agreement", which is the subject matter of the topic.[1178] The Commission does not intend to provide a definition to be used for all purposes. Thus, rather than stating what the term "means" or "is understood to mean", paragraph 1 simply sets out what the term is used to "refer to" for the purposes of the present draft conclusions. The various elements of paragraph 1 are explained below.

"Agreement"

(5) The first word to be clarified in the term "non-legally binding international agreement" is "agreement". At this stage of its work, the Commission has decided to retain the existing title of the topic, which uses this term. Some States and members of the Commission do not consider this term appropriate, having expressed a preference for alternatives such as "instrument" or "arrangement",[1179] on the grounds that the term "agreement" would necessarily refer, in the technical sense, to a legally binding agreement and that using this term in the context of the present topic would introduce more confusion than clarity. The decision to retain the term "agreement" was justified on the following grounds:

(i) the ordinary meaning of the term corresponds to the nature of the texts covered by the topic, that is, those which, whatever their designation or form and regardless of their legal force, embody a commitment resulting from a "concurrence of wills" or a "mutual understanding" (in other words, the fact that two or more persons jointly agree to one or more commitments);[1180]

(ii) the *travaux préparatoires* of the Vienna Convention on the Law of Treaties and the definition of treaties set forth in that Convention show that, while every treaty is an agreement, not every agreement is a treaty, and there are international agreements that do not create legal rights and obligations;[1181]

[1178] Some members wondered whether the term "non-legally binding international agreements" should be changed in the English version to "legally non-binding international agreements", which would be more closely aligned with the other language versions. At this stage of the Commission's work, the wording initially chosen has been retained, without prejudice to any future decision in this regard.

[1179] The term "instrument" has been recently used by the International Court of Justice in *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)* (Judgment, 19 May 2025, General List No. 179, paras. 72-74) and *Obligations of States in respect of Climate Change* (Advisory Opinion, 23 July 2025, General List No. 187, para. 140), the Institute of International Law in the resolution on status and functions of the conferences or meetings of parties to multilateral environmental agreements of 30 August 2025 (adopted at the session of Rabat, at art. 8) and the Committee of Legal Advisers on Public International Law of the Council of Europe (Meeting report, 65th meeting, 28-29 September 2023, Strasbourg, France, CAHDI (2023) 25, para. 29, and Meeting Report, 69th meeting, 25-26 September 2025, Strasbourg, France, CAHDI (2025) 19, paras. 37–54).

[1180] See, for example, International Centre for Settlement of Investment Disputes, *Ángel Samuel Seda and others v. Republic of Colombia*, case No. ARB/19/6, award of 27 June 2024, para. 695: an "agreement" refers to a "joint manifestation of consent". Guideline 1.1 of the *Guidelines* of the Inter-American Juridical Committee (see footnote 1157 above) provides the following clarification regarding the term "agreement": "Although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior."

[1181] See footnotes 1153 and 1154 above and, for a more detailed discussion, A/CN.4/772, paras. 30–42.

(iii) the term "non-legally binding international agreements" cannot be confused with treaties, since it combines the words "agreements" and "non-legally binding" in a single term;

(iv) this term has been used by the Commission in its recent work;[1182]

(v) this term also appears in jurisprudence[1183] and legal writings;[1184]

(vi) the term "agreement" also makes it possible to clearly define the scope of the topic by excluding unilateral acts, which would not be possible with the term "instrument", which is generally used to refer to both agreements and unilateral acts of States[1185] or unilateral acts of international organizations;[1186]

(vii) lastly, the term "agreement" makes it possible to emphasize what is central to the present topic, namely the difficulties arising from the use of agreements that resemble treaties in several respects but do not possess their legally binding nature.

(6) The Commission did not consider it necessary to define the term "agreement" in draft conclusion 3, as it was of the view that its ordinary meaning was sufficiently clear in the light of the above. However, in order to address the concerns expressed by certain States regarding the use of the term "agreement" in the context of the

[1182] See, in particular, paragraph (6) of the commentary to conclusion 4 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties: "While every treaty is an agreement, not every agreement is a treaty. … [An agreement] is not necessarily binding" (*Yearbook … 2018*, vol. II (Part Two), para. 52, at p. 33). See also, among many other examples, the "G20 Principles for Cooperation between the IMF and Regional Financing Arrangements" of 15 October 2011, which refer to "non-binding broad principles for cooperation [that] have been agreed".

[1183] See, for example, *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, 18 March 2015, *Reports of International Arbitral Awards*, vol. XXXI, pp. 359–606, at p. 538, para. 426.

[1184] See, among others, C. Ahlström, *The Status of Multilateral Export Control Regimes: An Examination of Legal and Non-Legal Agreements in International Cooperation* (Iustus Förlag, Uppsala, 1999); D. Azaria, *The Indirect Legal Effects of Non-Binding Agreements*, University College London Research Paper Series, No. 21/2023, pp. 1–11; G. Bienda, "Essai sur la nature juridique des accords migratoires entre l'Union européenne et certains États africains", *African Yearbook of International Law*, vol. 25, 2022, pp. 256–284; J. Busuttil, "The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking", *International and Comparative Law Quarterly*, vol. 31 (1982), pp. 474–487; P. Gautier, "Non-binding agreements"; O. Hathaway, "Non-binding agreements and international law", American Society of International Law, *International Law Behind the Headlines*, episode 33, 2022; M. Hayashi, "Benefits of a legally non-binding agreement: the case of the 2013 US-Russian agreement on the elimination of Syrian chemical weapons", *International Community Law Review*, vol. 20 (2018), pp. 252–277; A. Mensi, "The identification of international non-binding agreements through the lens of subjective and objective indicators: fiction or reality?", *La Comunità Internazionale*, 2024, pp. 413–443; R. Monaco, "Accords internationaux non obligatoires et effets juridiques préliminaires", *Liber amicorum honouring Ignaz Seidl-Hohenveldern* (Carl Heymanns Verlag, Cologne, 1988), pp. 383–401; J.-F. Morin, P. Pic, "Sequencing binding and non-binding agreements: the case of outer space governance", *International Theory*, vol. 17 (2025), pp. 350–370; F. Münch, "Non-binding agreements", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1969, pp. 1–11; O. Schachter, "The twilight existence of nonbinding international agreements", *American Journal of International Law*, vol. 71 (1977), pp. 296–304; E. Tepper, "The laws of space warfare: a tale of non-binding international agreements", *Maryland Law Review*, vol. 83 (2024), pp. 458–517.

[1185] See, for example, the "instruments of ratification, acceptance, approval or accession" referred to in article 16 of the Vienna Convention on the Law of Treaties.

[1186] See, for example, International Court of Justice, which uses the term "instruments" to refer to resolutions in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, *Judgment, I.C.J. Reports 2014*, p. 226, at para. 78.

present topic, draft conclusion 3 contains a third paragraph that preserves the more specific or technical meanings that may be attached to this term.[1187]

(7) For the purposes of the present topic, the term "agreement" is intended to cover both non-legally binding agreements adopted in the form of a single document and those adopted in the form of a (non-legally binding) exchange of letters. It is also intended to cover acts adopted between subjects of international law within an institutional framework lacking its own legal personality (such as a declaration adopted by the participants in an international conference), subject to any rules applicable within that institutional framework.

> *"agreement made in writing between States, between States and international organizations, or between international organizations, whether bilateral or multilateral"*

(8) Paragraph 1, in certain respects, takes a broad approach to the scope of the topic by including (i) bilateral or multilateral international agreements (including regional agreements) (ii) made not only between States but also between States and international organizations or between international organizations.[1188] The explicit mention of these subjects of international law serves to clarify that the agreements covered by the present draft conclusions are those made at the international level. Furthermore, the reference in paragraph 1 to any "international" agreement entered into by these subjects of law implies that the paragraph does not cover agreements made exclusively under internal law.[1189]

(9) The meaning of "States" as used in paragraph 1 is clarified in paragraph 2, which is discussed below. The inclusion of international organizations in the scope of the topic must be understood within the limits of their international personality, which is of a functional character and dependent on the specific rules applicable to them.

(10) On the other hand, the present topic does not cover agreements that are not made in writing (although this would not preclude, assuming it were of any use or relevance, the use of the present draft conclusions with respect to non-legally binding oral agreements). Given the particular issues they raise, agreements entered into with or between persons or entities other than States or international organizations (such as national liberation movements, insurgent movements, armed groups or companies)[1190] are also excluded from the scope.

[1187] In footnote 1 of the questionnaire sent to its members on "non-legally binding agreements" (before it decided to change the title of the topic to refer to "instruments"), the Committee of Legal Advisers on Public International Law specified that, "[f]or the purpose of this questionnaire, we use the term 'non-legally binding agreement' to describe the phenomenon of an agreement between two subjects of international law intending to remain below the threshold of binding treaty under international law. This is done for reasons of uniformity and without prejudice to the discussion, whether 'non-legally binding agreement' is an appropriate term for these types of understandings."

[1188] The plural formulation "between States, between States and international organizations, or between international organizations" is of a general scope and should be understood to refer, more specifically, to agreements concluded between two or more States, between two or more international organizations, or between one or more States and one or more international organizations.

[1189] In its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice considered that "it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter" (*Advisory Opinion, I.C.J. Reports 2019*, p. 95, at para. 172).

[1190] Including these entities within the scope of the topic would have required them to be identified, which could "give rise to all kinds of problems" (see, by analogy, paragraph (6) of the commentary to article 3 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), para. 63, at p. 22). Furthermore, these entities "seem too heterogeneous a group

"non-legally binding"

(11) As the phrase "non-legally binding" is in common use today, there is no reason to depart from it here, even though in the French version, the adjective "*contraignant*" could be misleading, since it refers to the idea of "*contrainte*" [coercion] rather than obligation. The term "binding" ("*contraignant*") has been used by the Commission in its work on other topics, including in conclusion 10 (1) of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and in guideline 6 of the Guide to Provisional Application of Treaties.[1191] This adjective is currently used regularly in practice regarding the negotiation and conclusion of multilateral instruments.[1192] It is also the adjective used in the aforementioned work of the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe. The term is also found in international jurisprudence with some variations, the term "binding" in English sometimes being translated into French as "*obligatoire*" or "*force obligatoire*" rather than "*contraignant*".[1193]

"which, as such, does not create any rights or obligations, or have other binding legal effects, under international law"

(12) The last part of paragraph 1 is intended to clarify what is meant by the term "non-legally binding" for the purposes of the draft conclusions. In this regard, it provides four clarifications.

(13) First, it states that a non-legally binding agreement "does not create any rights or obligations". This wording is frequently used in provisions intended to expressly state that an international agreement is not legally binding.[1194] The substance of this statement is also found in internal instruments adopted by States to regulate or guide their practice in this area.[1195]

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to constitute a general category" (*Yearbook ... 1974*, vol. II (Part One), p. 298, para. (5) of the commentary to article 3).

[1191] *Yearbook ... 2018*, vol. II (Part Two), para. 52, at p. 63, for conclusion 10, and *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), p. 78. See also paragraph (11) of the general commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, in which the Commission indicates that they "are cast as a non-binding declaration of draft principles" (*Yearbook ... 2006*, vol. II (Part Two), para. 66, at p. 60); and the working paper prepared in 2015 on the long-term programme of work (A/CN.4/679), para. 15.

[1192] See, for example, the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, adopted in Rio de Janeiro in 1992 (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 and Corr.1, United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex III). See also, among other examples, the decisions calling for the development of an "international legally binding instrument" on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 69/292 of 19 June 2015, para. 1) and on plastic pollution (United Nations Environment Assembly resolution 5/14 of 2 March 2022 (UNEP/EA.5/Res.14), para. 3).

[1193] See, for example, International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at para. 26; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 70; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, at para. 49; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023, I.C.J. Reports 2023*, p. 619, at para. 62.

[1194] See, below, the practice cited in the commentary to draft conclusion 5.

[1195] See, for example, Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales*, art. 43; India, *Guidelines/SoP on the conclusion of international treaties in*

(14) Examples in which the fact of being (non-)legally binding is equated with the fact of (not) creating rights or obligations can be found in jurisprudence. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, for example, the International Court of Justice sought to determine whether the agreements "create rights and obligations in international law for the Parties".[1196] Similarly, the International Tribunal for the Law of the Sea has considered whether a text invoked before it is a "source of rights and obligations between Parties".[1197] An arbitral tribunal has likewise examined whether the documents submitted "evince an intention to create legal rights and obligations".[1198]

(15) Second, paragraph 1 expands on the above wording by stating that an agreement is not legally binding if it does not create any rights or obligations "or have other binding legal effects". It is indeed possible for an agreement not to create rights or obligations, as such, but to affect existing rights and obligations (for example, by repealing or suspending them). There are also agreements that are declaratory (such as those establishing a border) or interpretative in nature and that may or may not be legally binding, depending on the circumstances. As some authors have pointed out, the legal effect of a treaty does not necessarily take the form of provisions giving rise to rights and obligations.[1199] In the vast majority of its provisions, the 1969 Vienna Convention on the Law of Treaties uses a more comprehensive expression, stating that the parties are "bound by" the treaty.[1200] It is therefore necessary to clarify that a non-legally binding international agreement refers not only to any agreement that does not create rights or obligations, but also, more broadly, to any agreement that does not "have other binding legal effects".[1201] In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice used a comprehensive formula of this kind in considering the question of whether a commitment had "legal force".[1202] In its judgment on the merits in *Obligation to Negotiate Access to the Pacific Ocean*, the Court considered whether or not an agreement demonstrated "an intention of the parties to be legally bound".[1203] In a similar vein, the International Tribunal for the Law of the Sea examined the existence of "legal obligations" (in French, *"la présence*

India, 16 January 2018, p. 4; United States, *Code of Federal Regulations*, Title 22, sect. 181.4 (b) (1).

1196 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 1193 above), at para. 25.

1197 International Tribunal for the Law of the Sea, *"Hoshinmaru" (Japan v. Russian Federation), Prompt Release, Judgment*, *ITLOS Reports 2005–2007*, p. 18, at p. 46, para. 86.

1198 *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility of 29 October 2015*, *Reports of International Arbitral Awards*, vol. XXXIII, pp. 1–152, at p. 97, para. 241, and at p. 86, para. 213 ("evince a clear intention to establish rights and obligations").

1199 See J. Combacau, *Le droit des traités* (Paris, Presses universitaires de France, 1991), pp. 68 and 69; or *Yearbook of the Institute of International Law*, vol. 60, Part I, Session of Cambridge 1983, p. 181.

1200 See, for example, art. 2 (b), (c), (f) and (g), arts. 7 or 16, or the titles of arts. 11–15 and 17.

1201 In his second report to the Inter-American Juridical Committee, D. Hollis makes a similar point: "All the Member States concurred that this category [of non-binding agreements] is defined in terms of commitments that lack any legal force" (CJI/doc.553/18, para. 11). See also resolution AG/RES. 1634 (XXIX-O/99) of the Organization of American States, adopted on 7 June 1999, which uses the expression "agreement having legal effect" (para. 3).

1202 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 132, para. 261.

1203 International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at p. 539, para. 91.

d'engagements juridiques") to determine whether an agreement was legally binding or not.[1204]

(16) The further indication that the agreement must not create "any" rights or obligations or have other binding legal effects in order to be non-legally binding is meant to signal that if the agreement contains at least one provision that creates a right or obligation under international law, it is normally an agreement "governed by international law" within the meaning of treaty law. It is important to note, however, that in practice there are examples of agreements that the parties have expressly characterized as being non-legally binding while acknowledging that they contain a legally binding provision.[1205]

(17) Third, it is stated that there must be no binding legal effects "under international law". It cannot be ruled out that a non-legally binding international agreement might have or produce legally binding effects under the internal law of one (or all) of the participants in the agreement. Since it is not for the Commission to address this matter, the clarification "under international law" was included in order to better define the scope of the topic.

(18) Furthermore, in the specific context of the topic, the phrase "under international law" seemed clearer than the phrase "governed by international law", which appears in the definition of "treaty" set forth in article 2 of the Vienna Convention on the Law of Treaties. Using the latter wording (stating that non-legally binding international agreements "are not governed by international law") would have created the misleading impression that such agreements are completely outside the scope of international law. However, like all international conduct, they come under international law and cannot result in, for example, a violation of the peremptory norms of general international law (*jus cogens*) or the rules and principles of general international law. The Commission will examine this issue in greater detail as it continues its work.

(19) Fourth and finally, paragraph 1 states that an international agreement is non-legally binding if it does not, "as such", create any rights or obligations or have other legal effects.[1206] These words are intended to make it clear that the nature of the agreement depends on its own effect, regardless of any other legal consequences that rules of international law might attach to it from outside. However, the phrase "as such" should not be interpreted to mean that a non-legally binding international agreement is necessarily capable of having legal effects on some other basis. The Commission will explore this issue as part of its upcoming discussions on the possible legal implications of these agreements (in particular as conduct attributable to States and international organizations at the international level); it has not yet taken a position on this issue at the current stage of its work.

(20) It is further understood that a non-legally binding international agreement does not lose its non-binding character simply by recalling or stating rights or obligations that have a different legal basis, provided that it merely notes their existence without in and of itself attaching any new binding legal effects to them.[1207]

[1204] International Tribunal for the Law of the Sea, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012*, p. 4, at p. 35, para. 93.

[1205] See, for example, article 19 of the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé, 25 June 2013): "Nothing in this Code of Conduct is intended to: (a) create or establish a binding agreement, except as noted in Article 13".

[1206] In the *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges*, the Tribunal used a similar formulation ("to create *independent* legally enforceable obligations as opposed to merely recording the understandings of the Parties", emphasis added) (*Award on the First Question, decision of 30 November 1992 (revised 18 June 1993)*, *Reports of International Arbitral Awards*, vol. XXIV, pp. 3–334, at p. 131, para. 6.8).

[1207] See, for example, paragraph 1 (a) of the 1992 Forest Principles (footnote 1192 above).

Paragraph 2

(21) Paragraph 2 clarifies what is covered by the term "non-legally binding international agreement" as used in paragraph 1 with respect to States. In doing so, it defines, *ratione personae*, the types of agreements covered by this topic.

(22) It was necessary to make this clarification due to the widespread use of non-legally binding agreements by State authorities other than those generally considered to have the authority to bind or represent the State at the international level.[1208] These agreements are sometimes referred to as "inter-institutional agreements" or "administrative arrangements".[1209] They may include:

- agreements between economic regulatory authorities;[1210]
- agreements between other types of specialized national public authorities;[1211]

[1208] The practice of establishing twinning agreements between cities in different countries, for example, was mentioned during the Commission's discussions.

[1209] See, for example, guideline 1.5 of the *Guidelines* of the Inter-American Juridical Committee (see footnote 1157 above). According to the commentary to this guideline, it covers "international agreements concluded among State institutions, whether (i) national ministries or agencies or (ii) sub-national territorial units like regions or provinces". For recent studies on agreements of this type, see C.A. Bradley, "State international agreements: the United States, Canada, and constitutional evolution", *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 2023, pp. 1–23 (in particular pp. 19 *ff.*); G.J. Garcia Sanchez, "The other secret deals: uncovering the power of non-binding international agreements", *Fordham International Law Journal*, vol. 48 (2024), pp. 285–351; A. Messing, "Nonbinding subnational international agreements: a landscape defined", *The Georgetown Environmental Law Review*, vol. 30, No. 1 (2017), pp. 173–201. See also J. Mervyn Jones, "International agreements other than 'inter-State treaties' – modern developments", *British Yearbook of International Law*, 1944, pp. 114 *et seq*.

[1210] See, for example, the list of more than 250 agreements, most of which are not legally binding, on international cooperation between competition agencies compiled by the Organisation for Economic Co-operation and Development *(OECD Inventory of International Co-operation Agreements between Competition Agencies (MoUs)*, 2025, including the part entitled "Miscellaneous provisions"). See also (expressly stating that they are not legally binding) the Cooperation Agreement on the Exchange of Information on Banking Supervision between the Prudential Supervision and Resolution Authority of France and the State Bank of Viet Nam of 25 September 2013; or the Memorandum of Understanding between the European Securities and Markets Authority and the Securities and Futures Commission Related to CCPs Established in Hong Kong, of 18 March 2022. See also the practice identified in R. Bismuth, *La coopération internationale des autorités de régulation du secteur financier et le droit international public* (Brussels, Émile Bruylant, 2011), pp. 206–237; M. Loja, *International Agreements between Non-State Actors as a Source of International Law* (Oxford, Hart, 2022), pp. 112 *et seq*.

[1211] See, for example, the Memorandum of Understanding between the Survey of India and the Federal Service for State Registration, Cadastre and Cartography (The Russian Federation) of 8 July 2024; the memorandum of understanding between the National Institute of Metrology of the People's Republic of China and the Government of Australia, as represented by the National Measurement Institute, of 12 June 2024; or the memorandum of understanding of 3 April 2018 between the Entidad estatal de seguros agrarios (ENESA) of Spain and the Caisse nationale de la mutualité agricole (CNMA) of Algeria (cited by F. Jiménez García, *Derecho internacional líquido: ¿Efectividad frente a legitimidad?* (2021), pp. 175 and 176). See also the Memorandum of Cooperation between the Intellectual Property Offices of the Member States of the Association of Southeast Asian Nations and the Korean Intellectual Property Office of the Republic of Korea for Comprehensive Cooperation in the Field of Intellectual Property of 27 March 2018; or the Memorandum of Understanding between the National Anti-Corruption Authority of the Italian Republic and the Government Inspectorate of the Socialist Republic of Viet Nam of 26 September 2019. For examples of legal cooperation, see, for example, the list of agreements and other arrangements (137 as at 13 May 2026) concluded "between the Prosecutor General's Office of the Russian Federation and the competent authorities of foreign states", available at https://epp.genproc.gov.ru/en/gprf/international-co-operation/documents/sogls/.

- agreements between such an authority and an international organization;[1212]
- agreements between local administrative authorities in different States;[1213]
- arrangements entered into by the administrative authorities of two States with a view to implementing a treaty.[1214]

(23) It seemed necessary to include these agreements within the scope of the topic for three reasons: (i) because of the widespread nature of this practice; (ii) because many of these agreements are expressly presented as non-legally binding, while others are registered under Article 102 of the Charter of the United Nations,[1215] which means that the practical question of distinguishing between treaties and non-legally binding international agreements also arises in connection with these agreements; (iii) in order to better raise awareness among the relevant authorities, who are not necessarily experts in this field, of the challenges that may arise from the use of non-legally binding international agreements. In order to ensure that all stakeholders potentially concerned by the present draft conclusions appreciate the benefit of taking note of them, the flexible verb "includes" is used in this paragraph to refer to the relevant agreements and authorities.

(24) To properly identify the various types of agreements covered by the present draft conclusions "in relation to States", the Commission drew drafting inspiration from the definition of a State contained in article 2 of its articles on jurisdictional immunities of States and their property and in article 2 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. On this basis, paragraph 2 distinguishes between three main categories:

(i) "organs of the government", which the Commission described in 1991 as including, among others, the Head of State or Government, the central Government and government ministries and agencies;[1216]

(ii) "territorial units", a term borrowed from conventions adopted within the framework of the Hague Conference on Private International Law,[1217] which encompasses what the Commission designated in the 1991 articles as the "constituent units of a federal State" and "political subdivisions of the

[1212] Examples include the Memorandum of Understanding between the International Seabed Authority and the National Institute of Oceanography and Fisheries of Egypt of 18 January 2024 (available at https://www.isa.org.jm/wp-content/uploads/2024/05/2024_MOU-ISAEgypt_JTRC.pdf) and the "working arrangements", which do "not create legal obligations", that the Body of European Regulators for Electronic Communications may establish "with competent authorities of third countries and with international organisations" (see Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018, art. 35; and Court of Justice of the European Union (Grand Chamber), case C-632/20 P, judgment, 17 January 2023).

[1213] See, for example, the Memorandum of Understanding between the City of London Corporation and Tokyo Metropolitan Government of 4 December 2017.

[1214] Based on the model (subsequently used in other contexts) of art. 5 (2) of the Universal Postal Convention of 28 June 1929, under which "Administrations are authorised to make with one another any necessary agreements" ("*arrangements*" in French) (Universal Postal Convention (London, 28 June 1929), League of Nations, *Treaty Series*, vol. 102, No. 2368, p. 245, at p. 257).

[1215] See, for example, the International Express Mail Agreement between the Postal Administration of Senegal and the United States Postal Service (Dhaka, 5 June 1986 and Washington, 3 July 1986, United Nations, *Treaty Series*, vol. 2263, No. 40319, p. 453).

[1216] *Yearbook ... 1991*, vol. II (Part Two), paras. (11)–(13) of the commentary to article 2, pp. 16 and 17.

[1217] See, for example, article 25 of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

State which are entitled to perform acts in the exercise of the sovereign authority of the State", such as "autonomous regions of a State";[1218]

(iii) "agencies or instrumentalities of the State", which the Commission identified in its 1991 articles as State entities entitled to perform acts in the exercise of the sovereign authority of the State and in respect of which it noted that, in practice, there is "no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government".[1219]

On the other hand, the Commission did not include in paragraph 2 the "other entities" referred to in the 1991 articles and the 2004 Convention, since that term refers to private entities, in particular businesses, whose practices are unrelated to the topic at hand.[1220]

(25) It is stated at the end of paragraph 2 that the term refers to agreements that these organs, units, agencies or instrumentalities "may enter into". This flexible wording was preferred over more restrictive formulations to the effect that only entities authorized to "represent the State"[1221] are covered, or that only agreements that these entities are entitled to adopt or that are adopted in accordance with the internal law of the State are included. The Commission considered that such formulations would have encroached upon the freedom of States to determine who has the capacity or authority to represent them or bind them internationally, and under what rules or procedures, and that they would have given the impression that the Commission intended to establish a "regime" for such agreements.[1222] Such formulations would also have required the Commission to address complex issues of internal law applicable to foreign relations, particularly those of a constitutional nature. It also appears that not all States have necessarily established a domestic framework for determining which entities may enter into non-legally binding international agreements.

(26) By limiting itself to the phrase "may enter into", the Commission intended not to be overly restrictive and to allow for the necessary flexibility, while at the same time making clear, through the use of this phrase, that it would be advisable for the entities concerned to consider, when negotiating and entering into such agreements, their capacity to do so under their national legal systems and the procedures that may apply to this type of agreement.

(27) Paragraph 2 of the present draft conclusion should not be interpreted as legitimizing a practice that is not accepted under national legal systems or that is restricted in some way by the State or States concerned.[1223] It is for each State to determine whether its authorities are able to enter into such agreements in accordance with the requirements of its internal law.

[1218] *Yearbook ... 1991*, vol. II (Part Two), paras. (6) *et seq*. of the commentary to article 2, pp. 14 *et seq*.

[1219] *Ibid*., para. (16) of the commentary to article 2, p. 17.

[1220] *Ibid*., para. (15) of the commentary to article 2, p. 17.

[1221] The criterion of "representation" appears in the judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 46).

[1222] The Inter-American Juridical Committee also opted for a cautious formulation: "States or State institutions should be able to make political commitments to the extent political circumstances allow" (guideline 2.4 of the aforementioned *Guidelines*, see footnote 1157 above).

[1223] See, for example, the 18 December 2000 agreement between the Government of Canada and the Government of the Russian Federation on the principles and basis for cooperation between the provinces and territories of Canada and the subjects of the Russian Federation, article 3 of which states that: "Understandings concluded between the Provinces and Territories of Canada and the Subjects of the Russian Federation are not international agreements."

(28) Since paragraph 2 is intended to clarify the meaning of paragraph 1, it was not necessary to specify in the text of paragraph 2 that only "international" agreements are covered. This is clear, by implication, from the reference in paragraph 1 to agreements concluded between States, between States and international organizations, or between international organizations.

(29) It was not deemed appropriate to include a provision comparable to paragraph 2 with regard to international organizations. It is generally the organization as a whole, as a single legal person, and not its organs acting independently, that undertakes commitments at the international level. In addition, unlike States, in respect of which general international law draws a distinction between persons who are presumed to represent the State and those who must be authorized to represent it, the rules applicable within international organizations vary greatly from one organization to another and they "exhibit structural differences which rule out the possibility of making them the subject of general rules".[1224] Furthermore, since no request for information on this issue has yet been sent to international organizations, it seemed premature to take a position on this matter.

Paragraph 3

(30) As noted above, some concerns have been raised regarding the use of the term "agreement" for the purposes of the topic, either because there is seen to be a contradiction in using the terms "agreement" and "non-legally binding" together or because of the diversity of terminological approaches, since the use of the term "agreement" is, in certain texts or practices, reserved for legally binding international agreements. To take account of these concerns, paragraph 3 states that the use of the term "agreement" in the present draft conclusions "does not affect the meaning which may be given" to this term either "in the internal law or the practice of a State or in the rules or the practice of an international organization" (subpara. (*a*)) or "in any international instrument" (subpara. (*b*)). The phrase "does not affect" is used here for the same reasons as those explained in paragraph (2) of the commentary to draft conclusion 2. Paragraph 3 is intended to reassure States and international organizations that their terminological practices will be preserved and will not be affected by the use of the term "non-legally binding international agreements" for the purposes of the present draft conclusions.

(31) Subparagraph (*a*) acknowledges the existence of rules or practices of States or international organizations in which the term "agreement" is used only to denote a legally binding international agreement, while other terms are used for non-legally binding instruments (such as "arrangement" or "memorandum of understanding"). The formulation "the internal law or the practice of a State" encompasses internal rules – whether constitutional, legislative or otherwise – and the corresponding practices, including, for example, those of government ministries in the form of guidelines or manuals. The term "internal law" is also the term typically used by the Commission.[1225]

(32) The reference in subparagraph (*a*) to "practice", in addition to a State's "internal law" and the "rules" of an international organization, is intended to cover the international practice of those entities. For this reason, the phrase "the rules or the practice" of an international organization does not affect the meaning usually given by the Commission to the phrase "rules of the organization", which includes the organization's "established practice" but not necessarily its practice at the

[1224] See paragraph (8) of the commentary to article 7 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982* (see footnote 1190 above), at p. 26.

[1225] See the use of this term in the 1966 draft articles on the law of treaties, the 2011 Guide to Practice on Reservations to Treaties and the 2021 Guide to Provisional Application of Treaties.

international level.[1226] The phrases "the internal law or the practice" and "the rules or the practice" effectively highlight the diversity of terminological practices followed by States and international organizations.

(33) Subparagraph (*b*) takes into account the fact that, in some cases, the term "agreement" may be used in different kinds of international instruments (treaties or resolutions of international organizations, in particular) in a sense that can be interpreted, or is interpreted, in those contexts as referring only to legally binding agreements.[1227] The use of the term "agreement" for the purposes of the topic does not affect the meaning given to the word "agreement" in these international instruments.

Part Two

…

Commentary

Part Two, the title of which will be adopted once this part has been finalized, is intended to provide elements of clarification on the approach to be taken in determining whether an international agreement is legally binding or not. This is a matter of great practical importance because it facilitates the task of distinguishing between treaties, which bind their parties under international law, and international agreements that are not legally binding under such law. This question arises repeatedly in the practice of legal departments in States and international organizations, both during and after the negotiation and adoption of such agreements. It may also arise before a dispute settlement body if there are differing views on whether an agreement is legally binding or not. The following draft conclusions, which will be supplemented by additional ones, are intended to cover these various situations.

Conclusion 4
Assessment of whether an international agreement is legally binding or not

1. Whether an international agreement is legally binding or not depends on the intention of the participants thereto. In the absence of an intention of the participants to be legally bound by the agreement, it is not legally binding.

2. The intention of the participants in the agreement to be or not to be legally bound may be expressly stated.

3. In the absence of such an express indication, the intention of the participants in the agreement to be or not to be legally bound can be established by recourse to the relevant elements identified in draft conclusions […to …].[b] These elements are assessed as a whole.

4. Whether an international agreement is legally binding or not is assessed on a case-by-case basis.

[1226] Draft art. 2, para. 1 (*j*), of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook … 1982* (see footnote 1190 above); art. 2, subpara. (*b*), of the articles on the responsibility of international organizations.

[1227] The term "agreement" as used in articles 15 and 281 of the United Nations Convention on the Law of the Sea has, for example, been interpreted as necessarily meaning "a legally binding agreement" (*Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 1204 above), para. 89), a "binding agreement" or a "legally binding agreement" (*The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 1198 above), paras. 212 and 219; *Timor Sea Conciliation (Timor-Leste/Australia), decision on competence of 19 September 2016*, *Reports of International Arbitral Awards*, vol. XXXIV, p. 208, paras. 54–58. See also C. Wold, "A history of 'AGREEMENTS' under article IV.3 and 'agreements' under article IV.4 in the Convention on Migratory Species" (UNEP/CMS/COP11/Inf.31), 25 September 2014.

[[b] To be finalized at a future session.]

Commentary

(1) The purpose of draft conclusion 4 is to set forth the general parameters to be taken into account when assessing, either during or after the drafting and adoption of an international agreement, whether it is legally binding or not. It begins by noting that the intention of the participants in the agreement is the key consideration (paragraph 1). It then indicates, in paragraphs 2 and 3, how this intention can be stated or established.[1228] Lastly, it states that this assessment is conducted on a case-by-case basis (paragraph 4). The purpose of setting out these parameters is to draw attention to the legal issues at stake and, through the clarifications provided, to assist practitioners involved in drafting, negotiating, adopting or identifying non-legally binding international agreements.

Paragraph 1

(2) The fact that intention is the key element in establishing that an international agreement is legally binding or, conversely, that it is not legally binding is hardly in dispute. It was deemed essential to make this point in the first paragraph of the draft conclusion by stating that whether an international agreement is legally binding or not "depends on the intention of the participants thereto".

(3) The central role of intention has been fully recognized in case law. In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice considered whether a "legal undertaking was intended to exist".[1229] In *Obligation to Negotiate Access to the Pacific Ocean*, it similarly held that "for there to be an obligation … on the basis of an agreement", there must be elements demonstrating "an intention of the parties to be legally bound".[1230] This approach was confirmed in the Court's judgment of 19 May 2025 in *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, in which the Court stated that "an intention of the parties to be legally bound is necessary for an instrument to constitute a treaty. Absent such an intention to be bound, it is not possible to qualify an instrument as a treaty."[1231] Other decisions and arbitral awards support this approach: "[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties";[1232] "[w]hat matters, ultimately, is the intention of the Parties to be bound by the agreement under international law".[1233] As one arbitral tribunal put it, "[a] key factor in distinguishing a 'non-legally binding instrument' from a treaty is the intention of the parties".[1234]

[1228] The semantic flexibility of these two verbs makes it possible to address both the drafters of the agreement (how they can proceed to state their intention) and those who, when deciding whether to adopt the agreement or when assessing it before or after adoption, will be considering how the intention was stated or established or how to establish it.

[1229] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 132, para. 261.

[1230] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 1203 above), at p. 539, para. 91.

[1231] International Court of Justice, *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 72.

[1232] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 1198 above), at p. 86, para. 213.

[1233] *Ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia, first phase, 17 May 2001, *International Law Reports*, vol. 128, pp. 435–504, at pp. 449 and 450, para. 3.15.

[1234] *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*, *Reports of International Arbitral Awards*, vol. XXVII, p. 35, at p. 92, para. 142.

(4) To leave no room for doubt, and given that the present draft conclusions specifically concern non-legally binding international agreements, the second sentence of paragraph 1 specifies that, in the absence of an intention of the participants to be legally bound by the agreement, it is not legally binding. The point here is not to establish a legal presumption, but to indicate that "an intention of the parties to be legally bound is necessary" for an agreement to be legally binding[1235] and that, consequently, in the absence of such an intention (which is assessed on a case-by-case basis, as indicated in paragraph 4 of the present draft conclusion), the agreement is not legally binding.

(5) The use of the term "intention" in the singular and the term "participants" in the plural in the phrase "the intention[[1236]] of the participants" – a grammatical structure also used by the International Court of Justice in its judgment in *Land and Maritime Delimitation and Sovereignty over Islands*[1237] – is meant to emphasize that what matters is not the individual intention or unilateral position of any one participant, but rather the common intention of all participants in the agreement. For the same reason, the verb "*liés*" ["bound"] is used in the plural in paragraphs 1, 2 and 3 of the draft conclusion (explicitly in some language versions and implicitly in others). Furthermore, in the light of the indications provided in draft conclusion 3, paragraph 1, whenever the present draft conclusion refers to the participants' intention to be or not to be legally bound, it is always understood to mean "under international law".

(6) Once the basic observation has been made that the nature of the agreement "depends on the intention" of the participants therein, it is necessary to determine how this intention can be stated or established.[1238] Case law, which is consistent with national practice,[1239] generally distinguishes between two main situations. In *Obligation to Negotiate Access to the Pacific Ocean*, the International Court of Justice stated that the intention to be legally bound, "in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence".[1240] In a more recent ruling, it essentially reiterated this distinction, stating that an agreement may be characterized as a treaty "if the Parties had expressed an intention to be legally bound by that document or if such an intention could be inferred".[1241] Along the same lines, an arbitral tribunal stated that the intention for an agreement to be either binding or non-binding as a matter of law must be "clearly expressed or is otherwise a matter for objective determination".[1242] Consequently, paragraphs 2 and 3 distinguish between two

[1235] *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 72.

[1236] Or, in English, "an" intention in the second sentence of the paragraph.

[1237] *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 72.

[1238] The word "intention" is sometimes used in a more limited sense to refer to indicators described as "subjective" as opposed to indicators that would be considered "objective". These adjectives are not used here because they may cause confusion. The intention is what needs to be established and the indicators are the means by which the intention is expressed or identified, it being understood that such indicators may be more or less subjective or objective (for example, relying on the terms used in the agreement is in a certain sense more objective than seeking to discern the intention of the parties from the positions they expressed during the negotiations).

[1239] See, for example, South Africa, *Directive for the Conclusion of International Agreements* (footnote 1170 above), para. 4.4; Argentina, information submitted in writing, sect. III; or Ireland, information submitted in writing, p. 1.

[1240] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 1203 above), at p. 539, para. 91.

[1241] *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 72.

[1242] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 1183 above), paras. 426 and 427.

scenarios.[1243] For the sake of clarity and to better help the reader proceed step by step, a separate paragraph is devoted to each one.

Paragraph 2

(7) Paragraph 2 states that "[t]he intention of the participants in the agreement to be or not to be legally bound may be expressly stated". This covers cases in which the participants in the agreement have explicitly stated their intention to be or not to be legally bound. The verb "stated" refers to a deliberate step taken by the participants in the agreement to make their intention explicit.

(8) Such an explicit step should be distinguished from situations in which textual indicators (among other elements) are resorted to as a means of seeking to reflect or identify the intention of the participants in an agreement when this intention has not been expressly stated. The Commission's future work on the relevant textual elements – which fall under paragraph 3, discussed below – will help refine the points made here regarding paragraph 2.

(9) An express statement of intention can take various forms and be worded in various ways, which will not be exhaustively summarized here. This diversity can create difficulties in concretely conveying or identifying the intention. Thus, drawing too sharp a distinction between the two situations referred to in paragraphs 2 and 3, respectively, of draft conclusion 4 should be avoided.

(10) As for its purpose, an express statement of intention may indicate either that the agreement is legally binding or that it is not. Regarding its wording, the intention can be expressly stated in various ways. It may be stated in the agreement itself. Draft conclusion 5 reverts in greater detail to the scenario – frequent in practice today – in which an agreement indicates that it is not legally binding, as well as the weight to be accorded to such an indication and its possible limitations. The intention could also be stated, for example, in a treaty providing in advance that a joint interpretative declaration adopted subsequently by the parties will be legally binding on them.[1244] Alternatively, the intention could be stated in the negotiating mandate for an agreement if the participants decide that the agreement must necessarily be legally binding or non-legally binding. It may also be considered, by extension, that when the participants in an agreement explicitly agree, after its adoption, that the agreement is legally binding, they are expressly stating their intention in this regard.[1245]

(11) The possible approaches outlined in the preceding paragraph (on which the Commission takes no position in principle) must be assessed and interpreted on a case-by-case basis, as emphasized in paragraph 4. For an intention to be considered as having been expressly stated, it should be expressed in explicit terms and should,

[1243] Since paragraphs 2 and 3 elaborate on paragraph 1, they simply use the term "agreement" to refer to the "international agreement" mentioned in paragraph 1, without repeating the adjective "international", which is implied.

[1244] See, for example, the Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (Beijing, 11 July 2008), United Nations, *Treaty Series*, vol. 2626, No. 46763. Article 19 (2) provides as follows: "An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section."

[1245] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (see footnote 1234 above), at para. 156 ("The Parties agree that, as a matter of international law, the March 2000 MoU is not a binding instrument"); *Arbitration pursuant to the Asylum Partnership Agreement (The Republic of Rwanda v. The United Kingdom of Great Britain and Northern Ireland)*, case No. 2025-45, award of 15 May 2026, paras. 55 and 109 ("Both Parties agree that through this exchange of notes … they concluded a binding agreement under international law"). See also International Court of Justice, *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 24, para. 48, in which the Court notes that "it is no longer contested" between the parties that the agreement in question "is an international treaty".

in itself, leave no doubt as to the participants' intention. In the event that such a doubt arises, recourse should additionally be had to the relevant elements referred to in paragraph 3.

(12) Paragraph 2 was deliberately worded so as to suggest only a possibility. The participants in the agreement are in fact free to proceed as they see fit in this regard; international law imposes no obligation to make such an express statement of intention or to do so in any specific form.[1246] As noted above,[1247] while some States have internal laws requiring, in certain cases, that the agreement include an express clause clarifying the intention, other States have a practice of not including such a clause when adopting a non-legally binding international agreement.[1248] To take this diversity of practice into account and preserve this freedom, paragraph 2 merely indicates that the intention "may be" expressly stated.

Paragraph 3

(13) Paragraph 3 addresses situations in which the participants in the agreement have not expressly stated their intention to be or not to be legally bound within the meaning of paragraph 2. The neutrality of the phrase "[i]n the absence of" avoids implying that it would have been preferable for the participants in the agreement to have expressly stated their intention.[1249] The term "such" in the phrase "[i]n the absence of such an express indication" serves to show that this paragraph applies to situations other than the one referred to in the preceding paragraph. Paragraph 3 is intended to clarify that in situations where there is no express indication, or where such an indication exists but is insufficient to expressly state the intention of the participants in the agreement within the meaning of paragraph 2,[1250] recourse should be had to "relevant elements" as indicated in paragraph 3. The use of the bracketed phrase "[… to …]" in this paragraph and the insertion of the explanatory footnote "To be finalized at a future session" make it clear that the precise identification of these relevant elements will be addressed in one or more future draft conclusions.

(14) The term "indications" or "indicators" is sometimes used in practice or case law to refer to these elements.[1251] This term is used to highlight the nature of the process: it involves "inferring"[1252] the intention from these elements, with the aim of reflecting or identifying an intention that has not been expressly stated.

(15) The relationship between paragraphs 2 and 3 should not be interpreted to mean that recourse to these elements is necessarily precluded if there is an express statement of intention. The elements may also be used to support or confirm an intention that the participants in the agreement have expressly stated.

(16) The "relevant elements" referred to in paragraph 3 may relate, for example, to the terms used in the agreement, its form or structure, the type of provisions it contains, or – without being exhaustive – the circumstances in which it was drawn up or adopted. These elements, which the Commission has begun to examine, will be

[1246] The *Guidelines* of the Inter-American Juridical Committee (see footnote 1157 above) go further in this regard. Guideline 3.3 indicates that, "[t]o avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion", and includes a table with sample text for "specifying" the type of agreement.

[1247] See footnote 1177 above.

[1248] See also below, para. (3) of the commentary to draft conclusion 5.

[1249] See paragraph (12) of the commentary to draft conclusion 4.

[1250] See, in this regard, the details provided in the commentary to draft conclusion 5.

[1251] See, for example, *Land and Maritime Delimitation and Sovereignty over Islands* (footnote 1179 above), para. 74.

[1252] *Ibid*., para. 72.

addressed in proposed texts to be submitted at future sessions.[1253] In particular, it will be important to specify what it means in practice to assess the relevant elements "as a whole", as indicated in the second sentence of paragraph 3, and to provide clarification regarding the relative weight of each of these elements, as well as their interaction. The phrase "as a whole" conveys, at the very least, the idea that, in principle, none of the relevant elements is decisive on its own and that they should therefore be considered together.[1254] To quote from the case law of the International Court of Justice, the intention "may be established on the basis of an objective examination of all the evidence"[1255] and "[t]he presence of concordant indications can be more decisive than any indication taken individually".[1256]

(17) The statement that the intention "can" be established by recourse to these relevant elements does not imply that it is always possible to establish the intention. This might prove impossible under certain circumstances.[1257] What is meant here is that, in order to establish the intention, it is important to consider the relevant elements in question. To this end, the verb "can" was chosen rather than "may" in the English version to avoid giving the impression that this approach is merely discretionary. Since these elements are used in practice and in case law to identify the intention to be or not to be legally bound, the participants in the agreement must pay due attention to them, as it is on the basis of these elements that their intention could subsequently be established.

[1253] In its judgment of 19 May 2025, the International Court of Justice provided a general description of these, classifying them into three broad categories: "the Court observes that indications of parties' intentions to be bound may be identified in the terms of the instrument and the particular circumstances in which it was drawn up, as well as the subsequent conduct of the parties" (*Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 74). The Commission will clarify the content of these three categories and other potentially relevant elements as its work progresses.

[1254] See, in this regard, *Land and Maritime Delimitation and Sovereignty over Islands* (footnote 1179 above), paras. 74, 97 and 98; or High Court of South Africa, *Earthlife Africa – Johannesburg and Another v Minister of Energy and Others (19529/2015)*, [2017] ZAWCHC 50 (26 April 2017), paras. 108–112.

[1255] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 1203 above), at p. 539, para. 91.

[1256] *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 74.

[1257] See, for example, World Trade Organization, Appellate Body of the Dispute Settlement Body, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, 27 March 1998, AB-1998-1, para. 69.

Paragraph 4

(18) The last paragraph of draft conclusion 4 states that whether an international agreement is legally binding or not "is assessed on a case-by-case basis". This approach is widely accepted.[1258] It preserves the freedom of negotiators and is all the more appropriate given that, as the practices of States and international organizations vary, a particular element used to distinguish a treaty from a non-legally binding international agreement may have a meaning in one context that differs from its meaning in another. Various elements may convey a different intention depending on the situation or be perceived differently depending on the participants in the agreement. The approach described in paragraph 4 serves as a reminder that each case is unique and that what may appear to be well established in some situations is not necessarily so in others.[1259]

(19) This "case-by-case" approach is supported by case law[1260] and scholarship.[1261] It was confirmed by the International Court of Justice when it stated that "[t]he weight to be accorded to any particular indication will turn on the circumstances of each case".[1262] It is therefore important to consider the context and circumstances surrounding each agreement to establish whether it is legally binding or not. This calls for greater vigilance in the process of drafting, adopting or identifying such an agreement.

Conclusion 5
Express indication of intention

The fact that an international agreement expressly indicates that it is not legally binding under international law is normally sufficient to identify the intention of the participants thereto.

[1258] See, for example, A. Mensi, "The identification of international non-binding agreements", pp. 413–443, citing on p. 421 the following statement by Sir Michael Wood to the British House of Commons in 2021: "Ultimately, whether a document is binding or not must be assessed on a case-by-case basis to determine whether the negotiating States intended the instrument to be (or not to be) binding under international law". See also, in the same vein regarding the "case-by-case examination of Final Acts", M. Wood, "Final Act", *Max Planck Encyclopedia of Public International Law* (April 2021), para. 14.

[1259] For example, in the case concerning *Maritime Delimitation in the Indian Ocean*, the International Court of Justice held that an agreement formally designated as a "Memorandum of Understanding", a term that in the practice of some States refers only to non-legally binding international agreements, was in this case "a valid treaty that entered into force upon signature and is binding on the Parties under international law" (see footnote 1193 above, para. 50).

[1260] See, for example, on the 24 June 2014 judgment of the Greek Council of State (No. 2307/2014), *Revue générale de droit international public (RGDIP)*, vol. 119 (2015), pp. 846–848; on the 7 December 2018 decision of the Federal Constitutional Court of Germany (2 BvQ 105/18 *et al*.), *RGDIP*, vol. 123 (2019), pp. 1031 and 1032; on the 27 December 2019 decision of the Constitutional Court of the Republic of Korea (2016heonma253), *RGDIP*, vol. 124 (2020), pp. 748 and 749. See also, on two judgments of the Constitutional Court of Germany issued in 2001 and 1994, A. Mensi, "The identification of international non-binding agreements", pp. 413–443, at pp. 423 and 424. Regarding the first judgment, Mensi notes that the Court "underlined how the nature of an agreement shall be ascertained 'from the circumstances in the individual case'".

[1261] See, for example, *Yearbook of the Institute of International Law*, vol. 60, Part II (Session of Cambridge 1983), p. 136 (Mr. Arangio-Ruiz). See also M. Fitzmaurice, "Treaties", *Max Planck Encyclopedia of Public International Law*, February 2021, para. 12; J.-P. Jacqué, "Acte et norme en droit international public", *Collected Courses of the Hague Academy of International Law*, 1991, vol. II, No. 227, pp. 357–417, at p. 391.

[1262] *Land and Maritime Delimitation and Sovereignty over Islands* (see footnote 1179 above), para. 74. See also *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 1204 above), at p. 35, para. 91; *ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (see footnote 1233 above), at p. 451, para. 3.18.

Commentary

(1) Draft conclusion 5 supplements draft conclusion 4 by addressing in greater detail the specific case in which an international agreement expressly indicates that it is not legally binding under international law. As the title of draft conclusion 5 shows, its purpose is to clarify in which cases such an express indication is sufficient to identify the intention of the participants in the agreement; in other words, in which cases it suffices as an express statement of their intention not to be legally bound.

(2) The Commission deemed it appropriate to devote a separate draft conclusion to this type of express indication for two reasons: first, because the present draft conclusions specifically concern non-legally binding agreements, and the intention not to be legally bound is thus the key aspect to be established for the purposes of the present topic; and second, because this practice is increasingly prevalent and may give rise to difficulties in certain cases.

(3) As noted in the commentary to paragraph 2 of draft conclusion 4, the inclusion of a clause specifying that the international agreement is not legally binding is left to the discretion of the participants in the agreement. A review of the practices of States and international organizations shows that they do not always consider it necessary – or that some States do not consider it appropriate – to include such provisions in non-legally binding international agreements.[1263] Consequently, the fact that such a provision is not included in an international agreement does not, at least on its own, affect the nature of the agreement.[1264] Whether the agreement is legally binding or not must be established in this case by recourse to the relevant elements referred to in paragraph 3 of draft conclusion 4.

(4) There are several ways to expressly indicate in an agreement that it is not legally binding under international law. Such an indication can be provided in the title.[1265] Today, it is most often provided in a specific clause of the agreement (or a specific clause and an indication in the title of the instrument).[1266] Practice varies as to the wording of such clauses:

- some indicate that the text "is not a legally binding document",[1267] that it "is not intended ... to be legally binding",[1268] that it "does not constitute a Treaty" [1269] or that it "presents a non-legally binding, cooperative framework";[1270]

[1263] See footnote 1177 above.

[1264] See, for example, A. Aust, "Alternatives to treaty-making: MOUs as political commitments", in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, 1st ed. (Oxford, Oxford University Press, 2012), pp. 46–72, at p. 51: "… the use of such formulas is not yet common, and omitting them certainly does *not* indicate that the instrument was intended to be a treaty" (emphasis in the original).

[1265] See, for example, the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (footnote 1192 above).

[1266] See the non-legally binding instrument on all types of forests annexed to General Assembly resolution 62/98 of 17 December 2007. Section II (2) of the instrument states that "The instrument is voluntary and non-legally binding".

[1267] For example, the Memorandum of Understanding between the City of London Corporation and Tokyo Metropolitan Government, 4 December 2017, second to last paragraph.

[1268] Memorandum of Understanding for Cooperation, Coordination and Exchange of Information between Asian Development Bank and International Bank for Reconstruction and Development/International Development Association, 12 December 2014, sect. 8.01; New Zealand, *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2021, p. 35.

[1269] See, for example, Kingdom of the Netherlands, information submitted in writing, brochure on *Memoranda of Understanding* (October 2021), annex II (B), para. 5.

[1270] See paragraph 7 of the Global Compact for Safe, Orderly and Regular Migration, annexed to General Assembly resolution 73/195 of 19 December 2018.

- other clauses state more specifically that the agreement "does not create any legal rights or obligations"[1271] or "is not intended to create legally binding obligations", "legally binding rights or obligations" or "any legal rights or obligations";[1272]
- some clauses use similar wording but specify "under international law"[1273] or "under international or national law";[1274]
- some clauses add that the agreement is not a treaty;[1275]
- some clauses specify that the agreement does not constitute or create legally binding obligations, "express or implied", [1276] or "either directly or indirectly";[1277]

[1271] For example, the Memorandum of understanding between the National Institute of Metrology of the People's Republic of China and the Government of Australia, as represented by the National Measurement Institute, of 12 June 2024, para. 10. See also France, information submitted in writing ("*ne crée aucune obligation juridique entre les signataires*").

[1272] See, for provisions of this type: Charter of the Financial Stability Board (2009), art. 16; Memorandum of Cooperation between the Fair Trade Commission of Japan and the Competition Commission of Singapore, 22 June 2017, para. 10.4; Memorandum of Understanding on the migration and mobility partnership between India and the United Kingdom, 4 May 2021, para. 6.3.5. See also *Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments*, annex 2: Model MOU including sample paragraphs, final clause, para. 2 ("does not create any legally binding rights or obligations"); Memorandum of Understanding on the Framework for the Restitution of Illegally Acquired Assets Forfeited in Switzerland to the Benefit of the Population of the Republic of Uzbekistan between the Swiss Federal Council and the Government of the Republic of Uzbekistan, 8 September 2020, para. 7 ("does not create any legally binding rights or obligations between the Signatories"). See also Memorandum of understanding on trade and economic co-operation between the United Kingdom and the State of Oregon, 6 November 2025, sect. 11, para. 1.

[1273] See, for example, Guatemala, information submitted in writing, 26 December 2024, p. 1 ("is a non-binding agreement and does not create any rights or obligations for the participants under international law"); Philippines, information submitted in writing, p. 3; Kingdom of the Netherlands, information submitted in writing, brochure on *Memoranda of Understanding* (October 2021), annex II (B), para. 5. See also the similar clause typically found in arrangements concluded pursuant to the London Protocol (C. Yiallourides *et al*., "Cross-border CO_2 transport and storage networks in Europe through 'arrangements' under the London Protocol", *Ocean Development & International Law*, 2026, p. 14).

[1274] Joint Declaration establishing a migration partnership between the Islamic Republic of Mauritania and the European Union, 7 March 2024, final provision ("The provisions of this joint declaration and the action plan are not designed to create legal rights or obligations under international or national law").

[1275] Russian Federation, information submitted in writing, p. 2 ("This (act) is not a treaty and does not create rights or obligations governed by international law"). See also Memorandum of Understanding on Cooperation between the Supreme People's Court of the People's Republic of China and the Supreme Court of the Republic of Singapore on Information on Foreign Law, 3 December 2021, art. XVII, para. 2 ("This MOU does not constitute any treaty or law nor does it create any legally binding rights or obligations between the Participants under domestic or international law"); or the United Kingdom-Chile memorandum of understanding on the energy transition, 3 October 2024, para. 7.

[1276] Memorandum of Understanding between the World Customs Organization (WCO) and the Intergovernmental Organisation for International Carriage by Rail (OTIF), 10 July 2017, sect. H, para. 12 ("is not intended to create legally binding obligations, express or implied, on either Party"). See also United States-Japan Framework for Securing the Supply of Critical Minerals and Rare Earths through Mining and Processing, 28 October 2025, sect. II, para. 4.

[1277] Switzerland, *Practice Guide to International Treaties* (2023), para. 108, footnote 75.

- similarly, it may be stated that "[n]othing expressed or implied herein (whether by operation of law or otherwise) is intended to legally commit or oblige any Participant to perform or observe any of the provisions herein";[1278]
- while this is by no means an exhaustive list of possible formulations, some agreements contain more detailed clauses, worded in a wide variety of ways, specifying the legal effects that the agreements in question do not create;[1279]
- as a reminder, the Inter-American Juridical Committee provided proposed wording for this type of clause in its 2020 Guidelines.[1280]

(5) According to draft conclusion 5, this type of indication "is normally sufficient to identify the intention of the participants" in the agreement. In most cases, in fact, the presence of such an indication is sufficient to eliminate any ambiguity, as noted by several States.[1281] It would indeed be paradoxical not to take into account a clause whose very purpose is to expressly indicate the intention of the drafters of the agreement. Such an express indication necessarily carries significant weight.

(6) In the Arbitration pursuant to the Asylum Partnership Agreement (*The Republic of Rwanda v. The United Kingdom of Great Britain and Northern Ireland*), the arbitral tribunal relied on a clause of this type (which states that "[t]his Arrangement will not be binding in international law") to find that "[t]he MoU was not binding in international law".[1282] Scholars tend to consider that if the drafters of an international agreement have taken care to expressly specify its non-legally binding nature, this indication plays a decisive role in establishing their intention[1283]

1278 Memorandum of Understanding among International Bank for Reconstruction and Development and others and African Development Bank and others on Development Cooperation, 27 January 2025, art. 11.1.

1279 See, for example, Memorandum of Understanding of the Pentalateral Energy Forum on Emergency Planning and Crisis Management for the Power Sector, 26 June 2017, p. 2 ("This Memorandum of Understanding does not create any rights or obligations under national or international law and does not intend to replace or modify any existing legal obligations between the signatories"). For further examples of detailed clauses, see Memorandum of Understanding on Cooperation in Sports between the Ministry of Youth Affairs and Sports (India) and the Ministry of Culture, Gender, Entertainment and Sport (Jamaica), 1 October 2024, para. 10; Memorandum of Understanding between the United Kingdom and Thailand for an Enhanced Trade Partnership, 18 September 2024, sect. V, para. 1; Energy transition action plan (ETAP) between the United Kingdom and the Republic of Colombia, 23 April 2024, second to last paragraph; Memorandum of Understanding establishing a framework for financial services regulatory cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland, 27 June 2023, para. 14; United Kingdom-Singapore Memorandum of Understanding on digital trade facilitation, 22 December 2021, para. 0.9.

1280 See footnote 1246 above.

1281 See, for example, South Africa, *Directive for the Conclusion of International Agreements* (footnote 1170 above), para. 4.4; Argentina, information submitted in writing, sect. III; Philippines, information submitted in writing, p. 2; or replies of the Republic of Korea and Norway to question 5 of the questionnaire circulated by the Committee of Legal Advisers on Public International Law.

1282 *Arbitration pursuant to the Asylum Partnership Agreement* (see footnote 1245 above), para. 29. See also para. 37 (stating that the arrangement "[was] not legally binding under UK Law, Rwanda law or any other law including international law"). Conversely, when faced with an express indication by only one party in a case where the other participant "[had] not contest[ed] this point", the International Court of Justice considered it simply as one element among others in *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 1203 above), at p. 543, para. 106.

1283 See, for example, A. Aust, "Alternatives to treaty-making: MOUs as political commitments" (footnote 1264 above), at pp. 50 and 51; or A. Spagnolo, "The conclusion of bilateral agreements and technical arrangements for the management of migration flows: an overview of the Italian practice", *The Italian Yearbook of International Law*, vol. 28 (2018), pp. 211–230, at p. 219.

or, at the very least, dispels any doubt as to the intention[1284] or ensures that establishing it will not pose any particular difficulty in such a case.[1285]

(7) The Commission was not, however, in a position to conclude that this would automatically apply or be determinative in all situations, hence the inclusion of the term "normally" in draft conclusion 5. The term "normally" does not establish a formal presumption. Rather, it reflects a pragmatic approach better suited to the present topic by referring to the idea of a general rule or principle that may be subject to exceptions; this also reflects the need to proceed on a case-by-case basis, as noted in paragraph 4 of draft conclusion 4. The term "normally" makes allowance for, on the one hand, the diversity of practices followed by States and international organizations in this regard, and, on the other, the fact that the drafters of the agreement in question are not necessarily specialists in the drafting of international agreements or did not necessarily seek guidance from the competent internal authorities at the time the agreement was drawn up and adopted. This can lead to situations in which a blatant discrepancy emerges between the express indication in the agreement stating that it is not legally binding and other elements that point in a radically different direction.[1286] In the event of a fundamental or manifest contradiction between the express indication and the other relevant elements, it would be difficult to conclude that the intention of the participants in the agreement has been expressly stated within the meaning of paragraph 2 of draft conclusion 4. An assessment of all the relevant elements as a whole appears to be called for in this case. The Commission will address the relative weight to be accorded to the various relevant elements in such a situation when it discusses these elements.

[1284] A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35 (1986), p. 802 (giving the example of an explicit indication in the preamble of a bilateral declaration); or P. Gautier, "Non-binding agreements", para. 16.

[1285] See, for example, C.A. Bradley *et al.*, "The rise of nonbinding international agreements", pp. 1325 and 1326; A. Mensi, "The identification of international non-binding agreements", pp. 427–429; T. Meyer, "Alternatives to treaty-making – Informal agreements", p. 79; Y. Nakanishi, "Defining the boundaries of legally binding treaties. Some aspects of Japan's practice in treaty-making in light of State practice", *International Community Law Review*, vol. 20 (2018), p. 190.

[1286] See, for example, the discussion of this issue in section 1 (f) of the written information from Switzerland.

Chapter X
Prevention and repression of piracy and armed robbery at sea

A. Introduction

141. The Commission, at its seventy-third session (2022), decided to include the topic "Prevention and repression of piracy and armed robbery at sea" in its programme of work and appointed Mr. Yacouba Cissé as Special Rapporteur.[1287] At the same session, the Commission requested the Secretariat to prepare a memorandum concerning the topic, addressing in particular elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States. The memorandum would also concern writings relevant to the definitions of piracy and of armed robbery at sea and resolutions adopted by the Security Council and by the General Assembly relevant to the topic. Two memorandums on the topic were made available to the Commission at its seventy-fourth session (2023) [1288] and seventy-fifth session (2024), [1289] respectively. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and views concerning the topic.

142. The General Assembly, in paragraph 7 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

143. At its seventy-fourth session, the Commission considered the first report of the Special Rapporteur,[1290] as well as the memorandum by the Secretariat, providing elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States, as well as information on resolutions adopted by the Security Council and by the General Assembly relevant to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary debate. The Commission subsequently provisionally adopted draft articles 1 to 3,[1291] as contained in the report of the Drafting Committee,[1292] and commentaries thereto.[1293]

144. At its seventy-fifth session, the Commission considered the second report of the Special Rapporteur,[1294] as well as the memorandum by the Secretariat, providing information on: the treatment of the provision containing the definition of piracy in the 1956 draft articles concerning the law of the sea; views expressed by States at the

[1287] At its 3583rd meeting, on 17 May 2022 (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 239). The topic had been included in the long-term programme of work of the Commission during its seventy-first session (2019), on the basis of the proposal contained in annex III to the report of the Commission (*Yearbook … 2019*, vol. II (Part Two), para. 290 (b)).

[1288] A/CN.4/757.

[1289] A/CN.4/767.

[1290] A/CN.4/758.

[1291] For the statement of the Chair of the Drafting Committee, see https://legal.un.org/ilc/documentation/english/statements/2023_dc_chair_statement_piracy.pdf.

[1292] A/CN.4/L.984.

[1293] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 56.

[1294] A/CN.4/770.

First United Nations Conference on the Law of the Sea, which resulted in the adoption of the Convention on the High Seas,[1295] and at the Third United Nations Conference on the Law of the Sea, which resulted in the adoption of the United Nations Convention on the Law of the Sea;[1296] and writings relevant to the definitions of piracy and of armed robbery at sea. Following the debate in plenary, the Commission decided to refer draft articles 4 to 7, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate. That included the understanding that the Committee would first hold a general discussion on the topic as a whole and its future direction. The Commission subsequently took note of draft article 4,[1297] as contained in the interim oral report of the Chair of the Drafting Committee.[1298]

145. Also at its seventy-fifth session, the Commission was informed that Mr. Yacouba Cissé had resigned as Special Rapporteur for the topic.[1299] At the same session, the Commission appointed Mr. Louis Savadogo as Special Rapporteur for the topic.[1300]

146. At its seventy-sixth session (2025), the Commission had before it a note by the Special Rapporteur,[1301] in which he identified points of law which, in his opinion, could constitute the major themes of the work of the Commission on the topic. He also outlined general areas of inquiry based on the main features of the topic and provided methodological guidance addressed to the members of the Commission to focus their work. The Commission decided to establish a Working Group of the Whole on the topic, to consider the note by the Special Rapporteur and appointed the Special Rapporteur as Chair of the Working Group. [1302] The Commission subsequently took note of the oral report of the Chair of the Working Group.[1303]

B. Consideration of the topic at the present session

147. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/791 and Corr.1). In the first report, the Special Rapporteur reviewed legal instruments on cooperation regarding piracy and armed robbery at sea, including regional instruments, analysed the legislation and practice of States on policing measures regarding piracy and armed robbery at sea, as well as the mechanisms for criminal prosecutions of such acts, set forth his proposal for future work on the topic and provided a list of materials consulted for the purpose of the first report. The Special Rapporteur proposed 18 draft articles on piracy and armed robbery committed using uncrewed aircraft or vessels or through the unlawful interception of data from navigation software (draft art. 5); the exercise by the State of its powers of enforcement (draft art. 6); hot pursuit in the territorial sea (draft art. 7); seizure of a pirate ship or aircraft (draft art. 8); ships and aircraft which are entitled to seize on account of piracy or armed robbery at sea (draft art. 9); criminal responsibility (draft art. 10); criminal jurisdiction (draft art. 11); confiscation and

[1295] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.
[1296] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3.
[1297] For the statement of the Chair of the Drafting Committee, see https://legal.un.org/ilc/documentation/english/statements/2024_dc_chair_statement_piracy.pdf.
[1298] A/CN.4/L.1000.
[1299] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 82.
[1300] *Ibid.*
[1301] A/CN.4/786.
[1302] *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 406.
[1303] *Ibid*., para. 408.

seizure (draft art. 12); assistance measures and the duty to rescue victims (draft art. 13); rights and guarantees for arrested persons (draft art. 14); judicial cooperation (draft art. 15); extradition (draft art. 16); joint investigations (draft art. 17); international cooperation for purposes of confiscation (draft art. 18); disposal of confiscated proceeds of crime and property (draft art. 19); statute of limitations (draft art. 20); preventive measures (draft art. 21); and the relationship of the draft articles to the United Nations Convention on the Law of the Sea and other relevant legal instruments (draft art. 22).

148. The Commission considered the first report of the Special Rapporteur at its 3742nd to 3748th meetings, from 19 to 29 May 2026.

149. At its 3748th meeting, on 19 May 2026, the Commission decided to refer draft articles 5 to 14, as contained in the first report, to the Drafting Committee, taking into account the views expressed in the plenary debate and on the basis of the understanding of the Special Rapporteur as to their relationship with the previous provisions referred to the Drafting Committee.[1304] The summary of the plenary debate can be found in section B.2 below.

150. At its 3767th meeting, on 17 July 2026, the Chair of the Drafting Committee presented an interim oral report on draft articles 3 *bis*, 4 *bis*, 5, 5 *bis*, 5 *ter* and 5 *quater*, provisionally adopted by the Committee at the present session. The interim oral report was presented for information only and is available on the website of the Commission.[1305] At the same meeting, the Commission took note of the interim oral report.

1. Introduction by the Special Rapporteur of the first report

151. The Special Rapporteur explained that the purpose of his report was to examine the prevention and repression of piracy and armed robbery at sea, building on the note he had submitted at the seventy-sixth session of the Commission and incorporating comments and observations made by States in the Sixth Committee at the eightieth session of the General Assembly. He indicated that the report was accompanied by two annexes, including a list of relevant documents and 18 draft articles intended to clarify and systematize existing rules of international law applicable to the topic.

152. The Special Rapporteur stated that the study was not exhaustive but aimed to identify and organize the principal legal issues. The report addressed in particular a number of evolving issues, including the use of maritime and aerial drones, the deployment of armed security personnel on board merchant vessels, the role of international naval forces and jurisdictional challenges such as pursuit into the territorial sea of third States and the management of seized assets. He emphasized that, in his report, special attention had been given to less frequently explored topics.

153. Consistent with the positions expressed by several delegations in the Sixth Committee, the study was grounded in the United Nations Convention on the Law of the Sea, while also drawing on other rules of international law, including customary international law, various multilateral treaties of universal scope, regional instruments highlighting common interest in the area of maritime security, unilateral acts of States and the jurisprudence of courts and tribunals. In that regard, he recalled that the preamble of the United Nations Convention on the Law of the Sea provided that the matters not regulated therein continued to be governed by the rules and principles of general international law. The Special Rapporteur emphasized that the

[1304] Statements made at the 3748th meeting are reflected in A/CN.4/SR.3748. See A/CN.4/791, para. 151, regarding the understanding of the Special Rapporteur.

[1305] For the interim oral report of the Drafting Committee, see https://legal.un.org/ilc/documentation/english/statements/2026_dc_chair_statement_piracy.pdf.

study placed particular importance on the law as enacted and applied by States, seeking to capture both its continuity and its contemporary developments.

154. The Special Rapporteur explained that the report followed a traditional legal methodology, beginning with the clarification of key concepts such as prevention, repression and maritime policing. It had appeared methodologically appropriate to approach the subject of piracy and armed robbery at sea through six complementary normative frameworks governing the conduct of States, namely: (*a*) international instruments; (*b*) regional instruments; (*c*) the national laws and regulations of States; (*d*) policing measures; (*e*) prosecutions against individuals apprehended; and (*f*) the acts of courts and tribunals. He noted that the study relied extensively on State practice, while acknowledging certain gaps due to limited information. He had sought to provide information that was as precise, up to date and concrete as possible, giving equal importance to legal texts, practical facts and doctrinal analysis. He acknowledged, however, that the information collected might contain errors or omissions and invited members of the Commission and the Secretariat to draw them to his attention.

155. The Special Rapporteur regretted that his request to States for information on their practice regarding the use of maritime or aerial drones, the repression of maritime cybercrime and the case law of their courts and tribunals had remained unanswered.[1306]

156. Regarding the proposed draft articles, the Special Rapporteur indicated that they constituted an effort at codification in line with the mandate of the Commission, taking fully into account the practice of States.

157. The Special Rapporteur noted that several draft articles reflected well-established rules of international law. He explained that draft articles 14 ("Rights and guarantees for arrested persons"), 15 ("Judicial cooperation"), 16 ("Extradition"), 17 ("Joint investigations") and 18 ("International cooperation for purposes of confiscation") could be considered instances of codification in the strict sense.

158. In his view, draft articles 6 ("Exercise by the State of its powers of enforcement") and 9 ("Ships and aircraft which are entitled to seize on account of piracy or armed robbery at sea") constituted an attempt to regulate powers that, although not provided for in the United Nations Convention on the Law of the Sea, were nevertheless the subject of substantial State practice. As for draft articles 11 ("Criminal jurisdiction") and 21 ("Preventive measures"), the Special Rapporteur noted that they were intended to regulate new issues on which substantial practice already existed. Finally, he noted that draft articles 5 ("Piracy and armed robbery committed using uncrewed aircraft or vessels or through the unlawful interception of data from navigation software") and 7 ("Hot pursuit in the territorial sea") sought to address new realities.

159. The Special Rapporteur observed that the nature of maritime crime was evolving, noting that the traditional definition of piracy no longer fully reflected current realities, as most incidents occurred within the territorial sea and were classified as armed robbery at sea. He also noted that, while the use of the term "armed robbery at sea" has allowed for the criminalization of acts within national jurisdiction, the substitution of terms also limited the universal jurisdiction attached to acts of piracy to those committed only on the high seas or in the exclusive economic zone.

160. The Special Rapporteur highlighted that the increase in acts of maritime cybercrime constituted a significant emerging challenge not envisaged in conventional law. He suggested that such acts could lead to operational, safety or security failures in maritime transport due to the alteration, loss or compromise of

[1306] See *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 29.

information or systems and could enable the remote control of vessels. He also noted that, since 2023, at the request of the Security Council, the Secretary-General of the United Nations had been submitting periodic reports to the Council on the matter. He suggested that traditional jurisdictional criteria based solely on physical location might require reconsideration and that, as a tentative solution in the absence of applicable rules, jurisdiction might be determined by reference to the territorial effects of cybercrimes rather than the location from which they were initiated. He expressed the hope that ongoing work within the International Maritime Organization, including the anticipated adoption of a non-binding International Code of Safety for Maritime Autonomous Surface Ships (MASS Code), would provide useful guidance.

161. In conclusion, the Special Rapporteur recommended that members focus their interventions on draft articles 5 to 14, in view of the available time. He recalled the statistical data contained in the 2025 report of the International Maritime Organization on piracy and armed robbery at sea.[1307] He noted in particular that, in 2025, only 17 of the 171 reported incidents qualified as piracy, insofar as they were committed on the high seas, while 111 were carried out in the territorial sea and 31 in port areas. He emphasized that offences categorized as armed robbery were now more numerous than acts of piracy within the meaning of article 101 of the United Nations Convention on the Law of the Sea and highlighted that, far from losing relevance, piracy and armed robbery at sea remained of pressing importance, being lucrative yet undoubtedly high-risk for their perpetrators.

2. Summary of the debate

(a) General comments

162. Members generally welcomed the first report of the Special Rapporteur, in particular for its ambition and attention to the current operational realities of piracy and armed robbery at sea. Several members highlighted the richness of the materials referenced in the report. Members also expressed appreciation for the work of the previous Special Rapporteur, Mr. Yacouba Cissé, and several members welcomed that the report built on the work done on the topic under his leadership.

163. Members emphasized the importance and relevance of the topic, highlighting that maritime security was a common global concern. Members recalled that piracy and armed robbery at sea created risks, most importantly to the security of crews and passengers, but also to global trade and local economic development in affected regions. Some members noted both the persistence of enforcement gaps and capacity challenges relating to both prevention and repression and the evolving character of maritime criminality. The need to align the Commission's work with the needs of States was underscored. It was also observed that focusing on piratical acts had led many to lose sight of the sociological and historical underpinning of such acts.

164. Regarding the concepts of prevention and repression, some members expressed agreement with the Special Rapporteur that clarity as to their meaning was needed. It was recalled that article 100 of the United Nations Convention on the Law of the Sea regulated neither the prevention of piracy nor armed robbery at sea at all. It was therefore emphasized that other legal bases were needed for further obligations in relation to prevention and repression. Several members considered that prevention and repression should be read in association and should be seen as part of a single cooperation framework. A holistic approach was therefore encouraged. The view was expressed that the definition of the two concepts beyond the commentary to draft article 1 was not necessary.

165. A number of members encouraged the Commission to put international cooperation at the centre of its work on the topic. It was highlighted that cooperation could entail the coordination of resources and not just a harmonization of unilateral

[1307] MSC.4/Circ.270 of 29 April 2026.

practice. It was observed that States had referred to several forms of cooperation in the Sixth Committee and in their written comments, including regional and subregional arrangements, naval operations and joint patrols, information-sharing mechanisms, transfer agreements, extradition treaties and mutual legal assistance arrangements. Additionally, some members called for the inclusion of technical assistance and capacity-building measures in the draft articles. In that regard, article 270 of the United Nations Convention on the Law of the Sea, which covered cooperation to remedy capacity issues relating to maritime technology, was recalled.

166. It was observed that most acts of violence against maritime shipping occurred in territorial seas or internal waters, which underscored the necessity of addressing armed robbery at sea. Several members highlighted the scope for improved cooperation between States in relation to armed robbery at sea. The possibility of examining the notion of the contiguous zone in relation to armed robbery at sea was raised.

167. Members highlighted the need to distinguish between piracy and armed robbery at sea, with a particular focus on the provisions relating to cooperation in criminal matters or other questions normally governed by national criminal law. A number of members recalled that, while piracy occurred on the high seas or in a place outside the jurisdiction of a State, armed robbery at sea occurred within the internal waters, archipelagic waters or territorial sea of a State. It was emphasized that conflating the two offences risked intrusion into the territorial sovereignty of States. Several members suggested dealing with the two offences in structurally distinct provisions throughout the draft articles. Clarification of the extent to which the rules relating to piracy would apply within the exclusive economic zone was requested.

168. Several members highlighted the need to accommodate technological realities that were not contemplated when the relevant provisions of the United Nations Convention on the Law of the Sea were negotiated. The view was expressed that the Commission should close gaps in the legal framework in a manner that complemented the Convention. It was recalled that the preamble to the Convention affirmed that matters not regulated by it continued to be governed by general international law. In that regard, the view was expressed that the key ambition for the topic was to provide a practical framework of cooperation for States in the prevention and repression of piracy and armed robbery at sea, which was the aspect of the Convention requiring more development. The relevance of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the acts and recommendations of the International Maritime Organization was also underscored.

169. While noting the relevance of transnational criminal law instruments to the topic, several members cautioned against automatically transposing elements from those legal regimes to piracy and armed robbery at sea. It was suggested that the Commission refer to the previous instruments while integrating the specific nature of the topic to construct a single mutual legal assistance system. The need to study complex questions relating to criminal law in detail before considering the drafting of provisions was emphasized. Where other instruments had different provisions governing the same matter, the Commission was encouraged to study the possibilities and ensure that the draft articles were consistent with them all. Caution was encouraged when formulating a general rule on the basis of limited practice, especially as practice was not always uniform. The Commission was also urged to highlight specific additional requirements when particular practical issues could be identified. In that regard, a doubt was expressed as to whether certain provisions represented proposals for codification. The possibility of establishing an international jurisdiction entrusted with the repression of piracy was raised.

170. Members emphasized the importance of regional arrangements, as well as of trans-regional cooperation. The value of regional practice in informing practically useful solutions was underscored. It was emphasized that, while regional

arrangements might operationalize cooperation, they could not, in principle, enlarge the enforcement powers granted by the United Nations Convention on the Law of the Sea against foreign vessels. It was recalled that, in its commentary to draft article 1, the Commission had indicated that it did not intend to duplicate existing frameworks, but rather to clarify and build upon them. It was observed that, given the diversity of national and regional practice, there was a need to distinguish between general practices and special rules limited to certain States or regions. The inclusion of a provision on the use of terms to bring uniformity across diverse regional practice was suggested. The need for a mapping exercise to guide the Commission's efforts to harmonize existing frameworks was emphasized. The importance of leaving space for regional and trans-regional cooperation to increase was also underscored. It was also observed that a variety of approaches to addressing piracy and armed robbery at sea could be viewed as reflecting the extension of prescriptive jurisdiction in a way that allowed for broad discretion in its exercise.

171. In the light of the high number of draft articles proposed by the Special Rapporteur, some members stressed that they were not in a position to comment on each of the draft articles.

(b) Draft article 5 (Piracy and armed robbery committed using uncrewed aircraft or vessels or through the unlawful interception of data from navigation software)

172. Several members welcomed the inclusion of a provision seeking to address the use of new technologies, such as autonomous and remotely operated vessels, to commit acts of piracy or armed robbery at sea. However, it was suggested that any provision expanding the definition of piracy to encompass new technologies would have to be carefully drafted to ensure consistency with existing instruments, including the United Nations Convention on the Law of the Sea, as well as with the draft articles provisionally adopted at prior sessions. It was also suggested that, rather than creating an independent crime, draft article 5 should reflect that the definitions of piracy and armed robbery at sea were broad enough to encompass acts committed using new technologies.

173. Several members suggested that the definitions contained in draft article 5 should be moved to a general definitions provision or to the commentary to the draft article. Some members also cautioned against providing technical definitions of terms that may become obsolete in the light of further technological advancements. It was suggested that the Commission could base its work on the International Maritime Organization's MASS Code, and could acknowledge that autonomous and remotely operated vessels could also be used for the prevention and repression of piracy and armed robbery at sea.

174. Regarding the inclusion of maritime cybercrime in the draft articles, some members expressed the concern that the definition provided by the Special Rapporteur was too narrow to encompass acts that facilitated piracy or armed robbery at sea. However, it was also noted that the definition as presented could include acts beyond the scope of the draft articles.

(c) Draft article 6 (Exercise by the State of its powers of enforcement)

175. Members recognized the importance of enforcement measures for the prevention and repression of piracy and armed robbery at sea. Several members suggested that draft article 6 would benefit from separating those measures applicable to piracy from those applicable to armed robbery at sea, as different jurisdictional principles would apply to each offence. Some members saw merit in further defining the terms used in the draft article, especially those related to the use of force. Members also noted the detailed treatment by the Special Rapporteur of rules of engagement related to enforcement powers at sea and suggested that such matters might be better addressed in the commentaries.

176. It was noted that draft article 6, as proposed by the Special Rapporteur, provided for the mandatory seizure of vessels where there were reasonable grounds to believe that the offences of piracy and armed robbery at sea had been committed. In that regard, it was recalled that article 100 of the United Nations Convention on the Law of the Sea did not necessarily imply a duty to capture and prosecute pirates, and that article 107 of the Convention restricted the use of policing powers at sea to ships and aircraft that were entitled to exercise them. It was also noted that the draft article made no reference to the right of visit provided in article 110 of the Convention. Members highlighted the jurisprudence of international tribunals related to enforcement operations at sea, to the reasonable use of force and to the protection of human rights.

177. It was suggested that the draft article could better reflect a balance between operational necessity and human rights constraints, as well as state that any use of force must adhere, *inter alia*, to the precepts of legality, proportionality, precaution and elementary considerations of humanity.

(d) Draft article 7 (Hot pursuit in the territorial sea)

178. Several members recalled that article 111 of the United Nations Convention on the Law of the Sea provided for a right of hot pursuit that ceased as soon as the ship being pursued entered the territorial sea of its own State or of a third State. It was acknowledged that the limitation on continuing pursuit into the territorial sea of States other than that of the pursuing vessel provided vessels engaged in piracy with a means to escape enforcement actions. Members noted that draft article 7, as proposed by the Special Rapporteur, extended the right to hot pursuit in the territorial sea of a third State with its consent. In that regard, members highlighted that such consent could not be presumed and that any such provision should anticipate the situation where no consent is given within a reasonable period of time. It was suggested that, instead of allowing the hot pursuit to continue into the territorial sea of a third State, the draft article should provide that the pursuing vessel is to notify the coastal State that a suspected vessel was approaching its territorial sea.

179. Some members considered that the extension of the right of hot pursuit into the territorial sea was in direct tension with the United Nations Convention on the Law of the Sea and with the sovereignty of the coastal State. While it was acknowledged that conditioning the continuation of the hot pursuit on the consent of the coastal State would remove that tension, members noted a need for clarification as to how such consent could be requested and granted during a hot pursuit. Some members were of the view that the extension of the right of hot pursuit to the territorial sea did not codify existing customary international law, and it was suggested that the Commission should state as much. The view was expressed that the Commission should refrain from engaging in an exercise of progressive development in matters related to State sovereignty, in the absence of State practice.

180. It was also noted that draft article 7 contained a compensation standard for wrongful seizure seemingly narrower than the one in article 106 of the United Nations Convention on the Law of the Sea.

(e) Draft article 8 (Seizure of a pirate ship or aircraft)

181. With respect to draft article 8, some members saw a need for consideration to determine the implications of the provision, including its relationship with draft articles 5 and 7, paragraph 3, as proposed in the first report of the Special Rapporteur. Clarification as to whether the provision applied to armed robbery at sea was called for. To the extent that it only applied to piracy, the added value of the provision was questioned. Some members therefore recommended its deletion. The addition of "seizure of a pirate ship or aircraft" was proposed in order to clarify the scope of application of the provision.

(f) Draft article 9 (Ships and aircraft which are entitled to seize on account of piracy or armed robbery at sea)

182. While some members welcomed addressing the practice of using armed security personnel aboard merchant vessels, reservations were expressed at the approach taken by the Special Rapporteur in draft article 9. It was recalled that article 107 of the United Nations Convention on the Law of the Sea limited seizure on account of piracy to warships, military aircraft or other government-service vessels clearly marked as such. Some members noted that the draft article would allow armed security personnel on board merchant ships to seize a pirate ship or aircraft on the high seas, to arrest the alleged perpetrators and to seize the property on board. Members also noted that draft article 9 would allow armed security personnel on board merchant ships of a third State, when authorized by the coastal State, to carry out a seizure of a vessel in the territory of the coastal State, including its territorial sea, engaged in armed robbery at sea. In that regard, it was noted that such armed security personnel may include both uniformed military personnel and privately contracted armed security personnel. Several members were of the view that the provision would confer extensive powers to private persons, which could lead to abuse. It was suggested that privately contracted armed security personnel on merchant ships should only be empowered to take necessary and proportionate protective measures in self-defence or defence of persons on board and to detain persons temporarily pending their transfer to competent public authorities.

183. Several members raised a question as to whether the responsibility for a wrongful seizure would fall on the flag State, particularly in the case of privately contracted armed security personnel. It was noted that extending seizure powers to privately contracted armed security personnel would require establishing an accountability framework and oversight mechanisms.

184. Some members also noted that, upon a seizure of a pirate vessel and its crew, draft article 9, paragraph 1, would authorize delivery of the vessel to the authorities of the flag State, of the nearest coastal State or to any public authority of a State en route. In that regard, it was suggested establishing an order of precedence among those States using objective criteria.

185. It was noted that draft article 9, paragraph 3, would allow the warships, military aircraft or other government-service vessels clearly marked as such of a third State to seize a vessel engaged in armed robbery at sea with the authorization of the coastal State. Members acknowledged that operational difficulties might arise relating to seeking and obtaining the authorization of the coastal State. The view was expressed that such a provision might be inconsistent with the territorial sovereignty and jurisdiction of the coastal State.

186. Clarification was sought regarding the reference to self-defence in paragraph 4 of draft article 9, as it could refer either to individual self-defence under general criminal law principles or to the State's right of self-defence under international law. It was suggested that the necessity and proportionality conditions for self-defence should be emphasized.

(g) Draft article 10 (Criminal responsibility)

187. Members took note of draft article 10, which addresses the formation of criminal associations to commit piracy and armed robbery at sea, as well as the situation of minors. While some members welcomed the reference to modes of criminal participation other than commission, it was noted that article 101 of the United Nations Convention on the Law of the Sea already provided a legal basis for extending criminal responsibility beyond immediate perpetrators. Some members raised concerns regarding the term "[p]articipating in a criminal association", as it was not found in the criminal legislation of many States. It was also noted that piracy and armed robbery at sea were not always committed by structured criminal groups.

188. Members expressed concern at the treatment of minors in paragraph 2 of draft article 10 and emphasized that the criminal responsibility of minors would depend on national legislation, applicable juvenile justice standards and applicable international and regional instruments, including the Convention on the Rights of the Child. Some members expressed concern at the use of the criterion of capacity for discernment as the determining factor for the criminal responsibility of the minor to arise. The view was expressed that the draft article should establish a minimum age for a minor to be subject to criminal jurisdiction.

(h) Draft article 11 (Criminal jurisdiction)

189. Several members underscored that draft article 11 on the establishment of criminal jurisdiction constituted the core of the work of the Commission on the topic. Some members noted that draft article 11 would create an obligation for States to establish criminal jurisdiction over piracy and armed robbery at sea. The provision was contrasted with article 105 of the United Nations Convention on the Law of the Sea, which permitted the establishment of criminal jurisdiction over piracy. A number of members expressed caution regarding the approach of the Special Rapporteur in treating the jurisdictional bases relating to piracy and armed robbery at sea in the same paragraph. Members noted that such an approach could be seen as contradicting draft articles 2 and 3, as provisionally adopted by the Commission at previous sessions, and encouraged the Special Rapporteur to treat each offence separately, addressing their distinct jurisdictional basis. Members were of the view that draft article 11 provided a wide basis for the establishment of jurisdiction over acts of piracy and armed robbery at sea, and questioned whether it might lead to conflicts of jurisdiction. The view was expressed that mechanisms for the mandatory transfer of accused persons might be necessary to avoid the risk of impunity in cases where the capturing State declined to exercise jurisdiction.

190. Some members urged a careful approach based on State practice for the establishment of jurisdiction following the seizure of vessels by privately contracted armed security personnel and joint maritime operations, provided for in paragraph 4 of draft article 11. The view was expressed that privately contracted armed security personnel should not be able to effectively determine the prosecuting forum by deciding the place of delivery of the accused persons.

191. It was noted that paragraph 5 of draft article 11 imposed an obligation on States either to extradite or prosecute individuals in their territory, in respect of both piracy and armed robbery at sea, including those committed by means of maritime cybercrimes. In that regard, it was noted that the provision would extend the jurisdiction of States for armed robbery at sea committed beyond their respective territories, which in the view of some members was not supported by customary international law. While recognizing that the coastal State had the primary jurisdictional connection for armed robbery at sea, the view was expressed that extradition or transfer should be available as a complementary mechanism in cases where the coastal State was genuinely unable to prosecute or where prosecution elsewhere would better serve the interests of justice.

192. It was noted that paragraph 6 of draft article 11 created a priority for the courts of the State that carried out the first seizure to decide on penalties and other measures to be applied in respect of acts of piracy and armed robbery at sea. It was underscored that, in the case of armed robbery at sea, the provision would create a conflict between the coastal State's territorial jurisdiction and the capturing State's prosecutorial priority. The view was expressed that the paragraph did not account for the practice of States in criminal cooperation agreements.

(i) Draft article 12 (Confiscation and seizure)

193. Several members welcomed draft article 12 as a useful measure to repress piracy and armed robbery at sea. The importance of the principle that pirates could

not transfer valid title to stolen goods was underscored. It was recalled that article 105 of the United Nations Convention on the Law of the Sea allowed the courts of the seizing State to determine the action to be taken with regard to seized ships, aircraft or property. However, it was questioned whether all of draft article 12 reflected customary international law. Some members proposed reframing the provision to require States to take measures in accordance with domestic law and applicable treaty obligations. While support was expressed for paragraphs 2 and 3, clarification was called for as to whether the confiscation provided for in paragraph 3 should occur upon seizure or after investigation. The need for safeguards for *bona fide* third parties, shipowners, cargo owners, seafarers and victims was underscored. Several members suggested the deletion of the specific definitions, which were considered outside the scope of the topic and risked overlapping with definitions already provided in national legal systems. Others suggested streamlining them or moving them to a general definitions provision. It was observed that paragraph 5 might pose problems for States where bank secrecy was a fundamental constitutional right. It was suggested that the paragraph be aligned with relevant recommendations of the Financial Action Task Force, which were the internationally recognized standard on anti-money-laundering activities. It was also proposed that the provision would be better placed directly before draft article 19.

(j) Draft article 13 (Assistance measures and the duty to rescue victims)

194. Members welcomed the emphasis on humanitarian assistance in draft article 13. Some members highlighted that article 18, paragraph 2, of the United Nations Convention on the Law of the Sea clearly permitted innocent passage through the territorial sea for the purpose of rendering assistance to those in danger or distress and therefore cautioned against making such assistance subject to the authorization of the coastal State. Some members called for the simplification of the text. It was questioned whether the reference to considerations of humanity in paragraph 1 was necessary, in view of the reference to human rights in draft article 14. The view was expressed that paragraph 2 might be superfluous, as it subordinated itself to national laws. Support was expressed for paragraphs 3 and 4, regarding the salary and repatriation of seafarers, as it was consistent with the Maritime Labour Convention, 2006, of the International Labour Organization. It was recommended that the text be kept flexible enough to account for the safety of vessels and crew providing assistance and to accommodate the variety of national systems by which victims might receive compensation or redress. The possibilities of addressing specific measures and regimes and distinguishing between existing obligations and recommended best practices in the commentaries were highlighted.

(k) Draft article 14 (Rights and guarantees for arrested persons)

195. Several members emphasized the importance of addressing the rights and guarantees for persons arrested for piracy and armed robbery at sea in draft article 14. In view of the variety of possibly relevant universal and regional human rights instruments, some members proposed reframing the provision as a more general clause on fair treatment. In view of the possibility of detention at sea, it was suggested to add a provision regulating the maximum duration of such detention in conformity with international human rights law. With respect to paragraph 1, it was suggested that the relevant safeguards should be more clearly identified, either in the text or in the commentary. Examples included protections relating to legal counsel, interpretation, consular access and the prohibition of torture and ill-treatment. The addition of a specific *non-refoulement* provision was also proposed. With regard to paragraph 2, some members questioned whether there was an obligation to extradite or prosecute with respect to piracy in customary international law and whether such an obligation would be appropriate to a domestic offence such as armed robbery at sea. Several decisions of international courts and tribunals were highlighted as potential references for the commentary.

(l) Draft articles 15 to 22

196. Although, as noted in paragraph 161 above, the Special Rapporteur had recommended that members focus their interventions at the present session on draft articles 5 to 14, some members also made comments on draft articles 15 to 22 during their interventions.

Draft article 15 (Judicial cooperation)

197. It was suggested that, while the need for draft article 15 was obvious, the provision should preserve a number of grounds for refusal to cooperate, including prejudice to sovereignty, security, public order, ongoing proceedings or human rights concerns or the lack of double criminality. It was also proposed that the Commission draw inspiration from article 14 of the draft articles on prevention and punishment of crimes against humanity.

Draft article 16 (Extradition)

198. With respect to draft article 16, it was noted that, in general, extradition required an agreed legal framework between the States concerned. Some members considered that the provision went too far in deeming piracy and armed robbery at sea to be extraditable offences under existing treaties and that a better approach would be to encourage States to develop bilateral or multilateral extradition mechanisms. It was also suggested that the Commission should draw inspiration from draft article 13 of the draft articles on prevention and punishment of crimes against humanity.

Draft article 17 (Joint investigations)

199. While it was highlighted that draft article 17 responded to real enforcement needs for the prevention and repression of piracy and armed robbery at sea, a number of members proposed that the Commission avoid mandatory phrasing, as States had no general obligation to establish joint investigation mechanisms under customary international law. It was suggested that greater emphasis could be placed on the range of cooperative mechanisms available to facilitate prosecutions.

Draft article 18 (International cooperation for purposes of confiscation)

200. Several drafting proposals were made concerning draft article 18. It was suggested that paragraph 3 was superfluous and could therefore be deleted. The view was expressed that paragraph 4 was inappropriate, as the draft articles were not themselves a treaty basis. The reformulation of paragraph 5 as a recommendation to conclude agreements for cooperation related to confiscation of assets, rather than as an obligation, was proposed.

Draft article 19 (Disposal of confiscated proceeds of crime and property)

201. With respect to draft article 19, some members highlighted the need for careful study in adapting other transnational criminal law regimes to the topic. It was suggested that the provision should make the rights of *bona fide* third parties explicit. It was emphasized that contributing proceeds to efforts for prevention and repression of piracy and armed robbery at sea should be optional and subject to national law.

Draft article 20 (Statute of limitations)

202. Regarding draft article 20, some members considered that the subjective nature of the expression “long statute of limitations period” could pose difficulties. According to one view, more flexible drafting was preferable. Other members suggested deleting the provision, as statutes of limitations were regulated by national law. The need for conformity with the generally accepted prohibition on *ex post facto* alteration of criminal statutes was underscored. It was queried whether armed robbery

at sea, which was a domestic offence, should be treated differently to armed robbery on land.

Draft article 21 (Preventive measures)

203. Draft article 21 was welcomed as necessary and important for the prevention and repression of piracy and armed robbery at sea. The enrichment of the relevant measures was called for. It was also suggested that either elements relating to control and coercive measures be grouped together or the provision placed earlier in the text as a whole. Another proposal was to divide the provision into several draft articles.

Draft article 22 (Relationship of the present draft articles to the United Nations Convention on the Law of the Sea and other relevant legal instruments)

204. Members highlighted the importance of draft article 22, which clarified the relationship between the draft articles and the United Nations Convention on the Law of the Sea. Some members expressed reservations as to paragraph 2, as it mandated coordination with other legal regimes and competent international organizations. The view was expressed that the content of the draft article would depend on the final content of the outcome on the topic as a whole, as there was a significant amount of progressive development in the draft articles.

(m) Final form

205. A number of members expressed support for the continuation of work on the topic in the form of draft articles. Such draft articles could potentially serve as the basis for a future treaty, should States wish to pursue one. According to another view, the absence of a comprehensive multilateral convention on prevention and repression of piracy and armed robbery at sea did not necessarily mean that there was a legal gap requiring codification. Other members expressed openness to revisiting the final form. It was questioned whether draft articles were the appropriate form in light of the complex series of instruments already dealing with piracy and armed robbery at sea. The view was also expressed that, if the outcome of the work on the topic were draft guidelines, that would risk duplicating ongoing work in other forums.

206. While some members noted that the draft articles proposed were more detailed than was common in the work of the Commission, they were open to such an approach. The view was expressed that the Commission should limit treaty-making to certain aspects of international cooperation. Some members expressed a preference for more concise, general provisions, which could be more likely to facilitate reaching consensus. It was observed that the more detailed content of the draft articles could be reflected in the commentary instead. Some members suggested rearranging the draft articles from general to specific in scope. The need for the draft articles to be usable by States was underscored. The division of the draft articles into parts was also proposed.

(n) Future programme of work

207. Support was expressed for the workplan proposed by the Special Rapporteur in the first report. A number of members welcomed the presentation of a full set of draft articles, as it provided guidance on the proposed scope and direction of the project. The Commission was urged to focus on updating, in a technology-neutral way, the rules of piracy in the face of new threats and proposing duties of enhanced cooperation in relation to armed robbery at sea, with a view to addressing enforcement gaps. It was suggested that the consideration of the draft articles proposed be divided among sessions by theme.

208. A number of members urged the Special Rapporteur to explain the foundations in existing law and practice for the draft articles proposed in detail in his future reports. Several members called for further examination of State practice on several of the issues discussed. Several members considered it desirable to clarify whether each

draft article represented the codification of international law or its progressive development.

3. Concluding remarks by the Special Rapporteur

209. The Special Rapporteur thanked members of the Commission for their high-quality comments on his first report, which focused on the methodology and the final form of the work, as well as the content of the report and the draft articles proposed. With respect to the methodology and final form, he indicated that he was flexible but would prefer to have draft articles.

210. The Special Rapporteur noted that, while the workplan discussed in 2025 did not foresee the presentation of draft articles at the present session, the debate had shown that there was interest among members in considering the provisions put forward in his report. He noted that, while the Commission often worked differently to his proposed way forward, the presentation of a complete set of draft articles at once was not unprecedented and had been received positively by some members.

211. The Special Rapporteur indicated that he had taken note of the many useful comments on the draft articles proposed in his first report. He also highlighted comments on the technique of drafting the proposed draft articles. He recalled the views of several members on the relationship between the draft articles proposed and other instruments from which they borrowed. Concerning the relationship between the topic and the United Nations Convention on the Law of the Sea, the Special Rapporteur indicated that he fully shared the concerns of those members and States who had stressed the need to keep the work on the topic within the framework of the Convention. He pointed out that the study did not call into question the balance of the Convention nor propose the revision of relevant rules.

212. The Special Rapporteur noted that a recurring concern during the debate had been the preservation of a clear distinction between piracy and armed robbery at sea. In light of some views that certain proposed draft articles might conflate the two, he indicated that he would revisit the drafts to ensure the distinction was taken into account.

213. Turning to the individual draft articles proposed, the Special Rapporteur focused his comments on the debate on draft articles 5 to 14. He assured those members who had expressed views on subsequent provisions that he had taken careful note of their comments.

214. Regarding draft article 5, on autonomous or remotely piloted aircraft or vessels or the unlawful interception of navigation software data, the Special Rapporteur explained that the provision responded to requests of both members and States and that the need for such a provision had been generally accepted. He recalled a number of the definitional and legal challenges raised by members and indicated that he agreed with those members preferring a more general definition.

215. With respect to draft article 6, on the exercise by the State of its powers of enforcement, the Special Rapporteur recalled that a number of members had considered that the text needed to be simplified. He stated that he envisaged a revision of the provision to simplify the drafting and transfer some elements to the commentary.

216. The Special Rapporteur noted that draft article 7, on hot pursuit in the territorial sea, was a provision of particular sensitivity. He considered that the provision could be further discussed in the Drafting Committee, together with guarantees for the respect of the sovereignty of the coastal State.

217. As several members had highlighted the redundancy of draft article 8, on seizure of a pirate ship or aircraft, the Special Rapporteur proposed that it be withdrawn.

218. The Special Rapporteur took note of reservations expressed by several members concerning draft article 9, which dealt with ships and aircraft authorized to carry out seizure in the case of piracy or armed robbery at sea. In light of the comments, the Special Rapporteur considered that the provision required further study.

219. The Special Rapporteur took note of the fact that draft article 10 on criminal responsibility had given rise to considerable comments. He proposed maintaining paragraph 2, as minors had been implicated in a number of cases.

220. Regarding draft article 11 on criminal jurisdiction, the Special Rapporteur noted that several members had emphasized the centrality of the provision and explained that the provision did not itself impose an obligation to prosecute all cases.

221. Regarding draft article 12, on confiscation and seizure, the Special Rapporteur noted that some members had highlighted its usefulness while urging its reformulation to focus on the obligations of States. He indicated that he would take the comments into consideration in his future report.

222. The Special Rapporteur highlighted several comments on draft article 13, which concerned assistance measures and the duty to rescue victims. He announced his intention to restructure the text, taking into account the comments of members.

223. Regarding draft article 14, which concerned rights and guarantees for arrested persons and had received general support, the Special Rapporteur noted several suggestions from members to strengthen the protections afforded by the provision.

Chapter XI
Due diligence in international law

A. Introduction

224. The Commission, at its seventy-sixth session (2025), decided to include the topic "Due diligence in international law" in its programme of work and appointed Ms. Penelope Ridings as Special Rapporteur.[1308]

225. The General Assembly, in paragraph 9 of its resolution 80/164 of 15 December 2025, subsequently took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

226. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/792). In the first report, the Special Rapporteur discussed her methodological approach and terminological issues, reviewed both the debate on the topic in the Sixth Committee of the General Assembly at its seventy-ninth and eightieth sessions and the previous work of the Commission and other international legal bodies relevant to the topic. She also provided an overview of available material on the topic since the late nineteenth century. The Special Rapporteur identified issues and questions to be examined by the Commission and discussed the possible form of the final outcome and future programme of work.

227. The Commission considered the first report of the Special Rapporteur at its 3750th to 3756th meetings, from 29 June to 7 July 2026. The summary of the plenary debate can be found in section B.2 below.

1. Introduction by the Special Rapporteur of the first report

228. The Special Rapporteur began her introduction by recalling that the report was preliminary in nature. Its purpose was to lay the foundation for the future work of the Commission by mapping the material on due diligence in international law and identifying the principal issues and questions on which the views of members of the Commission and States would be particularly useful. Accordingly, no draft provisions had been proposed by the Special Rapporteur. She explained that she had sought to facilitate a collaborative discussion that would assist the Commission in determining the scope of the topic, the questions to be examined and the overall direction of the future work, while also enabling States to gain a comprehensive understanding of such discussion through the report of the Commission to the General Assembly.

229. The Special Rapporteur explained that the mapping exercise of material on due diligence in international law had been conducted from both a temporal and a thematic basis. The methodology she adopted had been inductive and based primarily on State practice and *opinio juris*, together with the jurisprudence of international, regional and national courts and tribunals, while doctrine had been considered in a more limited manner. She indicated that the report was intended to identify areas of

[1308] At its 3728th meeting, on 30 May 2025 (*Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 437). The topic had been included in the long-term programme of work of the Commission during its seventy-fifth session (2024), on the basis of the proposal contained in annex II to the report of the Commission (*Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10)).

convergence, divergence and ambiguity, with a view to assisting the determination of the direction of the topic.

230. Addressing her approach to the topic, the Special Rapporteur emphasized that, in order to make the broad topic of due diligence in international law more accessible, she had organized the report according to temporal periods and thematic areas. She noted that the report had deliberately not sought to examine all relevant judicial decisions, doctrine or legal questions relating to due diligence, owing to the need for conciseness. She also acknowledged that the examples and materials cited in the report were not as diverse and representative as she would have wished and expressed the hope that the debate in the Commission would elicit further and more diverse examples.

231. The Special Rapporteur observed that her preliminary survey had revealed broad areas of convergence in the consideration of due diligence in international law. She noted general agreement regarding the relevance and practical usefulness of the topic, while recalling that several States had emphasized the need for a prudent approach to its scope. She also observed convergence regarding the importance of due diligence in relation to transboundary environmental harm, as well as its role in other fields, including international human rights law and international humanitarian law. She further highlighted convergence regarding certain functions of due diligence, including its application to acts and omissions and its role in risk management, particularly where potentially harmful conduct was carried out by non-State actors. In addition, the Special Rapporteur noted convergence concerning the notion of due diligence and certain procedural requirements, including the adoption of legislative and administrative measures, notification, consultation and, where appropriate, risk assessment. Finally, she observed increasing convergence regarding a number of factors relevant to the *in concreto* assessment of whether due diligence had been exercised by States, including the degree of risk and severity of harm, knowledge of the risk of harm, the means and capabilities of the State concerned, the degree of control exercised by the State over territory and persons and the existence of preventive and monitoring measures.

232. The Special Rapporteur also referred to the main areas of divergence among States and scholars regarding the scope and legal nature of due diligence. In her view, it was clear that there were two main conceptions of due diligence: one conception regarded due diligence as a standard of conduct associated with specific primary obligations, while the other regarded it as a general obligation of a State not to allow knowingly its territory to be used for acts which harmed the rights or interests of other States. She recalled that the latter had been articulated by the International Court of Justice in the *Corfu Channel* case.[1309] The Special Rapporteur proposed exploring both conceptions, as both were reflected in the positions taken by States in recent advisory proceedings relating to climate change and in discussions concerning cyberspace; she stated that she found worthwhile to explore the idea of whether both conceptions could be accommodated within a single concept of due diligence in international law. She also referred to divergent views concerning the obligations engaging due diligence, including the distinction between obligations of conduct and obligations of result, and whether the obligation not knowingly to allow territory to be used for harmful acts also entailed an obligation to exercise due diligence to prevent such harm. Further divergences referred to by the Special Rapporteur concerned whether the application of due diligence in new fields required evidence of the relevant State practice and *opinio juris*, and the relationship between due diligence and the rules of customary international law on responsibility of States. In that regard, she emphasized the importance of preserving the integrity of the work of the Commission on responsibility of States for internationally wrongful acts.

[1309] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland* v. *Albania), Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4.

233. The Special Rapporteur suggested questions on which she invited members of the Commission to express their views during the plenary debate. Those questions concerned the scope, content and legal character of due diligence in international law. In particular, she invited members to comment on whether the topic should remain confined to due diligence expected of States and not of other actors such as international organizations or business enterprises; whether due diligence could be regarded as a single concept encompassing both a general obligation and a standard of conduct; the legal character and possible source of due diligence; the implications of the diversity in treaty language commonly associated with due diligence; and the relationship between due diligence and the rules of customary international law on responsibility of States. She also invited members to express their views on the proposal that the final outcome of the work should take the form of draft principles and to provide additional examples of State practice, *opinio juris* and doctrine representing different geographical regions, legal traditions and official languages of the United Nations.

234. The Special Rapporteur concluded her introduction by outlining her proposed future programme of work. She indicated her intention to propose draft principles at the next session concerning the scope of the topic and the use of terms. She explained that the second report would examine in greater detail the circumstances in which obligations of due diligence arise, such as variability, knowledge, risk, severity of harm, the standard of reasonableness and other relevant factors. Subsequent reports would address the remaining issues identified in the syllabus, including the relationship between due diligence and the rules of customary international law on responsibility of States. She emphasized that the proposed phased approach would enable the work of the Commission to proceed in a measured manner, guided by the views expressed by members of the Commission and States.

2. Summary of the debate

(a) General comments

235. Members generally commended the Special Rapporteur for her first report, which they considered to provide a solid basis for the future work of the Commission on the topic. The prudent and cautious approach followed by the Special Rapporteur was welcomed. Several members viewed favourably the preliminary mapping exercise and the decision not to propose draft provisions in the report. It was stated that the Commission should establish an analytical framework before suggesting draft provisions.

236. Members highlighted the importance of the topic. Some members emphasized the relevance of the topic to contemporary issues, including climate change, pandemics and activities in cyberspace. It was observed that the topic was of increasing relevance as it expanded from the protection of the interests of States to global public goods, including the environment. Several members pointed to the prominence of the topic in various contexts, including in treaties and in the jurisprudence of international courts and tribunals. The recognition of the relevance of the topic by delegations in the Sixth Committee was also recalled. Several members emphasized the complexity of the topic, highlighting the diversity of opinions among both States and scholars, the variations in terminology used in relation to the topic and the importance of context. It was stated that, through its work on the topic, the Commission had the opportunity to establish a clear understanding of a concept that had long defied precise definition. The view was also expressed that the definition of "due diligence" should be addressed with care so as not to predetermine the legal nature of due diligence.

237. Several members supported the inductive methodology of the report and its reliance on State practice and *opinio juris*, whereas some members considered that the report placed disproportionate emphasis on jurisprudence and called for closer examination of State practice, including the implications of the fact that States rarely

referred explicitly to due diligence in their treaty practice. While the temporal and thematic approaches were also generally welcomed, some members called for caution regarding the periodization of the development of the concept of due diligence and the assessment of nineteenth- and early twentieth-century material. It was stated that focus could have been placed on the work of then-existing universal bodies, such as codification conferences. Several members called for greater geographical diversity in the materials examined and increased attention to national legislation, national court decisions and the practice and legal traditions of different regions. The view was expressed that the Commission should examine the relevant practice of States before inviting them to answer directly the legal questions that the Commission would have to address.

238. While some members welcomed the references to the previous work of the Commission, the view was expressed that such work could have been presented in more positive terms in the first report and also that caution was required when drawing general conclusions from such work undertaken in specific contexts. Some members expressed appreciation for the references to the work of the International Law Association and the Institute of International Law. Clarification was sought as to whether the work on the topic would consider soft law instruments, which frequently articulated due diligence obligations in considerable detail.

239. The attention of the Special Rapporteur in her report to terminology was welcomed. The view was expressed that it would be better to use the term "*diligence requise*" in French, instead of "*diligence due*". It was observed that the terms "*devoir de vigilance*" and "*mesures appropriées*" had been used in French in some contexts in which "due diligence" was used in English.

(b) Scope of the topic

240. A number of members expressed the view that the scope of the topic should be limited to due diligence in international law, without consideration of, or prejudice to, national law. The view was expressed that due diligence in international law should be studied through the lens of national law and jurisprudence. Several members considered that the scope of the topic should be restricted to the obligations of States. Other members were of the view that the obligations of international organizations, in particular those exercising competences delegated by States or implementing the international obligations of States, should fall within the scope of the topic. According to another view, in respect of due diligence as a standard of conduct, the scope of the topic should extend to whomever the addressee of the relevant obligation might be.

241. Several members considered that conduct of private actors could be relevant to the topic from the perspective of the obligations of States to regulate such conduct. The view was expressed that the Commission should refrain from examining the subtopic of due diligence and multinational corporations, while, according to another view, the Commission should study national legislation and jurisprudence regarding requirements for multinational corporations to exercise due diligence outside their home country. It was also suggested that the Commission could elaborate on the applicability of human rights in relations between private actors.

242. A central question in the debate on the scope of the Commission's work on the topic concerned the two conceptions of due diligence identified in the first report: due diligence as a general or autonomous obligation and due diligence as a standard of conduct associated with specific primary obligations. Several members agreed with the Special Rapporteur on the coexistence of such conceptions in the views of both States and scholars.

243. A number of members highlighted the existence of an autonomous obligation of due diligence in international law. Some members considered there to be a general due diligence obligation as a corollary of State sovereignty, to prevent harm to the rights and interests of other States; those members cited the *Corfu Channel* case to

support their views. Other members pointed to limitations on the relevance of the *Corfu Channel* case, stressing its historical and factual context. Additionally, the Commission was encouraged to avoid framing the no-harm rule set out in *Corfu Channel* as a due diligence principle or rule. Some members mentioned other autonomous due diligence obligations in various specific fields of international law, including environmental law, human rights law and the law of the sea.

244. With respect to the conception of due diligence as a standard of conduct, several members addressed the relationship between due diligence and relevant primary rules. It was stated that due diligence could be an intrinsic component of or an implicit modality of applying a primary obligation, and it was highlighted that due diligence might be analogous to proportionality as part of a primary rule. The view was expressed that due diligence as a standard of conduct was mostly associated with obligations of conduct, but that it was important to avoid excessive rigidity in distinguishing between obligations of conduct and obligations of result. It was suggested that, to identify whether a due diligence standard applied to a primary rule, it had to be established whether States had agreed to undertake such an obligation at the time the rule was created. The relevance of the rules of treaty interpretation was highlighted and it was stated that the phrasing of the obligation was relevant, but not conclusive, as to whether it required due diligence. The Commission was cautioned against describing due diligence as "ancillary" to the primary rule. Some members underscored that the flexible character of due diligence as a standard of conduct should not be confused with a lack of legal character.

245. A number of members expressed support for examining both conceptions, while views differed as to the emphasis that should be placed on each of them. Some members considered that the work of the Commission should primarily focus on due diligence as a standard of conduct, while others emphasized the importance of focusing on due diligence as a general or autonomous legal obligation, including as a corollary of State sovereignty or in connection with the obligation of a State not to allow knowingly its territory to be used for acts contrary to the rights of other States. According to other members, the examination of the latter question would amount to determining the existence of a particular primary rule and should not form part of the scope of the topic. It was observed that the question was being discussed in other forums, particularly in relation to climate change and cyberlaw, in whose work the Commission might wish not to interfere.

246. Differing views were expressed regarding the relationship between the two conceptions. While it was suggested that the two conceptions could be merged, another view was that due diligence should be understood as existing along a continuum, depending on the particular context. Several members stressed the importance of analysing the legal and factual context for the understanding of due diligence. It was considered that the two conceptions operated at different levels of the international legal order and could produce different legal consequences. It was stated that, while characterizing due diligence as a standard of conduct would not be inaccurate, such a characterization did not fully capture the role of due diligence in the operation of a wide range of international obligations. Some members cautioned against assuming the existence of a single autonomous obligation applicable uniformly across international law. The Commission was urged not to impose obligations upon States without their consent.

247. Support was voiced by several members for identifying common or core elements of due diligence across different fields of international law, while preserving the specificities of particular legal regimes and primary obligations. Some members emphasized that due diligence was a cross-cutting concept and that its content and functions varied according to the relevant primary obligation and the legal and factual context. It was thus suggested that the Commission should focus on the content of due diligence as a standard of conduct in specific fields of international law, the operation of due diligence in particular legal regimes and the description of relevant practice without imposing a rigid taxonomy. A number of members called for caution

against overgeneralization and the need for a comparative analysis to determine which elements of due diligence were capable of being transposed across different fields and which were specific to particular regimes was emphasized.

248. Regarding the relationship between due diligence and the distinction between obligations of conduct and obligations of result, some members considered due diligence to be associated principally with obligations of conduct. It was suggested that the Commission should determine whether due diligence applied to all such obligations or only to certain categories thereof. It was stated that the distinction had practical implications for the determination of a breach and the burden of proof.

249. Several members, however, cautioned against drawing an overly rigid distinction between obligations of conduct and obligations of result. It was emphasized that many international obligations exhibited characteristics of both categories, that obligations of conduct could require the achievement of specific results and could be as demanding as obligations of result, and that the content of each primary obligation had to be determined through interpretation of the applicable rule. The view was expressed that the classification of an obligation as one of conduct might be a consequence of the recognition that it required the exercise of due diligence, rather than the basis for such recognition. According to another view, depending on the context, due diligence obligations could contain elements of both conduct and result.

250. Different approaches were proposed as to the practical focus of the work of the Commission on the topic. It was suggested that an attempt to catalogue the obligations requiring the exercise of due diligence would inevitably be incomplete and, thus, the Commission was encouraged instead to seek to identify criteria or indicators for recognizing when a primary obligation required the exercise of due diligence. Some members suggested that the Commission should focus on distilling and identifying the factors that determined the applicable standard of conduct and on clarifying how compliance with an obligation of conduct was to be assessed through the standard of due diligence. It was also suggested that the Commission should identify parameters relevant to all due diligence obligations and those shaped by the content of the applicable primary rule.

251. Several members addressed the suggestion made in the first report that the Commission examine the treaty language commonly associated with due diligence. Support was expressed for identifying expressions or "trigger" words commonly used in treaties and other international instruments to indicate that the exercise of due diligence was required, while acknowledging that due diligence could also arise where such terminology was not expressly used. It was suggested that identifying the formulations commonly associated with due diligence could provide practical guidance to States in the negotiation and drafting of treaties and in understanding the commitments resulting therefrom. At the same time, a number of members cautioned against developing a taxonomy based solely on particular formulations, emphasizing that the existence and content of due diligence depended primarily on the context, object and purpose of the applicable primary obligation.

252. Some members called upon the Commission to clarify the source of a general obligation of due diligence, if such an obligation existed. It was considered that the Commission had yet to determine whether due diligence had crystallized as a rule of customary international law or was only a standard of conduct. Some members expressed the view that State practice and *opinio juris* were insufficient to support the conclusion that a general obligation of due diligence had crystallized as a rule of customary international law, at least outside special regimes. It was suggested that the Commission examine the legal nature of due diligence as a general principle of law. The view was expressed that, while some features of due diligence might deserve consideration as general principles of law, those could not be conflated with an autonomous legal obligation. It was stated that conceiving of due diligence as a general principle of law could be used to bypass the traditional process of formation

of rules of customary international law in newly emerging fields of international law. Some members considered that the Commission should not seek to answer or prejudge the question of the source of a general due diligence obligation. The need for an inductive approach on the matter was underscored.

253. A number of members suggested that the Commission study the relationship between due diligence and State responsibility or whether due diligence had a primary or secondary character. Some members considered that due diligence operated at the interface between primary obligations and secondary obligations, such as the rules of the responsibility of States. In the view of several members, failure to exercise due diligence would constitute a breach of the relevant primary rule, which could have consequences under the law of State responsibility. The view was expressed that due diligence provided a normative framework through which State responsibility might arise for actions not attributable to a State. According to another view, it would be premature to characterize due diligence as either a primary or secondary obligation. The Commission was encouraged not to blur the distinction between primary and secondary obligations, and it was suggested that it might be better to consider due diligence separately from State responsibility, consistent with the approach taken in the work of the Commission on the latter topic. Some members emphasized that due diligence should not function as a shortcut for attribution. The nuanced relationship between due diligence and many provisions of the articles on responsibility of States for internationally wrongful acts was highlighted.

(c) Content of due diligence

254. With respect to the elements relevant to determining the content of due diligence and the level of conduct required in a particular case, it was reiterated that due diligence was inherently contextual and that the applicable standard could vary depending on the primary obligation concerned and the factual circumstances. The importance of an *in concreto* analysis was emphasized. Among the relevant factors identified by members were the nature, seriousness and urgency of the risk of harm, the foreseeability of such harm, actual or constructive knowledge of the risk of harm, the means and capacities available to the State and the reasonableness of the measures available to States. A number of members referred to the substantive and procedural dimensions of due diligence. It was suggested that measures such as risk assessment, notification, consultation, information exchange, monitoring and enforcement could constitute important means of giving effect to due diligence obligations.

255. Several members attached particular importance to the relevance of the means and capacities of States in determining the conduct required in the exercise of due diligence. It was observed that differences in capacity could affect the level of diligence reasonably expected of a State. At the same time, it was highlighted that differences in capacity should not result in the absence of any meaningful obligation of a State to act. The role of international cooperation, including through international organizations, in enabling States to obtain access to information, expertise, technology and other resources necessary to discharge their obligations was also highlighted.

(d) Due diligence and specific fields of international law

256. Several members made observations regarding due diligence and specific fields of international law. It was stated that the concept was most established in international environmental law and international human rights law and that a substantial environmental no-harm rule could be found in international humanitarian law. With respect to international environmental law, the view was expressed that due diligence played a dual role as both a substantive rule and a standard of conduct. The Commission was called on to define more precisely the relation between the principle of common but differentiated responsibilities and respective capabilities and due diligence. Regarding international human rights law, the Commission was encouraged to clarify the relationship between due diligence and the concept of

positive obligations. It was noted that due diligence in respect of transboundary environmental harm had shaped the scope of the jurisdiction of international human rights instruments. It was also observed that regional human rights jurisprudence had shaped the general understanding and application of due diligence.

257. With respect to the law of the sea, it was recalled that the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had applied a due diligence standard requiring the assessment of the best available science to evaluate the foreseeability and severity of potential harms. Some members observed that due diligence could attach to certain standards of protection, for example "full protection and security" in international investment law. In connection with arms control, it was observed that article 7 of the Arms Trade Treaty[1310] was not merely a due diligence obligation, but coupled procedural obligations with a substantive prohibition on authorization of exports when an overriding risk remained. Regarding space law, it was suggested that the principle of due regard in the context of activities in outer space might provide useful analogies.

258. Several members noted the prominence of due diligence in the discussions regarding the application of international law in cyberspace. It was observed that there were differing views on the question and that emerging State practice could be relevant. The view was expressed that due diligence served as a mechanism through which States were expected to exercise their authority in a manner consistent with the protection of rights beyond a purely territorial conception of governance. According to another view, State practice and *opinio juris* in the cyber context showed that several States did not consider due diligence as merely a tool assisting in compliance with the principle of the sovereign equality of States.

(e) Final form

259. Several members indicated their agreement with the Special Rapporteur's proposal that the Commission develop draft principles on the topic. A number of members considered that draft principles were best suited to the cross-cutting and context-dependent character of the topic. The view was expressed that State practice and *opinio juris* were not sufficiently uniform or widespread to support a codification exercise, while some members were of the view that the topic was essentially a codification exercise. The need for the outcome of the Commission's work to balance flexibility and legal certainty was emphasized. It was noted that developing draft principles would not imply taking sides as to whether due diligence was, itself, a principle of international law.

260. Other members expressed either a preference for, or an openness to, a different form. It was suggested that draft conclusions would better distil existing practice. According to another view, draft guidelines would be appropriate to highlight the practical significance of the work on the topic and to provide guidance to States. Some members considered that different forms might be necessary for each of the two conceptions of due diligence. In that regard, the view was expressed that draft articles might better address the *Corfu Channel* formulation, in line with the Commission's earlier work on transboundary harm.

(f) Future programme of work

261. A number of members expressed support for the proposal of the Special Rapporteur for future work on the topic. Some members recommended that the next step should be the determination of the legal nature of due diligence. The Special Rapporteur was encouraged to move from a mapping exercise to a prescriptive approach in her next report. It was proposed that the Commission start with the consideration of due diligence as a standard of conduct before moving to the more

[1310] Arms Trade Treaty (New York, 2 April 2013), United Nations, *Treaty Series*, vol. 3013, No. 52373, p. 269.

challenging questions of the scope of due diligence and the potential existence of a general autonomous obligation of due diligence. According to another view, the analysis of the topic should start from international environmental law to understand how environmental protections had shaped the scope of due diligence as a substantive rule.

262. Members suggested a variety of aspects for future consideration by the Commission in the work on the topic. They included, for example, the extraterritorial dimension of due diligence; the meaning and operation of the "should have known" standard; and the significance of terminological variations. It was also suggested that the Commission examine possible tensions between due diligence and certain rules of international law, such as the inviolability of diplomatic premises in the cyber context. Attention was drawn to the temporal dimension of due diligence, in particular the question of when a duty to act was triggered, and to the operation of due diligence in the contexts of artificial intelligence, pandemic prevention and international space law.

263. Some members suggested that the Commission clarify the relationships between due diligence and related concepts, including the principle of prevention, obligations to ensure respect of international humanitarian law, the precautionary principle or approach, the concept of the margin of appreciation and the principle of good faith. A view was expressed that the Special Rapporteur should study the use of due diligence standards by former colonial powers against the interests of Asian, African and other States, inherent limitations of the articles on responsibility of States for internationally wrongful acts in relation to the proposed study and the issue of capacity-building in the context of due diligence. The Commission was also encouraged to explore aspects of due diligence in relation to the rights of Indigenous Peoples.

264. A number of members highlighted instances of regional practice that might be relevant to consider in future reports. An analysis of national legislation and decisions of national courts was suggested.

3. Concluding remarks by the Special Rapporteur

265. The Special Rapporteur thanked members for their diligence and care in engaging with the first report and for their high-quality, comprehensive and thoughtful comments, criticisms and suggestions, from which she had benefited considerably. She recalled members' general support for the topic, as well as their endorsement of the inductive methodology used in the report. She recognized the need for caution expressed by some members in relation to the particular context of some of the historical precedents cited. She acknowledged the agreement of several members that due diligence should be explored in light of its diversity in different fields of international law, with a goal of identifying a common core of due diligence, and took note of the need for care to avoid overgeneralization.

266. With respect to the scope of the work of the Commission on the topic, the Special Rapporteur noted the general agreement to limit its scope to due diligence "in international law", without prejudicing or considering national law. She noted the potential for considering due diligence as a general principle derived from national legal systems and the need to consider national judicial decisions as subsidiary means for the identification of rules of international law. While there was also general agreement to focus on the due diligence obligations of States, she considered that the Commission could benefit from assessing the practice of international organizations in certain limited contexts. She also agreed with the point that the obligations of States to regulate private actors were of immediate relevance.

267. The Special Rapporteur observed that much of the debate on the topic had focused on whether the Commission should address both possible conceptions of due diligence. She agreed that the uncertainty in jurisprudence pointed to the need to consider the question of due diligence as an autonomous obligation carefully and with

an open mind. She noted that, while members generally agreed that the conception of due diligence as a standard of conduct was well-established under international law, potentially the most significant point of ambiguity during the plenary debate had been whether there was a general obligation on States not to allow knowingly their territory to be used for acts contrary to the rights of other States, i.e. the *Corfu Channel* conception of due diligence.

268. In the Special Rapporteur's view, it was relevant for the Commission to explore both conceptions of due diligence, while acknowledging the context and potential limitations of the *Corfu Channel* formulation. She therefore proposed that, for the time being, the Commission should continue its consideration of due diligence, comprising both its conceptions.

269. The Special Rapporteur considered that, under the umbrella of the legal character or legal nature of due diligence, it was important to address debates on three matters: where due diligence lay with respect to the sources of international law; its relationship with certain other principles and norms; and the relationship of due diligence with primary rules with which it associated as a standard of conduct.

270. In relation to the debate pertaining to sources, the Special Rapporteur was of the view that the Commission was not, at the present stage, in a position to decide on the status of due diligence within the sources of international law. She was mindful of the caution expressed by some members that too broad a general obligation of due diligence could lead to a regime of responsibility without an internationally wrongful act. She agreed that the Commission should determine whether due diligence had crystallized as a rule of customary international law through a rigorous assessment of State practice and *opinio juris*, national legal systems and jurisprudence. She indicated that the Commission could revert to the matter as work on the topic progressed.

271. The Special Rapporteur acknowledged that it would be important to consider the relationship of due diligence with certain international legal principles, including in particular the principles of prevention, sovereignty, cooperation and good faith. She indicated that that work would provide context for the consideration of due diligence but that it would also be important not to detract from the purpose of the topic, which was to identify the nature of due diligence.

272. Regarding the relationship of due diligence with primary rules of international law, the Special Rapporteur underscored the need for the Commission to balance preparing an objective set of criteria underlying due diligence as a standard of conduct, with the need not to prejudge the content of particular primary rules with which it was associated. While she would refer, at the present stage, to due diligence as a "standard of conduct", she had taken note of the need for caution regarding terminology. The Special Rapporteur acknowledged that terminology required further consideration in light of differences in the use of terms across fields of international law, legal cultures and instruments.

273. The Special Rapporteur had found noteworthy the extent to which members agreed on the criteria underlying due diligence as a standard of conduct. She considered that the support in the plenary regarding the existence and content underlying the conception of due diligence as a standard of conduct provided a basis for further in-depth consideration by the Commission. She was inclined towards the position that due diligence was an "integral" part of the substance of primary obligations. The possible variance of the standard in accordance with a given primary rule could be addressed in future reports.

274. Regarding the relationship between due diligence and State responsibility, the Special Rapporteur agreed that the former concerned the content and performance of primary obligations but that failure to meet the required standard imposed by a due diligence obligation might have consequences under the law of State responsibility. She stated that the relationship between due diligence and State responsibility would

be considered in future reports in a cautious manner, taking into account the articles on responsibility of States for internationally wrongful acts.

275. The Special Rapporteur highlighted the various views expressed by members on the question of obligations of conduct or means and obligations of result. She considered that the Commission should continue to examine the relationship between due diligence and obligations of conduct or means and obligations of result, not as a theoretical inquiry, but with the objective of providing practical guidance to States as to the characterization and implications of their obligations.

276. The Special Rapporteur recalled both the interest expressed by members in providing an indicative list of common drafting choices that would suggest the due diligence character of an obligation and the caution urged against overgeneralizing the significance of certain terms. She agreed that the Commission could examine how the content or formulation of a primary obligation influenced the application of due diligence. The Special Rapporteur stated that she would give further consideration as to whether an indicative list of what she had termed "trigger" words would be useful for States.

277. The Special Rapporteur expressed gratitude for the inputs received from members aiming towards enhancing and diversifying the materials surveyed in her first report and invited further suggestions. She indicated that she would endeavour to further assess treaty-making practice, national legislation and its implementation, where potentially relevant, and the practice of international organizations, where pertinent, in clarifying State obligations, drawing from sources from various regions.

278. Turning to the final form and future programme of the work, while the Special Rapporteur noted the agreement of most members that draft principles would be the appropriate final form, she observed that the Commission did not need to take a decision on the question at the present stage. She intended to propose texts for draft principles in her next report, and their reception in subsequent sessions would enable further reflection on alternative forms of output, if necessary.

279. Regarding future work on the topic, the Special Rapporteur stated that she remained mostly committed to the original plan outlined in the first report. However, in light of the convergence within the Commission regarding due diligence as a standard of conduct, she would propose draft principles on that aspect of due diligence in her second report. She also considered that such an approach would enable the Commission to make tangible progress on the topic before the end of the quinquennium. It would also allow time for further research and reflection on State practice of due diligence as a stand-alone obligation. In conclusion, the Special Rapporteur emphasized that she remained committed to an inclusive, representative and collaborative method of work for the project, in line with the spirit of the Commission.

Chapter XII
Compensation for the damage caused by internationally wrongful acts

A. Introduction

280. The Commission, at its seventy-sixth session (2025), decided to include the topic "Compensation for the damage caused by internationally wrongful acts" in its programme of work and appointed Mr. Mārtiņš Paparinskis as Special Rapporteur.[1311]

281. The General Assembly, in paragraph 9 of its resolution 80/164 of 15 December 2025, subsequently took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

282. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/793). In the first report, the Special Rapporteur conducted a review of the debate on the topic in the Sixth Committee of the General Assembly at its seventy-ninth and eightieth sessions, as well as of related previous work, both of the Commission and of other international legal bodies. The first report contained an examination of the scope, content and legal status of article 36 of the articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001 (articles on State responsibility). In addition, the Special Rapporteur presented an examination of the scope of the present topic, including with regard to internationally wrongful acts, compensation for the damage caused and scope *ratione personae*. Moreover, the Special Rapporteur identified issues and questions to be examined by the Commission and conducted a review of relevant judicial decisions and State practice. The first report also contained a discussion of the possible final form of the work on the topic and future programme of work.

283. At its 3756th to 3761st meetings, from 7 to 14 July 2026, the Commission considered the first report of the Special Rapporteur. The summary of the plenary debate can be found in section B.2 below.

284. At its 3782nd meeting, on 29 July 2026, the Commission decided to request the Secretariat to prepare a memorandum for its seventy-ninth session providing information on whether, or to what extent, consideration is given to the financial capacity of the responsible State to pay compensation based on a survey of the case law of international courts and tribunals and other international bodies, and of treaties contained in the United Nations Treaty Series and in the League of Nations Treaty Series, which may be of relevance to its future work on the topic "Compensation for the damage caused by internationally wrongful acts".

285. At the same meeting, the Commission approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international bodies in order to obtain information and their views relevant to the topic. A questionnaire concerning issues specifically relevant to the topic will be communicated to States (see chap. III).

[1311] At its 3728th meeting, on 30 May 2025 (*Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 437). The topic had been included in the long-term programme of work of the Commission during its seventy-fifth session (2024), on the basis of the proposal contained in annex I to the report of the Commission (*Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10)).

1. Introduction by the Special Rapporteur of the first report

286. The Special Rapporteur explained that he intended to align the work on the topic with the conceptual framework and analytical distinctions drawn by the Commission in its work on the articles on State responsibility, particularly article 36 concerning compensation. Such an approach reflected the central role of the articles on State responsibility, as had also been recognized by States in the Sixth Committee of the General Assembly. He observed that there had been new developments since the submission of the first report, including recent decisions of international courts and tribunals at the inter-State level and resolutions adopted by the General Assembly.

287. The Special Rapporteur indicated that, first, he intended to approach the topic based on contemporary practice, going beyond what had been possible for the Commission in its earlier, more general work. Second, the study of the topic would build on the increasing number and diversification of decisions of international courts and tribunals. The Special Rapporteur explained that the scope *ratione personae* of the topic would encompass inter-State claims and situations where compensation was owed to individuals or other entities. He proposed covering compensation arising under both the responsibility of States and the responsibility of international organizations, while reparations awarded by international criminal courts or tribunals would not be covered. Third, he clarified that specialized practice on compensation, including regarding valuation methods, would be considered, in particular to provide additional examples to supplement the material provided in the commentary to article 36 of the articles on State responsibility.

288. The Special Rapporteur stressed that, while he intended to build on the articles on State responsibility, the first report also analysed other previous codification efforts related to compensation, including by the Institute of International Law and the 1930 texts adopted on first reading by the Third Committee of the Conference for the Codification of International Law of the League of Nations. He mentioned that more recent developments included the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2005, and the declarations of the Committee on Reparation for Victims of Armed Conflicts of the International Law Association.

289. The Special Rapporteur observed that other international bodies, such as the Commission on the Determination of Quantum in International Adjudication of the Institute of International Law and Working Group III (Investor-State Dispute Settlement Reform) of the United Nations Commission on International Trade Law, were studying the issue of compensation. Working Group III was set to consider provisions on cross-cutting issues in investment reform, as well as the draft guidelines on the calculation of damages and compensation in investor-State dispute settlement. He also referred to the ongoing work of the Working Group on International Investment Contracts of the International Institute for the Unification of Private Law, which addressed compensation and damage, with the caveat that that work was based on contractual principles of non-performance.

290. The Special Rapporteur noted that, since its adoption of the articles on State responsibility, the Commission had addressed compensation as part of its work on a few topics, including the articles on the responsibility of international organizations, the draft articles on prevention and punishment of crimes against humanity, the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the principles on protection of the environment in relation to armed conflicts.

291. Concerning the scope *ratione materiae* of the topic, the Special Rapporteur explained that it would address compensation obligations arising from internationally wrongful acts, focusing on the secondary rules of responsibility. He stressed that work on general secondary rules of compensation needed both to engage with all the elements of relevant practice and subsidiary means that shed light on the general rules

and to avoid unduly flattening the particularities of their application in different ways by different bodies and in different contexts. He emphasized that article 36 of the articles on State responsibility reflected customary international law and that compensation for damage caused by internationally wrongful acts in paragraph 1 of that article would be addressed as a "basic rule". He indicated that work on the topic would also address other terms that were necessarily implicated, in particular terms contained in the articles on State responsibility, such as "caused" and "damage" (art. 31), and the questions of interest and contribution to the injury (arts. 38 and 39, respectively).

292. In response to a State's comments in the Sixth Committee, the Special Rapporteur expressed openness to examining the effect of article 27, subparagraph (*b*), of the articles on State responsibility. That article provided that the invocation of a circumstance precluding wrongfulness was without prejudice to the question of compensation for any material loss caused by the act in question. The Special Rapporteur indicated that his openness in that regard did not suggest a departure from the distinction between compensation in that sense and compensation within the framework of reparation for wrongful conduct and was without prejudice to whether that issue would be addressed within the scope of the topic or as part of the delineation of its scope. Moreover, he confirmed that the proposed scope of the topic was not envisaged to include the establishment of institutions, as suggested by some States, but the output of institutions would be taken into account.

293. The Special Rapporteur indicated that the work on the topic would address compensation as a legal consequence of internationally wrongful conduct without prejudice to other forms of reparation. It would examine issues concerning the concretization of the rules of compensation, such as the analysis of the precise point of wrongfulness and injury, causality, damage (including moral and "pure" environmental damage, the impermissibility of punitive damages, and the question of the compensability of macroeconomic damage), mitigation, plurality of factors or actors, interest and contribution to injury. The question of loss of profits would also be addressed. He further observed that the objective was to clarify secondary rules governing compensation while remaining attentive to the diversity of contexts in which those rules operated and to the possible impact of the category of the responsible actor or the entity invoking responsibility. With regard to peremptory norms of general international law (*jus cogens*), the Special Rapporteur did not intend to address directly the issues covered in chapter III of part two of the articles on State responsibility (that is, serious breaches of obligations under peremptory norms of general international law), while acknowledging that broader developments in international law might affect work on the present topic.

294. The Special Rapporteur emphasized the importance of a detailed study of the extensive judicial and arbitral practice since 2001, when the Commission had adopted the articles on State responsibility, including by the International Court of Justice, the International Tribunal for the Law of the Sea, human rights courts, investor-State tribunals and various claims commissions. He also underlined the importance of collecting State practice from a wide range of regions, languages and legal traditions, including treaties, pleadings, national court decisions and practice of claims commissions.

295. Concerning the final form, the Special Rapporteur considered that draft articles would more closely reflect the relationship of the topic to the Commission's earlier work on responsibility for internationally wrongful acts and correspond more closely to the preferences expressed by States in the Sixth Committee. In his view, draft articles would also provide flexibility for addressing practical issues through the commentaries. He noted the importance of avoiding terminological confusion in work on the topic in relation to the notion of draft principles.

296. Regarding the future programme of work, the Special Rapporteur indicated that the second report, to be prepared for the seventy-eighth session of the

Commission, would contain draft provisions. Subsequent reports would address the identification and application of the rules on compensation, with a view to completing a first reading during the next quinquennium.

2. Summary of the debate

(a) General comments

297. Members generally emphasized the importance, timeliness and practical relevance of the topic. Several members stressed that compensation for the damage caused by internationally wrongful acts was not a purely technical issue but related to broader matters, including peaceful settlement of disputes, fairness and distributive justice. The first report was generally welcomed and considered to be a high-quality, clear and useful starting point for consideration of the topic. A number of members appreciated its broad and representative research, including the use of multilingual sources. Members also generally agreed with the Special Rapporteur's decision to address the scope and methodology for the study of the topic before drafting provisions.

298. Several members supported the Special Rapporteur's proposal to build on the conceptual framework and analytical distinctions drawn by the Commission in its earlier work on State responsibility, in particular in article 36 of the articles on State responsibility. Some members welcomed the first report's systematic analysis of article 36. Several members stressed that the topic should supplement, rather than alter, existing rules in the articles on State responsibility. It was highlighted that the topic should be aligned with other relevant work of the Commission, including its work on responsibility of international organizations, diplomatic protection, peremptory norms of general international law (*jus cogens*), sea-level rise in relation to international law, succession of States in respect of State responsibility and settlement of disputes to which international organizations are parties. It was suggested that the topic should not focus solely on formal legal rules, but should also examine the legal techniques, methods and practices through which compensation operated in practice. It was stated that the traditional framework on State responsibility, particularly the intertemporal principle and *ratione temporis* limitations, might be insufficient to address colonial reparations and historical injustices and that the perspectives of formerly colonized States should be examined as part of the work on the topic.

299. Members supported basing the work of the Commission on judicial decisions, State practice and other relevant materials, while emphasizing that practice should be representative, balanced and assessed in context. According to some members, judicial and arbitral decisions should not be accorded disproportionate weight solely because they were well known or accessible and should not be treated as a substitute for the analysis of State practice and *opinio juris*. It was suggested that the Commission should take into account different contexts in which compensation arose, including voluntary payments by the responsible State, negotiated settlements between the parties and determinations through third-party adjudicatory settlement.

(b) Scope of the topic

300. A number of members agreed that the topic should be limited to secondary rules of responsibility for internationally wrongful acts. It was emphasized that compensation for the damage caused by internationally wrongful acts should not be confused with liability for lawful acts and that work on the topic should not duplicate special regimes established under treaty frameworks. Several members cautioned that the distinction between primary and secondary rules, or between lawful and wrongful acts, might be difficult to apply in practice, for example in cases involving mixed lawful and wrongful conduct, climate-related damage, damage caused by space objects, countermeasures with disproportionate consequences or compensation required by primary rules. Some members considered that a strict primary-secondary

rules distinction could unduly exclude historical injustices and colonial reparations from the scope of the topic. It was stressed that such a distinction should not be understood as granting general secondary rules automatic normative priority over the interpretation and application of primary rules. It was suggested that the topic should be situated within broader theoretical and historical contexts that showed both the value and the limits of the primary-secondary rules distinction. In addition, it was considered that compensation should be examined through systemic integration with relevant primary rules and that the nature of the breached primary obligation might affect compensation.

301. Several members supported, or were open to, considering compensation under article 27, subparagraph (*b*), of the articles on State responsibility, noting that the question of compensation might arise even where wrongfulness was precluded. Some members noted that the application of article 27, subparagraph (*b*), originally designed for inter-State relations, raised particular complexities in investment arbitration, which justified analysing that article. Other members expressed reservations about that approach, highlighting that compensation in such situations belonged to a different framework and that its inclusion could call into question the structure of the articles on State responsibility. It was recalled that the question of compensation under article 27, subparagraph (*b*), had been deliberately left open by the Commission when drafting the articles, that the commentary left compensation largely to negotiation among the States concerned and that relevant practice remained limited. It was nevertheless suggested that article 27, subparagraph (*b*), could inform the understanding of article 36 of the articles on State responsibility and could therefore be examined as an incidental issue, rather than as part of the core of the topic.

302. A view was expressed that work on the topic should not directly address the establishment of compensation institutions. Some members, however, considered that institutional and procedural settings should not be entirely disregarded, since they might help to explain variations in compensation practice among different bodies, including differences in lump-sum awards, equitable approaches and methods of quantification, and could also provide useful material for mass claims, evidentiary rules, distribution arrangements and implementation.

303. A number of members supported taking article 36 of the articles on State responsibility as the core provision for defining the scope of the topic, while emphasizing that the study could also encompass other directly relevant provisions, such as articles 31, 34, 38 and 39. At the same time, some members cautioned that issues such as causation and contribution to the injury should be addressed only to the extent that they raised compensation-specific questions and not as general questions of State responsibility.

304. Several members supported excluding from the scope of the topic forms of reparation other than compensation, while others cautioned that compensation should not be entirely detached from other forms, particularly in fields where compensation might form part of a broader framework of reparation. Some members noted that a narrow focus on compensation might create the risk of presenting it as the predominant or default form of reparation.

305. Support was expressed for excluding, in principle, issues covered by parts one and three of the articles on State responsibility (i.e. the internationally wrongful act of a State and the implementation of the international responsibility of a State, respectively). Nevertheless, some members cautioned that certain issues in those two parts, such as composite acts, circumstances precluding wrongfulness, invocation of responsibility, countermeasures, plurality of actors and peremptory norms of general international law (*jus cogens*), should not be excluded where they affected the identification or application of the rules of compensation.

306. Some members supported addressing historical injustices, including colonialism, slavery, forced labour and structural harm. Other members cautioned

that historical injustices should not become a central focus of the topic, since they required examination of primary rules and broader questions beyond compensation. The view was expressed that the Commission could examine the contemporary legal consequences that States increasingly attached to the acknowledgement of historical injustices through reparatory practice. Another view was that historical injustices could be addressed where the existence of an obligation to provide compensation was assumed or recognized, while noting that doing so could raise particular difficulties of proof, valuation and assessment of community or intergenerational harm.

307. Several members supported, or were open to, extending the scope of the topic to include situations involving persons or actors other than States. A number of members considered that the Commission should not be restricted by article 33, paragraph 2, of the articles on State responsibility, stressing that contemporary practice increasingly recognized compensation claims brought directly by actors other than States and addressed interests beyond traditional inter-State injury, especially in the fields of human rights and investment law. Some members suggested that the question of how compensation awarded at the inter-State level might be transferred to individual victims should also be considered. It was suggested that the Commission should address overlapping claims where the same internationally wrongful act breached obligations owed both to a State and to its nationals, including whether payment to one claimant affected claims by the other, and that double recovery should be avoided. It was observed that similar questions could arise where compensation was claimed on the basis of obligations *erga omnes*.

308. Some members, nevertheless, cautioned against generalizing compensation rules across all claimants, since the ability of actors other than States to claim compensation might depend on the applicable primary obligations and the remedial structure of the relevant regime. It was suggested that the Commission should not determine in the abstract whether international law conferred a right to compensation on actors other than States; rather, it should focus on how compensation was assessed and determined where such a right had already been recognized.

309. Support was voiced by some members for excluding compensation ordered by international criminal courts or tribunals against convicted persons, since it did not concern compensation for internationally wrongful acts. It was pointed out, however, that the practice of the International Criminal Court might be useful for addressing compensation in mass claims.

310. Several members supported including international organizations as possible bearers of compensation obligations within the scope of the topic, with some members stating that excluding them entirely could imply that international organizations might act as subjects of international law without incurring responsibility. At the same time, some members expressed reservations, since international organizations differed from States in significant aspects: their practice remained less mature, the status of article 36 of the articles on the responsibility of international organizations as a rule of customary international law remained controversial, and their inclusion would extend the scope of topic beyond manageable limits. Several members considered that, if international organizations were to be examined, due regard had to be given to their structural specificities, internal rules, limited mandates and applicable *lex specialis*. The need to ensure coherence between the present topic and the topic of settlement of disputes to which international organizations are parties was stressed. It was nevertheless noted that the latter topic concerned procedural issues rather than the substance of secondary rules on compensation.

(c) Questions to be examined

311. Several members supported examining how the general secondary rule of compensation should be formulated in the light of practice in different fields of international law. A number of members cautioned against the generalization of

specialized practice, particularly where practice remained contested or reflected the application of *lex specialis*. Some members suggested that the Commission should seek to identify general rules applicable across different areas of international law to promote greater coherence and consistency, while remaining attentive to *lex specialis*. It was stated that the Commission might formulate detailed general secondary rules only where practice was sufficiently broad and representative, whereas field-specific or context-dependent practice might be better reflected through general principles or illustrations of best practices. Some members suggested that the Commission should examine whether the different compensation practices in specialized fields reflected different applications of general rules in different contexts or distinct approaches developed within special regimes. The view was expressed that the Commission should focus on general rules. Differing views were expressed on whether compensation rules should vary according to the beneficiary of the obligation: on the one hand, it was emphasized that reparation flowed from the international wrongfulness of the act and should not depend on the nature of the beneficiary, while on the other, it was stated that rules developed in an inter-State setting should not be assumed to apply automatically to other relationships.

312. A number of members considered that breaches of peremptory norms of general international law (*jus cogens*) or of obligations *erga omnes* raised important questions for compensation. Several members supported considering whether developments had affected the law of compensation, without reopening discussions of all consequences of breaches of peremptory norms of general international law (*jus cogens*) or obligations *erga omnes* or of the underlying primary obligations. It was suggested that such an examination could encompass, *inter alia*, whether and to what extent the peremptory character of the norm or the *erga omnes* character of the obligation breached affected causation, compensable damage, standing to claim compensation, competing claims and the allocation and distribution of compensation, including through victim-oriented funds or other modalities. According to another view, obligations *erga omnes* should be excluded from the scope of the topic, as they pertained to another topic in the Commission's long-term programme of work.

313. With regard to the relationship between compensation and other forms of reparation, several members considered that the former should not be treated as the only or primary form of reparation, since full reparation might be achieved through other forms. Some members indicated that, in cases of serious human rights violations or historical injustices, compensation might need to operate alongside rehabilitation, formal apologies, memorialization and other measures to achieve full reparation. It was suggested that work on the topic should systematically examine the range of forms of reparation found in contemporary practice. Some members viewed compensation as generally subsidiary to restitution where restitution could make good the injury and recalled that it was reparation in general, and not necessarily compensation in particular, that had to be made in full. Some members suggested that the appropriate form of reparation might depend on the type of harm suffered and that non-material injuries might require forms of reparation different from those applicable to economic loss. It was observed that the prominence of compensation in some fields, such as investment law, might reflect the design of particular treaty regimes rather than any general displacement of restitution as the primary form of reparation in general international law.

314. Members generally supported further examination of the identification and concretization of secondary rules of compensation. A number of members supported further clarification of the causal nexus required for compensation. It was stated that the test of a "sufficiently direct and certain causal nexus" had been applied inconsistently and left substantial discretion to courts and tribunals. It was also stated that the Commission could clarify the role of factors such as directness, foreseeability and proximity, as well as the applicable standard of proof. Some members emphasized that the nature and purpose of the obligation breached might affect the causal inquiry. Challenges of establishing causation in climate change, environmental

harm and other complex settings were mentioned. It was observed that causation should remain a necessary requirement even in cases involving breaches of peremptory norms of general international law (*jus cogens*) or obligations *erga omnes*. Some members remarked that moral or non-material injury should not be treated as residual in work on the topic. Several members supported further examination of pure environmental damage, and some members considered that the compensability of macroeconomic harm also required further study. As for punitive damages, some members considered them impermissible under general international law, while others regarded the law as insufficiently settled or cautioned against treating their exclusion under the articles on State responsibility as an unquestioned starting point, especially when the harm was irreparable, as in the case of environmental damage. A view was expressed that punitive damages did not constitute compensation. In addition to causal nexus and damage, some members supported examining mitigation, concurrent causes and contribution to injury, especially in complex situations involving several causes or actors.

315. A number of members supported examining the determination of the quantum of compensation as a core practical issue. It was noted that the assessment of compensation often involved approximation rather than mathematical precision. Several members expressed support for examining techniques for quantifying damage, including global or lump-sum awards, while cautioning against unduly generalizing such approaches. Some members emphasized that appropriate valuation techniques depended on the type of injury and legal context. It was further emphasized that many compensation questions were also evidentiary questions, including those of whether damage had been proved and whether causation had been established. Some members supported examining loss of profits as a distinct issue closely related to the determination of quantum and valuation, while others cautioned against treating loss-of-profit methodologies developed in specialized regimes as general standards of international law.

316. The proposal to examine interest as part of compensation was supported by several members, who emphasized that it was an accessory element of compensation rather than an independent form of reparation. Some members were of the view that interest should not be awarded automatically and that future work should clarify when it was necessary for compensation and how it should be calculated. Some members cautioned against treating the payment of compound interest as a general rule of international law, noting that practice remained divergent and that particular caution was required regarding practice in the context of investment arbitration.

317. A number of members voiced support for examining whether the responsible State's financial situation should be taken into account when determining the amount of compensation, particularly where an award might have a crippling effect on its economy or population. Some members stressed the tension between full reparation and the responsible State's capacity to pay, while noting that exceptionally large awards might affect public interests, including climate change-related obligations. Other members cautioned that any departure from the principle of full reparation would require convincing evidence of consistent State practice and *opinio juris* in that regard. The view was expressed that a distinction should be drawn between taking the responsible State's financial situation into account in determining the amount of compensation and addressing exceptional financial hardship through payment arrangements while preserving the principle of full reparation. It was considered that reliance on the responsible State's financial hardship should not result in undercompensation of victims of mass violations, particularly in situations involving mass violations of human rights. The importance of distinguishing crippling compensation from punitive damages was underlined, since an exceptionally large award might still be compensatory if it reflected the actual injury suffered. It was suggested that crippling compensation was better understood as part of the interpretation and application of the relevant primary obligation, rather than as an exception to a secondary rule. Some members were of the view that the financial

burden caused by crippling compensation should be addressed not through a fixed ceiling on compensation, but through equitable considerations and practical mechanisms, such as proportionality, payment modalities, instalments or compensation funds. It was noted that practice relating to international organizations might provide useful guidance on managing financial constraints while respecting the principle of full reparation.

318. Several members indicated their agreement to examine the role of general principles of law and equity in the law applicable to compensation. With respect to general principles of law applicable to compensation, some members were of the view that they should be identified through a transparent and genuine comparative analysis reflecting different legal traditions. A number of members emphasized that those general principles of law should not be derived from a single legal tradition, from a limited group of national legal systems or from one specialized field of international law, nor should they be confused with customary international law or specialized compensation techniques. The view was expressed that general principles of law might be relevant in relation to particular compensation rules, such as mitigation.

319. A number of members considered that equity might be of assistance in determining compensation where precise quantification was difficult, including in cases involving lump-sum awards, macroeconomic damage, non-material harm or crippling compensation. At the same time, it was stressed that equity must operate *infra legem* and should not replace legal rules. Some members considered that equity could help to achieve fair and practical compensation by avoiding both excessive and inadequate awards, and others suggested that equity might be particularly relevant to non-material injury, community harm and public-interest claims.

320. Members mentioned a number of additional issues that, in their view, were relevant to the topic, for example: (*a*) the question of continuing or composite internationally wrongful acts, including in situations involving succession of States; (*b*) the question of recoverable costs, such as legal costs, costs arising from the detention of vessels, environmental restoration costs and other related expenses; (*c*) mass damage and mass claims; and (*d*) *ex gratia* payments, domestic compensation and voluntary payments. Some members pointed out that such additional issues should be examined within the context of the topic only to the extent that they were directly relevant to the identification, assessment or implementation of compensation.

(d) Relevant judicial decisions and State practice

321. Practice from various international courts and tribunals and compensation mechanisms since the adoption by the Commission of the articles on State responsibility was considered to be particularly valuable. Some members emphasized that practice should be assessed by reference to its legal basis, institutional setting and remedial structure. Several members observed that investment arbitration might provide useful guidance but cautioned that, because such practice emerged under specific treaty frameworks, it should not be treated as determinative in the formulation of general secondary rules. The work of Working Group III of the United Nations Commission on International Trade Law on damages and compensation in investor-State dispute settlement was mentioned in that connection.

322. Some members considered cases and practice in human rights contexts relevant, especially in relation to non-material harm, satisfaction and the relationship with other forms of reparation, but emphasized the need to distinguish such practice from regime-specific remedial structures. Several members viewed claims commissions and institutional compensation mechanisms as useful for understanding mass claims, funding, enforceability, claims classification and administrative processing, and the need for an analysis of the rationales behind those mechanisms was also emphasized.

323. The importance of non-judicial practice, including negotiated settlements, lump-sum agreements and voluntary payments, was recognized. It was observed that non-judicial practice might demonstrate how States addressed evidence, causation, categories of loss, restoration costs and modalities of compensation. It was suggested that the Commission should proceed with caution when deriving general rules from compensation agreements, since such agreements might reflect political, diplomatic or practical compromises rather than evidence of *opinio juris* for identifying customary international law.

324. Several members considered that practice involving international organizations, private parties and emerging areas such as climate change should be taken into account but that generalization across different fields should be avoided. Some members suggested that domestic and transnational practice concerning colonial wrongs, forced labour and wartime abuse might illuminate issues of proof, valuation, community harm and intergenerational harm, without reopening broader questions of responsibility.

325. Members offered examples of potentially relevant practice, including claims settlement agreements and negotiated arrangements, such as the settlement between the United States of America and Viet Nam in 1995, settlements between Norway and the Syrian Arab Republic in 2006 and between Libya and Norway in 1985, nuclear testing compensation practices, *ex gratia* payment schemes, United Nations compensation mechanisms, General Assembly resolutions on the oil slick on Lebanese shores and on transatlantic slavery, practice of human rights treaty bodies and African, inter-American and European human rights courts, and national court decisions and settlements concerning historical injustices, as well as approaches developed in the Asia-Pacific region to equitable adjustment and to the relationship between harm and remedy. A view was expressed that contemporary compensation disputes often arose in developing countries, post-conflict societies and small island developing States.

(e) Final form

326. Several members supported the elaboration of draft articles on the topic, with some members emphasizing that draft articles would reflect the continuity between the topic and the Commission's previous work on responsibility and would enhance legal certainty and predictability. It was stressed that draft articles could be appropriate where the Commission's work was essentially codification and based on article 36 of the articles on State responsibility.

327. At the same time, a number of members expressed reservations about draft articles, as compensation practice was diverse, context-sensitive and often highly technical; it was stressed that a single set of draft articles might suggest a level of uniformity or rigidity not supported by the underlying practice. The view was expressed that draft articles might give the impression of creating a new self-contained regime of compensation or might overemphasize inter-State and investment law paradigms at the expense of human rights, environmental and victim-oriented approaches. It was suggested that issues such as evidence, the use of experts, equitable considerations and valuation methods might not fit naturally into draft articles.

328. A number of members favoured more flexible forms of provisions. Some members considered that draft principles would better reflect the Commission's task of identifying common norms of compensation across different fields, clarify the content, scope and application of article 36 of the articles on State responsibility and be more suitable for preserving a balance between codification and progressive development, reflecting the diversity of practice relevant to the topic. Others suggested that draft guidelines, possibly accompanied by a practical guide or handbook, might better capture the technical and operational dimensions of compensation. Some members referred to practice-oriented work in other contexts,

including investor-State dispute settlement, as illustrating the usefulness of guidelines for technical questions of damages and compensation.

329. Some members suggested that the Commission could consider a hybrid or combined form of output. It was suggested that work on the topic might identify specific legal rules where sufficient practice and *opinio juris* existed, while providing less prescriptive guidance on questions such as evidence, expert assessment, equitable considerations, valuation techniques, payment modalities and implementation. Some members considered that a hybrid approach was capable of preserving the legal character of the Commission's work while also responding to the practical needs of various actors.

330. Several members considered it premature to decide the final form at the present stage. It was stressed that the final form should follow substance and function and that the choice between the different forms should depend on the scope of the topic, the nature of the rules ultimately identified and the degree of support in practice. The need to take comments by States in the Sixth Committee into account before taking a final decision was emphasized by several members.

(f) Future programme of work

331. A number of members supported the proposed organization and schedule contained in the first report as a useful starting point, while emphasizing that it should remain provisional and flexible. Some members suggested that the Commission should adjust the organization and schedule of work in the light of further clarification of the scope of the topic and the comments to be made by States in the Sixth Committee. Several members emphasized that, overall, the future work of the Commission should remain evidence-based, practical and attentive to the views expressed by States in the Sixth Committee. It was stressed that the topic should provide meaningful and practical guidance, rather than remain at a purely abstract level or focus solely on formal legal rules. Several members emphasized that future work should distinguish between codification and progressive development.

332. It was suggested that a questionnaire to States prepared by the Special Rapporteur and a memorandum on compensation prepared by the Secretariat could be useful for strengthening the evidentiary basis for work on the topic. In particular, it was considered that both a questionnaire and a memorandum could provide useful guidance for the interpretation and further development of article 36 of the articles on State responsibility. It was suggested that a questionnaire could be addressed not only to States, but also to international organizations and other relevant institutions, in order to gather relevant practice.

3. Concluding remarks by the Special Rapporteur

333. The Special Rapporteur noted that members had emphasized the importance of the topic and had acknowledged that it could provide helpful practical guidance, including in clarifying various aspects of the rules on compensation.

334. Regarding the application of the law of responsibility to address historical injustices, the Special Rapporteur noted that the analysis of issues related thereto would be compatible with the existing framework and that he intended to consider them when work on the topic had reached the substantive stage. He also noted that recent developments mentioned by members, such as General Assembly resolution 80/250, explicitly referred to the articles on State responsibility. He indicated that the Commission's conception of responsibility was compatible with responsibility for conduct that was internationally wrongful, including by way of continuous or composite wrongful acts, by later agreement or establishment of consensus on what the primary obligation had been at the critical date, by acceptance of responsibility, litigation in national courts, or existence or creation of primary rules or other legal mechanisms that were not conditioned by wrongfulness of conduct.

335. In relation to the institutional aspect of the topic, the Special Rapporteur agreed with the observations of members that the practice of international courts and tribunals should not be the sole focus and that the examination of State practice more broadly, including non-judicial practice, was important. He explained that that broad approach informed the request for information on specific issues on which comments would be of particular interest to the Commission, contained in chapter III of the annual report, and would also inform the questionnaire to be communicated to States on the topic.

336. In relation to the focus on secondary rules, the Special Rapporteur acknowledged the points made in plenary that there might be situations where primary rules specifically determined compensation. He indicated that future reports on the topic would consider the possibility that primary rules might also operate as *lex specialis* secondary rules.

337. In relation to the question of compensation despite the presence of a circumstance precluding wrongfulness, he pointed out that one approach could be to consider the question incidentally in delineating the scope of the topic regarding wrongful conduct. The decision on whether a more concrete statement than that contained in the articles on State responsibility was possible might be deferred to the concluding stages of the first reading, to take into account the discussion in the Commission and the Sixth Committee and new materials that might emerge in the interim, including in States' responses to the questionnaire.

338. Concerning compensation for the damage caused, the Special Rapporteur agreed with the observation that the scope was limited to compensation and not full reparation. He reiterated that that approach was in conformity with customary international law and treaty obligations of full reparation, where compensation was but one form and not necessarily the most important, particularly for areas such as human rights law and environmental law, where other legal consequences of wrongful acts were accorded greater relevance. The Special Rapporteur confirmed that he did not intend to exclude punitive damages from the scope of the topic but that they should be considered and recognized as impermissible under international law.

339. Regarding the consideration of other legal consequences of internationally wrongful acts as part of the scope of the topic, the Special Rapporteur stated that the concept of financially assessable damage in article 36, paragraph 2, of the articles on State responsibility was intended to differentiate compensation from satisfaction. Moreover, the consideration of satisfaction could be relevant to explain what compensation was not and to that extent would be covered.

340. Concerning the issue of overlapping claims, the Special Rapporteur indicated that it could relate to the invocation and implementation of responsibility rather than its content and thus fell outside the intended scope of the topic. However, he mentioned that the plurality of injured and responsible actors would be covered to the extent relevant for the determination of the content of responsibility.

341. In relation to the scope *ratione personae* of the topic, namely, the entities entitled to compensation or obliged to provide it, the Special Rapporteur noted that, overall, members welcomed the approach of covering both States and individuals. In relation to compensation by international organizations, the Special Rapporteur noted that it seemed that members somewhat favoured addressing compensation by international organizations. In that connection, he stated that he would listen carefully to the statements in the Sixth Committee at the eighty-first session of the General Assembly regarding compensation by international organizations to form his opinion on how to proceed. He suggested that the decision could be deferred to the concluding stages of work on the topic, in the light of the discussion in the Commission and the Sixth Committee and the outcomes of pending international dispute settlement proceedings and decisions involving international organizations.

342. The Special Rapporteur acknowledged that an analysis of the particularities of rules, fields of international law, actors and injuries lay at the core of the topic and that a distinction also needed to be drawn as to which rules constituted *lex specialis*. He acknowledged the call for caution by members not to accord disproportionate weight to decisions of international investment tribunals, while stressing that the draft conclusions on subsidiary means for the determination of rules of international law provided benchmarks to assess the weight of decisions of international courts and tribunals, with the quality and relevance of decisions being central elements. He noted the difference between questions concerning the quality of a decision of an international tribunal and those concerning whether it was *lex specialis*.

343. In relation to the consideration of violations of peremptory norms of general international law (*jus cogens*), the Special Rapporteur indicated that he would reflect on it based on the Sixth Committee discussion of whether the particular issues identified as relating to compensation were traceable to *jus cogens* as a legal concept or a descriptive category. As to the concern expressed by some members that the work on the topic should not prioritize compensation over full reparation and the legal consequences of internationally wrongful acts, the Special Rapporteur recalled a suggestion that those issues could be addressed by a "without prejudice" clause. The Special Rapporteur further noted that members had emphasized the need to strike the juridical equilibrium through technical rules and principles.

344. Regarding the determination of the quantum of compensation, the Special Rapporteur noted that members considered it to be one of the greatest potential contributions of work on the topic. In relation to moral damages, the Special Rapporteur agreed that they should be given a central role in line with their treatment under human rights law and that the Commission could alleviate concerns raised about the arbitrariness of their determination by providing consistent and comprehensible criteria for the assessment and valuation of non-pecuniary harm. He reiterated that he would approach loss of profits and interest, including the practice of compound interest, with appropriate caution.

345. The Special Rapporteur indicated that he would also approach with the caution appropriate to the subject matter the question of whether account should be taken of the financial burden imposed on the responsible State when determining compensation, which had been left open in the reparations judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo*.[1312] He acknowledged that some members considered the question an important aspect for consideration. With respect to the consideration of equity and general principles of law, the Special Rapporteur recalled that it had already been discussed in relation to more particular aspects such as calculation of non-material damages and crippling compensation and that some members had described the use of equity as a manifestation of the concept of justice in relation to compensation.

346. He acknowledged the call by members for the Commission to engage thoroughly with State practice, while noting that some members called for caution in identifying the legal rationale of materials such as treaties and claims and in relying on materials or institutions that might suggest taking a position in current disputes. The Special Rapporteur indicated that he welcomed the views of the Commission regarding relevant State practice for the topic and would appreciate general suggestions or instances of practice from States, not limited to formalized dispute settlement.

347. In relation to the final form, the Special Rapporteur stated that he would address the question of the form in the second report, considering the views expressed in the Commission and the Sixth Committee. He also mentioned that the final form would depend on the substance of the draft provisions proposed.

[1312] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13.

348. In relation to the future programme of work, he recognized that some members had called for caution and affirmed that he would take into account views expressed by members and in the Sixth Committee when preparing the second report.

349. The Special Rapporteur stated that the plenary debate would inform his approach in the preparation of the questionnaire to be communicated to States on the topic and that a general request for relevant information would be contained in chapter III of the annual report of the Commission. He indicated that the questionnaire, building on the experience of work on the topic of settlement of disputes to which international organizations are parties, would include the request that materials be provided in time for the seventy-ninth session of the Commission, when more detailed issues and provisions might be ripe for discussion. Moreover, he had taken note of suggestions regarding a request for a memorandum by the Secretariat and would discuss its scope and timeline with the Secretariat.

Chapter XIII
Other decisions and conclusions of the Commission

A. Memorial for former members

350. At its 3739th meeting, on 13 May 2026, the Commission heard statements in honour of the memory of former members Ms. Concepción Escobar Hernández, Mr. Julio Barboza and Judge Stephen Schwebel. The Commission was also informed of the recent passing of Judge Sir Kenneth Keith.

B. Inclusion of a new topic in the programme of work

351. At its 3783rd meeting, on 30 July 2026, the Commission decided to include the topic "Identification and legal consequences of obligations *erga omnes* in international law" in its programme of work and to appoint Mr. Masahiko Asada as Special Rapporteur.

C. Request by the Commission for the Secretariat to prepare a memorandum

352. At its 3782nd meeting, on 29 July 2026, the Commission decided to request the Secretariat to prepare a memorandum for its seventy-ninth session providing information on whether, or to what extent, consideration is given to the financial capacity of the responsible State to pay compensation based on a survey of the case law of international courts and tribunals and other international bodies, and of treaties contained in the United Nations Treaty Series and in the League of Nations Treaty Series, which may be of relevance for its future work on the topic "Compensation for the damage caused by internationally wrongful acts".

D. Programme, procedures and working methods of the Commission and its documentation

353. On 29 April 2026, the Planning Group was constituted for the present session, with the first vice-chair, Mr. Alioune Sall, as Chair.

354. The Planning Group held four meetings on 30 April and 8 May, 3 June and 13 July 2026. It had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its eightieth session, prepared by the Secretariat (A/CN.4/788); General Assembly resolution 80/164 of 15 December 2025 on the report of the International Law Commission on the work of its seventy-sixth session; General Assembly resolution 80/167 of 15 December 2025 on the rule of law at the national and international levels; and the proposed programme budget for 2027, Programme 6, Legal affairs, subprogramme 3, concerning the progressive development and codification of international law.

1. Working Group on the long-term programme of work

355. At its 1st meeting, on 30 April 2026, the Planning Group decided to reconstitute the Working Group on the long-term programme of work with Mr. Marcelo Vázquez-Bermúdez as Chair. The Chair of the Working Group presented an oral report of the work of the Working Group to the Planning Group, on 13 July 2026, including proposals for topics being considered at the current session to the Planning Group. The Planning Group took note of the oral report.

356. The Commission, on the recommendation of the Working Group, decided to include the topic "The right to regulate in international investment law" in the long-term programme of work.

357. 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 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.[1313]

358. The Commission considered that the topic selected would constitute a useful contribution to the progressive development of international law and its codification. The syllabus of the topic appears in annex I to the present report.

359. The Commission recalls that 10 other topics remain on the long-term programme of work, namely: (*a*) ownership and protection of wrecks beyond the limits of national maritime jurisdiction; [1314] (*b*) jurisdictional immunity of international organizations;[1315] (*c*) protection of personal data in transborder flow of information;[1316] (*d*) extraterritorial jurisdiction;[1317] (*e*) the fair and equitable treatment standard in international investment law;[1318] (*f*) evidence before international courts and tribunals;[1319] (*g*) universal criminal jurisdiction;[1320] (*h*) reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law; [1321] (*i*) the principle of non-intervention in international law;[1322] and (*j*) legal aspects of accountability for crimes committed against United Nations personnel serving in peacekeeping operations.[1323]

360. The Commission, on the recommendation of the Working Group, also decided to include in its annual report an updated version, prepared by Mr. Mario Oyarzábal, of the syllabus on the topic "Extraterritorial jurisdiction", which was included in the long-term programme of work of the Commission at its fifty-eighth session (2006).[1324] The revised syllabus of the topic appears in annex II to the present report.

2. Working Group on methods of work and procedures

361. At its 1st meeting, on 30 April 2026, the Planning Group decided to reconvene the Working Group on methods of work and procedures of the Commission, with Mr. Charles Chernor Jalloh as Chair. The Working Group held six meetings on 22 and 29 May and 6, 7, 8 and 9 July 2026.

1313 *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553. See also *Yearbook ... 1997*, vol. II (Part Two), para. 238.
1314 *Yearbook ... 1996*, vol. II (Part Two), para. 248 and annex II, Addendum 2.
1315 *Yearbook ... 2006*, vol. II (Part Two), para. 257 and annex II.
1316 *Ibid*., para. 257 and annex IV.
1317 *Ibid*., para. 257 and annex V.
1318 *Yearbook ... 2011*, vol. II (Part Two), para. 365 and annex IV.
1319 *Yearbook ... 2017*, vol. II (Part Two), para. 267 and annex II.
1320 *Yearbook ... 2018*, vol. II (Part Two), para. 369 and annex I.
1321 *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 290 and annex II.
1322 *Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (A/80/10), para. 446 and annex II.
1323 *Ibid.*, para. 446 and annex IV.
1324 *Yearbook ... 2006*, vol. II (Part Two), para. 257 and annex V.

362. 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 13 July 2026. The Planning Group took note of the oral report.

363. During the present session, the Working Group focused on advancing the preparation of the handbook on the methods of work and procedures of the Commission, which began in 2023. It can be recalled that the Commission had decided, in 2024, to focus on this issue, as part of its three standing agenda items on the revitalization of the working methods and procedures. The work carried out was based on drafts containing relevant material drawn from volume I of the *Work of the International Law Commission* and the reports of the Commission addressing methods of work from 1996 and 2011, as well as proposals for improvement made by members in the previous quinquennium. The Working Group considered two draft chapters and included various updates, including new elements, such as examples from the recent practice of the Commission. It is expected that, during the intersessional period, to the extent possible, and next year, the above-mentioned work will continue with the objective of finalizing the handbook at the seventy-eighth session.

364. The Working Group also began the consideration of elements to be included in the final report of its work during the quinquennium regarding proposals for improvements to the working methods of the Commission, to be finalized at the seventy-eighth session. These included possible recommendations on the various procedures of the Commission, including in relation to such issues as the preparation of documents, the scope of the work of the various bodies in the Commission, such as working groups and the Drafting Committee, and the question of nomenclature of the various forms of output of the Commission. Given that the next session will be the last of the present quinquennium, sufficient time will need to be allocated to the Working Group to finalize both its handbook and report.

3. Consideration of General Assembly resolution 80/167 of 15 December 2025 on the rule of law at the national and international levels

365. The General Assembly, in its resolution 80/167 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.[1325] 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[1326] report remain relevant and reiterates the comments made at its previous sessions.[1327]

366. 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.

[1325] Para. 22.

[1326] *Yearbook... 2008*, vol. II (Part Two), pp. 146–147.

[1327] *Yearbook... 2009*, vol. II (Part Two), para. 231; *Yearbook... 2010*, vol. II (Part Two), paras. 390–393; *Yearbook... 2011*, vol. II (Part Two), paras. 392–398; *Yearbook... 2012*, vol. II (Part Two), paras. 274–279; *Yearbook... 2013*, vol. II (Part Two), paras. 171–180; *Yearbook... 2014*, vol. II (Part Two), paras. 273–280; *Yearbook... 2015*, vol. II (Part Two), paras. 288–295; *Yearbook... 2016*, vol. II (Part Two), paras. 314–322; *Yearbook ... 2017*, vol. II (Part Two), paras. 269–278; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 372–380; *ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 293–301; *ibid., Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 304–312; *ibid., Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 258–269; *ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 262–274; and *ibid., Seventy-ninth Session, Supplement No. 10* (A/79/10), paras. 431–442.

367. 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. The Commission recalls that the worsening financial difficulties of the United Nations led, in 2025, to the limitation of its session to a single five-week period, instead of the twelve weeks originally planned and approved by the General Assembly. Such limitations forced the Commission to delay progress in various topics and to postpone to the current session the adoption on second reading of the draft articles on immunity of State officials from foreign criminal jurisdiction and the draft conclusions on general principles of law, as well as the adoption on first reading of the draft conclusions on subsidiary means for the determination of rules of international law and of the draft guidelines on settlement of disputes to which international organizations are parties. The Commission notes that, in accordance with General Assembly resolution 80/164 of 15 December 2025, its seventy-seventh session was held over eleven weeks, which reflects a partial restoration of the duration of its proceedings, while still falling short of the approved twelve weeks.[1328] It further notes that the General Assembly decided that the Secretariat would not take any exceptional measures affecting the duration of the current session without consulting the Bureau of the Sixth Committee.[1329] The Commission remains concerned that any reduction in the duration of its sessions has significant effects on the organization of its work, places a burden on its programme of work and undermines the conditions under which it carries out its mandate, thereby weakening the promotion of the rule of law at the international level.

368. As part of its mandate concerning the promotion of the progressive development of international law and its codification, the Commission will continue to take into account the rule of law as a principle of governance and the human rights and sustainable development that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations, as well as in the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.[1330]

369. 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)",[1331] without favouring one over the other. The Commission also takes note of recent international judicial developments on sustainable development and climate change, including the advisory opinion that the International Court of Justice issued on 23 July 2025, on the *Obligations of States in Respect of Climate Change*,[1332] following the request submitted to it by consensus by the General Assembly.

370. In accordance with its mandate of the promotion of the progressive development of international law and its codification, its mission to promote respect for the rule of law at the international level and its supportive function to the General Assembly and to States, the Commission welcomes the calls expressed by the President of the General Assembly to elaborate legally binding instruments on prevention and punishment of crimes against humanity and on the protection of

[1328] Para. 21.
[1329] Para. 22.
[1330] General Assembly resolution 67/1 of 24 September 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.
[1331] Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, para. 70.
[1332] *Obligations of States in Respect of Climate Change*, Advisory Opinion, 23 July 2025, General List No. 187.

persons in the event of disasters.[1333] The Commission recalls that these topics have been integral to its programme of work, leading to the adoption of draft articles on the protection of persons in the event of disasters in 2016[1334] and draft articles on prevention and punishment of crimes against humanity in 2019.[1335] The Commission notes with satisfaction that, by its resolution 79/122 of 4 December 2024, the General Assembly decided to advance the drafting of a convention on prevention and punishment of crimes against humanity on the basis of these draft articles[1336] and that the Preparatory Committee for the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity held its first session in New York from 19 to 30 January 2026. The Commission also notes with satisfaction that the General Assembly convened the United Nations Conference of Plenipotentiaries on the Protection of Persons in the Event of Disasters in resolution 80/169 of 15 December 2025, and that the Preparatory Committee will meet in New York from 31 August to 4 September 2026.

371. In fulfilling its mandate concerning the promotion of the progressive development of international law and its codification, the Commission is conscious of the extent of the challenges concerning the strengthening of the rule of law, including the need to ensure gender parity in national and international institutions and considers equal representation as an element of the rule of law. In this regard, the Commission is itself aware that, in terms of its own composition, progress needs to be made to achieve this goal.

372. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,[1337] 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 promotion of the progressive development of international law and its codification.

373. The Commission particularly welcomes the General Assembly's decision to invite Member States to focus their comments concerning the rule of law during the debates in the Sixth Committee at the eightieth session of the General Assembly, on the subtopic "The rule of law at the national and international levels at the eightieth anniversary of the United Nations"[1338]. It further notes with particular interest that, in its resolution 80/167, the General Assembly invited Member States to focus their comments during the upcoming debate in the Sixth Committee at its eighty-first session on the subtopic "Enhancing the rule of law by strengthening the cooperation between the Sixth Committee of the General Assembly and the International Law Commission",[1339] the subject matter of which directly relates to the dialogue between the Sixth Committee and the Commission.

374. The Commission emphasizes the importance it attaches to its close dialogue with the Sixth Committee, which is an essential element in the exercise of its mandate to progressively develop and codify international law. In this regard, the Commission

[1333] United Nations, "Sixième Commission: le Président de l'Assemblée générale appelle à élaborer des conventions sur les crimes contre l'humanité et sur la protection des personnes" ["Sixth Committee: General Assembly President calls for the development of conventions on crimes against humanity and the protection of persons"], press release, 17 October 2024 (French only).

[1334] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. IV.

[1335] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. IV.

[1336] General Assembly resolution 79/122 of 4 December 2024 on the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity.

[1337] General Assembly resolution 78/112 of 7 December 2023 on the rule of law at the national and international levels, paras. 2 and 20.

[1338] General Assembly resolution 79/126 of 4 December 2024 on the rule of law at the national and international levels, para. 24.

[1339] *Ibid*., para. 25.

recalls that, at its seventy-fourth session (2023), it adopted a standing agenda item, in the context of its working group on methods of work, aimed at examining and strengthening the "relationship of the International Law Commission with the General Assembly and other bodies".[1340] It further recalls that the Sixth Committee's annual review of its reports, as well as the comments and observations that States provide to it—both in writing and during the debate—guide and enrich its work at every stage of its proceedings. Recognizing that the quality of this dialogue largely determines the contribution that both bodies make to strengthening the rule of law at the international level, the Commission expresses its willingness to explore, in a spirit of cooperation, ways to enhance the fluidity and effectiveness of this dialogue with a view to fostering mutual understanding. In this context, the Commission reaffirms the importance of contributions from States and international organizations, particularly insofar as they help to better identify the needs that its work must address. The Commission further recalls that its website constitutes an essential tool to ensure the widest possible dissemination of its work and to foster ongoing dialogue with all stakeholders.[1341]

375. The Commission thus intends to demonstrate, in keeping with its long-standing vocation, that it is committed to grounding its work in reality and thereby satisfying the needs expressed by States. The discussion of the rule of law is intended to remain consistent with this approach, as reflected in the processes leading to the drafting of several multilateral treaties,[1342] some of which have been adopted.[1343]

376. During the present session, the Commission continued to make its contribution to the promotion of the rule of law, including by working on the topics in the programme of work for the present session: "Immunity of State officials from foreign criminal jurisdiction"; "General principles of law"; "Succession of States in respect of State responsibility"; "Subsidiary means for the determination of rules of international law"; "Settlement of disputes to which international organizations are parties"; "Non-legally binding international agreements"; "Prevention and repression of piracy and armed robbery at sea"; "Due diligence in international law"; and "Compensation for the damage caused by internationally wrongful acts".

377. The Commission reiterates its commitment to the promotion of the rule of law throughout its work.

4. Honoraria

378. The views of the Commission concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002 have been expressed in its previous reports.[1344] The Commission emphasizes that

[1340] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 257.

[1341] See section 9 below and https://legal.un.org/ilc/.

[1342] General Assembly resolution 78/112 of 7 December 2023 on the rule of law at the national and international levels, para. 9.

[1343] See, in particular, *Yearbook… 2015*, vol. II (Part Two), para. 294.

[1344] See *Yearbook … 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook … 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook … 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook … 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook … 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook … 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook … 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook … 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook … 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook … 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook … 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook … 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook … 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook … 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook … 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook … 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 302; *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10),

resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research. This is without prejudice to the establishment of the trust fund pursuant to paragraph 37 of resolution 77/103 of 7 December 2022.

5. Documentation and publications

379. The Commission once again emphasizes 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 courts and international courts and tribunals in its treatment of questions of international law. The Commission reiterates 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 once again 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 continues to reiterate 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, in particular to be in a position to collect materials as representative as possible coming from the different legal systems of the world. It follows that Special Rapporteurs cannot be asked to reduce the length of their reports following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission to the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.[1345]

380. 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, before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterates the importance of Special Rapporteurs submitting their reports within the time limits specified by the Secretariat. Only on this basis can the Secretariat ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

381. On the other hand, the Commission calls on the Secretariat to ensure that the documentation services involved in editing and translating documents increase their efficiencies, in particular, in ensuring the timely processing and circulation of Special Rapporteur reports from the original languages in which they are prepared to all the other official languages of the Commission.

382. The Commission recognizes the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.[1346] The Commission notes with appreciation the efforts of the Secretariat in desktop

para. 317; *ibid.*, *Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 270; *ibid.*, *Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 277; *ibid.*, *Seventy-ninth Session* (A/79/10), para. 446; and *ibid.*, *Eightieth Session* (A/80/10), para. 464.

[1345] 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.

[1346] See *Yearbook ... 2007*, vol. II (Part Two), paras. 387–395. See also *Yearbook ... 2013*, vol. II (Part Two), para. 185.

publishing, which greatly enhanced the timely issuance of such publications for the Commission, despite constraints due to lack of resources.

383. The Commission again reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development of international law and its codification, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English version for timely correction and prompt release. The Commission once more called on the Secretariat to resume the practice of preparing provisional summary records in both English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission, subject to the availability of the resources to do so. The Commission further noted that the more recent practice of submitting to the members of the Commission the provisional records electronically for corrections to be made in track changes continued to work 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.

384. The Commission expressed its gratitude to all Services involved in the processing of documentation 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 continued to be appreciated in light of the ongoing financial constraints.

385. The Commission reaffirmed its commitment to multilingualism and recalled the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolution 76/268 of 10 June 2022.[1347]

386. The Commission expressed its appreciation to the United Nations Library at Geneva for the research support services provided during its seventy-seventh session and for the dedicated efforts of the Library staff. It welcomed the updated multilingual bibliographies and tailored online information package prepared for the Commission, as well as the selection of print materials made available in temporary Library spaces and the provision of interlibrary loan services. These efforts ensured continued access to essential resources during the ongoing renovation of the Library and Archives building.

387. The Commission emphasized the importance of protecting the Library's collections during the renovation of the premises of the United Nations Office at Geneva and ensuring their safe and timely return to the Library's stacks and reading rooms. The Commission expressed its appreciation for the arrangements made to provide research facilities and workspaces in temporary spaces during its seventy-seventh session and underscored that access to adequate research facilities was essential to its work. It stressed the need to ensure sufficient research workspaces for members and assistants near the meeting room and that the specialized reading rooms in the Library and Archives building were restored in time for the seventy-eighth session.

388. The Commission reaffirmed that the Library's services, collections and facilities were indispensable to its work. It noted with concern that persistent

[1347] See also General Assembly resolutions 69/324 of 11 September 2015; 71/328 of 17 September 2017; and 73/346 of 16 September 2019. See further General Assembly resolutions 77/103 of 7 December 2022; 78/108 of 7 December 2023; and 80/164 of 15 December 2025.

budgetary constraints, including reductions in posts, adversely affected the Library's capacity to provide the specialized resources and research support upon which the Commission relied. The Commission therefore stressed the need to ensure that the Library was provided with adequate human and financial resources to sustain its collections, maintain the quality and continuity of its services and fulfil its mandate.

6. *Yearbook of the International Law Commission*

389. The Commission once again confirmed that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 80/164, once again expressed its appreciation to Governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to the Trust Fund. The Commission wishes to express its gratitude for the contributions received from Austria, Cyprus, Ireland, Qatar, Panama, the Philippines, Portugal and Türkiye to the Trust Fund since the seventy-sixth session in 2025.

390. The Commission recommends that the General Assembly, as it had done in its resolution 80/164, express its satisfaction with the remarkable progress achieved in recent years in addressing the backlog of the *Yearbook of the International Law Commission* in all six languages, and welcome the efforts made by the Division of Conference Management of the 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* while ensuring the high quality of the publication.

7. Trust Fund on assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto, established by General Assembly resolution 77/103

391. In resolution 80/164, the General Assembly expressed its appreciation for contributions made to the Trust Fund for assistance to Special Rapporteurs of the International Law Commission or Chairs of its Study Groups and matters ancillary thereto, established by resolution 77/103, and invited further contributions to the Trust Fund, in accordance with the terms of the Trust Fund, including the need for the financial contributions not to be earmarked for any specific activity of the International Law Commission, its Special Rapporteurs or Chairs of its Study Groups. Since the seventy-sixth session in 2025, contributions were received from Austria, Cyprus, the Czech Republic, Ireland, Portugal and the United Kingdom of Great Britain and Northern Ireland.

392. The Commission expressed its appreciation to States that had contributed to the Trust Fund and noted that the Codification Division had opened a call for applications for possible assistants to constitute a roster of suitable candidates to assist the Special Rapporteurs. One person was hired to assist Mr. Louis Savadogo, Special Rapporteur on prevention and repression of piracy and armed robbery at sea and two persons were hired to assist Mr. Claudio Grossman Guiloff, Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.[1348] The Commission reiterated the importance of diversity of legal systems, gender, language and regional diversity being taken into consideration and highlighted the importance

[1348] Ms. Meriem Agrebi (Tunisia), Ms. Joana de Andrade Pacheco (Brazil) and Ms. Victoria Ernst (United States of America).

of this initiative as a training opportunity for young international law professionals and scholars, especially those from developing countries.

8. Assistance of the Codification Division

393. The Commission once again reiterated its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the continuing assistance provided to Special Rapporteurs, Co-Chairs of Study Groups and Chairs of working groups, and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. The Commission also recognized the work of the Codification Division in providing texts in different languages to ensure the quality and representativeness of the work of the Drafting Committee. The Commission further reiterated its deep concern regarding the reduction of resources allocated to the Codification Division, in particular the recent further cuts as part of the UN80 Initiative, which have reduced the number of staff available to service the Commission. It also, once again, reiterated the importance of implementing all the decisions of the General Assembly concerning the indispensable role of the Codification Division, including in providing assistance to the Commission.

9. Websites

394. The Commission reiterated its appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.[1349] The Commission once again expressed the view that the website and other websites maintained by the Codification Division [1350] constitute an invaluable resource for the Commission and for researchers, including practitioners and scholars of the work of the Commission, thereby contributing to the rule of law and to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission continued to welcome 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 streaming of the plenary meetings of the Commission. The Commission reiterated its view that it would be desirable to allocate additional funding and to pursue the possibility of seeking voluntary funding to make the website of the Commission accessible in the six official languages of the United Nations. The Secretariat was further encouraged to consider pursuing technological solutions in assisting in providing translations, subject to the availability of the resources.

10. Webcast

395. The Commission reiterated its concern about the discontinuance of the live streaming service of the United Nations webcast of its plenary meetings. The Commission noted the importance of the availability of the webcast to facilitate the engagement of the delegates of the Sixth Committee with the work of the Commission and noted the feedback obtained in the past that expressed interest in following the work of the Commission with such a tool. The Commission considered that it was desirable to maintain the use of the webcast and called on the Member States to consider allocating the necessary financial resources to ensure the availability of the webcast at future sessions. The Commission drew attention to the existence of the "listen live" functionality provided by the United Nations Office at Geneva.[1351]

[1349] http://legal.un.org/ilc.
[1350] In general, available from: http://legal.un.org/cod/.
[1351] https://listen-live.unog.ch/en/.

11. United Nations Audiovisual Library of International Law

396. The Commission reiterated its appreciation for the extraordinary value of the United Nations Audiovisual Library of International Law[1352] in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission. The Commission acknowledged the recent activities of the United Nations Audiovisual Library of International Law and called for continued efforts to overcome the delays in the addition of new content. The Commission further welcomed the addition of content across various topics of international law and the use of new formats and means of sharing the lectures, including the recent establishment of a Spotify podcast functionality, besides the existing podcast accounts on SoundCloud and Apple Podcasts, with over 500 audio lectures in all United Nations official languages. The Commission also welcomed the efforts of the Secretariat in ensuring greater accessibility through the addition of transcripts to new lectures added to the library.

12. Resolutions of the General Assembly on the United Nations Conferences of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity and on Protection of Persons in the Event of Disasters

397. The Commission welcomed once again the adoption of resolution 79/122 of 4 December 2024 whereby the General Assembly decided to convene the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity to elaborate and conclude a legally binding instrument on the basis of the draft articles on prevention and punishment of crimes against humanity adopted by the Commission in 2019,[1353] to take place at the United Nations Headquarters in New York in 2028. In accordance with General Assembly resolution 79/122 of 4 December 2024 and decision 80/521 of 15 December 2025, the Preparatory Committee for the United Nations Diplomatic Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity met from 19 to 30 January 2026 (first session), and will meet from 12 to 15 April 2027 (second session) at United Nations Headquarters in New York.

398. The Commission also welcomed the adoption of resolution 80/169 of 15 December 2025 whereby the General Assembly decided to convene the United Nations Conference of Plenipotentiaries on Protection of Persons in the Event of Disasters on the basis of the draft articles on protection of persons in the event of disasters adopted by the Commission in 2016, to take place in 2027.[1354] A resumed session of the Sixth Committee devoted to the consideration of the topic was held from 6 to 10 April 2026. In accordance with General Assembly resolution 80/169 of 15 December 2025, the Preparatory Committee for the United Nations Diplomatic Conference of Plenipotentiaries on Protection of Persons in the Event of Disasters will meet from 31 August to 4 September 2026 at United Nations Headquarters in New York.

399. The Commission further welcomed the resumption of the practice of inviting the respective Special Rapporteurs of the Commission on the topic to serve as legal experts in both Conferences.

[1352] http://legal.un.org/avl/intro/welcome_avl.html.

[1353] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. IV.

[1354] *Ibid., Supplement No. 10* (A/71/10), chap. IV.

13. Visit of the Secretary-General

400. At the 3755th meeting, on 6 July 2026, the Secretary-General, Mr. António Guterres, visited the Commission and delivered remarks.[1355]

14. Date and place of the seventy-eighth session of the Commission

401. The Commission decided that its seventy-eighth session would be held in Geneva from 26 April to 11 June and from 5 to 30 July 2027.

402. In paragraph 281 of the report of its seventy-third session (2022), paragraph 291 of the report of its seventy-fourth session (2023), paragraph 464 of the report of its seventy-fifth session (2024) and paragraph 488 of the seventy-sixth session (2025), the Commission recommended holding the first part of its seventy-seventh (2026) session in New York with the view to enhancing its dialogue with the General Assembly to facilitate direct contact between the Commission and delegates of the Sixth Committee. Since insufficient resources were made available to hold the first part of the seventy-seventh session in New York, the most cost-effective solution was to hold it at the United Nations Office at Geneva. The Commission hopes that in the future the Secretariat will, accordingly, be able to proceed with holding part of a future session in New York. The Commission reiterated that particular attention was drawn to the need to ensure access to the venue of the meetings and availability of sufficient conference and library facilities at Headquarters and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. The need to ensure access and sufficient space for assistants to members of the Commission to attend meetings of the Commission was once again emphasized.

E. Cooperation with other bodies

403. At the 3741st meeting, on 15 May 2026, Judge Iwasawa Yuji, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[1356] An exchange of views followed.

404. The Commission, at its 3743rd meeting on 20 May 2026, decided, in order to strengthen its substantive exchanges, to establish a working group on cooperation with regional legal bodies, chaired by Mr. Andreas D. Mavroyiannis, the Chair of the Commission at the present session. The Working Group held an exchange of views with the Committee of Legal Advisers on Public International Law of the Council of Europe on 2 July 2026,[1357] the Inter-American Juridical Committee on 14 July 2026[1358] and the Asian-African Legal Consultative Organization on 15 July 2026.[1359] The Commission continues to value its cooperation with such bodies and expresses

[1355] The remarks by the Secretary-General are available at https://www.un.org/sg/en/content/sg/statements/2026-07-06/secretary-generals-remarks-the-international-law-commission-delivered. See also A/CN.4/SR.3755.

[1356] See A/CN.4/SR.3741.

[1357] The Working Group met with the representatives of the Committee of Legal Advisers on Public International Law, from the Council of Europe (CAHDI), Ms. Kerli Veski, Chair of the CAHDI, together with Ms. Ana Gomez, Secretary of CAHDI, and Ms. Zine Homburger, from the CAHDI Secretariat. The two topics discussed at the meeting were non-legally binding international agreements and settlement of disputes to which international organizations are parties.

[1358] The Working Group met with the Chair of the Inter-American Juridical Committee, Mr. Julio José Rojas Báez. The two topics discussed at the meeting were non-legally binding international agreements and sea-level rise in relation to international law.

[1359] The Working Group received the Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Dr. Kamalinne Pinitpuvadol. The two topics discussed at the meeting were non-legally binding international agreements and the role of regional organizations in supporting the progressive development and codification of international law.

the hope that the exchanges of views can be continued in future sessions, including in the format of a working group.

405. On 7 July 2026, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on matters of mutual interest. Welcome remarks were made by Mr. Jürg Lauber, ICRC Vice-President, and opening remarks by Ms. Cordula Droege, Chief Legal Officer and Head of the Legal Division, ICRC, and Mr. Andreas D. Mavroyiannis, Chair of the Commission. A presentation was made on the work of the Commission on the topic "Due diligence in international law" by Ms. Penelope Ridings, Special Rapporteur on the topic. A presentation was made by Ms. Abby Zeith, Legal Adviser, on "Recent developments and emerging issues in the law of naval warfare". A presentation was also made as an update on the Commission's work on immunity of State officials from foreign criminal jurisdiction by Mr. Claudio Grossman Guiloff, Special Rapporteur. The presentations were followed by an exchange of views. Concluding remarks were made by Ms. Lindsey Cameron, incoming Head of the Legal Division, ICRC.

F. Representation at the eighty-first session of the General Assembly

406. The Commission decided that it should be represented at the eighty-first session of the General Assembly by its Chair, Mr. Andreas D. Mavroyiannis.

G. International Law Seminar

407. Pursuant to General Assembly resolution 80/164 of 15 December 2025, the sixtieth session of the International Law Seminar was held at the Palais des Nations from 29 June to 17 July 2026, during the present session of the International Law Commission. The Seminar is intended for young jurists specializing in international law, as well as young professors or government officials pursuing academic or diplomatic careers.

408. Twenty-three participants from different nationalities and all regional groups took part in the session.[1360] The participants attended the plenary meetings of the Commission and attended specially arranged lectures and visits.

409. The Legal Office of the United Nations Office at Geneva was responsible for the administration and organization of the Seminar. Mr. Michael Schoiswohl, Senior Legal Adviser to the United Nations Office at Geneva, served as its Director, assisted by Ms. Vinuon In. Mr. Vittorio Mainetti, international law expert and consultant, acted as Coordinator, assisted by Ms. Aure Allexandre, Assistant Coordinator, and Mr. Adrien Aurejac, legal intern, who was responsible for the development and realization of the Seminar's sixtieth anniversary commemorative project.

[1360] The following persons participated in the Seminar: Mr. Abdulahi Mohamed Abdulahi (Somalia), Mr. Sauryk Abirbek (Kazakhstan), Mr. Carlos Alarcón Armendáriz (Ecuador), Mr. Alan Amadio (Italy), Ms. Karin Arana Chacón (Guatemala), Mr. Jonathan Brosseau-Rioux (Canada), Mr. Quazi Omar Foysal (Bangladesh), Mr. Eduardo Fragoso Jacobo (Mexico), Ms. Yinuo Kang (China), Ms. Haidy Mahmoud (Egypt), Ms. Desrie Markham (Antigua and Barbuda), Mr. El Hadj Mohamedou (Mauritania), Ms. Marang Sanyang (Gambia), Mr. Jutha Saovabha (Thailand), Ms. Ioana-Alexandra Smărăndescu (Romania), Mr. Sergej Stoma (Lithuania), Ms. Linda Sydänmaanlakka (Finland), Mr. Elisée Judicaël Tiehi (Côte d'Ivoire), Mr. Mawuto Tossa (Togo), Ms. Özge Türk (Türkiye), Ms. Velina Valcheva (Bulgaria), Ms. Melinda Vittay (Hungary) and Ms. Hla Yadanar Win (Myanmar). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 8 May 2026 and selected 24 candidates from 379 applications. One participant was unable to continue participating in the Seminar after the first day due to an unforeseen personal emergency.

410. On the first day of the Seminar, Mr. Andreas D. Mavroyiannis, Chair of the Commission, officially opened the Seminar. Mr. Michael Schoiswohl and Mr. Vittorio Mainetti welcomed the participants.

411. Lectures and briefings were delivered by several members of the International Law Commission. These included: Mr. Giuseppe Nesi on "The work of the International Law Commission"; Mr. Keun-Gwan Lee on "Simulating the work of the International Law Commission"; Mr. Charles Chernor Jalloh on "Subsidiary means for the determination of rules of international law"; Mr. Claudio Grossman Guiloff on "Immunity of State officials from foreign criminal jurisdiction"; Mr. Bimal N. Patel on "Succession of States in respect of State responsibility"; Mr. Louis Savadogo on "Prevention and repression of piracy and armed robbery at sea"; Mr. Mathias Forteau on "Non-legally binding international agreements"; Mr. Mārtiņš Paparinskis on "Compensation for the damage caused by internationally wrongful acts"; Mr. Marcelo Vázquez-Bermúdez on "General principles of law"; Mr. August Reinisch on "Settlement of disputes to which international organizations are parties"; and Ms. Penelope Ridings on "Due diligence in international law". Mr. Arnold Pronto, Director of the Codification Division and Secretary of the Commission, delivered a lecture entitled "The work of the Codification Division".

412. Participants also attended a round table on "Climate change before international courts and tribunals: reflections for the ILC", chaired by Mr. Vittorio Mainetti, with presentations by Mr. Roberto Virzo, Professor of International Law at the University of Messina, Italy; Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva; Ms. Nilüfer Oral, member of the Commission; Mr. Claudio Grossman Guiloff, member of the Commission; and Ms. Mara Tignino, Senior Lecturer at the University of Geneva and Scientific Director of the Geneva Water Hub.

413. Participants attended the launch of the publication *International Law for Diplomats*, organized by the United Nations Library and Archives Geneva. They also attended the launch of *The Cambridge Handbook on the League of Nations and International Law*. A presentation of the United Nations Library was organized for the participants, followed by a visit of the Library and of the premises of the United Nations Office at Geneva.

414. A session was devoted to the International Law Research Forum, which provided participants with an opportunity to present their research and to exchange views on a wide range of contemporary issues of international law.

415. An exercise was organized and chaired by Mr. Keun-Gwan Lee, member of the Commission, offering participants an opportunity to simulate the work and proceedings of the International Law Commission. The exercise focused on the topic "Non-legally binding international agreements", currently under consideration by the Commission. Mr. Matthias Forteau, Special Rapporteur on the topic, provided feedback on the draft conclusions prepared during the simulation exercise.

416. Participants visited the International Labour Organization (ILO) and attended presentations given by Ms. Tomi Kohiyama, ILO Legal Adviser, Ms. Foivi Vlastou-Dimopoulou and Ms. Thais Oliveira Adileu, ILO Legal Officers, on ILO standard-setting and related developments. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Hôtel de Ville. Seminar participants visited the Alabama Room and the premises of the cantonal authorities, guided by the Protocol Service of the Republic and Canton of Geneva.

417. A closing ceremony was held with the Commission, on 17 July 2026, to mark the end of the sixtieth session of the International Law Seminar and to commemorate its sixtieth anniversary. During the ceremony, each participant was presented with a diploma. Mr. Andreas D. Mavroyiannis, Mr. Michael Schoiswohl and Mr. Vittorio Mainetti, and Ms. Yinuo Kang (China), Ms. Ioana-Alexandra Smărăndescu, (Romania), Mr. El Hadj Lehbib Mohamedou (Mauritania), and Ms. Desrie Markham

(Antigua and Barbuda), on behalf of participants attending the Seminar, addressed the Commission. Several members of the Commission who had previously attended the Seminar also took the floor to share their experience and to reflect on the importance of the Seminar for their professional careers.

418. The Commission noted with preoccupation that, in recent years, the finances of the International Law Seminar have been adversely affected by economic and financial factors, which in turn has had an impact on what the Seminar can offer in terms of stipends. While the situation improved after 2022, owing to large voluntary contributions, since 2025 the level of contributions received has declined significantly. Continued voluntary contributions are essential to securing the Seminar's operation and accessibility. Therefore, the Seminar must reflect on ways and means to broaden its financial basis in the future.

419. In 2026, 15 fellowships were granted (5 for travel and subsistence and 10 for subsistence only). Since its inception in 1965, 1,397 participants from 180 countries have attended the Seminar. Some 843 have received a fellowship.

420. The Commission noted with satisfaction that comprehensive conference services and facilities, including interpretation services in English, French and Spanish, were made available to the Seminar. It expressed the hope that the same services would be provided at future sessions, within existing resources. The Commission also expressed its appreciation for the support provided by the United Nations Library and Archives Geneva, whose facilities and resources contributed to the successful conduct of the session.

421. The Commission reiterates the importance it attaches to the Seminar, which enables young international lawyers, especially from developing countries, to deepen their understanding of the work of the Commission and the activities of international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar for its sixty-first session in 2027, with as broad a participation as possible and adequate geographical distribution.

Annex I

The right to regulate in international investment law

New topic proposed by Vilawan Mangklatanakul

I. Introduction

1. International law on the protection of foreign investment has evolved from a set of rules under customary international law and general principles of law into specifically designed treaty provisions with the objectives of creating favourable conditions for fostering investment flows and offering adequate protection to investments.[1] Investment has become an important pillar for economic development, employment generation and social advancement. Establishing an environment in which investment can thrive, especially in low- and middle-income countries, is seen as crucial for building resilient pathways to sustainable economic growth.[2] Over the years, these proliferating investment treaties[3] have formed the so-called investment treaty regime[4] with their own evolutionary features and backlashes.[5] States have realized that the set of rules originally aimed at encouraging and protecting foreign investments may have excessively constrained their regulatory space. This policy space issue has increasingly gained traction, especially in the light of various challenges facing the world today, such as pandemics, environmental degradation, climate change and extreme poverty. As the world is seeking to achieve inclusive and sustainable economic growth, as well as accelerating climate change adaptation and mitigation and tackling other global issues through increasing reliance on international law,[6] it must be ensured that the investment treaty regime is able to accommodate these goals. After all, international investment law is not "an island,

[1] K.J. Vandevelde, "A brief history of international investment agreements", *UC Davis Journal of International Law and Policy*, vol. 12 (2005–2006), pp. 157–194.

[2] United Nations Economic and Social Commission for Asia and the Pacific, *Foreign Direct Investment and Sustainable Development in International Investment Governance* (Bangkok, 2019).

[3] See UNCTAD, "International Investment Agreements Navigator", available at https://investmentpolicy.unctad.org/international-investment-agreements.

[4] L.N.S. Poulsen, "The investment treaty regime", in J.C.W. Pevehouse and L. Seabrooke, eds., *Oxford Handbook of International Political Economy* (online edition, Oxford Academic, 2021).

[5] K. Dionysiou, "The backlash against investment treaty arbitration: treat the cause and not the symptom", in K. Dionysiou, ed., *CETA's Investment Chapter: A Rule of Law Perspective*, *European Yearbook of International Economic Law*, vol. 13 (Cham, Springer, 2023).

[6] See, e.g., International Tribunal for the Law of the Sea, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law, 12 December 2022, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf; Inter-American Court of Human Rights, Request for an advisory opinion on the climate emergency and human rights, submitted by Colombia and Chile, available at https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf (unofficial translation); and General Assembly resolution 77/276 of 29 March 2023 entitled "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change".

entire of itself".[7] It is part of the international legal system, interacting with other regimes.

2. Over the years, the actual and perceived overreach of the investment treaty regime into the regulatory space of States has been at the core of its legitimacy crisis and the main driver of calls and proposals for reforms at the international level, for example, by the United Nations Conference on Trade and Development (UNCTAD)[8] and the ongoing efforts by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform).[9] Notably, calls for negotiations of a multilateral investment treaty,[10] as well as a multilateral investment court,[11] are evidence of an ever-growing sentiment that reforms at a structural level may be needed. However, tangible work and outcomes at the international level have so far been primarily directed at issues of a procedural nature, particularly the reform of the investor-State dispute settlement system,[12] leaving substantive questions regarding the right to regulate without a comparable multilateral framework.

3. Other forums have also engaged with investment-related questions, although within different mandates. The International Institute for the Unification of Private Law, together with the ICC Institute of World Business Law, is developing work on international investment contracts, using the former's Principles of International Commercial Contracts for clauses on stabilization, hardship, renegotiation and dispute settlement, including references to the right to regulate.[13] This work, however, is framed in terms of transnational commercial and contract law and is aimed at assisting in the drafting and interpretation of investment contracts, rather than defining States' regulatory powers and obligations under public international law. Expert bodies, such as the Institute of International Law and the International Law

7 F. Baetens, "No law is an island, entire of itself – how international investment law interacts with other fields of public international law", in F. Baetens, ed., *Investment Law within International Law: Integrationist Perspectives* (Cambridge, Cambridge University Press, 2013).

8 UNCTAD, "Recent developments in the IIA regime: accelerating IIA reform", *International Investment Agreements Issues Note*, No. 3 (August 2021).

9 See https://uncitral.un.org/en/working_groups/3/investor-state.

10 A. Åslund, "The world needs a multilateral investment agreement", Policy Brief 13-1 (Peterson Institute for International Economics, 2013); and M. Gotsiridze, "Is the time right for a multilateral investment treaty?", Kluwer Arbitration Blog, 6 January 2024.

11 UNCITRAL, "Multilateral Permanent Investment Court", available at https://uncitral.un.org/en/multilateralpermanentinvestmentcourt.

12 In 2022, the International Centre for Settlement of Investment Disputes approved, by an overwhelming majority, a comprehensive set of amendments to the Centre's rules to improve the efficiency and cost of the investor-State dispute settlement process. In UNCITRAL Working Group III, work on the substantive aspects of the right to regulate was included in the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244, p. 11); however, concerns raised by States during the thirty-sixth session of the Working Group (A/CN.9/WG.III/WP.149, paras. 8–17) were primarily related to the structure and procedure of investor-State dispute settlement; namely, consistency, coherence, predictability and correctness of arbitral decisions by tribunals; arbitrators/decision makers; and costs and duration. It is thus unclear whether the substantive issues, including the right to regulate, would be discussed in the Working Group.

13 International Institute for the Unification of Private Law, "Proposals for the New Work Programme for the triennial period 2023–2025" (memorandum prepared by the Secretariat), document C.D. (101) 4 rev., 101st session of the Governing Council (Rome, 8–10 June 2022), available at https://www.unidroit.org/wp-content/uploads/2022/06/C.D.-101-4-rev.-Proposals-for-the-New-Work-Programme-for-the-triennial-period-2023-2025-2.pdf.

Association, have likewise produced important studies and resolutions [14] on investment law, including a new commission of the Institute on climate change obligations and international investment law, but their outputs, while doctrinally influential, remain those of non-governmental scholarly bodies rather than intergovernmental processes grounded in formal State participation.

4. Substantive reforms on the right to regulate therefore have been and will remain for the foreseeable future in the domain of treaty drafting by States at the bilateral and regional levels. References to "the right to regulate" can be traced back to as early as 1974 in the Charter of Economic Rights and Duties of States, in which the General Assembly affirmed the permanent sovereignty of States over their wealth, natural resources and economic activities,[15] as well as their right to regulate and exercise authority over foreign investment within their national jurisdiction. [16] Subsequently, it was reflected in the draft text of the failed multilateral agreement on investment,[17] which was negotiated by members of the Organisation for Economic Co-operation and Development between 1995 and 1998; however, it was not until the year 2000 that explicit reference to the term appeared in an investment treaty.[18] Since then, it has found its way into more than a hundred treaties, as well as the model bilateral investment treaties of several countries.[19] While different meanings could be ascribed to the term "right to regulate" depending on the specific context in which it appears, this proposal utilizes the term in its broadest sense; that is, as a corollary of sovereignty underscoring a State's entitlement, as recognized under customary international law, to govern its territory through the exercise of its jurisdiction to prescribe, enforce and adjudicate.[20] In this broad sense, the right to regulate thus serves as the vehicle through which the competing forces of investment protection

[14] Institute of International Law, "Legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-State treaties", resolution adopted at the Tokyo Session, 13 September 2013, available at https://www.idi-iil.org/app/uploads/2017/06/2013_tokyo_en.pdf.

[15] Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX) of 12 December 1974, art. 2, para. 1.

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

[17] See the draft negotiating text of the multilateral agreement on investment, as at 24 April 1998, annex 2, annex (Package of proposals for text on environment and labour), sect. 3 (Affirmation of right to regulate): "A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement", available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2813/download.

[18] The earliest agreement in which the term "right to regulate" is explicitly mentioned seems to be the Agreement between New Zealand and Singapore on a Closer Economic Partnership (2000), which recognizes the "right to regulate" in the preamble ("Recognising their right to regulate, and to introduce new regulations on the supply of services and on investment in order to meet national policy objectives").

[19] Southern African Development Community Protocol on Finance and Investment (2006); Norway model bilateral investment treaty (2007); Türkiye model bilateral investment treaty (2009); Senegal–Türkiye bilateral investment treaty (2010); India–Malaysia comprehensive economic cooperation agreement (2011); Free Trade Agreement between the EFTA States and Hong Kong, China (2011); Argentina–Qatar bilateral investment treaty (2016); and Ethiopia–United Arab Emirates bilateral investment treaty (2016).

[20] J.E. Viñuales, "Sovereignty in foreign investment law", in Z. Douglas and others, eds., *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford, Oxford University Press, 2014), p. 317; and A. Petrenko, *The Right to Regulate in International Economic Law: Towards a General Theory with Lessons from the GATS* (Göttingen, Universitätsverlag Göttingen, 2024), p. 18. In a narrower sense, the right to regulate in international investment law may be understood as a concept that could exempt a State from being liable under investment treaties. See, e.g., C. Titi, "The right to regulate in international investment law (revisited)", *Courses of the Summer School on Public International Law*, vol. XVIII (2022), pp. 21–22.

and State economic sovereignty can be balanced in the context of international investment law.

5. In fact, the drive to safeguard public policy space began to manifest itself in several other ways within the text of treaties, appearing with increasing frequency in agreements concluded since the 2000s, for example, as general exception and essential security exception clauses modelled on those found in the General Agreement on Tariffs and Trade, as well as annexes specifying how the indirect expropriation clause must be interpreted and applied. This evolution in treaty drafting was for the most part a reaction by States to the continuing upsurge of cases related to investor-State dispute settlements, which resulted in a multitude of awards that were seen as unduly favouring private interests over public policy considerations of the State.[21]

6. Central to the concerns of States is the ability of foreign investors to bypass domestic courts and challenge their regulatory actions directly before international arbitration tribunals.[22] The high value of claims and damages in cases related to investor-State dispute settlements, which have seen a dramatic upward trajectory, heightens the concerns about the systemic impact on public finances and regulatory autonomy.[23] In the proceedings of the International Centre for Settlement of Investment Disputes on the Stay of Enforcement of the *Tethyan Copper* Award, Pakistan pleaded that immediate payment of the full amount of the $5.9 billion Award would have an "immediate and potentially devastating effect on Pakistan's fragile economy", leading to removal of funding for health, social and welfare programmes that would have "disastrous impacts for the people of Pakistan … particularly the most disadvantaged and vulnerable", as well as affecting its ability to respond to security threats, including dealing with terrorist threats, terror financing and money-laundering.[24] By 2022, with interest accruing to the International Centre for Settlement of Investment Disputes and other awards, Pakistan entered into a settlement with the foreign investor allowing its mining activities to proceed.[25]

7. Given these circumstances, the role of international arbitration tribunals in achieving the right balance between investment protection and the State's ability to pursue legitimate public policy objectives is of fundamental importance. Absent specific guidance in the treaty text (as is the case with most old generation treaties), tribunals have shown varying degrees of deference to a State's regulatory decisions. This is particularly evident in the decisions of international arbitral tribunals on the

[21] For an overview of how treaty provisions on the right to regulate have been formulated, see C. Baltag, R. Joshi and K. Duggal, "Recent trends in investment arbitration on the right to regulate, environment, health and corporate social responsibility: too much or too little?", *ICSID Review – Foreign Investment Law Journal*, vol. 38 (2023).

[22] While a variety of public interest measures have been subject to investor-State dispute settlement claims, there has been a notable escalation in claims targeting environmental measures: from 12 initiated prior to 2000 to 37 in the period 2000–2010 and 126 in the period 2011–2021. See A/78/168.

[23] According to UNCTAD, the average award has grown more than tenfold over three decades, rising from approximately $25 million between 1994 and 2003 to $385 million between 2014 and 2023. Moreover, the distribution of award sizes reveals a significant increase in high-value decisions. For instance, in the period 2010–2019 there were 43 awards that exceeded $100 million and 11 awards that exceeded $1 billion. UNCTAD, "Compensation and damages in investor-State dispute settlement proceedings", *International Investment Agreements Issues Note*, No. 1 (September 2024).

[24] International Centre for Settlement of Investment Disputes, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Case No. ARB/12/1, Decision on Stay of Enforcement of the Award, 17 September 2020, para. 143.

[25] For a discussion of the case, see S. Ahmad, "The role of developing countries in investor-State arbitration: reflections on *Tethyan Copper v Islamic Republic of Pakistan*", *LSE Law Review*, vol. 8 (2023).

fair and equitable treatment standard and indirect expropriation, the two most litigated claims in investor-State dispute settlements.[26]

8. For example, tribunals have different approaches in determining the extent to which the fair and equitable treatment standard restricts the freedom of States to modify their laws and regulations. The *Tecmed* Award illustrates an approach that centres on investment protection and did not mention any need to consider the State's regulatory interest.[27] The broad language employed in the Award implies that the mere fact that there has been a change in the law may potentially trigger the liability of the State. The *Occidental (I)* Tribunal framed the requirement in more absolute terms, stating that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made" and asserted even further that this requirement "is not different from that required under [customary] international law".[28] In contrast, other tribunals have recognized that States have a right to modify their laws and regulations in order to adapt to changing circumstances[29] while setting out limitations to that regulatory freedom, for example, where the modification amounts to a "fundamental" or "radical" change,[30] goes beyond an "acceptable margin of change"[31] or where the State had extended explicit undertakings to investors guaranteeing that there would not be a change in the laws and regulations.[32]

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[26] The fair and equitable treatment provision was invoked by claimants in about 85 per cent of investor-State dispute settlement cases, followed by indirect expropriation at about 70 per cent. In cases decided in favour of the investor, tribunals most frequently found breaches of fair and equitable treatment (about 65 per cent) and indirect expropriation (about 30 per cent). UNCTAD, "Facts and figures on investor-State dispute settlement cases", *International Investment Agreements Issues Note*, No. 3 (November 2024), p. 8.

[27] International Centre for Settlement of Investment Disputes, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations"); this broad approach was subsequently adopted by other tribunals, e.g. in International Centre for Settlement of Investment Disputes, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Case No. ARB/01/7, Award, 25 May 2004; and London Court of International Arbitration, *Occidental Exploration and Production Company v. Republic of Ecuador (I)*, Case No. UN3467.

[28] London Court of International Arbitration, *Occidental Exploration and Production Company v. Republic of Ecuador (I)*, Case No. UN3467, Final Award, 1 July 2004, paras. 189–190.

[29] It is of course understood that the right to regulate encompasses only those regulatory actions that are in accordance with due process and are reasonably connected to rational policy objectives.

[30] International Centre for Settlement of Investment Disputes, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, Case No. ARB/13/36, Award, 4 May 2017, para. 382 ("Taking account of the context and of the [Energy Charter Treaty]'s object and purpose, the Tribunal concludes that Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve").

[31] International Centre for Settlement of Investment Disputes, *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Case No. ARB/10/7, Award, 8 July 2016, para. 433 (judging the acceptable margin of change by reference to the effect of the measures on the investor's business operations).

[32] Stockholm Chamber of Commerce (arbitration under the Energy Charter Treaty), *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, Arbitration No. 062/2012, Award, 21 January 2016, paras. 490–549 (in para. 490, the Tribunal states: "*En el presente caso, no existen compromisos específicos que España haya adoptado personalmente frente a los Demandantes. Este tipo de compromisos se hubiese podido realizar con base en una cláusula de estabilización, o con cualquier tipo de declaración que el Estado haya dirigido a los inversores, según las cuales el marco regulatorio existente no cambiaría*" ["In the present case, there are no specific commitments adopted

9. In the new generation treaties, States have often made clear that the application of investment protection standards must take into account their regulatory space, for example, by stating in the preamble that the Parties recognize "their inherent right to regulate and resolved to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public policy objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system, and public morals".[33] The following provision has also been included in a number of agreements: "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement."[34] Furthermore, where a general exceptions clause has been included in an agreement, it is apparent that the Parties' intended to push the needle even further in favour of regulatory autonomy. For example, this means that even fundamental or radical changes in the law could be deemed permissible to the extent that such changes were implemented in a non-discriminatory manner, did not have an underlying protectionist intent and were "necessary" to achieve one of the specified policy objectives.[35]

10. With regard to indirect expropriation, the case law shows different approaches to how tribunals have addressed the question of whether the policy intent of a State's measure has any bearing on its liability to pay compensation. In general, there are two competing doctrines. One school of thought, often referred to as "the sole effect doctrine", places primary importance on the economic effect of the measure while deeming the question of the Government's intent behind the measure as not being relevant in determining whether an indirect expropriation has occurred.[36] The other approach, often referred to as the "police powers doctrine", asserts that "the State's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes

by Spain directed at the Claimants. Such commitments could have been made on the basis of a stabilization clause, or with any kind of statement that the State had directed to the investors, according to which the existing regulatory framework would not change"]).

33 E.g., Chile–United Arab Emirates comprehensive economic partnership agreement (2024), preamble. See also New Zealand–United Arab Emirates comprehensive economic partnership agreement (2025), preamble.

34 E.g., Côte d'Ivoire–Portugal bilateral investment treaty (2019), art. 6, para. 2. See also Indonesia–Switzerland bilateral investment treaty (2022), art. 4, para. 6.

35 These are the three conditions to qualify as an exception under a general exceptions clause modelled after those specified in the General Agreement on Tariffs and Trade (arts. XX and XXI).

36 International Centre for Settlement of Investment Disputes, *Fireman's Fund Insurance Company v. United Mexican States*, Case No. ARB(AF)/02/1, Award, 17 July 2006, para. 176 (f) ("The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation"). See also International Centre for Settlement of Investment Disputes, *Metalclad Corporation v. United Mexican States*, Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 111 ("The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. … the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation").

economic damage to an investor"[37] or even if it makes certain activities "uneconomic to continue".[38]

11. While application of the police powers doctrine has gained traction, the continuing existence of a large stock of old generation treaties means that the sole effect doctrine will continue to be of significant relevance.[39] The concept of indirect expropriation was often expressed in these earlier treaties exclusively in terms of effects, for example, "having effect equivalent to", "the effects of which would be tantamount to" and "having a similar effect of" expropriation. This provides a textual justification for the doctrine and has been a foundational pillar for the reasoning of numerous arbitral decisions.[40] On the other hand, tribunals that have supported or applied the police powers doctrine often claim that this accords with general or customary international law.[41] In the new generation treaties, States have shown their preference for the application of the police powers doctrine by reaffirming, for

[37] *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A v. Oriental Republic of Uruguay* (see footnote 31 above), para. 295. See also International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2023*, p. 51, at p. 115, para. 185 ("It has long been recognized in international law that the bona fide non-discriminatory exercise of certain regulatory powers by the government aimed at the protection of legitimate public welfare is not deemed expropriatory or compensable"); German-Venezuelan Mixed Claims Commission, *Bischoff Case*, Award, 1903, *Reports of International Arbitral Awards* (UNRIAA), vol. X (United Nations publication, Sales No. 60.V.4), p. 420; Iran–United States Claims Tribunal, *Sedco, Inc. v. National Iranian Oil Company and the Islamic Republic of Iran*, Interlocutory Award, No. ITL 55-129-3, 28 October 1985, para. 90; and Permanent Court of Arbitration, *Saluka Investments B.V. v. Czech Republic*, Case No. 2001-04, Partial Award, 17 March 2006, para. 255. Prior to this, the Methanex Tribunal held that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable". *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV, chap. D, para. 7.

[38] International Centre for Settlement of Investment Disputes, *Marvin Roy Feldman Karpa v. United Mexican States*, Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 112.

[39] Tribunals are seen as having discretion as to which doctrine to apply. The discretion enjoyed by tribunals was recognized in the annulment proceedings before the International Centre for Settlement of Investment Disputes in the case of *Patrick Mitchell v. Democratic Republic of the Congo*, in which the ad hoc committee did not consider the tribunal's adoption of the sole effect doctrine as a ground for annulment. While acknowledging that there were "various positions adopted in legal doctrine and case law on the question of determining whether the effect should be the sole and unique criterion to be used in assessing an indirect expropriation", it concluded that, in opting for the sole effect doctrine, the tribunal was "merely exercising its freedom of judgment". See International Centre for Settlement of Investment Disputes*, Patrick H. Mitchell v. Democratic Republic of the Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 54. See also C. Titi, *The Right to Regulate in International Investment Law* (Baden-Baden/Oxford, Nomos/Hart, 2014), p. 287 (footnotes omitted): "Opting for the police powers doctrine or the sole effect doctrine is a matter of tribunal discretion, therefore it is not possible to pre-judge which measure will be deemed to constitute permissible non-compensable state regulation and which not, especially given that neither doctrine may be characterised as prevalent."

[40] See, e.g., International Centre for Settlement of Investment Disputes, *Siemens A.G. v. Argentine Republic*, Case No. ARB/02/8, Award, 6 February 2007, *ICSID Reports*, vol. 14.

[41] See, e.g., *Methanex Corporation v. United States of America* (footnote 37 above); *Marvin Roy Feldman Karpa v. United Mexican States* (footnote 38 above); *Saluka Investments B.V. v. Czech Republic* (footnote 37 above); and Permanent Court of Arbitration, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, Case No. 2008-01, Award, 2 August 2010. Tribunals have also cited article 31, paragraph (3) (c), of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, as grounds for the application of customary international law, see, e.g., *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A v. Oriental Republic of Uruguay* (footnote 31 above).

example, that: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public moral, public health, safety, and the environment, do not constitute indirect expropriation."[42]

12. It is apparent that the development of State practice in the drafting of investment treaties shows a clear shift in favour of greater regulatory autonomy. However, old generation treaties, which did not benefit from this evolution, still dominate the current landscape of the investment treaty regime.[43] Thus, the rules found in general international law related to the right to regulate require special attention in relation to these earlier treaties. As regards the new generation treaties, the safeguards for the right to regulate found in them remain mostly untested.[44] Moreover, regrettably, some of the few cases available, such as *Eco Oro v. Colombia*, indicate a tendency to adopt an interpretation that prioritizes investment protection over the State's right to regulate in the public interest, contrary to the express intention of the treaty drafters.[45] With the foregoing in mind, there is scope for the International Law Commission to analyse the right to regulate in international investment law and closely related concepts, both as found in general international law and as expressed in treaty text, so as to clarify the law and offer greater certainty on the extent to which a State's right to regulate is or can be preserved in the old and new generation investment treaties.[46]

II. Criteria for selecting new topics

13. On the selection of new topics for its long-term programme of work, the Commission is guided by the following criteria, namely that the topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State

[42] China–Nicaragua free trade agreement (2023), chap. 11, annex II-B, para. 4 (*b*). See also India–Senegal bilateral investment treaty (2008), annexure 5.1, para. 3; Australia–Republic of Korea free trade agreement (2014), chap. 11, annex 11-B, para. 5; and Myanmar–Singapore bilateral investment treaty (2019), annex II, para. 3 (*b*).

[43] Of the global stock of foreign direct investment, 49 per cent is covered by old generation treaties compared with 16 per cent covered by new generation treaties. The proportional share with respect to old generation treaties is higher for developing and least developed countries. UNCTAD, "International investment agreements trends: the increasing dichotomy between new and old treaties", *International Investment Agreements Issues Note*, No. 2 (October 2024), pp. 6–7.

[44] While applauding the widespread effort of States to rebalance their investment treaties, UNCTAD acknowledged that: "It remains to be seen whether these refinements will be interpreted in line with the treaty parties' intent in ISDS." *Ibid.*, p. 4.

[45] In his partial dissenting opinion, Philippe Sands outlines extensively how the majority ignored the explicit requirements of the agreement and concluded that: "The approach taken by the majority fails to respect the text agreed by the drafters of the FTA, and is likely to undermine the protection of the environment." International Centre for Settlement of Investment Disputes, *Eco Oro Minerals Corp. v. Republic of Colombia*, Case No. ARB/16/41, Partial Dissenting Opinion of Philippe Sands, 9 September 2021.

[46] The uncertainty has led a number of States to take a cautious approach undermining their ability to achieve important regulatory objectives, a situation often described as "regulatory chill". For example, Denmark decided to set a deadline of 2050 for ceasing oil and gas exploration projects instead of an earlier date of 2040 or 2030 due to the possibility that it may be liable for "incredibly expensive" compensation to investors under the Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95, see https://www.capitalmonitor.ai/analysis/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/?cf-view; and the Ministry of Finance of Germany warned the Chancellor's office in 2019 that using regulation to phase out coal would create an "increased risk of litigation, especially international litigation based on the [Energy Charter Treaty]", see https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab.

practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission 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.[47] The proposed topic, "The right to regulate in international investment law", satisfies all of the criteria above.

14. First, the proposed topic reflects the needs of States. During the period 2014–2023, the number of treaty-based investor-State dispute settlement cases more than doubled. The total number of such cases brought on the basis of investment treaties reached 1,332, with 60 new arbitrations initiated in 2023.[48] Across the globe, at least 132 countries and one economic grouping have been respondents in one or more investor-State dispute settlement cases.[49] Thus, the issues raised by investor-State dispute settlement cut across regions and national boundaries[50] and from the early stages of the work of UNCITRAL Working Group III, it was agreed by the Member States that "the potential impact of ISDS on the regulatory policy of States should guide the work on ISDS reform".[51]

15. Second, State practice is at a sufficiently advanced stage as seen in the continued proliferation of investment treaties that reflect States' concerns about policy space and the current investor-State dispute settlement system. At present, the number of investment treaties has reached more than 3,000, comprising 2,868 bilateral investment treaties and 518 treaties with investment provisions.[52] More than 500 of these were concluded in or after 2011, comprising what is generally considered to be the new generation treaties. When the old generation treaties are compared with the new generation ones, the growing trend to include provisions addressing the issue of regulatory space is apparent. In a study on the international investment regime, UNCTAD found a striking increase in such provisions between treaties concluded in 1959–2010 and those concluded in 2011–2016. For example, provisions limiting the scope of indirect expropriation increased from 5 to 42 per cent, while the inclusion of exceptions for public policy measures increased from 7 to 43 per cent.[53] In a

[47] *Yearbook ... 1997*, vol. II (Part Two), p. 72, para. 238.

[48] UNCTAD, "Facts and figures on investor-State dispute settlement cases", p. 1 ("By the end of 2023, investors had filed a total of 235 fossil fuel-related cases and at least 123 [investor-State dispute settlement] proceedings arose in relation to the renewable energy sector.").

[49] *Ibid*., p. 3.

[50] In 2020, the Ministers of Trade of the African Union Member States adopted a declaration in response to the coronavirus disease (COVID-19) pandemic reaffirming "the need to maintain the right and ability to regulate … investments in the public interest", expressing concern that investor-State dispute settlements could undermine efforts to tackle the pandemic and requested Member States "to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels", available at https://disasterlaw.ifrc.org. In 2011, the European Parliament adopted a resolution expressing deep concern for "the possibility of conflict between private interests and the regulatory tasks of public authorities" and "the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations", while stressing that future investment agreements of the European Union "must respect the capacity for public intervention". See European Parliament resolution of 6 April 2011 on the future European international investment policy".

[51] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)", A//CN.9/970, para. 37. (UNCITRAL is composed of 70 Member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems.)

[52] UNCTAD, "International Investment Agreements Navigator" (see footnote 3 above).

[53] UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (New York, 2018), table 8, p. 70; one or both of these provisions are also increasingly found in the model bilateral

subsequent study, UNCTAD found that 8 out of 9 treaties concluded in 2020 contained limitations on the scope of indirect expropriation and exceptions for public policy measures.[54]

16. In addition, there are currently 1,463 known investor-State dispute settlement cases, more than 1,100 of which have been concluded, with diversity in terms of regional distribution, economic sectors and procedural rules.[55] Moreover, the effect of investor-State dispute settlement on the State's right to regulate has been widely discussed and problems, especially with regard to the drafting and interpretation of investment treaties, can be clearly identified. Thus, the issues that require examination and analysis are concrete, as shown in section IV below. Recent State practice adds further specificity: joint interpretive statements adopted by treaty parties under existing agreements,[56] as well as the marked increase in the inclusion of general exception clauses and essential security interest clauses in new generation treaties, provide concrete reference points from which the Commission's work could proceed.

17. Third, the need to achieve an appropriate balance between international protection of investments and the preservation of the State's regulatory space reflects new developments in international law and pressing concerns of the international community as a whole. Foreign direct investment continues to be an essential engine of economic growth and development for every country.[57] Clarifications of the law pertinent to addressing this issue and suggestions for possible progressive development in this area would allow investment treaties to facilitate much needed global foreign direct investment flows without hampering the ability of States to take ambitious regulatory actions in order to address national and global challenges.

18. Fourth, the present topic is of pressing concern to the international community as a whole, since foreign investment plays a significant role in the economic growth of all States and is therefore likely to be positively received by them. Its inclusion would also enhance the diversity and contemporary relevance of the Commission's work. In line with its role as the principal organ established by the General Assembly for the codification and progressive development of international law, the Commission has maintained that it should actively contribute to framing the legal

investment treaties of various countries, e.g., Türkiye (2009), Colombia (2011), Southern African Development Community (2012), India (2015), the Czech Republic (2016) and the Russian Federation (2016), and the European Union model clauses for bilateral investment agreements with third countries (2023).

54 UNCTAD, "Recent developments in the IIA regime: accelerating IIA reform", pp. 2–8 (this trend is particularly noticeable in free trade agreements, including those concluded by the Association of Southeast Asian Nations and the European Union, as well as mega-regional free trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership).

55 UNCTAD, "International Investment Agreements Navigator".

56 Such as Draft Interpretation No …/2024 of the [Comprehensive Economic and Trade Agreement] Joint Committee of … regarding Article 8.10, Annex 8-A, Article 8.9 and Article 8.39 of the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2024-interpretation-project-projet.aspx?lang=eng.

57 UNCTAD has observed that developing economies remain in need of capital to fund their development and achieve the Sustainable Development Goals. For example, it estimates that, for developing economies, the average need for external financing stands at approximately $2.8 billion a year. In the context of Agenda 2030 for Sustainable Development, the investment gap across all Sustainable Development Goal sectors reached $4 trillion a year in 2023. See https://sdgpulse.unctad.org/investment-flows.

rules required to address such needs and is capable of providing practical guidance on current issues of legal policy in different areas of international life.[58]

19. Moreover, the topic falls squarely within the Commission's mandate of identification of customary rules and general principles of international law. While a number of other entities are engaged on issues related to investment law from different perspectives, including procedural and institutional reform of investor-State dispute settlement (UNCITRAL Working Group III), transnational contract law and model clauses (International Institute for the Unification of Private Law) and doctrinal analysis and climate-related investment issues (Institute of International Law), their work is focused on issues that are distinct in character from the questions of public international law to be examined by the Commission. The distinctive institutional position of the Commission, which is a subsidiary organ of the General Assembly composed of independent experts in international law who work in close cooperation with States through the Sixth Committee on the basis of formal written comments, enables it to address the substantive legal questions at the core of the proposed topic. Its work on this topic would contribute to the coherence of the international legal system, without affecting or duplicating the mandates of other entities working on related topics.

20. In sum, the proposed topic satisfies the criteria for the selection of a new topic in the long-term programme of work. It is timely, feasible and appropriate for the Commission to take up the topic, which will significantly contribute to the development of international investment law.

III. Past work of the Commission

21. To date, the Commission has not considered any topics directly related to the protection of foreign investment in international law. However, several related topics have been proposed over the years, including "Legal conditions of capital investment and agreements pertaining thereto" (1993), "The international legal regime of investments" (1990),[59] "The legal conditions of capital investment and agreements pertaining thereto" (1991)[60] and "Foundations of investment law" (1997). Topics suggested at the 1997 Colloquium on Progressive Development and Codification of International Law and the subsequent seminar held in Geneva in 1998 also included "Foreign investment" (1997)[61] and "Trade and investments" (1997).[62] However, ultimately, none of these were taken up by the Commission.

22. In 2011, the Commission added the topic of the fair and equitable treatment standard in international investment law to the long-term programme of work,[63] although it has not begun work on the topic. The Commission did undertake work on the most-favoured-nation clause on two occasions, adopting draft articles on such

[58] The General Assembly recently recognized that the Commission could consider working on certain topics of international law that received "new or renewed interest" from the international community. See General Assembly resolution 80/164 of 15 December 2025, preamble. For instance, the Commission recognized that: "Topics designed to provide practical answers to current issues of legal policy in various areas of international life should have priority over topics concerning which doctrinal and theoretical interests prevailed." See *Yearbook ... 1990*, vol. II (Part Two), footnote 366.

[59] *Yearbook ... 1990*, vol. II (Part Two), fn. 366.

[60] *Yearbook ... 1991*, vol. II (Part Two), para. 330.

[61] *Making Better International Law: The International Law Commission at 50 – Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, New York, 28-29 October 1997* (United Nations publication, Sales No. E/F.98.V.5), p. 36.

[62] *Ibid*.

[63] S.C. Vasciannie, "The fair and equitable treatment standard in international investment law", *Yearbook ... 2011*, vol. II (Part Two), annex IV.

clauses in 1978,[64] followed by a Study Group report on the topic in 2015.[65] Both of these undertakings include a study of most-favoured-nation provisions in investment treaties, but neither of them looked at other or more systemic issues pertaining to the international investment protection regime.

23. In the light of the above, it is clear that the call for the Commission to work on the topic of international investment law is not new. Given the recent and various developments in international law on the protection of foreign investment, it is now an opportune time for the Commission to take up work on the topic.

IV. Scope of the proposed topic and issues to be addressed

24. The proposed topic will focus on international rules applicable in the context of investment protection that directly (or may be invoked to) preserve the regulatory space of States. Such international rules cover those found in general international law and treaty provisions specifically negotiated between States. Special attention will be paid to areas in which there are (or are likely to be) uncertainties in the law and in which the potential effect on the cost of regulation is greatest, that being, fair and equitable treatment and indirect expropriation.

25. The inclusion of this topic in the programme of work would be an opportunity for the Commission to clarify the law so that States can determine with sufficient certainty the extent to which they can take measures to achieve legitimate public policy objectives without incurring liability under their investment treaties. The Commission could also identify potential problems that may arise in the application of newer provisions to safeguard the right to regulate and suggest ways to resolve them.

26. Thereby, the work of the Commission will particularly benefit investment treaty policymakers in Governments and international organizations and the community of legal advisers and arbitrators who will help reshape the future of international investment law. To this end, it would be necessary for the Commission to analyse investment treaty provisions (including those in bilateral investment treaties, investment chapters in free trade agreements and regional investment treaties), general international law and arbitral jurisprudence.

27. The Commission may address the following questions and issues, most of which have arisen in the context of either academic discussions or tribunal awards or both. Overall, they represent interpretative problems and questions of law that, if left unresolved, would likely result in unsatisfactory outcomes that prejudice a State's right to regulate.

28. The Commission may address the following questions and issues:

(a) as regards the police powers doctrine:

(i) Is the doctrine a rule of customary international law or a general principle of law and has its inclusion in new generation treaties caused it to change or potentially do so?

(ii) Absent specific reference to the doctrine in a treaty, to what extent does the doctrine remain applicable? To what extent is the choice between applying the sole effect doctrine and the police powers doctrine a matter of discretion for a tribunal?

(iii) Can the application of the police powers doctrine be reconciled with the public purpose requirement for lawful expropriations?

[64] *Yearbook ... 1978*, vol. II (Part Two), para. 74.

[65] Final report: Study Group on the Most-Favoured-Nation Clause, *Yearbook ... 2015*, vol. II (Part Two), annex.

(iv) To what extent is a tribunal bound to apply treaty provisions that merely express the Parties' shared understanding of the doctrine;

(v) In situations in which the doctrine applies, would it still be beneficial to include specific provisions on compulsory licensing under the article on expropriation?

(b) as regards general exceptions clauses:

(i) The nature, purpose, function and legal effect of the clause;

(ii) Whether the clause absolves the State of its liability to pay;

(iii) Interpretation of the conditions required for application of the clause and the relevance of the case law of the World Trade Organization;

(iv) The extent to which conditions required for the application of the clause guarantees a level of protection equivalent to that of the customary minimum standard of treatment;

(v) Interactions of the clause with other rules or provisions that safeguard the State's right to regulate; for example, if the treaty has a general exceptions clause, whether the police powers doctrine can be invoked separately as a customary rule to absolve the State of liability;

(vi) The extent to which the clause is still needed in the light of the arbitral jurisprudence on the application of various investment protection standards that already show an accommodation for the regulatory interests of States (for example, the interpretation of "in like circumstances" under the guarantee of national treatment; and deference to State regulatory decisions under fair and equitable treatment);

(c) as regards essential security exceptions clauses:

(i) The nature, purpose, function and legal effect of the clause;

(ii) The kinds of interests covered by the clause;

(iii) Interpretation of the conditions required for the application of the clause and the relevance of the case law of the World Trade Organization;

(iv) The interaction between essential security interest clauses in investment treaties and grounds precluding wrongfulness under general international law, such as necessity and force majeure, and the circumstances in which each may be invoked;

(v) Whether the clause absolves the State of its liability to pay compensation;

(d) as regards provisions that refer specifically to the "right to regulate":

(i) the meaning of the term "right to regulate";

(ii) the nature, purpose, function and legal effect of such provisions;

(iii) how these provisions interact with one another and with the various protection standards contained in the treaty.

V. The possible form of the work of the Commission

29. At this stage, it is difficult to predict with certainty what form the final outcome should take. It may be possible that a set of guidelines could emerge to clarify existing rules of international law (both general international law and treaty rules) in the light of contemporary practice for determining the extent to which a State's right to regulate is or can be preserved under investment treaties. The guidelines would thus be a "toolbox" in which the negotiators of investment treaties and those responsible for applying them should find answers to some of the fundamental questions in that regard, for example, whether the police powers doctrine reflects customary international law and how provisions to safeguard a State's right to regulate should be interpreted and what their legal effects are. Some of the content

could also be recommendatory in nature to guide States in further developing their treaty practice. For example, there could be an annex with model clauses or, alternatively, a collection of illustrative examples drawn from new generation investment agreements, accompanied by commentaries on their interpretation and a comparative analysis of their benefits in relation to other possible drafting options.

30. Furthermore, possibly at the later stages of the study, it may be prudent to evaluate whether there could be instances in which the balance of preserving the right to regulate may potentially be perceived as tilting too far in a direction that is opposed to the concurrent objective of promoting investments. It could therefore prove useful to dedicate some time on an analysis of possible options available to States for calibrating their investment treaties in order to achieve a better-balanced treaty but in a way that would not be prejudicial to their right to regulate. In this regard, there are various investment facilitation provisions that may be of value, including provisions on regulatory transparency, improvement of the regulatory environment [66] and improvement of rule-making processes.[67]

VII. Selected bibliography

Books

ADELEKE, F., *International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement*, 1st ed., London, Routledge, 2018.

AMADO, J.D., J.S. Kern and M. Doe Rodriguez, *Arbitrating the Conduct of International Investors*, Cambridge, Cambridge University Press, 2018.

BISHOP, R.D., J.R. CRAWFORD and W.M. REISMAN (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary*, 2nd ed., The Hague, Wolters Kluwer, 2014.

BÜCHELER, G., *Proportionality in Investor-State Arbitration*, Oxford, Oxford University Press, 2015.

BUNGENBERG, M. and others (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos/Hart, 2015.

CHAISSE, J., L. CHOUKROUNE and S. JUSOH (eds.), *Handbook of International Investment Law and Policy*, Singapore, Springer, 2021.

COLLINS, D., *An Introduction to International Investment Law*, 2nd ed., Cambridge, Cambridge University Press, 2023.

DAILLIER, P. and others (eds.), *Droit international public*, 9th ed., Paris, LGDJ, 2022.

DOLZER, R., U. KRIEBAUM and C. SCHREUER, *Principles of International Investment Law*, 3rd ed., Oxford, Oxford University Press, 2022.

[66] This includes provisions aimed at streamlining administrative procedures and improving regulatory coherence.

[67] This includes provisions aimed at rendering rule-making practices more predictable, evidence-based and open to stakeholder engagement.

DOUGLAS, Z., *The International Law of Investment Claims*, Cambridge, Cambridge University Press, 2009.

DROUBI, S. and C.J.F. ELIZONDO (eds.), *Latin America and International Investment Law: A Mosaic of Resistance*, Manchester, Manchester University Press, 2022.

HAMILTON, J.C., O.E. GARCIA-BOLIVAR and H. OTERO, *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States, and Counsel*, Leiden, Martinus Nijhoff, 2012.

HENCKELS, C., *Proportionality and Deference in Investor-State Arbitration*, Cambridge, Cambridge University Press, 2015.

HODGSON, M., Y. KRYVOI and D. HRCKA, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, London, Allen & Overy and British Institute of International and Comparative Law, 2021.

HRYNKIV, O., *National Security and International Economic Law: Restoring Balance*, Cambridge, Cambridge University Press, 2026.

KIDANE, W.L., *Africa's International Investment Law Regimes*, Oxford, Oxford University Press, 2023.

KINNEAR, M. and others (eds.), *Building International Investment Law: The First 50 Years of ICSID*, The Hague, Kluwer Law International, 2015.

KULICK, A. and M. WAIBEL (eds.), *General International Law in International Investment Law: A Commentary*, Oxford, Oxford University Press, 2024.

LIM, C.L., J. HO and M. PAPARINSKIS, *International Investment Law and Arbitration*: Commentary, Awards and Other Materials, 2nd ed., Cambridge, Cambridge University Press, 2021.

LÓPEZ ESCARCENA, S., *Indirect Expropriation in International Law*, Cheltenham, Edward Elgar, 2014.

MANN, H. and others, *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook*, 2nd ed., Winnipeg, International Institute for Sustainable Development, 2006.

MANTILLA BLANCO, S., *Full Protection and Security in International Investment Law*, Cham, Springer, 2019.

MCLACHLAN, C., L. SHORE and M. WEINIGER, *International Investment Arbitration: Substantive Principles*, 2nd ed., Oxford, Oxford University Press, 2017.

MONTT, S., *State Liability in Investment Treaty Arbitration*, Oxford, Hart, 2009.

MOROSINI, F. and M.R. SANCHEZ BADIN (eds.), *Reconceptualizing International Investment Law from the Global South*, Cambridge, Cambridge University Press, 2017.

MUCHLINSKI, P., F. ORTINO and C. SCHREUER (eds.), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008.

NEWCOMBE, A. and L. PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment*, The Hague, Kluwer Law International, 2009.

NIKIÈMA, S.H., *L'expropriation indirecte en droit international des investissements*, Geneva, Graduate Institute Publications, 2012.

ORREGO VICUÑA, F., *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*, Cambridge, Cambridge University Press, 2004.

OSTŘANSKÝ, J. and F. Pérez Aznar, *National Governance and Investment Treaties: Between Constraint and Empowerment*, Cambridge, Cambridge University Press, 2023.

PAPARINSKIS, M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford, Oxford University Press, 2013.

PETRENKO, A., *The Right to Regulate in International Economic Law: Towards a General Theory with Lessons from the GATS*, Göttingen, Universitätsverlag Göttingen, 2024.

QURESHI, A.H. (ed.), *Law Reforms Around the World: Perspectives from National and International Law*, Oxford, Routledge, 2024.

REINISCH, A. (ed.), *Standards of Investment Protection*, Oxford, Oxford University Press, 2008.

—— and C. SCHREUER, *International Protection of Investments: The Substantive Standards*, Cambridge, Cambridge University Press, 2020.

RIPINSKY, S. and K. WILLIAMS, *Damages in International Investment Law*, London, British Institute of International and Comparative Law, 2008.

SABANOGULLARI, L., *General Exception Clauses in International Investment Law: The Recalibration of Investment Agreements via WTO-based Flexibilities,* Baden-Baden, Nomos, 2016.

SABAHI, B., *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, Oxford, Oxford University Press, 2011.

SALACUSE, J.W., *The Law of Investment Treaties*, 3rd ed., Oxford, Oxford University Press, 2021.

SCHILL, S.W. (ed.), *International Investment Law and Comparative Public Law*, Oxford, Oxford University Press, 2010.

SCHWEBEL, S.M., *Justice in International Law: Further Selected Writings*, Cambridge, Cambridge University Press, 2011.

SORNARAJAH, M., *The International Law on Foreign Investment*, 5th ed., Cambridge, Cambridge University Press, 2021.

SUBEDI, S.P., *International Investment Law: Reconciling Policy and Principle*, 5th ed., Oxford, Bloomsbury, 2024.

TANZI, A. and others (eds.), *International Investment Law in Latin America: Problems and Prospects*, Leiden, Brill, 2016.

TITI, C., *The Right to Regulate in International Investment Law*, Baden-Baden/Oxford, Nomos/Hart, 2014.

——, "The right to regulate in international investment law (revisited)", *Courses of the Summer School on Public International Law*, vol. XVIII (2022).

TUDOR, I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford, Oxford University Press, 2008.

VADI, V., *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*, Cheltenham, Edward Elgar, 2018.

VIÑUALES, J.E., *Foreign Investment and the Environment in International Law*, Cambridge, Cambridge University Press, 2012.

WAIBEL, M., *The Backlash against Investment Arbitration: Perceptions and Reality*, The Hague, Kluwer Law International, 2010.

WONGKAEW, T., *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance*, Cambridge, Cambridge University Press, 2019.

YANNACA-SMALL, K. (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed., Oxford, Oxford University Press, 2018.

YU, J., *国际投资法 International Investment Law*, 6th ed., Beijing, Law Press China, 2022.

Official publications

Asia-Pacific Economic Cooperation, "Handbook on obligations in international investment treaties" (2020).

General Assembly resolution 77/276 of 29 March 2023 entitled “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change".

Organisation for Economic Co-operation and Development, "‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law", OECD Working Papers on International Investment, No. 2004/4.

——, *International Investment Law: A Changing Landscape*, Paris, 2005.

Report of the Commission to the General Assembly on the work of its forty-second session, *Yearbook ... 1990*, vol. II (Part Two), footnote 366.

Report of the Commission to the General Assembly on the work of its forty-third session, *Yearbook ... 1991*, vol. II (Part Two), para. 330.

Report of the Commission to the General Assembly on the work of its forty-ninth session, *Yearbook ... 1997*, vol. II (Part Two), para. 238.

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd: “Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights” (A/78/168).

Summary records of the meetings of the forty-ninth session 12 May–18 July 1997, *Yearbook ... 1997*, vol. I.

UNCTAD, *UNCTAD’s Reform Package for the International Investment Regime*, New York and Geneva, 2018.

Journal articles and book chapters

AHMAD, S., "The role of developing countries in investor-State arbitration: reflections on Tethyan Copper v Islamic Republic of Pakistan", *LSE Law Review*, vol. 8 (2023), p. 453.

BAETENS, F., "No law is an island, entire of itself – how international investment law interacts with other fields of public international law", *in* F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives*, Cambridge, Cambridge University Press, 2013.

BALTAG, C., "Investment arbitration and police powers: emerging issues", *European Investment Law and Arbitration Review*, vol. 5 (2020), p. 392.

——, R. JOSHI and K. DUGGAL, "Recent trends in investment arbitration on the right to regulate, environment, health and corporate social responsibility: too much or too little?", *ICSID Review – Foreign Investment Law Journal*, vol. 38 (2023), p. 381.

BARAK-EREZ, D., "The doctrine of legitimate expectations and the distinction between the reliance and expectation interests", *European Public Law*, vol. 11 (2005), p. 583.

BI, Y. and W. ZU [毕莹、俎文天], “从投资保护迈向投资便利化：投资争端解决机制的‘再平衡’及中国因应 [From investment protection to investment facilitation: the “rebalancing” of

investment dispute settlement mechanism and China's response], *Journal of Shanghai University of Finance and Economics*, vol. 25, (2023), p. 123.

BJORKLUND, A.K., "Emergency exceptions: state of necessity and *force majeure*", *in* P. Muchlinski and others (eds.), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 459–523.

BOUYAYACHEN, S., "La spécificité africaine du droit international des investissements: allégorie d'un paradigme régional de promotion des droits humains?", *Annuaire africain des droits de l'homme*, vol. 8 (2024), p. 123.

BREW, R., "Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection", *Canterbury Law Review*, vol. 25 (2019), p. 205.

BROWER, C. and J. TEPE, "The Charter of Economic Rights and Duties of States: a reflection or rejection of international law?", *The International Lawyer*, vol. 9 (1975), p. 295.

BURKE-WHITE, W.W., "The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system", *Asian Journal of WTO & International Health Law and Policy*, vol. 3 (2008), p. 199.

CABRERA COLORADO, O., "La tensión entre el derecho a regular y los derechos del inversor a la luz del principio de proporcionalidad", *Revista de Derecho Económico*, vol. 80, (2023), p. 3.

CLAUSSEN, K., "The casualty of investor protection in times of economic crisis", *Yale Law Journal*, vol. 118 (2009), p. 1545.

CORDERO MOSS, G., "Full protection and security", *in* A. Reinisch (ed.), *Standards of Investment Protection*, Oxford, Oxford University Press, 2008, pp. 133–150.

DAGBANJA, D.N., "The legal efficacy of investment treaty reforms in Africa", *African Journal of International Economic Law*, vol. 3 (2022), p. 40.

DARGIN, J., "The rising tide of expropriation in Venezuela: a look at 21st century resource nationalism", *Transnational Dispute Management*, vol. 2 (2008).

DE BRABANDERE, E. and A. De NANTEUIL, "Droit International de l'investissement", *European Journal of International Law*, vol. 26 (2015), p. 568.

DEGU, T.A., "The problematic of the 'all or nothing' approach to determining regulatory expropriation of foreign investment: towards proportionality as a measure of compensation", *Indonesian Journal of International and Comparative Law*, vol. 10 (2023), p. 310.

DIONYSIOU, K., "The backlash against investment treaty arbitration: treat the cause and not the symptom", *in* K. Dionysiou, *CETA's Investment Chapter, European Yearbook of International Economic Law*, vol. 13, Cham, Springer, 2022.

DOLZER, R., "Indirect expropriations: new developments?", *New York University Environmental Law Journal*, vol. 11 (2003), p. 64.

——, "Fair and equitable treatment: today's contours", *Santa Clara Journal of International Law*, vol. 12 (2014), p. 7.

DOUGHERTY, K., "Methanex v. United States: the realignment of NAFTA chapter 11 with environmental regulation", *Northwestern Journal of International Law and Business*, vol. 27 (2006), p. 735.

DUMBERRY, P., "The prohibition against arbitrary conduct and the fair and equitable treatment standard under NAFTA article 1105", *Journal of World Investment & Trade*, vol. 15 (2014), p. 117.

EL-KADY, H., "The amendments to the 1980 Arab League Investment Agreement: implications on the right to regulate investment in Arab countries", *Transnational Dispute Management*, vol. 3 (2014).

—— and M. DE GAMA, "The reform of the international investment regime: an African perspective", *ICSID Review – Foreign Investment Law Journal*, vol. 34 (2019), p. 482.

FIETTA, S., "Expropriation and the 'fair and equitable' standard: the developing role of investors' 'expectations' in international investment arbitration", *Journal of International Arbitration*, vol. 23 (2006), p. 375.

GALLUS, N., "The 'fair and equitable treatment' standard and the circumstances of the host State", *in* C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge, Cambridge University Press, 2011.

GÓMEZ MUÑOZ, W.A., "Protección del derecho interno de las inversiones de Minera Panamá y los recursos naturales", *Anuario de Derecho*, No. 54 (2024), p. 214.

GUMBIS, J. and R. KASPARAVICIUS, "State's right to regulate: what constitutes a compensable expropriation in investor-State arbitration?", *Yearbook on International Arbitration and ADR*, vol. 5 (2017), p. 153.

HAILES, O. and K. TURNBULL, "Police powers in a pandemic: investment treaty interpretation and the customary presumption of reasonable regulation", *in* P. Merkouris and others (eds.), *Custom and its Interpretation in International Investment Law*, Cambridge, Cambridge University Press, 2024.

HAMAMOTO, S., "Regulatory power and investors' interests: striking a balance in investment treaties concluded by Japan", *in* M. Mohan and C. Brown (eds.), *The Asian Turn in Foreign Investment*, Cambridge, Cambridge University Press, 2021.

HAN, L., "国际经贸投资规则对履行要求的规"［Regulation of performance requirements by international economic, trade and investment rules], *Jurist*, No. 6 (2017), p. 116.

HANSEN, C., "*Mondev International Ltd. v. United States*: a case study of the potential risks of NAFTA's ever-expanding arbitration provisions", *North Carolina Journal of International Law and Commercial Regulation*, vol. 29 (2003–2004), p. 351.

HARRISON, J., "The International Law Commission and the development of international investment law", Edinburgh School of Law Research Paper, No. 2012/27 (2012).

HIGGINS, R., "The taking of property by the State: recent developments in international law", *Collected Courses of The Hague Academy of International Law*, vol. 176 (1982), p. 259.

HIRSCH, M., "Between fair and equitable treatment and stabilization clause: stable legal environment and regulatory change in international investment law", *Journal of World Investment & Trade*, vol. 12 (2011), p. 783.

HORNBECK, S.K., "The most-favoured-nation clause", *American Journal of International Law*, vol. 3 (1909), p. 396.

JIANG, X., "试论国际投资法的新发展" [New developments in international investment law], *Hebei Law Science*, No. 3, 2019, p. 42.

KABRA, R., "Return of the inconsistent application of the 'essential security interest' clause in investment treaty arbitration: *CC/Devas v India* and *Deutsche Telekom v India*", *ICSID Rev – Foreign Investment Law Journal*, vol. 34 (2019), p. 723.

KAIROUANI, A., "La mise en œuvre du droit au développement dans le Protocole d'investissement de la Zone de libre-échange continentale africaine", *African Human Rights Yearbook*, vol. 7 (2023), p. 284.

KLÄGER, R., "Fair and equitable treatment: a look at the theoretical underpinnings of legitimacy and fairness", *Journal of World Investment & Trade*, vol. 11 (2010), p. 435.

KOLO, A. and T. WÄLDE, "Capital transfer restrictions under modern investment treaties", *in* A. Reinisch (ed.), *Standards of Investment Protection*, Oxford, Oxford University Press, 2008.

KORZUN, V., "The right to regulate in investor-State arbitration: slicing and dicing regulatory carve-outs", *Vanderbilt Journal of Transnational Law*, vol. 50 (2017), p. 355.

KRIEBAUM, U., "Regulatory takings: balancing the interests of the investor and the State", *Journal of World Investment & Trade*, vol. 8 (2007), p. 717.

KUHN, A.K., "Nationalization of foreign-owned property in its impact on international law", *American Journal of International Law*, vol. 45 (1951), p. 709.

LABIN, D.K. and R.R. MURATOVA, "New approaches to the balance between investor protection and the right to regulate within mega-regional agreements", *Moscow Journal of International Law*, No. 4 (2018), p. 54.

MANGKLATANAKUL, V., "From colonization to globalization: from FCN (treaties) to BIT – the principle of non-discrimination", *Saranrom Magazine*, vol. 67 (2010), p. 75.

——, "Thailand's first treaty arbitration: gain from pain", in *Investor-State Disputes: Prevention and Alternatives to Arbitration II, Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America*, Geneva, UNCTAD, 2011, p. 81.

MANIRUZZAMAN, A.F.M., "Expropriation of alien property and the principle of non-discrimination in international law of foreign investment: an overview", *Transnational Dispute Management*, vol. 3 (2005).

MATVEEV, V.V., "Международно-правовые механизмы защиты иностранных инвестиций: проблемы современной институализации" [International legal mechanisms for the protection of foreign investments: problems of modern institutionalization], doctoral dissertation, Moscow, 2023.

MBENGUE, M.M. and S. SCHACHERER, "The 'Africanization' of international investment law: the Pan-African Investment Code and the reform of the international investment regime", *Journal of World Investment & Trade*, vol. 18 (2017), p. 414.

MOON, W.J., "Essential security interests in international investment agreements", *Journal of International Economic Law*, vol. 15 (2012), p. 481.

MOSTAFA, B., "The sole effects doctrine, police powers and indirect expropriation under international law", *Australian International Law Journal*, vol. 15 (2008), p. 267.

MUCHLINSKI, P., "'Caveat investor'? The relevance of the conduct of the investor under the fair and equitable treatment standard", *International and Comparative Law Quarterly*, vol. 55 (2006), p. 527.

ORTINO, F., "The obligation of regulatory stability in the fair and equitable treatment standard: how far have we come?", *Journal of International Economic Law*, vol. 21 (2018), p. 845.

PAPARINSKIS, M., "Circumstances precluding wrongfulness in international investment law", *ICSID Review – Foreign Investment Law Journal*, vol. 31 (2016), p. 484.

——, "Crippling compensation in the International Law Commission and investor-State arbitration", *ICSID Review – Foreign Investment Law Journal*, vol. 37 (2022), p. 289.

PARLETT, K. and S. EWAD, "Protection of the environment in investment arbitration – a double-edged sword", Kluwer Arbitration Blog, 22 August 2017.

POULSEN, L.N.S., "The investment treaty regime", *in* J.C.W. Pevehouse and L. Seabrooke (eds.), *Oxford Handbook of International Political Economy* (online edition, Oxford Academic, 2021).

PRIETO, M.J., "Expropiación indirecta por medidas cautelares en procedimiento tributario", *Revista Chilena de Derecho*, vol. 39, (2012), p. 809.

QIAN, J. and S. HUANG, "国际投资法下东道国监管权的改革——基于可持续发展原则的分析" [The reform of the host State's regulatory power under international investment law: an analysis based on the sustainable development principle], *Journal of Beijing Institute of Technology (Social Sciences Edition)*, vol. 20 (2018), p. 128.

RAMEAU, R., "The African perspective: the development of investment laws, the Pan-African Investment Code (PAIC), and the African Continental Free Trade Area in the 'New Economic World Order'", *American Society of International Law Proceedings*, vol. 114 (2020), p. 62.

RAMMILA, D., "Indirect expropriation and the 'police powers' problem of international investment arbitration: considering the merits of a 'mitigated' approach", *Law, Democracy & Development*, vol. 30, p. 102.

RANJAN, P., "Police powers, indirect expropriation in international investment law, and article 31(3)(c) of the VCLT: a critique of Philip Morris v. Uruguay", *Asian Journal of International Law*, vol. 9 (2019), p. 98.

——, "Essential security interests in international investment law – a trend towards GATTization", *ICSID Review – Foreign Investment Law Journal*, vol. 39 (2024), p. 489.

—— and P. ANAND, "Investor State dispute settlement in the 2016 Indian model bilateral investment treaty: does it go too far?", *in* J. Chaisse and L. Nottage (eds.), *International Investment Treaties and Arbitration Across Asia*, Leiden, Brill, 2017.

RATNER, S.R., "Compensation for expropriations in a world of investment treaties: beyond the lawful/unlawful distinction", *American Journal of International Law*, vol. 111 (2017), p. 7.

SALCEDO MACHADO, J.G., "La protección contra la expropiación indirecta: el camino hacia su clarificación en los tratados de inversión modernos", *Advocatus*, No. 44 (2025), p. 91.

SCHREUER, C., "Fair and equitable treatment in arbitral practice", *Journal of World Investment & Trade*, vol. 6 (2005), p. 357.

——, "Protection against arbitrary or discriminatory measures", *in* C.A. Rogers and R.P. Alford (eds.), *The Future of Investment Arbitration*, Oxford, Oxford University Press, 2009, pp. 183–198.

—— and U. KRIEBAUM, "At what time must legitimate expectations exist?", *Transnational Dispute Management*, vol. 1 (2012).

SHEN, W., "投资者—东道国争端解决条款的自由化尚变和中国的路径——以中国双边投资协定为研究对象" [Liberal evolution of ISDS mechanisms in Chinese BITs and China's path – An investigation of ISDS clauses in Chinese BITs], *Business and Economic Law Review*, No. 3 (2020), p. 44.

SHIRLOW, E., "*Les Laboratoires Servier, SAA, and others v Republic of Poland*: defining the nature of the police powers 'defence' and the deference applicable in regulatory expropriation cases", *ICSID Review – Foreign Investment Law Journal*, vol. 29 (2014), p. 559.

SIERRA-CAMARGO, J. and F. SUÁREZ-RICAURTE, "The right to regulate", *in* D. Schneiderman and G. van Harten (eds.), *Rethinking Investment Law*, Oxford, Oxford University Press, 2023, pp. 180–198.

SOHN, L.B. and R.R. BAXTER, "Responsibility of States for injuries to the economic interest of aliens: II. Draft convention on the international responsibility of States for injuries to aliens", *American Journal of International Law*, vol. 55 (1961), p. 545.

SORNARAJAH, M., "Negotiated settlements of foreign investment disputes", *in* M. Sornarajah, *The Settlement of Foreign Investment Disputes*, The Hague, Kluwer Law International, 2000, pp. 113–149.

STONE, J., "Arbitrariness, the fair and equitable treatment standard, and the international law of investment", *Leiden Journal of International Law*, vol. 25 (2012), p. 77.

TARASOV, M.V., "Влияние прав человека на международное инвестиционное право" [The impact of human rights on international investment law], doctoral dissertation, HSE University, Moscow, 2025.

THOW, A.M. and B. MCGRADY, "Protecting policy space for public health nutrition in an era of international investment agreements", *Bulletin of the World Health Organization*, vol. 92 (2014), p. 139.

VASCIANNIE, S., "The fair and equitable treatment standard in international investment law and practice", *British Year Book of International Law*, vol. 70 (1999), p. 99.

YEUNG, K., "The regulatory State", *in* R. Baldwin and others (eds.), *The Oxford Handbook of Regulation*, Oxford, Oxford University Press, 2010.

VIÑUALES, J.E., "Sovereignty in foreign investment law", *in* Z. Douglas and others (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*, Oxford, Oxford University Press, 2014.

WAGNER, J.M., "International investment, expropriation and environmental protection", *Golden Gate University Law Review*, vol. 29 (1999).

WAGNER, K., "Regulation by exception – the emergence of (general) exception clauses in international investment law?", *Austrian Review of International and European Law*, vol. 26 (2021), p. 77.

WORTLEY, B.A., "Expropriation in International Law", *Transactions of the Grotius Society*, vol. 33 (1947), p. 25.

YE, T., "ICSID 下 IIAs 环境保护与投资保护的冲突及中国应对" [The conflict between environmental protection and investment protection in IIAs under ICSID and China's responses], 争议解决 *Dispute Settlement*, vol. 11 (2025), p. 149.

YI, Z., "Criteria in determining indirect expropriation in international investment arbitration: doctrinal investigation and new developments", *Foundation for Law and International Affairs Review*, vol. 3 (2022), p. 120.

ZAMIR, N., "The police powers doctrine in international investment law", *Manchester Journal of International Economic Law*, vol. 14 (2017), p. 318.

ZENG, J., "国际投资条约中的规制权规则探析" [Analysis of the rules of right to regulate in international investment treaties], 国际经济法学刊 *Journal of International Economic Law*, No. 1 (2020), p. 94.

ZEYL, T., "Charting the wrong course: the doctrine of legitimate expectations in investment treaty law", *Alberta Law Review*, vol. 49 (2011), p. 203.

ZHANG, Q., "论晚近南北国家在国际投资法重大议题上的不同进路"[On the different approaches of developed and developing countries on major issues of international investment law in recent years], 现代法学 *Modern Law Science*, vol. 42, (2020), p. 126.

ZRILIČ, J., "Armed conflict as force majeure in international investment law", *Manchester Journal of International Economic Law*, vol. 16, (2019), p. 28.

Cases

(a) International Centre for Settlement of Investment Disputes

Azurix Corp. v. Argentine Republic, Case No. ARB/01/12, Award, 14 July 2006, *ICSID Reports,* vol. 14 (2009), p. 367.

Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, Case No. ARB/96/1, Award, 17 February 2000, *ICSID Reports*, vol. 5, p. 153.

Eco Oro Minerals Corp. v. Republic of Colombia, Case No. ARB/16/41, Partial Dissenting Opinion of Philippe Sands, 9 September 2021.

Marvin Roy Feldman Karpa v. United Mexican States, Case No. ARB(AF)/99/1, Award, 16 December 2002, *ICSID Reports*, vol. 7, p. 318.

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Case No. ARB/01/7, Award, 25 May 2004, *ICSID Reports*, vol. 12 (2007), p. 6.

Patrick H. Mitchell v. Democratic Republic of the Congo, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, *ICSID Reports*, vol. 19, p. 103.

Philip Morris Brand Sàrl and Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Case No. ARB/10/7, Award, 8 July 2016, *ICSID Reports*, vol. 18, p. 466.

Siemens A.G. v. Argentine Republic, Case No. ARB/02/8, Award, 6 February 2007, *ICSID Reports*, vol. 14 (2009), p. 518.

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, Case No. ARB(AF)/00/2, Award, 29 May 2003, *ICSID Reports*, vol. 10 (2006), p. 134.

Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, Case No. ARB/12/1, Decision on Stay of Enforcement of the Award, 17 September 2020.

(b) Other

Inter-American Court of Human Rights, Request for an advisory opinion on the climate emergency and human rights, submitted by Colombia and Chile, 2023.

International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *Judgment, I.C.J. Reports 2023*, p. 51.

International Tribunal for the Law of the Sea, Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law, 12 December 2022.

London Court of Arbitration*, Occidental Exploration and Production Company v. Republic of Ecuador (I)*, Case No. UN3467, Final Award, 1 July 2004, *ICSID Reports*, vol. 12 (2007), p. 59.

Permanent Court of Arbitration, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, Case No. 2008-01, Award, 2 August 2010.

____, *Saluka Investments B.V. v. Czech Republic*, Case No. 2001-04, Partial Award, 17 March 2006.

Methanex Corporation v. United States of America, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 3 August 2005, *International Legal Materials*, vol. 44 (2005), p. 1345.

Annex II

Extraterritorial jurisdiction

Revised syllabus proposed by Mario Oyarzábal

I. Introduction

1. The topic "Extraterritorial jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session in 2006, on the basis of the syllabus prepared by the Secretariat.[1] However, the subject has a longer institutional history: questions concerning the exercise of jurisdiction beyond a State's territory were noted as early as 1949 in the Secretariat's Survey of International Law in relation to the Work of Codification of the International Law Commission[2] as a subject warranting the Commission's attention. The present document updates the syllabus to capture developments since 2006.

2. Since 2006, several interrelated trends have reshaped the subject. First, digital communications, cloud computing and cross-border data flows have generated novel jurisdictional questions extending beyond mere access to stored data to the regulation of data-processing, automated decision-making and cyberoperations more broadly. Second, expansive national enforcement actions in anti-bribery, competition law, financial sanctions and human rights accountability have tested the traditionally recognized limits of extraterritorial jurisdiction. Third, international human rights bodies and national courts have deepened the doctrine of extraterritorial application of human rights obligations. Fourth, mandatory supply-chain due diligence legislation has established a new form of regulatory extraterritoriality. Fifth, secondary economic sanctions have raised issues about compelling foreign actors to comply under threat of exclusion from the financial system. Sixth, the enactment of extraterritorial regulatory measures has become the practice of many States around the world, producing a genuinely multipolar landscape that cannot be understood through the lens of the practice of the United States of America and Europe alone. Seventh, domestic courts have increasingly resorted to anti-suit injunctions restraining a party from pursuing proceedings in another jurisdiction, a practice that constitutes an assertion of extraterritorial reach by courts, as opposed to legislatures, and is attracting growing attention in international commercial litigation. Eighth, the exercise of extraterritorial jurisdiction is no longer confined to States alone: international organizations, and regional economic integration organizations, in particular, increasingly perform functions analogous to those of States and extend the reach of their own law extraterritorially, as illustrated by European Union competition law and other European Union legislative instruments with extraterritorial effect. These developments reinforce the timeliness of codification and progressive development of the law governing extraterritorial jurisdiction.

3. The original syllabus introduced the notion of extraterritorial jurisdiction understood as the exercise of sovereign power or authority by a State outside of its territory, and distinguished prescriptive (normative), adjudicative and enforcement jurisdiction as three analytically separate categories, invoking the *S.S. "Lotus"* judgment (1927) of the Permanent Court of International Justice[3] as the starting point for the substantive principles governing the extraterritorial exercise of jurisdiction. It identified the recognized bases for such exercise: the objective territoriality principle, the "effects" doctrine, the protective

[1] *Yearbook … 2006,* vol. II (Part Two), annex E.

[2] Memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission", document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)), Part II, chap. III.

[3] Permanent Court of International, *Case of the S.S. "Lotus", Judgment, 7 September 1927, P.C.I.J. Reports, Series A No. 10.*

principle, the nationality principle, the passive personality principle and – as a principle exercised in the interest of the international community rather than a State's own interest and thus placed outside the proposed scope –universality. It surveyed the application of these principles in two fields of particular relevance – criminal law and commercial law – noting, in criminal law, the gradually broadening acceptance of the passive personality and protective principles in relation to terrorism, cybercrime and drug offences, and, in commercial law, reliance on the nationality principle and the effects doctrine in antitrust and competition matters. In the syllabus, the Secretariat further addressed the consequences of an invalid assertion of extraterritorial jurisdiction (diplomatic protest, non-recognition, blocking statutes, injunctions and international proceedings), questions of priority among competing valid jurisdictional claims (the presumption against extraterritoriality and the foreign State compulsion doctrine), and limitations grounded in sovereign equality, territorial integrity and non-intervention. It proposed a five-part outline for a future instrument – general provisions; principles of jurisdiction; extraterritorial assertion of jurisdiction; limitations; and dispute resolution – and appended a substantial selected bibliography of jurisprudence and literature.

4. The revised syllabus retains the 2006 text as its foundation but updates it to capture developments across nine areas. It also does not prejudge the categories of jurisdiction (the three analytically separate categories being essentially a common law construct) or the degree of territoriality or extraterritoriality thereof (prescriptive jurisdiction being understood as the most tolerant of extraterritoriality; adjudicative jurisdiction tending, in practice, to follow the State's prescriptive jurisdiction; and enforcement jurisdiction being strictly territorial and subject to the consent of the territorial State). Any future work will need to address this conceptual framework and the categories themselves may need to be revisited to arrive at a framework acceptable to all legal traditions.

II. Survey of principal developments since 2006

1. Competition law and the qualified "effects doctrine"

5. The "effects doctrine" – grounding a State's jurisdiction over foreign conduct in the effects that conduct produces within its territory, rather than in where it occurred – once genuinely contested as a basis for asserting jurisdiction in competition law, has since become broadly accepted in principle, although important aspects remain contested, including the permissible scope of the doctrine, the remedies available, considerations of comity and proportionality, and the territorial nexus required. In *Intel Corporation v. European Commission* (2017), the Court of Justice of the European Union confirmed that the European Union could assert jurisdiction over undertakings established outside the European Economic Area if it was "foreseeable that the conduct in question will have an immediate and substantial effect" therein.[4] Courts applying the doctrine have also required that the claim itself arise from the domestic effect relied upon to found jurisdiction, rather than from some other, unrelated effect of the same conduct. For example, in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* (2004), the United States Supreme Court declined to extend the Sherman Antitrust Act (1890) to a claim resting solely on foreign injury that was independent of the effects the conduct produced within the United States, interpreting the Foreign Trade Antitrust Improvements Act (1982) narrowly in the light of considerations of international comity.[5] The Anti-Monopoly Law (2008, amended 2022) in China has been extensively applied to cross-border mergers and abusive practices by foreign firms.[6] Several jurisdictions including India (Competition Commission: "appreciable adverse effect on competition" (AAEC) standard), Brazil (*Conselho Administrativo de Defesa Econômica (CADE)*: "foreign conduct that produces or is likely to produce anti-competitive effects within the Brazilian territory") and South Africa (Competition Act, 1998: "applies to all economic activity within, or having an effect within, the Republic") have enacted comparable effects-based legislation, producing overlapping and sometimes conflicting

[4] Court of Justice of the European Union (Grand Chamber), *Intel Corporation v. European Commission*, Case C-413/14 P, Judgment, 6 September 2017, para. 49.

[5] United States, Supreme Court, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

[6] China, Anti-Monopoly Law, adopted 30 August 2007, in force 1 August 2008, as amended in 2022.

jurisdictional claims that call for bilateral and multilateral cooperation.[7] Disputes today concern principally the extraterritorial reach of remedies and enforcement measures, rather than the legitimacy of asserting jurisdiction over foreign conduct in the first place.

2. Developments in criminal law

6. Extraterritorial criminal jurisdiction has also expanded. The passive personality principle, namely jurisdiction grounded in the nationality of the victim rather than the offender or the *locus delicti*, has been increasingly invoked in terrorism prosecutions: the United States, for example, asserts jurisdiction under section 2332 of Title 18 of the United States Code over the killing of its nationals abroad, subject to Attorney General certification that the act was intended to coerce, intimidate or retaliate against a government or civilian population. The protective principle, namely, permitting jurisdiction over conduct abroad that threatens a State's essential security or governmental functions, underlies extraterritorial applications of counterfeiting, espionage, and national-security statutes, including article 38 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (2020), which goes further than the classical protective principle, asserting jurisdiction over any person anywhere in the world regardless of nationality or any actual nexus to Hong Kong, China, and article 276 of the Criminal Code of the Russian Federation (1996), which covers espionage committed by foreign nationals or stateless persons abroad. The nationality principle has been extended through statutes reaching conduct by nationals abroad even in the absence of any territorial or victim nexus, as in: article 7 (II) (*b*) of the Criminal Code of Brazil, which subjects citizens of Brazil to prosecution at home for serious crimes, including crimes against children, committed entirely outside its territory; and extraterritorial provisions on child sex offences under article 33 of the Act on the Protection of Children and Juveniles against Sexual Abuse of the Republic of Korea (2005), and comparable regimes in other countries.[8] Beyond these traditional bases, cybercrime has generated a jurisdictional approach that extends territoriality itself: article 22 (1) (a) of the Council of Europe Convention on Cybercrime (2001) obligates State Parties to establish jurisdiction where an offence is committed using a computer system in their territory, unlike article 9 of the African Union Convention on Cyber Security and Personal Data Protection (2014), which does not contain equivalent jurisdictional provisions.[9] Finally, as in the 2006 syllabus, universal jurisdiction – exercised in the interest of the international community as a whole rather than that of the exercising State – falls outside the scope of the present topic. Although this exclusion may appear less self-evident today, given that contemporary debates on international crimes, sanctions, immunities, accountability and corporate conduct increasingly intersect with universal or quasi-universal jurisdiction, it is maintained here because the Commission already included the distinct topic "universal criminal jurisdiction" in its long-term programme of work in 2018; consideration of universal jurisdiction is accordingly better pursued under that topic.[10]

3. Human rights and environmental due diligence

7. Mandatory human rights and environmental due diligence legislation has emerged as a new form of extraterritoriality, since such instruments impose obligations on companies incorporated or active in the forum that reach conduct abroad. In its mapping of legislative measures across several jurisdictions in 2026, the Organisation for Economic Co-operation and Development distinguished three regulatory techniques: due diligence conduct requirements, disclosure obligations and product- or market-based measures that condition market access on due diligence.[11] Due diligence conduct requirements have so far emerged

[7] India, Competition Act, 2002 (Act No. 12 of 2003); Brazil, Antitrust Law No. 12.529, 2011; and South Africa, Competition Act No. 89, 1998.

[8] Brazil, Criminal Code, art. 7; Republic of Korea, Act on the Protection of Children and Juveniles from Sexual Abuse, art. 33; United Kingdom of Great Britain and Northern Ireland, Sexual Offences Act 2003; Australia, Crimes Act 1914, part III A; and Germany, Criminal Code, sect. 5, para. 8.

[9] Council of Europe Convention on Cybercrime (Budapest, 23 November 2001), United Nations, *Treaty Series*, vol. 2296, No. 40916, p. 167; and African Union Convention on Cyber Security and Personal Data Protection (Malabo, 27 June 2014).

[10] *Yearbook … 2018*, vol. II (Part Two), annex I.

[11] OECD, *Mapping Social and Environmental Due Diligence Legislation*, OECD Business and Finance Policy Papers, No. 101 (2026).

mostly in Europe: the *Loi de Vigilance* (2017) in France, the *Lieferkettensorgfaltspflichtengesetz* (2021, in force since 2023, in Germany and the European Union Corporate Sustainability Due Diligence Directive (2024), as amended by the Omnibus I package.[12] They impose due diligence obligations on large companies in respect of global supply chains; the European Union Directive also applies to non-European Union companies generating substantial turnover in the Union. Beyond Europe, due diligence normative developments have also taken place, usually focusing on disclosure obligations and soft law: the Modern Slavery Act (2018) in Australia requires reporting on worldwide supply chain risks, the non-binding Guidelines on Respecting Human Rights in Responsible Supply Chains (2022) of the Ministry of Economy, Trade and Industry in Japan call upon Japanese companies to conduct human rights due diligence across global value chains and the National Guidelines on Responsible Business Conduct (2019) in India, likewise voluntary, set comparable expectations. In parallel, domestic courts have entertained civil claims concerning the overseas conduct of multinational enterprises grounded in the defendant's domicile with clear extraterritorial effects, namely: the Supreme Court of Canada, in *Nevsun Resources Ltd. v. Araya* (2020), declined to strike out a civil claim against a Canadian mining company, brought in Canada on the basis of its Canadian domicile, in respect of alleged customary international law violations committed entirely in Eritrea; the courts in the Kingdom of the Netherlands, in the *Shell Nigeria litigation* (2021), held Shell's Nigerian subsidiary liable under Nigerian law for oil pipeline spills and found that the parent company, Royal Dutch Shell Plc – at the time incorporated in England and Wales but headquartered in the Kingdom of the Netherlands – owed the claimants a duty of care, albeit one limited to the installation of a leak detection system on the pipeline concerned; and the Supreme Court of the United Kingdom, in *Vedanta Resources Plc v. Lungowe* (2019) and *Okpabi v. Royal Dutch Shell Plc* (2021), likewise accepted as arguable, at the jurisdictional stage, that parent companies may owe a common law duty of care in respect of harm arising from their foreign subsidiaries' operations.[13]

4. Cyberspace and cross-border access to data

8. Cross-border jurisdiction over electronically stored data has become one of the most contested areas of jurisdictional law. In *United States v. Microsoft Corp.,* the United States Court of Appeals for the Second Circuit held in 2016 that the Stored Communications Act did not compel production of data held on servers abroad in response to a domestic warrant.[14] The Clarifying Lawful Overseas Use of Data Act (2018) amended the Stored Communications Act, explicitly stating that United States providers must disclose data within their possession, custody or control, regardless of whether the data are stored in or outside the United States. The European Union General Data Protection Regulation (2016, in force since 2018) asserts extraterritorial reach over non-European Union controllers and processors that offer goods or services to, or monitor the behaviour of, persons in the European Union.[15] The European Union Artificial Intelligence Act (2024, applicability

[12] France, *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*; Germany, *Lieferkettensorgfaltspflichtengesetz*, *Bundesgesetzblatt Jahrgang 2021*, vol. I, pp. 2959–2969; and Directive (EU) 2026/470 of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements, *Official Journal of the European Union*, 26 February 2026 ("Omnibus I").

[13] Canada, Supreme Court, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5; Kingdom of the Netherlands, The Hague Court of Appeal, *Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd*, *Oruma* case, ECLI:NL:GHDHA:2021:132; *Goi* case, ECLI:NL:GHDHA:2021:133; and *Ikot Ada Udo* case, ECLI:NL:GHDHA:2021:134; and United Kingdom, Supreme Court, *Vedanta Resources Plc and another v. Lungowe and others* [2019] UKSC 20, and *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3. In the *Município de Mariana* case, the High Court of Justice of England and Wales, applying Brazilian law, held BHP liable on the merits for the collapse, in 2015, of the Fundão dam in Brazil: *Município de Mariana and others v. BHP Group (UK) Limited and BHP Group Limited* [2025] EWHC 3001 (TCC).

[14] In *Warrant to Search a Certain E-Mail Account*, 829 F.3d 197 (2d Cir. 2016); *United States v. Microsoft Corp.*, 584 U.S., 138 S. Ct. 1186 (2018) (*per curiam*, vacated and remanded as moot).

[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of

being progressively rolled out until 2027) has extended this market-access model of regulatory extraterritoriality to automated decision-making; applies to providers and deployers of artificial intelligence systems whose output is used within the Union regardless of where the provider is established.[16] Comparable, if less expansive, frameworks have since emerged in China, India, the United States and, most recently, the Republic of Korea.[17] Unresolved questions remain under the Council of Europe Convention on Cybercrime and customary international law regarding governmental access to data stored abroad and State-sponsored cyberoperations, with the Second Additional Protocol to the Convention (2022) and the United Nations Convention against Cybercrime (2024) addressing some of these gaps at the regional and universal levels, respectively, although both have yet to enter into force.[18]

5. Anti-corruption and anti-bribery

9. Anti-corruption enforcement was one of the first expressions of extraterritoriality and has expanded markedly. As early as 1977, the United States adopted the Foreign Corrupt Practices Act, which has been applied against foreign companies, even those with a limited nexus to the United States.[19] Subsequently, international conventions requiring States to criminalize the bribery of foreign public officials were adopted: the Inter-American Convention against Corruption (1996), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).[20] As a consequence, many States have adopted domestic anti-bribery legislation, such as the Bribery Act (2010) in the United Kingdom of Great Britain and Northern Ireland, the Sapin II law (2016) in France, the Clean Companies Act (2013) in Brazil and the Prevention of Corruption (Amendment) Act (2018) in India.[21] In this context, coordinated multi-jurisdictional enforcement proceedings, sometimes resulting in simultaneous settlements, have become routine, formalized through mechanisms such as the "anti-piling on" policy of the United States Department of Justice, which credits

such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *Official Journal of the European Union*, L 119/1, 4 May 2016, art. 3.

[16] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), *Official Journal of the European Union*, 12 July 2024, art. 2 (1) (*c*).

[17] China, Interim Measures for the Management of Generative Artificial Intelligence, promulgated 10 July 2023, effective 15 August 2023; India, Digital Personal Data Protection Act, 2023; United States, Colorado Revised Statutes, sects. 6-1-1701 to 6-1-1707 (2024); United States, Texas Responsible Artificial Intelligence Governance Act (2025); and Republic of Korea, Framework Act on the Development of Artificial Intelligence and the Establishment of a Foundation of Trust (2025).

[18] Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence (Strasbourg, 12 May 2022), *Council of Europe Treaty Series*, No. 224; and United Nations Convention against Cybercrime: Strengthening International Cooperation for Combating Certain Crimes Committed by Means of Information and Communications Technology Systems and for the Sharing of Evidence in Electronic Form of Serious Crimes, adopted by the General Assembly on 24 December 2024 by resolution 79/243.

[19] United States, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 ff; United States, District Court for the District of Colombia, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008); United States, Department of Justice, "Alstom pleads guilty and agrees to pay $772 million criminal penalty to resolve foreign bribery charges", 22 December 2014; United States, Department of Justice, "Airbus agrees to pay over $3.9 billion in global penalties to resolve foreign bribery and ITAR Case", 31 January 2020.

[20] Inter-American Convention against Corruption (Caracas, 29 March 1996), E/1996/99; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (with annex) (Paris, 17 December 1997), United Nations, *Treaty Series*, vol. 2802, No. 49274, p. 225; and United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.

[21] France, *Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* ("Sapin II"); and Brazil, *Lei nº 12.846*, 1 August 2013 (*Lei Anticorrupção*).

penalties paid to foreign authorities, and the joint investigation and taskforce arrangements developed by enforcement authorities in France, Switzerland and the United Kingdom.[22]

6. Extraterritorial scope of human rights obligations

10. The extraterritorial scope of States' human rights obligations is a different issue from the exercise of extraterritorial jurisdiction addressed elsewhere in this syllabus. It is concerned primarily with treaty interpretation and practice, namely whether acts or omissions beyond the territory of a State Party fall within the scope of that State's human rights obligations. At the universal level, the Human Rights Committee confirmed, in its general comment No. 36 (2018), that the obligation to respect and ensure the rights under article 6 of the International Covenant on Civil and Political Rights applies to individuals over whom a State Party exercises "power or effective control" outside national borders, while the Committee against Torture has affirmed similar obligations in the context of rendition and extraterritorial interrogation operations.[23] At the regional level, the European Court of Human Rights, in *Al-Skeini and others v. United Kingdom* (2011), recognized two bases for extraterritorial jurisdiction under article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights): effective control over territory, and State agent authority and control over individuals.[24] Subsequent cases applied and developed those bases in military contexts. The Inter-American Court of Human Rights affirmed, in Advisory Opinion OC-23/17 (2017), that States bear extraterritorial human rights obligations where their activities cause transboundary environmental harm, grounding jurisdiction in a causal nexus between activities on the State's territory and rights violations abroad – a basis broader than that of the European Court of Human Rights, namely effective control over territory or persons. The Commission itself has engaged with the "effective control" logic in its draft principles on protection of the environment in relation to armed conflicts (2022), whose provisions applicable to situations of occupation address the extraterritorial application of international human rights law.[25] In Africa, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights uniquely proposes to grant the merged African Court of Justice and Human and Peoples' Rights jurisdiction over both human rights violations and corporate criminal liability on the continent (art. 46C), without limiting that jurisdiction to entities incorporated in African Union member States.[26] In the Asia-Pacific region, the absence of a regional human rights court has led to reliance on domestic constitutional litigation, United Nations treaty body communications and national human rights institutions to give effect to international human rights obligations with extraterritorial dimensions.

7. Jurisdictional issues in environmental law

11. This area illustrates another related but analytically distinct question: not whether a State may exercise jurisdiction over persons or conduct abroad, but the extraterritorial scope of a State's own obligations towards persons, territory and the environment beyond its borders when conduct within its jurisdiction or control causes transboundary harm. Three

[22] For example, Airbus reached simultaneous resolutions with the Parquet National Financier of France, the United Kingdom Serious Fraud Office and the United States Department of Justice and Department of State on 31 January 2020; United States, Department of Justice, "Coordination of corporate resolution penalties in parallel and/or joint investigations and proceedings arising from the same misconduct", *Justice Manual*; and United Kingdom, Serious Fraud Office; France, Parquet National Financier; and Switzerland, Office of the Attorney General, "International Anti-Corruption Prosecutorial Taskforce: Founding Statement" (2025).

[23] Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 63; and Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 29.

[24] *Al-Skeini and others v. United Kingdom* [Grand Chamber], No. 55721/07, *Reports of Judgments and Decisions 2011*, paras. 133 *et seq*.

[25] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 58, Text of the draft principles on protection of the environment in relation to armed conflicts, principles 19–21.

[26] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014) (not yet in force), art. 28.

advisory opinions delivered within 14 months have clarified this dimension of States' climate obligations. The International Tribunal for the Law of the Sea held, in May 2024, that greenhouse gas emissions constituted marine pollution, that States must prevent transboundary harm arising from emissions within their jurisdiction or control, and that that duty extended to ensuring that vessels flying a State's flag did not contribute to such emissions. The Inter-American Court of Human Rights, in May 2025, extended to the climate emergency the effective-control test that it had developed in an earlier advisory opinion in 2017. The International Court of Justice, in July 2025, likewise confirmed a customary duty to prevent significant harm to the climate system, including harm caused by private actors within a State's jurisdiction.[27] However, the European Court of Human Rights, in *Duarte Agostinho*, declined to adopt this "control over the source" approach, maintaining its traditional "control over the victim" test and thereby excluding extraterritorial claims based on a State's control over the source of harm arising outside its territory.[28] The Committee on the Rights of the Child reached a similar conclusion in *Sacchi et al. v. Argentina* (2021), finding that a State may bear extraterritorial responsibility for the transboundary effects of its emissions on children abroad. Domestic courts have applied comparable reasoning, both to private emitters and, increasingly, to States themselves.[29] The District Court of The Hague, in *Milieudefensie et al. v. Royal Dutch Shell Plc* (2021), ordered Shell to cut its global emissions by 45 per cent by 2030, although the Court of Appeal of The Hague (2024) declined to impose a specific numerical target on a company's worldwide emissions. The Higher Regional Court of Hamm, in *Lliuya v. RWE AG* (2025), held that a German company may in principle be liable under German property law for its proportionate contribution to climate harm abroad, notwithstanding the distance between the emissions and the harm.[30] On obligations arising from a State's own conduct, the Constitutional Court of Germany, in *Neubauer*, accepted that it could not be ruled out that the Basic Law extended protection to persons abroad – in that case, claimants in Bangladesh and Nepal – from the extraterritorial effects of conduct within German jurisdiction. The Italian Court of Cassation, by contrast, grounded jurisdiction in the location of the harm, holding that Italian courts have jurisdiction to hear a claim that an Italian-domiciled corporation (with significant State ownership) may be liable for climate-related damage occurring in Italy even where the underlying conduct took place abroad. Extraterritorial jurisdiction in international environmental law is not confined to climate change.[31] The Transboundary Haze Pollution Act (2014) in Singapore imposes civil and criminal liability on any entity, regardless of place of incorporation, whose conduct outside Singapore contributes to haze pollution within the country.[32]

8. Sanctions and countermeasures

[27] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, *ITLOS Reports 2024*, p. 4, at paras. 179 and 252; Inter-American Court of Human Rights, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25, 29 May 2025, Series A, No. 32, para. 278; Inter-American Court of Human Rights, *Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras. 95 and 101–104; and International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, para. 103.

[28] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others* [Grand Chamber], No. 39371/20, Judgment, 9 April 2024, paras. 565 *et seq*.

[29] Committee on the Rights of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019, CRC/C/88/D/104/2019, paras. 10.5 *et seq*.

[30] Kingdom of the Netherlands, District Court of The Hague, *Milieudefensie and others v. Royal Dutch Shell Plc*, ECLI:NL:RBDHA:2021:5339, Judgment, 26 May 2021, para. 5.3; Court of Appeal of The Hague, *Shell Plc and others v. Vereniging Milieudefensie and others*, ECLI:NL:GHDHA:2024:2100, Judgment, 12 November 2024, para. 7.96; Higher Regional Court of Hamm, *Lliuya v. RWE AG*, Case No. I-5 U 15/17, Judgment, 28 May 2025, p. 45.

[31] International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment, I.C.J. Reports 2010*, p. 14, at pp. 56–56, para. 101; and International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment, I.C.J. Reports 2015*, p. 665, at p. 706, para. 104.

[32] Transboundary Haze Pollution Act 2014 (2020 revised edition), part 2.

12. Secondary economic sanctions have sought to compel foreign financial institutions and companies to desist from transactions with sanctioned persons or entities on pain of exclusion from the United States financial system.[33] The European Union has maintained that such measures are contrary to international law when applied to European Union entities and has enacted blocking regulations, while itself adopting measures with extraterritorial consequences.[34] Other States have developed their own counter-frameworks: the Anti-Foreign Sanctions Law (2021) in China establishes countermeasures and a private cause of action in Chinese courts, with the Ministry of Commerce formalizing its first prohibition order under the Rules on Blocking the Improper Extraterritorial Application of Foreign Laws and Measures (Blocking Rules) in May 2026. The Russian Federation has enacted comparable counter-sanctions legislation.[35] The proliferation of overlapping counter-sanctions regimes creates acute conflicts of obligation for multinational enterprises.[36] Some blocking and counter-sanctions measures may be framed by States as responses to allegedly unlawful extraterritorial measures; whether they qualify as countermeasures within the meaning of articles 49 to 54 of the articles on responsibility of States for internationally wrongful acts (2001) depends on whether the conditions governing countermeasures under the law of State responsibility are satisfied.

9. Anti-suit injunctions and other extraterritorial assertions of jurisdiction by domestic courts

13. Anti-suit injunctions and other exercises of extraterritorial reach by domestic courts have proliferated in international commercial and intellectual property litigation. An anti-suit injunction does not of itself constitute an exercise of extraterritorial prescriptive or enforcement jurisdiction: it is an *in personam* order, addressed to a party already subject to the forum's jurisdiction, restraining that party from pursuing proceedings elsewhere, and thus indirectly affecting proceedings before foreign courts. The Court of Justice of the European Union held, in *Allianz SpA v. West Tankers Inc.* (2009), that a court-ordered anti-suit injunction restraining proceedings in another member State was incompatible with the Brussels I Regulation,[37] even in support of an arbitration agreement; and in *Gazprom OAO* (2015), it held that that did not extend to anti-suit orders made by arbitral tribunals.[38] Since the decision by the United Kingdom to leave the European Union ("Brexit"), the United Kingdom has resumed granting such injunctions, including for arbitrations seated abroad.[39] A further set of conflicts has arisen in cross-border standard-essential patent and fair, reasonable and non-discriminatory licensing litigation, in which courts in China, India, Germany and the United States have issued anti-suit injunctions restraining parallel proceedings abroad, generating responsive anti-anti-suit and even anti-anti-anti-suit injunctions. The Supreme People's Court of China enjoined enforcement of a German patent injunction in *Huawei Technologies Co. Ltd. v. Conversant Wireless Licensing S.a.r.l.* (2020); a worldwide anti-suit injunction from the Wuhan Intermediate People's Court in *Xiaomi Communication Technology Co. v. InterDigital, Inc.* (2020) was met by counter-injunctions from the Delhi High Court and the Munich Regional Court; and the United States District

[33] United States, Executive Order 14024 of 15 April 2021 ("Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation"), 86 Fed. Reg. 20249, as amended by Executive Order 14114 of 22 December 2023, 88 Fed. Reg. 89271 (26 December 2023); and Executive Order 14203 of 6 February 2025 ("Imposing Sanctions on the International Criminal Court"), 90 Fed. Reg. 9587 (12 February 2025).

[34] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, as amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018.

[35] China, Anti-Foreign Sanctions Law, adopted on 10 June 2021, first deployed in Announcement No. 21 (2026) of the Ministry of Commerce: "Blocking order regarding United States' sanctions on five Chinese companies involving Iranian oil", 2 May 2026.

[36] Russian Federation, Law No. 127-FZ of 4 June 2018 (counter-sanctions law).

[37] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[38] Court of Justice of the European Union, *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali SpA v. West Tankers Inc.*, Case C-185/07, Judgment, 10 February 2009; and *Gazprom OAO v. Lithuania*, Case C-536/13, Judgment, 13 May 2015.

[39] United Kingdom, Supreme Court, *UniCredit Bank GmbH v. RusChemAlliance LLC*, Judgment, 18 September 2024, [2024] UKSC 30, para. 113.

Court for the Eastern District of Texas issued an anti-interference injunction against a Chinese anti-suit injunction in *Ericsson Inc. v. Samsung Electronics Co.* (2021).[40]

III. Criteria for selection of topics

14. The topic was found in 2006 to satisfy the three criteria that the Commission had articulated for the selection of new topics, namely that a topic should: (a) reflect the needs of States with respect to the progressive development and codification of international law; (b) be sufficiently advanced in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for those purposes – and it satisfies them even more readily today. First, assertions of extraterritorial jurisdiction described in the above sections have generated friction between States that the Commission could help to resolve. Second, State practice is also considerably more developed, as evidenced by the corpus of judicial decisions, national legislation, and treaty practice surveyed. Third, the recognized bases for extraterritorial jurisdiction have proved durable, providing a stable framework within which the more recent developments can be situated.

IV. Future programme of work

15. Should the Commission decide to proceed with the topic, several approaches to its future programme of work merit consideration.

16. At one end of the spectrum, the Commission could undertake a comprehensive treatment of the general principles governing extraterritorial jurisdiction covering the full range of recognized bases (territoriality, nationality, passive personality, the protective principle and the effects doctrine), the limitations imposed by sovereignty, comity and non-intervention, and the available mechanisms for resolving jurisdictional conflicts. This approach would produce an instrument of broad normative scope. Expert and learned bodies have addressed the subject along comparable lines, although without producing a comprehensive and authoritative codification: the Institute of International Law examined the extraterritorial jurisdiction of States, producing a draft resolution[41] – in which it surveyed the general principles of prescriptive and enforcement jurisdiction and addressed conflicts between competing claims. The International Bar Association Task Force on Extraterritorial Jurisdiction (2009) produced a comprehensive multi-sectoral survey of State practice and legal principles across criminal law, antitrust, securities regulation and human rights, providing a detailed mapping of the field. The Commission, as a subsidiary organ of the General Assembly mandated with the progressive development and codification of international law, is uniquely positioned to produce an instrument firmly grounded in State practice that addresses the normative gaps and conflicts of obligation that expert bodies have identified but cannot resolve.

17. At the other end of the spectrum, the Commission could focus on one or more specific areas in which jurisdictional tensions have become particularly acute and in which the case for specific rules is strongest – for example, civil and commercial law, cyberspace and jurisdictional issues related to artificial intelligence or mandatory supply-chain due diligence obligations. Other issues sit less comfortably within the topic. The extraterritorial application of human rights treaties and the extraterritorial scope of environmental and climate obligations each raise a distinct methodological question, addressed above, since both concern the scope of a State's own substantive obligations rather than the exercise of

[40] China, Supreme People's Court, *Huawei Technologies Co. Ltd. v. Conversant Wireless Licensing S.a.r.l.*, (2019) Zui Gao Fa Zhi Min Zhong No. 732, 733, 734, Order, 28 August 2020; China, Wuhan Intermediate People's Court, *Xiaomi Communication Technology Co. v. InterDigital, Inc.* (2020) E 01 Zhi Min Chu No. 169, Order, 23 September 2020; India, Delhi High Court, *InterDigital Technology Corp. v. Xiaomi Corp.*, I.A. 8772/2020 in CS(COMM) 295/2020, Order, 9 October 2020; Regional Court of Munich, Case No. 7 O 14276/20, Order, 25 February 2021; China, Wuhan Intermediate People's Court, *Samsung Electronics Co. v. Telefonaktiebolaget LM Ericsson* (2020) E 01 Zhi Min Chu No. 743, Order, 25 December 2020; and United States, District Court for the Eastern District of Texas, *Ericsson Inc. v. Samsung Electronics Co.*, No. 2:20-CV-00380-JRG, 2021.

[41] Institute of International Law, *Yearbook*, vol. 65, Session of Milan, Part I (1993), pp. 174–185.

extraterritorial jurisdiction; they may accordingly be better treated as related but separate issues rather than as forming part of the Commission's work on this topic. Sanctions raise a comparable difficulty: blocking statutes and counter-sanctions measures may fall within the countermeasures regime under articles 49 to 54 of the articles on responsibility of States for internationally wrongful acts; and the underlying sanctions themselves raise foreign policy considerations and other legal issues such as their consistency with the principle of non-intervention, the immunities of States and their officials, and States' obligations under human rights and international economic law. In any event, a sectoral approach would permit deeper engagement with the technical and policy dimensions of each area and could produce targeted draft provisions with more immediate practical impact, although at the cost of leaving the underlying general framework unaddressed.

18. Intermediate approaches are also possible: the Commission could produce a set of general draft provisions on the principles of extraterritorial jurisdiction, accompanied by annexes or commentaries addressing specific fields; or it could adopt a phased programme, beginning with a general framework instrument and addressing particular sectors in subsequent or separate work. The intermediate approach seems preferable, as it would give States and practitioners a single reference framework – supporting coherence and predictability across the field as a whole – while also allowing the flexibility needed to address genuinely divergent sectoral practice, without either oversimplifying or fragmenting the topic.

19. The question of the appropriate approach is, in the first instance, one for the Commission itself, having regard to the complexity of the subject matter and its available resources. It is, however, also a matter on which the views of States must be taken into account. The present syllabus is intended to provide a basis for an initial exchange of views in the Sixth Committee. The reaction of States to the identification of the topic and to the range of possible approaches outlined above – including their assessment of which areas are most in need of codification or progressive development and which approach would best serve the interests of the international community – will inform the further elaboration of the Commission's programme of work. A first report by the Special Rapporteur, to be prepared following that exchange, would take into account the positions expressed by States in the Sixth Committee and would propose a more defined methodological and substantive framework for the Commission's consideration, including a preliminary determination of the scope of the topic, the form of the intended output and a proposed workplan for the topic as a whole.

V. Selected bibliography (updated)

The following bibliography updates and extends the bibliography appended to the annex in 2006, reflecting developments in the literature across the range of relevant countries, legal traditions and languages. Beyond the decisions of international and regional courts and bodies, the growing role of national courts and regulatory authorities in extraterritorial exercises of jurisdiction will warrant a substantial survey of relevant legislation, practice and case law at the appropriate moment, extending not only to the legislation and jurisprudence of States that assert extraterritorial jurisdiction, but also to the practice and case law of national courts in States affected by other States' extraterritorial measures.

English-language scholarship

AKHTZR, Z., "Mergers, Extraterritorial jurisdiction and convergence of EU and US Law", *European Review of Private Law*, vol. 27 (2019), p. 59.

ARCURI, A. and F. VIOLI, "Reconfiguring territoriality in international economic law", *Netherlands Yearbook of International Law*, vol. 47 (2017), p. 175.

BERKES, A., "Human rights obligations of the territorial State in the cyberspace of areas outside its effective control", *Israel Law Review*, vol. 52 (2019), p. 197.

BERMAN, P.S., "*Yahoo! v. LICRA*, private international law, and the deterritorialisation of data", *in* H. Muir Watt and others (eds.), *Global Private International Law: Adjudication without Frontiers*, Cheltenham, Edward Elgar Publishing, 2019, p. 393.

BESSON, S., "The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to", *Leiden Journal of International Law*, vol. 25 (2012), p. 857.

BHUTA, N. (ed), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges*, Oxford, Oxford University Press, 2016.

BIALOSTOZKY, N., "Extraterritoriality and national security: protective jurisdiction as a circumstance precluding wrongfulness", *Columbia Journal of Transnational Law*, vol. 52 (2014), p. 617.

BRIGHT, C., "The civil liability of the parent company for the acts or omissions of its subsidiary: the example of the *Shell* case in the UK and the Netherlands", *in* A. Bonfanti (ed.), *Business and Human Rights in Europe: International Law Challenges*, New York, Routledge, 2019, p. 212.

BUCHAN, R., *Cyber Espionage and International Law*, Oxford, Hart, 2019, chap. 5.

BUXBAUM, H.L., "Territory, territoriality, and the resolution of jurisdictional conflict", *American Journal of Comparative Law*, vol. 57 (2009), p. 631.

CANTÚ RIVERA, H., "Developments in extraterritoriality and soft law: towards new measures to hold corporations accountable for their human rights performance?", *Anuario Mexicano de Derecho Internacional*, vol. 14 (2014), p. 727.

CHENWI, L. and T.S. BULTO, "Extraterritoriality in the African regional human rights system from a comparative perspective", *in* L. Chenwi and T.S. Bulto (eds.), *Extraterritorial Human Rights Obligations from an African Perspective*, Cambridge, Intersentia, 2018, p. 13.

CREMONA, M., "Extending the reach of EU law: the EU as an international legal actor", *in* M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law*, Oxford, Oxford University Press, 2019, p. 64.

COLANGELO, A.J., "What is extraterritorial jurisdiction?", *Cornell Law Review*, vol. 99 (2014), p. 1303.

COOMANS, A.P.M. and R. KÜNNEMANN, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, Cambridge, Intersentia, 2012.

DE SCHUTTER, O., "Globalization and jurisdiction: lessons from the European Convention on Human Rights", *Baltic Yearbook of International Law*, vol. 6 (2006), p. 185.

DODGE, W.S., "The new presumption against extraterritoriality", *Harvard Law Review*, vol. 133 (2020), p. 1582.

EMMENEGGER, S., "Extraterritorial economic sanctions and their foundation in international law", *Arizona Journal of International and Comparative Law*, vol. 33 (2016), p. 632.

GÄRDITZ, K., "Legal restraints on the extraterritorial activities of Germany's intelligence services", *in* R.A. Miller (ed.), *Privacy and Power: a Transatlantic Dialogue in the Shadow of the NSA-Affair*, Cambridge, Cambridge University Press, 2017, p. 401.

GIBNEY, M., "Extraterritoriality", *in* M. Wewerinke-Singh and S. Mead (eds.), *The Cambridge Handbook on Climate Litigation*, Cambridge, Cambridge University Press, 2025, p. 200.

HADJIYIANNI, I., "The extraterritorial reach of EU environmental law and access to justice by third country actors", *European Papers*, vol. 2 (2017), p. 519.

____, "The extraterritorial reach of environmental law: legitimacy concerns and the role of domestic courts in controlling transnational regulatory power", *in* A.L. Parrish and C. Ryngaert, (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham, Edward Elgar, 2023, p. 372.

INSTITUTE OF INTERNATIONAL LAW, "Extraterritorial jurisdiction of States", *Yearbook*, 1993, Session of Milan, annex III; *Yearbook*, 1999, Session of Berlin, p. 371; and *Yearbook*, 2001, Session of Vancouver, p. 87.

INTERNATIONAL LAW ASSOCIATION, "Final report on extraterritorial jurisdiction", *Report of the Sixty-seventh Session Held at Helsinki, Finland, 12 to 17 August 1996* (1996), p. 520.

KAMMINGA, M.T., "Extraterritoriality", *in* R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, online edition, 2012.

KARAKAS, I. and H. BAKIRCI, "Extraterritorial application of the European Convention on Human Rights: evolution of the Court's jurisprudence on the notions of extraterritorial jurisdiction and State responsibility", *in* A. Van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law*, Oxford, Oxford University Press, 2018, p. 112.

LEHMANN, M., "Legal fragmentation, extraterritoriality and uncertainty in global financial regulation", *Oxford Journal of Legal Studies*, vol. 37 (2017), p. 406.

MA, D., Y. ZHOU and D. MAMADOU GUEDJOUMA, "Extraterritorial jurisdiction over transboundary marine pollution: Chinese courts and implications for marine environmental governance", *Review of European, Comparative & International Environmental Law*, vol. 35 (2026), p. 552.

MILANOVIC, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford University Press, 2011.

___, "Human rights treaties and foreign surveillance: privacy in a digital age", *Harvard International Law Journal*, vol. 56 (2015), p. 81.

MILLS, A., "Rethinking jurisdiction in international law", *British Yearbook of International Law*, vol. 84 (2014), p. 187.

MORGERA, E., *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge, Cambridge University Press, 2012.

MOSSOP, J. and D. FREESTONE, (eds.), *The Agreement on Marine Biodiversity of Areas Beyond National Jurisdiction: Commentary and Analysis*, Oxford, Oxford University Press, 2025.

OKOWA, P., "Transboundary air pollution", *in* L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed., Oxford, Oxford University Press, 2021, p. 475.

PARRISH, A.L., "The interplay between extraterritoriality, sovereignty, and the foundations of international law", *in* D.S. Margolies and others (eds.), *The Extraterritoriality of Law: History, Theory, Politics*, London, Routledge, 2019, p. 169.

____ and C. RYNGAERT (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham, Edward Elgar, 2023.

PERRONE, N., "Perspectives of extraterritorial jurisdiction for environmental damage in the proposal of the European Directive on Corporate Sustainability Due Diligence", *Italian Review of International and Comparative Law*, vol. 3 (2023), p. 389.

REHBINDER, E., "Extraterritoriality of pollution control laws from a European Perspective", *in* G. Handl and J. Zekoll, (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, Leiden, Nijhoff, 2012, p. 127.

REINISCH, A., "Human rights extraterritoriality: controlling companies abroad", *in* K. Yalin-Mor (ed.), *Community Interests Across International Law*, Oxford, Oxford University Press, 2018), p. 396.

RYNGAERT, C., *Jurisdiction in International Law*, 2nd ed., Oxford, Oxford University Press, 2015.

____, "Extraterritorial enforcement jurisdiction in cyberspace: normative shifts", *German Law Journal*, vol. 24 (2023), p. 537.

SCHMITT, M.N. (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge, Cambridge University Press, 2017.

SCOTT, J., "The geographical scope of the EU's climate responsibilities", *Cambridge Yearbook of European Legal Studies*, vol. 17 (2015), p. 92.

SECK, S., "Extraterritoriality and corporate climate responsibility", *in* A. Parrish and C. Ryngaert (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham, Edward Elgar, 2023, p. 476.

STEPHENS, T., *International Courts and Environmental Protection*, Cambridge, Cambridge University Press, 2009.

TESHOME, R.G., "Extraterritorial human rights obligations of States for transboundary climate harm: new developments and unanswered questions", *Netherlands Quarterly of Human Rights* (2026).

VORDERMAYER, M., "The extraterritorial application of multilateral environmental agreements", *Harvard International Law Journal*, vol. 59 (2018), p. 59.

French-language scholarship

BOUCOBZA, X. and Y.-M. SERINET, "La régulation des groupes internationaux de sociétés: universalité de la *compliance* versus contrôles nationaux", *Journal du droit international*, vol. 146 (2019), p. 3.

BISMUTH, R., "Pour une appréhension nuancée de l'extraterritorialité du droit américain – quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas", *Annuaire français de droit international*, vol. 61 (2015), p. 785.

____, "L'extraterritorialité des embargos et dispositifs anti-corruption américains: le point de vue du droit international public", *in* A. Gaudemet (ed.), *La compliance: un monde nouveau?: aspects d'une mutation du droit*, Paris, Éditions Panthéon-Assas, 2016, p. 37.

____, "L'extraterritorialité du FATCA et le problème des 'américains accidentels'", *Journal du droit international*, vol. 144 (2017), p. 1197.

BUXBAUM, H.L. and T.F. GRAFF, (eds.), *Extraterritoriality –L'extraterritorialité*, Leiden, Brill/Nijhoff, 2022.

CHAMPETIER DE RIBES JUSTEAU, A.-L., "De nouveaux obstacles à la responsabilité transnationale des entreprises dans le domaine des droits de l'homme: l'arrêt Kiobel et ses suites", *in* K. Benyekhlef (ed.), *Vers un droit global?* Montreal, Thémis, 2016, p. 77.

GRISEL, G., *Application extraterritoriale du droit international des droits de l'homme*, Basel, Helbing Lichtenhahn, 2010.

MARRELLA, F., "Protection internationale des droits de l'homme et activités des sociétés transnationales", *Collected Courses of The Hague Academy of International Law*, vol. 385 (2017), p. 33.

PRISO-ESSAWE, S.J., "Les juridictions régionales africaines à l'épreuve du devoir de vigilance", *in* E. Da Allada, (ed.), *Devoir de vigilance. Quelles perspectives africaines? Regards croisés en droit international, droit comparé et droit OHADA*, Paris, Éditions Lefebvre-Dalloz, 2026, p. 105.

Spanish-language scholarship

BONET PÉREZ, J. and R.A. ALIJA FERNÁNDEZ, (eds.), *La extraterritorialidad y la protección internacional de los derechos humanos respecto a conductas de los actores privados*, Madrid, Marcial Pons, 2021.

CANTÚ RIVERA, H., "Extraterritorialidad y soft law: desarrollos recientes en materia de empresas y derechos humanos", *Anuario Mexicano de Derecho Internacional*, vol. 14 (2014), p. 61.

MARULLO, M.C. and F.J. ZAMORA CABOT, "Recientes desarrollos en los litigios transnacionales empresas y derechos humanos: el caso Kiobel III", *Cuadernos Europeos de Deusto*, vol. 63 (2020), p. 57.

VANDEBOGAERDE, A., "La extraterritorialidad de los derechos económicos, sociales y culturales: ¿cómo atribuir obligaciones?", *in* J. Bonet Pérez and R.A. Alija Fernández (eds.), *La exigibilidad de los derechos económicos, sociales y culturales en la sociedad internacional del siglo XXI: una aproximación jurídica desde el derecho internacional*, Madrid, Marcial Pons, 2016, p. 71.

Other languages

ALÌ, A., "Dalle misure restrittive dell'Unione europea alla 'guerra economica' nei confronti della Russia e della Bielorussia a seguito dell'invasione dell'Ucraina", *Questione Giustizia* (2022).

BERNSTORFF von, J., "Extraterritoriale menschenrechtliche Staatenpflichten und Corporate Social Responsibility: wie weit geht die menschenrechtliche Verantwortung des Staates für das Verhalten eigener Unternehmen im Ausland?", *Archiv des Völkerrechts*, vol. 49 (2011), p. 34.

DE WET, E. and C. SEEWALD, "Die völkerrechtlichen Grundlagen von Sanktionen: Ein rechtsquellenorientierter Überblick unter besonderer Berücksichtigung der restriktiven Maßnahmen der EU gegen Russland", *Zeitschrift für öffentliches Recht*, vol. 79 (2024), p. 101.

DOMBROWSKI, N., *Extraterritoriale Strafrechtsanwendung im Internet*, Berlin, Duncker & Humblot, 2014.

HAFNER, G., "Völkerrechtliche Grenzen und Wirksamkeit von Sanktionen gegen Völkerrechtssubjekte", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 76 (2016), p. 391.

____, "Diener zweier Herren: Gegenmaßnahmen im unions- und völkerrechtlichen Kontext", *in* P.B. Donath and others (eds.), *Der Schutz des Individuums durch das Recht: Festschrift für Rainer Hofmann zum 70. Geburtstag*, Berlin, Springer, 2023), p. 71.

KARPENSTEIN, U. and R. SANGI, "Iran-Sanktionen am Scheideweg: Die EU-Blocking-Verordnung und INSTEX", *Europäische Zeitschrift für Wirtschaftsrecht*, vol. 8 (2019), p. 309.

MEESSEN, K.M., *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975.

MENG, W., *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Berlin, Springer, 1994.

____, "Wirtschaftssanktionen und staatliche Jurisdiktion – Grauzonen im Völkerrecht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 57 (1997), p. 269.

SALIBA, A.T. and T.G. MAIA, "Aplicação extraterritorial de tratados de direitos humanos: evolução à luz de demandas de direitos humanos contemporâneas", *Suprema: Revista de Estudos Constitucionais*, vol. 3 (2023), p. 163.

VEZZANI, S., "Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani", *Rivista di diritto internazionale*, vol. 101 (2018), p. 1086.