



United Nations

Report of the International Law Commission

**Seventy-first session
(29 April–7 June and 8 July–9 August 2019)**

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

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2019*.

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Chapter I Introduction

1. The International Law Commission held the first part of its seventy-first session from 29 April to 7 June 2019 and the second part from 8 July to 9 August 2019 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Eduardo Valencia-Ospina, Chair of the seventieth session of the Commission.

A. Membership

2. The Commission consists of the following members:

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

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

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

Mr. Evgeny Zagaynov (Russian Federation)

B. Officers and the Enlarged Bureau

3. At its 3453rd meeting, on 29 April 2019, the Commission elected the following officers:

Chair:	Mr. Pavel Šturma (Czech Republic)
First Vice-Chair:	Mr. Mahmoud D. Hmoud (Jordan)
Second Vice-Chair:	Ms. Nilüfer Oral (Turkey)
Chair of the Drafting Committee:	Mr. Claudio Grossman Guiloff (Chile)
Rapporteur:	Mr. Charles Chernor Jalloh (Sierra Leone)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairs of the Commission¹ and the Special Rapporteurs.²

5. At its 3470th meeting on 24 May 2019, the Commission set up a Planning Group composed of the following members: Mr. Mahmoud D. Hmoud (Chair); Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Huikang Huang, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

C. Drafting Committee

6. At its 3454th, 3458th, 3471st, 3476th, 3488th and 3494th meetings, on 30 April, on 7 and 27 May and on 9, 23 and 30 July 2019, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Peremptory norms of general international law (jus cogens)*: Mr. Claudio Grossman Guiloff (Chair), Mr. Dire D. Tladi (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Huikang Huang, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

(b) *Crimes against humanity*: Mr. Claudio Grossman Guiloff (Chair), Mr. Sean D. Murphy (Special Rapporteur), Mr. Bogdan Aurescu, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

¹ Mr. Georg Nolte, Mr. Ernest Petrič and Mr. Eduardo Valencia-Ospina.

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

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

(d) *Succession of States in respect of State responsibility*: Mr. Claudio Grossman Guiloff (Chair), Mr. Pavel Šturma (Special Rapporteur), Mr. Bogdan Aurescu, Mr. Huikang Huang, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

(e) *Immunity of State officials from foreign criminal jurisdiction*: Mr. Claudio Grossman Guiloff (Chair), Ms. Concepción Escobar Hernández (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

(f) *General principles of law*: Mr. Claudio Grossman Guiloff (Chair), Mr. Marcelo Vázquez-Bermúdez (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Ms. Patrícia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Dire D. Tladi, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Charles Chernor Jalloh (*ex officio*).

7. The Drafting Committee held a total of 43 meetings on the six topics indicated above.

D. Working Groups and Study Group

8. The Planning Group established the following Working Groups:

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

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

9. At its 3467th meeting, on 21 May 2019, the Commission established an open-ended Study Group on sea-level rise in relation to international law, to be co-chaired, on a rotating basis, by: Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

E. Secretariat

10. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto and Ms. Jessica M. Elbaz, Principal Legal Officers, served as Principal Assistant Secretaries to the Commission. Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Mr. David Nanopoulos, Ms. Carla Hoe and Ms. Christiane Ahlborn, Legal Officers, and Ms. Shin Yi Mak, Associate Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

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

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

Chapter II

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

12. With respect to the topic “**Crimes against humanity**”, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/725 and Add.1), as well as comments and observations received from Governments, international organizations and others (A/CN.4/726, Add.1 and Add.2). The fourth report addressed the comments and observations made by Governments, international organizations and others on the draft articles and commentaries adopted on first reading and made recommendations for each draft article.

13. The Commission adopted, on second reading, the entire set of draft articles on prevention and punishment of crimes against humanity, comprising a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto. The Commission decided, in conformity with article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration 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 regard to the topic “**Peremptory norms of general international law (*jus cogens*)**”, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/727), which discussed the question of the existence of regional *jus cogens* and the inclusion of an illustrative list, based on norms previously recognized by the Commission as possessing a peremptory character. Following the plenary debate, the Commission decided to refer the draft conclusion proposed in the fourth report to the Drafting Committee.

15. The Commission subsequently adopted, on first reading, 23 draft conclusions and a draft annex, together with commentaries thereto, on peremptory norms of general international law (*jus cogens*). The Commission 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, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020 (chap. V).

16. With respect to the topic “**Protection of the environment in relation to armed conflicts**”, the Commission had before it the second report of the Special Rapporteur (A/CN.4/728), which discussed questions related to the protection of the environment in non-international armed conflicts, and matters related to responsibility and liability for environmental damage. Following the plenary debate, the Commission decided to refer the seven draft principles, as proposed by the Special Rapporteur in her second report, to the Drafting Committee.

17. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, 28 draft principles, together with commentaries thereto, on protection of the environment in relation to armed conflicts. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-General, to Governments, international organizations, including from the United Nations and its Environment Programme, and others, including the International Committee of the Red Cross and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020 (chap. VI).

18. With regard to the topic “**Succession of States in respect of State responsibility**”, the Commission had before it the third report of the Special Rapporteur (A/CN.4/731), which addressed introductory issues, including certain general considerations, questions of reparation for injury resulting from internationally wrongful acts committed against the predecessor State as well as its nationals, and technical proposals in relation to the scheme of the draft articles. Following the debate in plenary, the Commission decided to refer draft articles 2, paragraph (f), X, Y, 12, 13, 14 and 15, and the titles of Part Two and Part Three, as contained in the third report of the Special Rapporteur, to the Drafting Committee. Upon its consideration of a first report of the Drafting Committee, the Commission provisionally adopted draft articles 1, 2 and 5, with commentaries thereto. Furthermore, the Commission

took note of the interim report of the Chair of the Drafting Committee on draft articles 7, 8 and 9 provisionally adopted by the Committee, which was presented to the Commission for information only (chap. VII).

19. With regard to the topic “**Immunity of State officials from foreign criminal jurisdiction**”, the Commission had before it the sixth (A/CN.4/722) and the seventh (A/CN.4/729) reports of the Special Rapporteur, which were devoted to addressing procedural aspects of immunity from foreign criminal jurisdiction. In particular, the sixth report, on which the debate was not completed at the seventieth session in 2018, provided an analysis of three components of procedural aspects related to the concept of jurisdiction, namely: (a) timing; (b) kinds of acts affected; and (c) the determination of immunity. The seventh report completed the examination of the procedural aspects of immunity regarding the relationship between jurisdiction and the procedural aspects of immunity; addressed questions concerning the invocation of immunity and the waiver of immunity; examined aspects concerning procedural safeguards related to the State of the forum and the State of the official, considered the procedural rights and safeguards of the official, and proposed nine draft articles. Following the debate in plenary, the Commission decided to refer draft articles 8 to 16 to the Drafting Committee, taking into account the debate and proposals made in plenary. The Commission received and took note of the interim report of the Chair of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only (chap. VIII).

20. With regard to the topic “**General principles of law**”, the Commission had before it the first report of the Special Rapporteur (A/CN.4/732), which addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also addressed previous work of the Commission related to general principles of law and provided an overview of the development of general principles of law over time, as well as an initial assessment of certain basic aspects of the topic and future work on the topic. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft conclusion 1 provisionally adopted by the Committee, which was presented to the Commission for information only (chap. IX).

21. With respect to the topic “**Sea-level rise in relation to international law**”, the Commission decided to include the topic in its programme of work and established a Study Group, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. The Study Group held one meeting, at which time it agreed on its composition, methods and programme of work, based on the three subtopics identified in the syllabus. The Commission subsequently took note of the joint oral report of the Co-Chairs of the Study Group (chaps. X and XI, sect. B).

22. As regards “**Other decisions and conclusions of the Commission**”, the Commission took note of an oral report of the Special Rapporteur on the topic “**Provisional application of treaties**”, Mr. Juan Manuel Gómez Robledo, on the informal consultations convened to consider the draft model clauses on provisional application of treaties, and decided to annex the Special Rapporteur’s revised proposal for the draft model clauses to the report, with a view to seeking comments from Governments in advance of the commencement of the second reading of the draft Guide to Provisional Application of Treaties at the seventy-second session of the Commission (chap. XI, sect. A, and annex A).

23. The Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, chaired by Mr. Mahmoud D. Hmoud, and the Working Group on methods of work, chaired by Mr. Hussein A. Hassouna (chap. XI, sect. D). The Commission decided to include in its long-term programme of work the topics: (a) “**Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law**”; and (b) “**Prevention and repression of piracy and armed robbery at sea**” (chap. XI, sect. D, and annexes B and C).

24. The Commission received Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice and continued its traditional exchanges of information with the Committee of Legal Advisers on Public International Law of the Council of Europe; the Inter-American Juridical Committee; the Asian-African Legal Consultative Organization; and the African Union Commission on International Law. Members of the Commission also held an informal exchange of views with the International Committee of the Red Cross (chap. XI, sect. F).

25. The Commission decided that its seventy-second session would be held in Geneva from 27 April to 5 June and from 6 July to 7 August 2020 (chap. XI, sect. E).

Chapter III

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

26. The Commission wishes to recall the adoption, at its seventieth session in 2018, of the first reading text of the draft Guide to Provisional Application of Treaties, and the subsequent request for comments and observations from Governments and international organizations.³ The Commission would invite Governments and international organizations to consider also including comments and observations on the draft model clauses on provisional application of treaties, contained in annex A to the present report.

27. The Commission considers as still relevant the request for information contained in chapter III of the report of its seventieth session (2018) on the topic “Succession of States in respect of State responsibility”,⁴ and would welcome any additional information.

28. The Commission would also welcome receiving any information in response to the following questions and requests, by 31 December 2019 (except where stipulated otherwise), in order for it to be taken into account in the respective reports of the Special Rapporteurs and co-Chairs of the Study Group on sea-level rise in relation to international law.

A. Immunity of State officials from foreign criminal jurisdiction

29. The Commission would welcome any information that States could provide on the existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State.

B. General principles of law

30. The Commission requests States to provide information on their practice relating to general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including as set out in:

- (a) decisions of national courts, legislation and any other relevant practice at the domestic level;
- (b) pleadings before international courts and tribunals;
- (c) statements made in international organizations, international conferences and other forums; and
- (d) treaty practice.

C. Sea-level rise in relation to international law

31. The Commission would welcome any information that States, international organizations and the International Red Cross and Red Crescent Movement could provide on their practice and other relevant information concerning sea-level rise in relation to international law.

32. At the seventy-second session (2020), the Study Group will focus on the subject of sea-level rise in relation to the law of the sea. In this connection, the Commission would appreciate receiving, by 31 December 2019, examples from States of their practice that may be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature. Such practice could, for example, relate to baselines and where applicable archipelagic baselines, closing lines, low-tide elevations, islands, artificial islands, land

³ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 88.

⁴ *Ibid.*, para. 36.

reclamation and other coastal fortification measures, limits of maritime zones, delimitation of maritime boundaries, and any other issues relevant to the subject. Relevant materials could include:

- (a) bilateral or multilateral treaties, in particular maritime boundary delimitation treaties;
- (b) national legislation or regulations, in particular any provisions related to the effects of sea-level rise on baselines and/or more generally on maritime zones;
- (c) declarations, statements or other communications in relation to treaties or State practice;
- (d) jurisprudence of national or international courts or tribunals and outcomes of other relevant processes for the settlement of disputes related to the law of the sea;
- (e) any observations in relation to sea-level rise in the context of the obligation of States parties under the United Nations Convention on the Law of the Sea to deposit charts and/or lists of geographical coordinates of points; and
- (f) any other relevant information, for example, statements made at international forums, as well as legal opinions, and studies.

33. The Commission would further welcome receiving in due course any information related to statehood and the protection of persons affected by sea-level rise, as outlined in the syllabus of the topic,⁵ both of which will be considered by the Study Group during the seventy-third session (2021) of the Commission.

⁵ *Ibid.*, annex B.

Chapter IV Crimes against humanity

A. Introduction

34. At its sixty-sixth session (2014), the Commission decided to include the topic “Crimes against humanity” in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur.⁶ The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, subsequently took note of the decision of the Commission to include the topic in its programme of work.

35. From its sixty-seventh session (2015) to its sixty-ninth session (2017), the Commission considered the topic on the basis of three successive reports submitted by the Special Rapporteur,⁷ and a memorandum by the Secretariat.⁸

36. At its sixty-ninth session (2017), the Commission adopted, on first reading, the entire set of draft articles on crimes against humanity, which comprised a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto.⁹ It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others for comments and observations.¹⁰

B. Consideration of the topic at the present session

37. At the present session, the Commission had before it the fourth report of the Special Rapporteur ([A/CN.4/725](#) and [Add.1](#)), as well as comments and observations received from Governments, international organizations and others ([A/CN.4/726](#), [Add.1](#) and [2](#)).

38. At its 3453rd to 3458th meetings, from 29 April to 7 May 2019, the Commission considered the fourth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft articles on the basis of the proposals by the Special Rapporteur, taking into account the comments and observations of Governments, international organizations and others, as well as the debate in plenary on the Special Rapporteur’s report.

39. The Commission considered the report of the Drafting Committee ([A/CN.4/L.935](#)) at its 3468th meeting, held on 22 May 2019, and adopted the entire set of draft articles on prevention and punishment of crimes against humanity on second reading (sect. E.1 below).

40. At its 3496th to 3499th meetings, from 31 July to 5 August 2019, the Commission adopted the commentaries to the aforementioned draft articles (see sect. E.2 below).

41. 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

42. At its 3499th meeting, on 5 August 2019, the Commission decided, in conformity with article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission

⁶ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, para. 266.

⁷ See [A/CN.4/680](#) and [Corr.1](#) (first report), [A/CN.4/690](#) (second report), and [A/CN.4/704](#) (third report),

⁸ [A/CN.4/698](#).

⁹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, paras. 38–42.

¹⁰ *Ibid.*, para. 43.

recommended the elaboration 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

43. At its 3499th meeting, held on 5 August 2019, the Commission, after adopting the draft articles on prevention and punishment of crimes against humanity, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the draft articles on prevention and punishment of crimes against humanity,

Expresses to the Special Rapporteur, Mr. Sean D. Murphy, 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 prevention and punishment of crimes against humanity.”

E. Text of the draft articles on prevention and punishment of crimes against humanity

1. Text of the draft articles

44. The text of the draft articles adopted by the Commission, on second reading, at its seventy-first session is reproduced below.

Prevention and punishment of crimes against humanity

...

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recalling the principles of international law embodied in the Charter of the United Nations,

Recalling also that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Considering the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

Considering also that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

...

Article 1

Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2

Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

Article 3

General obligations

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.

2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.

3. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Article 4

Obligation of prevention

Each State undertakes to prevent crimes against humanity, in conformity with international law, through:

(a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

Article 5

Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 6

Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.
2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
 - (a) committing a crime against humanity;
 - (b) attempting to commit such a crime; and
 - (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.
3. Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.
4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.
5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.
6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.
7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.
8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 7

Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:
 - (a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;
 - (c) when the victim is a national of that State if that State considers it appropriate.
2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.
3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 8
Investigation

Each State shall ensure that its competent authorities proceed to a prompt, thorough and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 9
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 10
Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 11
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law.
2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:
 - (a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;
 - (b) to be visited by a representative of that State or those States; and
 - (c) to be informed without delay of his or her rights under this paragraph.
3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Article 12

Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:
 - (a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and
 - (b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.
2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.
3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Article 13

Extradition

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.
2. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
3. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.
4. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.
5. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:
 - (a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and
 - (b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

6. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.
7. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.
8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.
9. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.
10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.
11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.
12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.
13. Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Article 14

Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.
2. In relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State, mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings.
3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:
 - (a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
 - (b) taking evidence or statements from persons, including by video conference;
 - (c) effecting service of judicial documents;
 - (d) executing searches and seizures;
 - (e) examining objects and sites, including obtaining forensic evidence;

- (f) providing information, evidentiary items and expert evaluations;
 - (g) providing originals or certified copies of relevant documents and records;
 - (h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
 - (i) facilitating the voluntary appearance of persons in the requesting State;
- or
- (j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance between the States in question.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

9. States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

Article 15

Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;
- (e) where possible, the identity, location and nationality of any person concerned; and
- (f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

- (a) if the request is not made in conformity with the provisions of this draft annex;
- (b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- (c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

9. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

- (a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

- (b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from

the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

- (a) the person freely gives his or her informed consent; and
- (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

- (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
- (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
- (c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and
- (d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

2. Text of the draft articles and commentaries thereto

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

Prevention and punishment of crimes against humanity

General commentary

(1) Three crimes typically have featured in the jurisdiction of international criminal courts and tribunals: genocide, crimes against humanity and war crimes. The crime of genocide¹¹ and war crimes¹² are the subject of global conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward those ends. By contrast, there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard, even though crimes against humanity are likely no less prevalent than genocide or war crimes. Unlike war crimes, crimes against humanity may occur in situations not involving armed conflict. Further, crimes against humanity do not require the special intent that is necessary for establishing genocide.¹³

(2) Treaties focused on prevention, punishment and inter-State cooperation exist for many offences far less egregious than crimes against humanity, such as corruption¹⁴ and transnational organized crime.¹⁵ Consequently, a global convention on prevention and punishment of crimes against humanity might serve as an important additional piece in the current framework of international law, and in particular, international humanitarian law, international criminal law and international human rights law. Such a convention could draw further attention to the need for prevention and punishment and could help States to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on the prevention, investigation and prosecution of such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, thereby – it is hoped – helping both to deter such conduct *ab initio* and to ensure accountability *ex post*. Matters not regulated by such a convention would continue to be governed by other rules of international law, including customary international law.

(3) Hence, the proposal for this topic, as adopted by the Commission at its sixty-fifth session in 2013, states that the “objective of the International Law Commission on this topic ... would be to draft articles for what would become a Convention on the Prevention and

¹¹ 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.

¹² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (hereinafter “Geneva Convention I”); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (hereinafter “Geneva Convention II”); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 (hereinafter “Geneva Convention III”); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (hereinafter “Geneva Convention IV”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3 (hereinafter “Additional Protocol I”).

¹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, p. 3, at p. 64, para. 139 (“The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution.”) (citing to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at pp. 121–122, paras. 187–188).

¹⁴ United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.

¹⁵ United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209.

Punishment of Crimes against Humanity”.¹⁶ While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties addressing crimes, as a basis for a possible future convention. Further, the draft articles are without prejudice to existing customary international law. In accordance with the Commission’s practice, and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included technical language characteristic of treaties (for example, referring to “States parties”) and has not drafted final clauses on matters such as ratification, reservations, entry into force or amendment.

(4) The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international criminal courts and tribunals, such as the International Criminal Court (as well as “hybrid” tribunals containing a mixture of international law and national law elements). Whereas the 1998 Rome Statute of the International Criminal Court¹⁷ regulates relations between the International Criminal Court and its States parties (a “vertical” relationship), the focus of the present draft articles is on the adoption of national laws and on inter-State cooperation (a “horizontal” relationship). Part IX of the Rome Statute on “International Cooperation and Judicial Assistance” assumes that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court will continue to exist without prejudice to the Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition and punishment in national legal systems of persons who commit such crimes, an objective consistent with the Rome Statute. In doing so, the present draft articles contribute to the implementation of the principle of complementarity under the Rome Statute. At the same time, the draft articles envisage obligations that may be undertaken by States whether or not they are parties to the Rome Statute. Finally, constituent instruments of international criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, but such instruments are not directed at steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Preamble

...

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recalling the principles of international law embodied in the Charter of the United Nations,

Recalling also that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Considering the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court,

¹⁶ See report of the International Law Commission on the work of its sixty-fifth session (2013), *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, annex B, para. 3.

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

Recalling that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

Considering also that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

...

Commentary

(1) The draft preamble aims at providing a conceptual framework for the draft articles, setting out the general context in which they were elaborated and their main purposes. In part, it draws inspiration from language used in the preambles of international treaties relating to the most serious crimes of concern to the international community as a whole, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute.

(2) The first preambular paragraph recalls the fact that, over the course of history, millions of people have been victimized by acts that deeply shock the conscience of humanity. When such acts, because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity.

(3) The second preambular paragraph recognizes that such crimes endanger important contemporary values (“the peace, security and well-being of the world”). In so doing, this paragraph echoes the purposes set forth in Article 1 of the Charter of the United Nations, and stresses the link between the pursuit of criminal justice and the maintenance of peace and security.

(4) The third preambular paragraph recalls the principles of international law embodied in the Charter of the United Nations, which include the principle of the sovereign equality of all States and the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.¹⁸ Thus, this preambular paragraph emphasizes, as does draft article 4, that although crimes against humanity may threaten the peace, security and well-being of the world, the prevention and punishment of such crimes must be undertaken in conformity with international law, including the rules on the threat or use of force. The phrasing of this preambular paragraph is modelled on the preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property and is consistent with the preamble of the Rome Statute.¹⁹

(5) The fourth preambular paragraph recalls also that the prohibition of crimes against humanity is not just a rule of international law; it is a peremptory norm of general international law (*jus cogens*). As such, this prohibition is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²⁰ The Commission has previously indicated that the prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of

¹⁸ Charter of the United Nations (San Francisco, 26 June 1945), art. 2, paras. 1 and 4. See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 26/25 (XXV) of 24 October 1970.

¹⁹ United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, vol. I, resolution 59/38, preamble; Rome Statute, preamble.

²⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 53. See also draft conclusion 2 of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading (see paragraph 56 below).

international law.²¹ The International Court of Justice has found that the prohibition on certain acts, such as torture,²² has the character of *jus cogens*,²³ which *a fortiori* suggests that a prohibition of the perpetration of such acts on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*. The status of the prohibition on crimes against humanity as *jus cogens* has also been noted by regional human rights courts,²⁴ international criminal courts and tribunals,²⁵ and some national courts.²⁶ While this preambular paragraph recalls that the prohibition of crimes against humanity is a

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- ²¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26 of the draft articles on responsibility of States for internationally wrongful acts (maintaining that those “peremptory norms that are clearly accepted and recognized include the prohibition[] of ... crimes against humanity”). See also draft conclusion 23 of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading (see paragraph 56 below); Fragmentation of international law: difficulties arising from the diversification and expansion of international law, report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), para. 374 (identifying crimes against humanity as one of the “most frequently cited candidates for the status of *jus cogens*”).
- ²² See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (hereinafter “Convention against Torture”).
- ²³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.
- ²⁴ See *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 154, para. 99 (acknowledging the *jus cogens* status of crimes against humanity); *Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 25 November 2006, Series C, No. 160, para. 402 (citing to *Almonacid-Arellano* on this point); *Manuel Cepeda Vargas v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 26 May 2010, Series C, No. 213, para. 42 (stating that “the prohibition of crimes against humanity ... is *ius cogens*”).
- ²⁵ See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 11*, para. 520 (“Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.”); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, Trial Chamber, International Criminal Court, para. 90 (“It is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*”).
- ²⁶ See *Mazzeo, Julio Lilo y otros*, Appeal Judgment, Supreme Court of Argentina, 13 July 2007, *Fallos*: 330:3248, para. 15 (recognizing the prohibition of crimes against humanity as *jus cogens*); *Arancibia Clavel, Enrique Lautaro*, Appeal Judgment, Supreme Court of Argentina, 24 August 2004, *Fallos*: 327:3312, para. 28 (stating that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity implied the recognition of the prohibition of crimes against humanity as a *jus cogens* norm); *Priebke, Erich*, Judgment, Supreme Court of Argentina, 2 November 1995, *Fallos*: 318:2148, paras. 2–5 (recognizing the prohibition of crimes against humanity as *jus cogens*); *Exp No. 0024-2010-PI/TC*, Judgment, Peruvian Constitutional Court, 21 March 2011, para. 53, available at <https://www.tc.gob.pe/jurisprudencia/2011/00024-2010-AI.html> (same); *National Commissioner of the South African Police Service v. Southern African Litigation Centre and Another*, Judgment, South African Constitutional Court, 30 October 2014, *South African Law Reports 2015*, vol. 1, p. 315, para. 37 (“Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because ‘all states have an interest as they violate values that constitute the foundation of the world public order’. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm”); *Attorney-General and 2 Others v. Kenya Section of International Commission of Jurists*, Judgment, Court of Appeal of Kenya, 16 February 2018, available at <http://kenyalaw.org/caselaw/cases/view/148746/> (“Some of the largely accepted examples of those norms from which no derogation is permitted but are obligatory equally upon State and non-State actors include prohibition of[:] genocide, crimes against humanity, war crimes[,] torture, piracy and slavery”).

norm of *jus cogens*, neither it nor the present draft articles seek to address the consequences of the prohibition having such status.

(6) As indicated in draft article 1 below, the present draft articles have two overall objectives: the prevention and the punishment of crimes against humanity. The fifth preambular paragraph focuses upon the first of these two objectives (prevention); it foreshadows obligations that appear in draft articles 3, 4 and 5 of the present draft articles by affirming that crimes against humanity must be prevented in conformity with international law. In doing so, this paragraph indicates that such crimes are among the most serious crimes of concern to the international community as a whole.

(7) The sixth preambular paragraph affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes.

(8) The seventh preambular paragraph considers, as a threshold matter, the definition of crimes against humanity set forth in article 7 of the Rome Statute. This definition served as a useful model when drafting the definition contained in draft article 2 of the present draft articles and, in conjunction with draft articles 6 and 7, identifies the offences over which States must establish jurisdiction under their national criminal law.

(9) The eighth through tenth preambular paragraphs focus on the second of the two overall objectives (punishment). The eighth preambular paragraph recalls the duty of every State to exercise criminal jurisdiction with respect to crimes against humanity. Among other things, this paragraph foreshadows draft articles 8 through 10 on the investigation of crimes against humanity, the taking of certain measures whenever an alleged offender is present, and the submission of the case to the prosecuting authorities unless the alleged offender is extradited or surrendered to another State or competent international court or tribunal.

(10) The ninth preambular paragraph notes that attention must be paid to the rights of individuals when addressing crimes against humanity. Reference to the rights of victims, witnesses and others anticipates the provisions set forth in draft article 12, including the right to complain to competent authorities, to participate in criminal proceedings, and to obtain reparation. At the same time, the reference to the right of alleged offenders to fair treatment anticipates the provisions set forth in draft article 11, including the right to a fair trial and, when appropriate, access to consular authorities.

(11) The tenth preambular paragraph considers that the effective prosecution of crimes against humanity must be ensured, both by taking measures at the national level and by enhancing international cooperation. Such cooperation includes cooperation with respect to extradition and mutual legal assistance, which is the focus of draft articles 13 and 14, as well as the draft annex.

Article 1

Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other grave international crimes, such as genocide, war crimes or the crime of aggression.

(3) If the present draft articles ultimately serve as the basis for a convention, the obligations of a State party under that convention, unless a different intention appears, would only operate with respect to acts or facts that took place, or any situation that existed, after

the convention enters into force for that State. Article 28 of the 1969 Vienna Convention on the Law of Treaties provides that, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”²⁷ The International Court of Justice applied article 28 with respect to a treaty addressing a crime (torture) in *Questions relating to the Obligation to Prosecute or Extradite*, finding that “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.”²⁸ However, States would remain bound at all times by whatever obligations exist under other rules of international law, including customary international law. Further, the law of treaties rule indicated above does not foreclose a State from adopting, at any time, a national law relating to crimes against humanity, so long as it is consistent with the State’s obligations under international law.

(4) In various provisions of the present draft articles, the term “national law” is used to refer to the internal or domestic law of a State. Use of this term is intended to cover all aspects of a State’s internal law, including the level (such as federal or provincial) at which such law should be adopted or to which it applies.

Article 2

Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

²⁷ Vienna Convention on the Law of Treaties, art. 28.

²⁸ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), p. 457, para. 100.

(b) “extermination” includes the intentional infliction of conditions of life including, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

Commentary

(1) The first two paragraphs of draft article 2 establish, for the purpose of the present draft articles, a definition of “crime against humanity”. The text of these two paragraphs is almost verbatim the text of article 7 of the Rome Statute, with just a few changes as discussed below. Paragraph 3 of draft article 2 is a “without prejudice” clause which indicates that this definition does not affect any broader definitions provided for in international instruments, customary international law or national law.

Definitions in other instruments

(2) Various definitions of “crimes against humanity” have been used since 1945, both in international instruments and in national laws that have codified the crime. The Charter of the International Military Tribunal established at Nürnberg Charter (hereinafter “Nürnberg Charter”), in article 6, subparagraph (c), defined “crimes against humanity” as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the

jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²⁹

(3) Principle VI (c) of the Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal defined crimes against humanity as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime".³⁰

(4) Furthermore, the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind identified as one of those offences: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".³¹

(5) Article 5 of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia stated that the Tribunal "shall have the power to prosecute persons responsible" for a series of acts (such as murder, torture, and rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".³² Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds",³³ that particular language was not included in the text of article 5.

(6) By contrast, the 1994 Statute of the International Criminal Tribunal for Rwanda, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-General's report of "crimes when committed as part of a widespread or systematic attack against any civilian population" and then continued with "on national, political, ethnic, racial or religious grounds".³⁴ As such, the Statute of the International Criminal Tribunal for Rwanda expressly provided that a discriminatory intent was required in order to establish the crime. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also defined "crimes against humanity" to be a series of specified acts "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group", but did not include the discriminatory intent language.³⁵ Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.³⁶

²⁹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, No. 251, p. 279 (hereinafter "Nürnberg Charter").

³⁰ *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, para. 119.

³¹ *Yearbook ... 1954*, vol. II, p. 150, para. 50, art. 2, para. 11.

³² 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, approved 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 [Add.1](#), annex, art. 5 (hereinafter "Statute of the International Criminal Tribunal for the Former Yugoslavia").

³³ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document [S/25704](#) and [Corr.1](#), p. 13, para. 48.

³⁴ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, approved by the Security Council in its resolution 955 (1994) of 8 November 1994, annex, art. 3 (hereinafter "Statute of the International Criminal Tribunal for Rwanda").

³⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

³⁶ See, for example, 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

(7) Article 5, paragraph 1 (b), of the 1998 Rome Statute lists crimes against humanity as being within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines “crime against humanity” as any of a series of acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an attack directed against any civilian population “means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack” (para. 2 (a)). Article 7, paragraph 3, provides: “[I]t is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”. Article 7, paragraph 1 (h), does not retain the nexus to an armed conflict that characterized the Statute of the International Criminal Tribunal for the Former Yugoslavia, nor (except with respect to acts of persecution) the discriminatory intent requirement that characterized the Statute of the International Criminal Tribunal for Rwanda.

(8) The definition of “crime against humanity” in article 7 of the Rome Statute has been accepted as of mid-2019 by 122 States parties to the Statute and is now being used by many States when adopting or amending their national laws.³⁷ The Commission considered article 7 to be an appropriate basis for defining such crimes in paragraphs 1 and 2 of draft article 2. Indeed, the text of article 7 is used verbatim except for three changes. First, the opening phrase of paragraph 1 reads “For the purpose of the present draft articles” rather than “For the purpose of this Statute”. Second, the phrase in article 7, paragraph 1 (h), of the 1998 Rome Statute that criminalizes acts of persecution when undertaken in connection with “any crime within the jurisdiction of the Court” has not been retained for paragraph 1 (h) of draft article 2, as discussed further below. Third, article 7, paragraph 3, of the Rome Statute on the definition of “gender” (as well as a cross-reference to that paragraph in paragraph 1(h)) has not been retained for draft article 2, as is also discussed further below.

Paragraphs 1 and 2

(9) The definition of “crimes against humanity” set forth in paragraphs 1 and 2 of draft article 2 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the International Criminal Court’s “Elements of Crimes” under the Rome Statute,³⁸ the case law of the International Criminal Court and other international criminal courts and tribunals, and increasingly national courts. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the International Criminal Court and other international criminal courts and tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that

Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 145, art. 2 (hereinafter “Statute of the Special Court for Sierra Leone”); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, art. 5 (hereinafter “Extraordinary Chambers of Cambodia Law”).

³⁷ For information submitted by Governments to the Commission on their national laws in this regard, see http://legal.un.org/ilc/guide/7_7.shtml. For a table compiling national laws, see Coalition for the International Criminal Court, *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)* (2012), at http://iccnw.org/documents/Global_Ratificationimplementation_chart_May2012.pdf. At present, however, not all national laws addressing crimes against humanity contain the same definition that appears in article 7 of the Rome Statute.

³⁸ See International Criminal Court, *Elements of Crimes*, adopted at the Assembly of States Parties to the Rome Statute of the International Criminal Court First session, New York, 3–10 September 2002, (*Official Records*, ICC-ASP/1/3), and amended at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication, RC/11) consolidated version of 2011, available from www.icc-cpi.int, pp. 5–12.

relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of mid-2019.

“Widespread or systematic attack”

(10) The first overall requirement is that the acts must be committed as part of a “widespread or systematic” attack. This requirement first appeared in the Statute of the International Criminal Tribunal for Rwanda,³⁹ although some decisions of the International Criminal Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the Statute of that tribunal, given the inclusion of such language in the Secretary-General’s report proposing that Statute.⁴⁰ Jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda maintained that the conditions of “widespread” and “systematic” were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.⁴¹ This reading of the widespread/systematic requirement is also reflected in the Commission’s commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, where it stated that “an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met”.⁴²

(11) When this standard was considered for the 1998 Rome Statute, some States expressed the view that the conditions of “widespread” and “systematic” should be conjunctive requirements – that they both should be present to establish the existence of the crime – because otherwise the standard would be over-inclusive.⁴³ Indeed, if “widespread”

³⁹ Unlike the English version, the French version of article 3 of the Statute of the International Criminal Tribunal for Rwanda used a conjunctive formulation (“généralisée et systématique”). In the *Akayesu* case, the Trial Chamber indicated: “In the original French version of the Statute, these requirements were worded cumulatively ... thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation”. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 579, footnote 144.

⁴⁰ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 202; *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, para. 648.

⁴¹ See, for example, *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, para. 437 (“[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative.”); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber II, International Criminal Tribunal for Rwanda, para. 123 (“The attack must contain one of the alternative conditions of being widespread or systematic.”); *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 579; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 648 (“either a finding of widespreadness ... or systematicity ... fulfils this requirement”).

⁴² *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18. See also the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22)*, p. 17, para. 78 (“elements that should be reflected in the definition of crimes against humanity included ... [that] the crimes usually involved a widespread or systematic attack” (emphasis added)); *Yearbook ... 1995*, vol. II (Part Two), p. 25, para. 90 (“the concepts of ‘systematic’ and ‘massive’ violations were complementary elements of the crimes concerned”); *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 20 (“the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations” (emphasis added)); *Yearbook ... 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to art. 21 (“Either one of these aspects — systematic or mass-scale — in any of the acts enumerated ... is enough for the offence to have taken place”).

⁴³ See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records, Volume II (A/CONF/183/13 Vol. II)*, p. 148 (India); *ibid.*, p. 150 (United Kingdom of Great Britain and Northern Ireland, France); *ibid.*, p. 151 (Thailand, Egypt); *ibid.*, p. 152 (Islamic Republic of Iran); *ibid.*, p. 154 (Turkey); *ibid.*, p. 155 (Russian Federation); *ibid.*, p. 156 (Japan).

commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Owing to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,⁴⁴ meaning that they are alternatives, but adding to article 7, paragraph 2 (a), of the Rome Statute a definition of “attack directed against any civilian population” which, as discussed below at paragraphs (17) to (33) of the commentary to the present draft article, contains a “State or organizational policy” element.

(12) According to the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, “[t]he adjective ‘widespread’ connotes the large-scale nature of the attack and the number of its victims”.⁴⁵ As such, this requirement refers to a “multiplicity of victims”⁴⁶ and excludes isolated acts of violence,⁴⁷ such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. A “widespread” attack may be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁴⁸ At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs

⁴⁴ Case law of the International Criminal Court has affirmed that the conditions of “widespread” and “systematic” in article 7 of the Rome Statute are disjunctive. See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, Pre-Trial Chamber II, International Criminal Court, para. 94. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, Pre-Trial Chamber II, International Criminal Court, para. 82; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, International Criminal Court, para. 162.

⁴⁵ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 428, *Judicial Supplement No. 23*, February/March 2001. See also *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 163; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, Trial Chamber II, International Criminal Court, para. 1123; *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, Pre-Trial Chamber I, International Criminal Court, para. 394; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, Trial Chamber I Section A, International Criminal Tribunal for the Former Yugoslavia, paras. 545–546; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment [and corrigendum], 17 December 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94.

⁴⁶ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 83; *Kayishema*, Judgment, 21 May 1999 (see footnote 41 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 39 above), para. 580; *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18 (using the phrase “on a large scale” instead of widespread). See also *Mrkšić*, Judgment, 27 September 2007 (see footnote 41 above), para. 437 (“‘widespread’ refers to the large scale nature of the attack and the number of victims”). In *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 24, the Chamber found that the attack against the civilian population was widespread “as it resulted in a large number of civilian victims”.

⁴⁷ See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor’s application under Article 58, 13 July 2012, Pre-Trial Chamber II, International Criminal Court, para. 19; *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al Abd-al-Rahman*, Case No. ICC-02/05-01/07, Decision on the prosecution application under Article 58(7) of the Statute, 27 April 2007, Pre-Trial Chamber I, International Criminal Court, para. 62. See also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, Trial Chamber I, International Criminal Tribunal for Rwanda, paras. 67–69; *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), paras. 122–123; para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47; para. (3) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103.

⁴⁸ *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 163 (citing to *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 83).

within the context of a broader campaign.⁴⁹ There is no specific numerical threshold of victims that must be met for an attack to be “widespread”.

(13) “Widespread” can also have a geographical dimension, with the attack occurring in different locations.⁵⁰ Thus, in the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that there was sufficient evidence to establish that an attack was “widespread” based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites and a large number of victims.⁵¹ Yet a large geographic area is not required; the International Criminal Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.⁵²

(14) In its *Situation in the Republic of Kenya* decision, the International Criminal Court Pre-Trial Chamber indicated that “[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts”.⁵³ An attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.⁵⁴

(15) Like “widespread”, the term “systematic” excludes isolated or unconnected acts of violence,⁵⁵ and jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Criminal Tribunal for the Former Yugoslavia defined “systematic” as “the organised nature of the acts of violence and the improbability of their random occurrence”⁵⁶ and found that evidence of a pattern or methodical plan establishes that an attack was systematic.⁵⁷ Thus, the Appeals Chamber in *Kunarac* confirmed that “patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence”.⁵⁸ The International Criminal Tribunal for Rwanda has taken a similar approach.⁵⁹

(16) Consistent with jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda, an International Criminal Court Pre-Trial Chamber in *Harun* found that “systematic” refers to “the organised nature of

⁴⁹ *Kupreškić*, Judgment, 14 January 2000 (see footnote 25 above), para. 550; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 649.

⁵⁰ See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 47 above), para. 30; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, paras. 176-177.

⁵¹ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), paras. 117-124. See *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 688-689.

⁵² *Kordić*, Judgment, 17 December 2004 (see footnote 45 above), para. 94; *Blaškić*, Judgment, 3 March 2000 (see footnote 40 above), para. 206.

⁵³ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 95. See also *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 163.

⁵⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind. See also *Bemba*, Decision, 15 June 2009 (footnote 44 above), para. 83 (finding that widespread “entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians”).

⁵⁵ See para. (3) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47; para. (3) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103.

⁵⁶ *Mrkšić*, Judgment, 27 September 2007 (see footnote 41 above), para. 437; *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 429.

⁵⁷ See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 648.

⁵⁸ *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94, *Judicial Supplement No. 34*, June 2002.

⁵⁹ *Kayishema*, Judgment, 21 May 1999 (see footnote 41 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 39 above), para. 580.

the acts of violence and improbability of their random occurrence”.⁶⁰ An International Criminal Court Pre-Trial Chamber in *Katanga* found that the term “has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a ‘non-accidental repetition of similar criminal conduct on a regular basis’”.⁶¹ In applying the standard, an International Criminal Court Pre-Trial Chamber in *Ntaganda* found an attack to be systematic since “the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting”.⁶² Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a “regular pattern” with a “recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and [the] coordinated ... commission of the unlawful acts ... in order to attack the non-Hema civilian population”.⁶³ In *Gbagbo*, an International Criminal Court Pre-Trial Chamber found an attack to be systematic when “preparations for the attack were undertaken in advance” and the attack was planned and coordinated with acts of violence revealing a “clear pattern”.⁶⁴

“Directed against any civilian population”

(17) The second overall requirement is that the act must be committed as part of an attack “directed against any civilian population”. Draft article 2, paragraph 2 (a), defines “attack directed against any civilian population” for the purpose of paragraph 1 as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.⁶⁵ As discussed below, jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court has construed the meaning of each of these terms: “directed against”, “any”, “civilian”, “population”, “a course of conduct involving the multiple commission of acts” and “State or organizational policy”.

(18) The International Criminal Tribunal for the Former Yugoslavia has found that the phrase “directed against” requires that civilians be the intended primary target of the attack, rather than incidental victims.⁶⁶ International Criminal Court Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Situation in the Republic of Kenya* case,⁶⁷ as did the International Criminal Court Trial Chambers in the *Katanga* and *Bemba* trial judgments.⁶⁸ In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that there was sufficient evidence showing the attack was “directed against”

⁶⁰ *Harun*, Decision, 27 April 2007 (see footnote 47 above), para. 62 (citing to *Kordić*, Judgment, 17 December 2004 (see footnote 45 above), para. 94, which in turn cites to *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 429). See also *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 179; *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 96; *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 394.

⁶¹ *Katanga*, Decision, 30 September 2008 (see footnote 45), para. 397.

⁶² *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), para. 31. See also *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 179.

⁶³ *Ntaganda*, Decision, 9 June 2014 (see footnote 46 above), para. 24.

⁶⁴ *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 225.

⁶⁵ See Rome Statute. See also International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 5.

⁶⁶ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 421 (“The expression ‘directed against’ specifies that in the context of a crime against humanity the civilian population is the primary object of the attack”).

⁶⁷ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 76.

⁶⁸ *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1104; *Bemba*, Judgment, 21 March 2016, (see footnote 44 above), para. 154.

civilians of the Central African Republic.⁶⁹ The Chamber concluded that Mouvement de libération du Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.⁷⁰ The Chamber further found that MLC soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.⁷¹ The term “directed” places its emphasis on the intention of the attack rather than the physical result of the attack.⁷² It is the attack, not the acts of the individual perpetrator, which must be “directed against” the target population.⁷³ The Trial Chamber in *Bemba* later confirmed “that the civilian population was the primary, as opposed to incidental, target of the attack, and in turn, that the attack was directed against the civilian population in the [Central African Republic]”.⁷⁴ In doing so, it explained that “[w]here an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to which the attacking force complied with the precautionary requirements of the laws of war”.⁷⁵

(19) The word “any” indicates that “civilian population” is to have a wide definition and hence should be interpreted broadly.⁷⁶ An attack can be committed against any civilians, “regardless of their nationality, ethnicity or other distinguishing feature”,⁷⁷ and can be committed against either nationals or foreigners.⁷⁸ Those targeted may “include a group defined by its (perceived) political affiliation”.⁷⁹ In order to qualify as a “civilian population” during a time of armed conflict, those targeted must be “predominantly” civilian in nature;⁸⁰ the presence of certain combatants within the population does not change its character.⁸¹ This

⁶⁹ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 94. See also *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), paras. 20–21.

⁷⁰ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 94.

⁷¹ *Ibid.*, paras. 95–98.

⁷² See, for example, *Blaškić*, Judgment, 3 March 2000 (footnote 40 above), para. 208, footnote 401.

⁷³ *Kunarac*, Judgment, 12 June 2002 (see footnote 58 above), para. 103.

⁷⁴ *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 674.

⁷⁵ *Ibid.*, para. 153 (citing to the jurisprudence of various international courts and tribunals).

⁷⁶ See, for example, *Mrkšić*, Judgment, 27 September 2007 (footnote 41 above), para. 442; *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), para. 547 (“[A] wide definition of ‘civilian’ and ‘population’ is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity”); *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 127; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 643.

⁷⁷ *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 399 (quoting *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 635). See also *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1103; *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 155.

⁷⁸ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 423.

⁷⁹ *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 164.

⁸⁰ See Additional Protocol I, art. 50, para. 1; *Blaškić*, Judgment, 3 March 2000 (footnote 40 above), para. 180 (recognizing civilians for the purpose of common article 3 to the 1949 Geneva Conventions as “persons who are not, or no longer, members of the armed forces”).

⁸¹ See, for example, *Katanga*, Judgment, 7 March 2014 (footnote 45 above), para. 1105 (holding that the population targeted “must be primarily composed of civilians” and that the “presence of non-civilians in its midst has therefore no effect on its status of civilian population”); *Mrkšić*, Judgment, 27 September 2007 (footnote 41 above), para. 442; *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 425 (“the presence of certain non-civilians in its midst does not change the character of the population”); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 180; *Blaškić*, Judgment, 3 March 2000, (footnote 40 above), para. 214 (“the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population”); *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), para. 549 (“the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian”); *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 128; *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 582 (“Where there are certain individuals within the

approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the 1949 Geneva Conventions states: “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁸² The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, “civilian” shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.⁸³ The status of any given victim must be assessed at the time the offence is committed;⁸⁴ a person should be considered a civilian if there is any doubt as to his or her status.

(20) “Population” does not mean that the entire population of a given geographical location must be subject to the attack;⁸⁵ rather, the term implies the collective nature of the crime as an attack upon multiple victims.⁸⁶ As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia noted in *Gotovina*, the concept means that the attack is upon more than just “a limited and randomly selected number of individuals”.⁸⁷ The International Criminal Court decisions in the *Bemba* case and the *Situation in the Republic of Kenya* case have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.⁸⁸

(21) The first part of draft article 2, paragraph 2 (a), refers to “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population”. Although no such language was contained in the statutory definition of crimes against humanity for the International Criminal Tribunal for the Former Yugoslavia and the

civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character”); *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 638.

⁸² Additional Protocol I, art. 50, para. 3.

⁸³ *Kayishema*, Judgment, 21 May 1999 (see footnote 41 above), para. 127 (referring to “all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the [Forces armées rwandaises], the [Rwandese Patriotic Front], the police and the Gendarmerie Nationale”).

⁸⁴ With respect to members of armed forces, differing views have been expressed. The *Blaškić* Appeals Chamber found that members of the armed forces, militias, volunteer corps and members of resistance groups cannot be considered civilians for this purpose, even when *hors de combat*. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2004*, paras. 110–114. Some other tribunals, however, have followed the approach of the *Blaškić* Trial Chamber, *Blaškić*, Judgment, 3 March 2000 (see footnote 40 above), para. 214, which said that “the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian”. See, for example, Notification on the Interpretation of “Attack against the Civilian Population” in the Context of Crimes against Humanity with Regard to a State’s or Regime’s Own Armed Forces, Case No. 3/07-09-2009-ECCC-OCIJ, 7 February 2017, Extraordinary Chambers in the Courts of Cambodia, para. 56 (“[A]s a matter of principle, between 1975 and 1979 an attack by a state or organisation against its own armed forces, when carried out in peacetime, satisfied the *chapeau* requirement of an attack against any civilian population.”). See also *Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Judgment and Sentence, 13 April 2006, Trial Chamber II, International Criminal Tribunal for Rwanda, paras. 48–51; *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 12 September 2006, Trial Chamber II, International Criminal Tribunal for Rwanda, para. 513.

⁸⁵ See *Situation in the Republic of Kenya*, Decision, 31 March 2010 (footnote 44 above), para. 82; *Bemba*, Decision, 15 June 2009 (footnote 44 above), para. 77; *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 424; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 644. See also *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 (defining crimes against humanity as “inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part*” (emphasis added)).

⁸⁶ See *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 644.

⁸⁷ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, vol. II, 15 April 2011, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, para. 1704.

⁸⁸ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 81; *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 77; *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 154.

International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals,⁸⁹ and was expressly stated in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the Rome Statute provides that the “acts” referred to in article 7, paragraph 2 (a), “need not constitute a military attack”.⁹⁰ The Trial Chamber in *Katanga* stated that “the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population”.⁹¹

(22) The second part of draft article 2, paragraph 2 (a), states that the attack must be “pursuant to or in furtherance of a State or organizational policy to commit such an attack”. The requirement of a “policy” element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the Rome Statute.⁹² While the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,⁹³ some early jurisprudence required it.⁹⁴ Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the work of the International Criminal Tribunal for the Former Yugoslavia, one that would later influence the drafting of the Rome Statute. The Trial Chamber found that

the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts ... Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.⁹⁵

The Trial Chamber further noted that, because of the policy element, such crimes “cannot be the work of isolated individuals alone”.⁹⁶ Later jurisprudence of the International Criminal

⁸⁹ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 415 (defining attack as “a course of conduct involving the commission of acts of violence”); *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 122 (defining attack as the “event in which the enumerated crimes must form part”); *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 581 (“The concept of ‘attack’ may be defined as a[n] unlawful act of the kind enumerated [in the Statute] ... An attack may also be non violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner”).

⁹⁰ See International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 5.

⁹¹ *Katanga*, Judgment, 7 March 2014 (footnote 45 above), para. 1101.

⁹² Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a “policy” descriptor when discussing article 6 (c) in the context of the concept of the “attack” as a whole. See *Judgment of 30 September 1946*, International Military Tribunal, in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946)*, vol. 22 (1948), p. 493 (“The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out”). Article II (1) (c) of Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity also contains no reference to a plan or policy in its definition of crimes against humanity. Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in *Official Gazette of the Control Council for Germany*, vol. 3, p. 52 (1946).

⁹³ The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that there was no policy element on crimes against humanity in customary international law, see *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 98 (“There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes”), although that position has been criticized in writings.

⁹⁴ See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), paras. 626, 644, and 653–655.

⁹⁵ *Ibid.*, para. 653.

⁹⁶ *Ibid.*, para. 655 (citing to *Prosecutor v. Dragan Nikolić a/k/a “Jenki”*, Case No. IT-94-2-R61, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 26).

Tribunal for the Former Yugoslavia, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.⁹⁷

(23) Prior to the Rome Statute, the work of the Commission in its draft codes tended to require a policy element. The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*".⁹⁸ The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.⁹⁹ At the same time, the definition of crimes against humanity included in the 1954 draft Code of Offences against the Peace and Security of Mankind did not include any requirement of scale ("widespread") or systematicity.

(24) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale *and instigated or directed by a Government or by any organization or group*".¹⁰⁰ The Commission included this requirement to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".¹⁰¹ In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 2, paragraph 2 (a), contains the same policy element as set forth in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the Rome Statute provide that a "'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population",¹⁰² and that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".¹⁰³

(26) This "policy" element has been addressed in several cases at the International Criminal Court.¹⁰⁴ In the 2014 judgment in *Katanga*, an International Criminal Court Trial Chamber stressed that the policy requirement is not synonymous with "systematic", since

⁹⁷ See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 98; *Kordić*, Judgment, 26 February 2001 (footnote 81 above), para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan"); *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 580.

⁹⁸ Art. 2, para. 11, of the draft Code of Offences against the Peace and Security of Mankind, *Yearbook ... 1954*, vol. II, p. 150 (emphasis added).

⁹⁹ *Ibid.*

¹⁰⁰ Art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47 (emphasis added).

¹⁰¹ Para. (5) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *ibid.* In explaining its inclusion of the policy requirement, the Commission noted: "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18". *Ibid.*

¹⁰² International Criminal Court, *Elements of Crimes* (see footnote 38 above), p. 5.

¹⁰³ *Ibid.* Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), paras. 554-555 (discussing acts "approved", "condoned", and for which "explicit or implicit approval" has been given); *Yearbook ... 1954*, vol. II, p. 150, art. 2, para. 11 of the draft Code of Offences against the Peace and Security of Mankind ("toleration"); Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992), document [S/1994/674](#), para. 85 ("[u]nwillingness to manage, prosecute and punish").

¹⁰⁴ See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 47 above), para. 24; *Bemba*, Decision, 15 June 2009 (footnote 44 above), para. 81; *Katanga*, Decision, 30 September 2008 (footnote 45 above), para. 396.

that would contradict the disjunctive requirement in article 7 of the 1998 Rome Statute of a “widespread” or “systematic” attack.¹⁰⁵ Rather, while “systematic” requires high levels of organization and patterns of conduct or recurrence of violence,¹⁰⁶ to “establish a ‘policy’, it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community”.¹⁰⁷ Further, the “policy” requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.¹⁰⁸ The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.¹⁰⁹ Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.¹¹⁰ Furthermore, the Trial Chamber in *Bemba* held that the requirement that the course of conduct was committed pursuant to or in furtherance of the State or organizational policy is satisfied not only where a perpetrator deliberately acts to further the policy, but also where a perpetrator has engaged in conduct envisaged by the policy, and with knowledge thereof.¹¹¹

(27) Similarly, in its decision confirming the indictment of Laurent Gbagbo, an International Criminal Court Pre-Trial Chamber held that “policy” should not be conflated with “systematic”.¹¹² Specifically, the Trial Chamber stated that “evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (a) of the Statute”.¹¹³ The policy element requires that the acts be “linked” to a State or organization,¹¹⁴ and it excludes “spontaneous or isolated acts of violence”, but a policy need not be formally adopted¹¹⁵ and proof of a particular rationale or motive is not required.¹¹⁶ In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that the attack was pursuant to an organizational policy based on evidence establishing that the MLC troops “carried out attacks following the same pattern”.¹¹⁷ The Trial Chamber later found that the MLC troops knew that their individual acts were part of a broader attack directed against the civilian population in the Central African Republic.¹¹⁸

(28) The second part of draft article 2, paragraph 2 (a), refers to either a “State” or “organizational” policy to commit such an attack, as does article 7, paragraph 2 (a), of the 1998 Rome Statute. In its *Situation in the Republic of Kenya* decision, an International Criminal Court Pre-Trial Chamber suggested that the meaning of “State” in article 7, paragraph 2 (a), is “self-explanatory”.¹¹⁹ The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.¹²⁰

(29) Jurisprudence from the International Criminal Court suggests that “organizational” includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: “Such a policy may be made either by groups of persons who govern a specific territory or by any

¹⁰⁵ *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), paras. 1111-1112. See also *ibid.*, para. 1101; *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), para. 208.

¹⁰⁶ *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), paras. 1111–1113.

¹⁰⁷ *Ibid.*, para. 1113.

¹⁰⁸ *Ibid.*, paras. 1108–1109 and 1113.

¹⁰⁹ *Ibid.*, para. 1109. See also *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), paras. 211–212, and 215.

¹¹⁰ *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1110.

¹¹¹ *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 161.

¹¹² *Gbagbo*, Judgment, 12 June 2014 (see footnote 64 above), paras. 208 and 216.

¹¹³ *Ibid.*, para. 216.

¹¹⁴ *Ibid.*, para. 217.

¹¹⁵ *Ibid.*, para. 215.

¹¹⁶ *Ibid.*, para. 214.

¹¹⁷ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 115.

¹¹⁸ *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 669.

¹¹⁹ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 89.

¹²⁰ *Ibid.*

organisation with the capability to commit a widespread or systematic attack against a civilian population”.¹²¹ An International Criminal Court Trial Chamber in *Katanga* held that the organization must have “sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts” and “a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population”.¹²²

(30) In its *Situation in the Republic of Kenya* decision, a majority of an International Criminal Court Pre-Trial Chamber rejected the idea that “only State-like organizations may qualify” as organizations for the purpose of article 7, paragraph 2 (a), and further stated that “the formal nature of a group and the level of its organization should not be the defining criterion. Instead ... a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values”.¹²³ In 2012, an International Criminal Court Pre-Trial Chamber in *Ruto* stated that, when determining whether a particular group qualifies as an “organization” under article 7 of the 1998 Rome Statute:

the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.¹²⁴

(31) As a consequence of the “policy” potentially emanating from a non-State organization, the definition set forth in paragraphs 1 and 2 of draft article 2 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft Code of Crimes against the Peace and Security of Mankind, stated that “the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone” and that it “does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code”.¹²⁵ As discussed previously, the 1996 draft Code added the requirement that,

¹²¹ *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 396 (citing case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Commission’s 1991 draft Code of Crimes against the Peace and Security of Mankind, para. (5) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103. See *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 81.

¹²² *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1119.

¹²³ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 90. This understanding was similarly adopted by the Trial Chamber in the *Katanga* judgment, which stated: “That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State” (*Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1120). The Trial Chamber also found that “the ‘general practice accepted as law’ ... adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics” (*ibid.*, para. 1121).

¹²⁴ *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 185. See also *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 93; *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11, Corrigendum to the Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the situation in the Republic of Côte d’Ivoire, 15 November 2011, Pre-Trial Chamber III, International Criminal Court, paras. 45–46.

¹²⁵ *Yearbook ... 1991*, vol. II (Part Two), pp. 103–104, para. (5) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind. The United Nations Convention against Transnational Organized Crime defines an “organized criminal group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain,

to be crimes against humanity, the inhumane acts must be “instigated or directed by a Government or by any organization or group”.¹²⁶ In its commentary to this requirement, the Commission noted: “The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State”.¹²⁷ While an organized criminal group or gang normally does not commit the kind of widespread or systematic violations covered by draft article 2, it might in certain circumstances.

(32) Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case stated that, “the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory”.¹²⁸ That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.¹²⁹

(33) In the *Ntaganda* case at the International Criminal Court, charges were confirmed against a defendant associated with two paramilitary groups, the Union des patriotes congolais and the Forces patriotiques pour la libération du Congo in the Democratic Republic of the Congo.¹³⁰ Similarly, in the *Mbarushimana* case, the prosecutor pursued charges against a defendant associated with the Forces démocratiques de libération du Rwanda, described, according to its statute, as an “armed group seeking to ‘reconquérir et défendre la souveraineté nationale’ of Rwanda”.¹³¹ In the case against Joseph Kony relating to the situation in Uganda, the defendant is allegedly associated with the Lord’s Resistance Army, “an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army”¹³² which “is organised in a military-type hierarchy and operates as an army”.¹³³ With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a “network” of perpetrators “comprised of eminent [Orange Democratic Movement Party (ODM)] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders”.¹³⁴ Likewise, charges were confirmed with respect to other defendants associated with “coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity (‘PNU’) youth in different parts of Nakuru and Naivasha” that “were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language”.¹³⁵

directly or indirectly, a financial or other material benefit.” United Nations Convention against Transnational Organized Crime, art. 2 (a).

¹²⁶ Art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47 (emphasis added).

¹²⁷ *Ibid.*, para. (5) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind

¹²⁸ *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

¹²⁹ *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, Trial Chamber II, International Criminal Tribunal for Former Yugoslavia, paras. 212–214.

¹³⁰ *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), para. 22.

¹³¹ *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. ICC-01/04-01/10, 16 December 2011, Pre-Trial Chamber I, International Criminal Court, para. 2.

¹³² *Situation in Uganda*, Case No. ICC-02/04-01/05, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005, Pre-Trial Chamber II, International Criminal Court, para. 5.

¹³³ *Ibid.*, para. 7.

¹³⁴ *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 182.

¹³⁵ *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 102.

“With knowledge of the attack”

(34) The third overall requirement is that the perpetrator must commit the act “with knowledge of the attack”. Jurisprudence from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda has concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.¹³⁶ This two-part approach is reflected in the Elements of Crimes under the 1998 Rome Statute, which requires as the last element for each of the proscribed acts: “The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”. Even so,

the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.¹³⁷

(35) In its decision confirming the charges against Laurent Gbagbo, an International Criminal Court Pre-Trial Chamber found that “it is only necessary to establish that the person had knowledge of the attack in general terms”.¹³⁸ Indeed, it need not be proven that the perpetrator knew the specific details of the attack;¹³⁹ rather, the perpetrator’s knowledge may be inferred from circumstantial evidence.¹⁴⁰ Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, an International Criminal Court Pre-Trial Chamber stated that the troops’ knowledge could be “inferred from the methods of the attack they followed”, which reflected a clear pattern.¹⁴¹ In the *Katanga* case, an International Criminal Court Pre-Trial Chamber found that

knowledge of the attack and the perpetrator’s awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.¹⁴²

(36) Furthermore, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.¹⁴³ According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most “be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack”.¹⁴⁴ It is the perpetrator’s knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was

¹³⁶ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 418; *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 133.

¹³⁷ International Criminal Court, *Elements of Crimes* (see footnote 38 above), p. 5.

¹³⁸ *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), para. 214.

¹³⁹ *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 434 (finding that the knowledge requirement “does not entail knowledge of the details of the attack”).

¹⁴⁰ See *Blaškić*, Judgment, 3 March 2000 (footnote 40 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including “the nature of the crimes committed and the degree to which they are common knowledge”); *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 657 (“While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances”). See also *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 134 (finding that “actual or constructive knowledge of the broader context of the attack” is sufficient).

¹⁴¹ *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 126. See *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 166–169.

¹⁴² *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 402.

¹⁴³ See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 103; *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), para. 558.

¹⁴⁴ *Kunarac*, Judgment, 12 June 2002 (see footnote 58 above), para. 103.

committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.¹⁴⁵ For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regard to Muslim women and girls.¹⁴⁶ A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack “by directly taking advantage of the situation created” and “fully embraced the ethnicity-based aggression”.¹⁴⁷ Likewise, an International Criminal Court Trial Chamber has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator’s motive is irrelevant for the act to be characterized as a crime against humanity.¹⁴⁸ It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the “State or the organisation’s criminal design”.¹⁴⁹

Prohibited acts

(37) Like article 7 of the 1998 Rome Statute, draft article 2, paragraph 1, at subparagraphs (a)–(k), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual’s act must be “part of” a widespread or systematic attack directed against any civilian population.¹⁵⁰ Determining whether the requisite nexus exists requires making “an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of” draft article 2, paragraph 1.¹⁵¹ The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.¹⁵²

(38) Two aspects of these subparagraphs bear mention. First, with respect to subparagraph (h), article 7, paragraph 1 (h), of the 1998 Rome Statute that criminalizes acts of persecution when undertaken in connection with “any act referred to in this paragraph or any crime within the jurisdiction of the Court”. The clause “or any crime within the jurisdiction of the Court” has not been retained for paragraph 1 (h) of draft article 2. The Commission considered this clause to be designed to establish a specific jurisdiction of the International Criminal Court and not to indicate the scope of what should constitute persecution as a crime against humanity more generally or for purposes of national law. Such a clause is not used as a jurisdictional threshold for other contemporary international criminal tribunals.¹⁵³ At the

¹⁴⁵ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 592.

¹⁴⁶ *Ibid.*, paras. 2–11

¹⁴⁷ *Ibid.*, para. 592.

¹⁴⁸ *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1125.

¹⁴⁹ *Ibid.*

¹⁵⁰ See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 100; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 649.

¹⁵¹ *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 165.

¹⁵² See, for example, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 41; *Prosecutor v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Štela”*, Case No. IT-98-34-T, Judgment, 31 March 2003, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 234, *Judicial Supplement No. 42*, June 2003; *Mrkšić*, Judgment, 27 September 2007 (footnote 41 above), para. 438; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 249, *Judicial Supplement No. 6*, June/July 1999.

¹⁵³ See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5 (h) (although it is noted that the Tribunal’s definition of crimes against humanity included “when committed in armed conflict”); Statute of the International Criminal Tribunal for Rwanda, art. 3 (h); Statute of the Special

same time, the clause “in connection with any act referred to in this paragraph” has been retained due to: (a) a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity; and (b) a recognition that subparagraph 1 (k) encompasses, in accordance with its terms, other inhumane acts. As such, the “in connection with any act referred to in this paragraph” clause provides guidance as to the nature of the persecution that constitutes a crime against humanity, specifically persecutory acts of a similar character and severity to those acts listed in the other subparagraphs of paragraph 1. Separately, it is noted that the clause “or other grounds ...” in subparagraph (h) allows for persecution on grounds other than those expressly listed, provided that such grounds “are universally recognized as impermissible under international law”. Certain other grounds have been suggested in this regard, such as persecution in the form of acts targeting children on the basis of age or birth.¹⁵⁴

(39) Second, with respect to subparagraph (k) on “other inhumane acts”, it is noted that the Elements of Crimes under the 1998 Rome Statute provide for the following requirements to constitute a crime against humanity:

- (1) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- (2) Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
- (3) The perpetrator was aware of the factual circumstances that established the character of the act.
- (4) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁵⁵

Definitions within the definition

(40) As noted above, draft article 2, paragraph 2 (a), defines “attack directed against any civilian population” for the purpose of draft article 2, paragraph 1. The remaining subparagraphs (b)–(i) of draft article 2, paragraph 2, define further terms that appear in paragraph 1, specifically: “extermination”; “enslavement”;¹⁵⁶ “deportation or forcible transfer of population”; “torture”; “forced pregnancy”; “persecution”; “the crime of apartheid”; and “enforced disappearance of persons”. These definitions also appear in article

Court for Sierra Leone, art. 2 (h); Extraordinary Chambers of Cambodia Law, art. 5; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014), art. 28C, para. 1 (h), available from <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

¹⁵⁴ Office of the Prosecutor of the International Criminal Court, “Policy on Children” (2016), para. 51 (“The Office considers that ... acts targeting children on the basis of age or birth may be charged as persecution on ‘other grounds’”).

¹⁵⁵ See International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 12.

¹⁵⁶ The definition of “enslavement” refers in part to “trafficking in persons”. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319, defines “trafficking in persons” at article 3 (a) as follows:

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 2.

(41) Article 7, paragraph 3, of the 1998 Rome Statute provides for the purposes of that Statute a definition of “gender” as referring “to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”. That paragraph (as well as a cross-reference to that paragraph in article 7, paragraph 1 (h)), has not been retained in draft article 2. Since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term “gender”, notably: the 2004 guidance document by the International Committee of the Red Cross;¹⁵⁷ the 2010 Committee on the Elimination of Discrimination against Women general recommendation No. 28;¹⁵⁸ the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence;¹⁵⁹ and recent reports of United Nations special rapporteurs or independent experts.¹⁶⁰ Moreover, the Office of the Prosecutor of the International Criminal Court in 2014 issued the “Policy paper on sexual and gender-based crimes”, which states:

Article 7 (3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the 1998 Rome Statute].¹⁶¹

¹⁵⁷ ICRC, *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, Geneva, 2004, p. 7 (“The term ‘gender’ refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term ‘sex’ refers to biological and physical characteristics”).

¹⁵⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 38 (A/66/38 (Part Two))*, annex III, p. 108. Paragraph 5 of the recommendation refers to gender as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences”.

¹⁵⁹ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210. Article 3 (c) of the Convention defines “gender” for purposes of the Convention to “mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

¹⁶⁰ See, for example, the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017) (A/HRC/35/23), paras. 17 *et seq.*; the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2018) (A/73/152), para. 2 (“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.”).

¹⁶¹ Office of the Prosecutor of the International Criminal Court, “Policy paper on sexual and gender-based crimes” (2014), para. 15. Article 21 of the Rome Statute on “applicable law” begins in paragraph 3 as follows: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights ...”.

A similar approach of viewing gender as a socially constructed (rather than biological) concept has been taken by various other international authorities¹⁶² and in the jurisprudence of international criminal courts and tribunals.¹⁶³

(42) Accordingly, the Commission decided not to include the definition of “gender” found in article 7, paragraph 3, of the 1998 Rome Statute, thereby allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning. While the term is therefore undefined in the present draft articles, the same is true as well for various other terms used in draft article 2, paragraph 1 (h), such as “political”, “racial”, “national”, “ethnic”, “cultural”, or “religious”. States, however, may be guided by the sources indicated above for understanding the meaning of the term “gender”.

Paragraph 3

(43) Paragraph 3 of draft article 2 provides: “This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law”. This provision is similar to article 1, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.¹⁶⁴ Article 10 of the 1998 Rome Statute (appearing in Part II on “Jurisdiction, admissibility, and applicable law”) also contains a “without prejudice clause”, which reads: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.

(44) Paragraph 3 is meant to ensure that the definition of “crimes against humanity” set forth in the first two paragraphs of draft article 2 does not call into question any broader definitions that may exist in international law, in particular in international instruments or in customary international law, or in national legislation. “International instrument” is to be

¹⁶² *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender identity, and equality and non-discrimination against same-sex couples], Advisory Opinion OC-24/17 of 24 November 2017, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016) (CAT/C/57/4 and Corr.1), para. 53; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women’s access to justice (CEDAW/C/GC/33); Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44)*, annex X; Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant), *Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2 (E/2006/22-E/C.12/2005/4)*, annex VIII; Report of the Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (2001) (A/56/156); Human Rights Committee, general comment No. 28 (2000) on article 3 (equality of rights between men and women), *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI B; Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (1996) (A/51/322); Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1993) on violence against women, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38)*, chap. I.

¹⁶³ *Prosecutor v. Ferdinand Nahimana, Jean Bosco and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 2003*, p. 376, at p. 1116, para. 1079; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 327; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 369–370; *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, Trial Chamber I, International Criminal Court, para. 191.

¹⁶⁴ Convention against Torture, art. 1, para. 2.

understood as being broader than just a legally binding international agreement, but as being limited to instruments developed by States or international organizations, such as the United Nations. To the extent that the definition of crimes against humanity is broader in certain respects under customary international law, then here too the present draft articles are without prejudice to such law. States also may adopt national laws that contain a broader definition of crimes against humanity, perhaps under the influence of broader definitions that may exist in international instruments or in customary international law. Thus, notwithstanding that an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation, if a State wishes to adopt or retain a broader definition in its national law, the present draft articles do not preclude it from doing so.

(45) For example, the definition of “enforced disappearance of persons” as contained in draft article 2 follows article 7 of the 1998 Rome Statute, but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,¹⁶⁵ in the 1994 Inter-American Convention on Forced Disappearance of Persons¹⁶⁶ and in the 2006 International Convention for the Protection of All Persons against Enforced Disappearance.¹⁶⁷ Those differences principally are that the latter instruments do not include the element “with the intention of removing them from the protection of the law”, do not include the words “for a prolonged period of time” and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

(46) In light of such differences, the Commission thought it prudent to include the “without prejudice” clause that appears in draft article 2, paragraph 3. However, any elements adopted in a national law, which do not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance, unless the States concerned so agree.

Article 3

General obligations

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.
2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.
3. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Commentary

(1) Draft article 3 sets forth in paragraph 1 the general obligation of States not to engage in acts that constitute crimes against humanity. Paragraph 2 sets forth a further general obligation to prevent and punish crimes against humanity. Paragraph 3 makes clear that no exceptional circumstances whatsoever may be invoked as a justification of crimes against humanity.

(2) Paragraph 1 of draft article 3 sets forth the first general obligation, which is that “Each State has the obligation not to engage in acts that constitute crimes against humanity.” Prior conventions, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1984 Convention against Torture, usually have not expressly provided that States shall not commit the acts at issue in those conventions. Nevertheless, the Commission viewed it as desirable for such an obligation to be made explicit in draft article

¹⁶⁵ Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 1.

¹⁶⁶ Inter-American Convention on Forced Disappearance of Persons (Belem, 9 June 1994), Organization of American States, *Treaty Series*, No. 60, art. II.

¹⁶⁷ 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, art. 2.

3. A formula that calls for States not to engage in “acts that constitute” crimes against humanity is appropriate since States themselves do not commit crimes; rather, crimes are committed by persons, but the “acts” that “constitute” such crimes may be acts attributable to the State under the rules on the responsibility of States for internationally wrongful acts.

(3) The general obligation “not to engage in acts” contains two components. First, States have an obligation not “to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law”.¹⁶⁸ In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice found that the identification of genocide as a crime, as well as the obligation of a State to prevent genocide, necessarily implies an obligation of the State not to commit genocide:

Under Article I the States parties are bound to prevent such an act, which it describes as ‘a crime under international law’, being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as ‘a crime under international law’: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.¹⁶⁹

(4) The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied “to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations [...] in question”.¹⁷⁰

(5) A breach of the obligation not to commit directly such acts engages the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on the responsibility of States for internationally wrongful acts. Indeed, in the context of disputes that may arise under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, article IX refers, *inter alia*, to disputes “relating to the responsibility of a State for genocide”. Although much of the focus of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is upon prosecuting individuals for the crime of genocide, the International Court of Justice has stressed that the breach of the obligation not to commit genocide is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.¹⁷¹ The Court’s approach is consistent with views previously expressed by the Commission,¹⁷² including in the commentary to the 2001 draft articles on the responsibility of States for internationally wrongful acts: “Where crimes

¹⁶⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (see footnote 13 above), p. 43 at p. 113, para. 166.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, p. 120, para. 183.

¹⁷¹ *Ibid.*, p. 114, para. 167 (noting that international responsibility is “quite different in nature from criminal responsibility”).

¹⁷² *Yearbook ... 1998*, vol. II (Part Two), p. 65, para. 249 (finding that the Convention on the Prevention and Punishment of the Crime of Genocide “did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility”).

against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them”.¹⁷³

(6) Second, States have obligations under international law not to aid or assist, or to direct, control or coerce, another State in the commission of an internationally wrongful act.¹⁷⁴

(7) Paragraph 2 of draft article 3 sets forth a second general obligation: “Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.” In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice found (again when considering article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) that States have an obligation “to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing” acts of genocide.¹⁷⁵ In that instance, the State party is expected to use its best efforts (a due diligence standard) when it has a “capacity to influence effectively the action of persons likely to commit, or already committing” the acts, which in turn depends on the State party’s geographic, political and other links to the persons or groups at issue.¹⁷⁶ At the same time, the Court found that “a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed”.¹⁷⁷ Further content of this second general obligation is addressed in various ways through the more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations and with, as appropriate, other organizations.

(8) The Court also analysed the meaning of “undertake” as contained in article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. At the provisional measures phase, the Court determined that such an undertaking imposes “a clear obligation” on the parties “to do all in their power to prevent the commission of any such acts in the future”.¹⁷⁸ At the merits phase, the Court described the ordinary meaning of the word “undertake” in that context as

to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.¹⁷⁹

The undertaking to prevent and punish crimes against humanity, as formulated in paragraph 2 of draft article 3, is intended to express the same kind of legally binding obligation upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

¹⁷³ *Yearbook ... 2001*, vol. II (Part. Two) and corrigendum, p. 142, para. (3) of the commentary to art. 58 of the draft articles on responsibility of States for internationally wrongful acts.

¹⁷⁴ *Ibid.*, p. 27, arts. 16–18 of the draft articles on responsibility of States for internationally wrongful acts.

¹⁷⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 13 above), p. 43, at p. 113, para. 166.

¹⁷⁶ *Ibid.*, p. 221, para. 430.

¹⁷⁷ *Ibid.*, p. 221, para. 431. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27, art. 14, para. 3 of the draft articles on responsibility of states for internationally wrongful acts: “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs”).

¹⁷⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at p. 22, para. 45.

¹⁷⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* (see footnote 13 above), p. 43, at p. 111, para. 162.

(9) The International Court of Justice also noted that the duty to punish in the context of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is connected to but distinct from the duty to prevent. While “one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent”,¹⁸⁰ the Court found that “the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations”.¹⁸¹ Indeed, the “obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty”.¹⁸²

(10) In the course of stating this second general obligation “to prevent and to punish crimes against humanity”, paragraph 2 of draft article 3 recognizes such crimes as “crimes under international law, whether or not committed in time of armed conflict”. While such language might have been incorporated in paragraph 1 of draft article 3, it is used in paragraph 2 where the focus is on the prevention and punishment of “crimes” committed by individuals, rather than on the acts of States.

(11) With respect to crimes against humanity being “crimes under international law”, the Nürnberg Charter included “crimes against humanity” as a component of the jurisdiction of the Tribunal. Among other things, the Tribunal noted that “individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.¹⁸³ Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East (hereinafter “Tokyo Tribunal”).¹⁸⁴

(12) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly.¹⁸⁵ The Assembly also directed the Commission to “formulate” the Nürnberg Charter principles and to prepare a draft code of offences.¹⁸⁶ The Commission in 1950 produced the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which stated that crimes against humanity were “punishable as crimes under international law”.¹⁸⁷ Further, the Commission completed in 1954 a draft Code of Offences against the Peace and Security of Mankind, which, in article 2, paragraph 11, included as an offence a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that “[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished”.¹⁸⁸

(13) The characterization of crimes against humanity as “crimes under international law” indicates that they exist as crimes whether or not the conduct has been criminalized under national law. Article 6 (c) of the Nürnberg Charter defined crimes against humanity as the commission of certain acts “whether or not in violation of the domestic law of the country where perpetrated”. In 1996, the Commission completed a draft Code of Crimes against the Peace and Security of Mankind, which provided, *inter alia*, that crimes against humanity

¹⁸⁰ *Ibid.*, p. 219, para. 426.

¹⁸¹ *Ibid.*, para. 425.

¹⁸² *Ibid.*, p. 220, para. 427.

¹⁸³ *Judgment of 30 September 1946* (see footnote 92 above), p. 466.

¹⁸⁴ Charter of the International Military Tribunal for the Far East, art. 5 (c) (Tokyo, 19 January 1946) (as amended on 26 April 1946), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4, C. Bevans, ed. (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 5 (c) (hereinafter “Tokyo Charter”). No persons, however, were convicted of this crime by that tribunal.

¹⁸⁵ *Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal*, General Assembly resolution 95 (I) of 11 December 1946.

¹⁸⁶ *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal*, General Assembly resolution 177 (II) of 21 November 1947.

¹⁸⁷ *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 376, principle VI of the Nürnberg Principles.

¹⁸⁸ *Yearbook ... 1954*, vol. II, p. 150, art. 1 of the draft Code of Offences against the Peace and Security of Mankind.

were “crimes under international law and punishable as such, whether or not they are punishable under national law”.¹⁸⁹ The gravity of such crimes is clear; the Commission has previously indicated that the prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of international law.¹⁹⁰

(14) Paragraph 2 of draft article 3 also identifies crimes against humanity as crimes under international law “whether or not committed in time of armed conflict”. The reference to “armed conflict” should be read as including both international and non-international armed conflict.¹⁹¹ The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,¹⁹² linked the jurisdiction of the International Military Tribunal over crimes against humanity to the existence of an international armed conflict; the acts fell under the Tribunal’s jurisdiction only if committed “in execution of or in connection with” any crime within the jurisdiction of the Tribunal, meaning a crime against peace or a war crime. As such, while the Charter did not exclude jurisdiction over acts that had been committed prior to the armed conflict, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime’s connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large-scale, perhaps as part of a pattern of conduct.¹⁹³ The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the armed conflict, although in some instances the connection of those crimes with other crimes within the jurisdiction of the International Military Tribunal was tenuous.¹⁹⁴

(15) The Commission’s 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal also defined crimes against humanity in Principle VI (c) in a manner that required a connection to an armed conflict.¹⁹⁵ In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.¹⁹⁶ At the same time, the Commission maintained that

¹⁸⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50, art. 1 of the draft Code of Crimes against the Peace and Security of Mankind. The 1996 draft Code contained five categories of crimes, one of which was crimes against humanity.

¹⁹⁰ See footnote 21 above and accompanying text.

¹⁹¹ See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., 2016, para. 218 of the commentary to common article 2 (hereinafter “ICRC, *Commentary on the First Geneva Convention*, 2016”) (“Armed conflicts in the sense of Article 2(1) are those which oppose High Contracting Parties (i.e. States) and occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.”); *ibid.*, para. 387 of the commentary to common article 3 (“A situation of violence that crosses the threshold of an ‘armed conflict not of an international character’ is a situation in which organized Parties confront one another with violence of a certain degree of intensity. It is a determination made based on the facts.”).

¹⁹² Protocol Rectifying Discrepancy in Text of Charter (Berlin, 6 October 1945), in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946)*, vol. 1 (1947), pp. 17–18 (hereinafter “Berlin Protocol”). The Berlin Protocol replaced a semicolon after “during the war” with a comma, so as to harmonize the English and French texts with the Russian text. *Ibid.*, p. 17. The effect of doing so was to link the first part of the provision to the latter part of the provision (“in connection with any crime within the jurisdiction of the Tribunal”) and hence to the existence of an international armed conflict.

¹⁹³ See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty’s Stationery Office, 1948), p. 179 (“Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims”).

¹⁹⁴ See, for example, *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the jurisdiction of the International Military Tribunal).

¹⁹⁵ *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, principle VI (c) of the Nürnberg Principles.

¹⁹⁶ *Ibid.*, para. 123.

“acts may be crimes against humanity even if they are committed by the perpetrator against his own population”.¹⁹⁷ The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in article I (b), to “[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations”.¹⁹⁸

(16) The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia included “crimes against humanity”. Article 5 of its Statute provided that the Tribunal may prosecute persons responsible for a series of acts (such as murder, torture or rape) “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”.¹⁹⁹ Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Statute of the Tribunal was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia. As such, the formulation used in article 5 (“armed conflict”) was designed principally to dispel the notion that crimes against humanity had to be linked to an “international armed conflict”. To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Tribunal’s Appeals Chamber later clarified that there was “no logical or legal basis” for retaining a connection to armed conflict, since “it has been abandoned” in State practice since Nürnberg.²⁰⁰ The Appeals Chamber also noted that the “obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict”.²⁰¹ Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the Tribunal was simply circumscribing the subject-matter of its jurisdiction, not codifying customary international law.²⁰²

(17) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over “crimes against humanity”. Although article 3 of the Statute of that Tribunal retained the same series of acts as appeared in the Statute of the International Criminal Tribunal for the Former Yugoslavia, the chapeau language did not retain the reference to armed conflict.²⁰³ Likewise, article 7 of the 1998 Rome Statute did not retain any reference to armed conflict, nor has it existed with respect to other relevant criminal tribunals.²⁰⁴

¹⁹⁷ *Ibid.*, para. 124.

¹⁹⁸ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73. As of July 2019, there were 55 States parties to this Convention. For a regional convention of a similar nature, see the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974), Council of Europe, *Treaty Series*, No. 82. As of July 2019, there were eight States parties to this Convention.

¹⁹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5.

²⁰⁰ *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, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, para. 140.

²⁰¹ *Ibid.*

²⁰² See, for example, *Kordić*, Judgment, 26 February 2001 (footnote 81 above), para. 33; *Tadić*, Judgment, 15 July 1999 (footnote 152 above), para. 251 (“[T]he armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law”).

²⁰³ Statute of the International Criminal Tribunal for Rwanda, art. 3. See *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, Appeals Chamber, International Criminal Tribunal for Rwanda, para. 269 (“[C]ontrary to Article 5 of the [Statute of the International Criminal Tribunal for the Former Yugoslavia], Article 3 of the [Statute of the International Criminal Tribunal for Rwanda] does not require that the crimes be committed in the context of an armed conflict. This is an important distinction”).

²⁰⁴ See, for example, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016, Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, para. 721 (finding that

(18) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal courts and tribunals, including the 1998 Rome Statute. In its place, as discussed in relation to the “chapeau” requirements of draft article 2, paragraph 1 (in conjunction with paragraph 2 (a)), the crime must be committed as part of a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack.

(19) Such treaty practice, jurisprudence, and the well-settled acceptance by States establish that crimes against humanity are crimes under international law that should be prevented and punished whether or not committed in time of armed conflict, and whether or not criminalized under national law.

(20) Draft article 3, paragraph 3, indicates that no exceptional circumstances may be invoked as a justification of crimes against humanity. This text is inspired by article 2, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²⁰⁵ but has been refined for the context of crimes against humanity. The expression “state of war or threat of war” has been replaced by the expression “armed conflict,” as was done in draft article 3, paragraph 2. In addition, the words “such as” are used to stress that the examples given are not meant to be exhaustive.

(21) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,²⁰⁶ as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.²⁰⁷

(22) One advantage of the formulation in draft article 3, paragraph 3, with respect to crimes against humanity is that it is drafted in a manner that relates to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligations of States as set forth in paragraphs 1 and 2 and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility.

Article 4 **Obligation of prevention**

Each State undertakes to prevent crimes against humanity, in conformity with international law, through:

- (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and
- (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

the definition of crimes against humanity under customary international law by 1975 did not require a nexus to an armed conflict).

²⁰⁵ Convention against Torture, art. 2, para. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”).

²⁰⁶ International Convention for the Protection of All Persons from Enforced Disappearance, art. 1, para. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”).

²⁰⁷ Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), Organization of American States, *Treaty Series*, No. 67, art. 5 (“The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture”).

Commentary

(1) Draft article 4 elaborates upon the obligation to prevent crimes against humanity that is set forth in general terms in draft article 3, paragraph 2. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provides in article I: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.²⁰⁸ Further, article V provides: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”. Article VIII provides: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III”. As such, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains within it several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision for States parties to call upon the competent organs of the United Nations to act for the prevention of genocide.

(3) Such an obligation to take preventive measures is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;²⁰⁹ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;²¹⁰ the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid;²¹¹ the 1979 International Convention against the Taking of Hostages;²¹² the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²¹³ the 1985 Inter-American Convention to Prevent and Punish

²⁰⁸ Convention on the Prevention and Punishment of the Crime of Genocide, art. I.

²⁰⁹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177. Article 10, paragraph 1, provides: “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure[s] for the purpose of preventing the offences mentioned in Article 1”.

²¹⁰ 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, art. 4 (“States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories”).

²¹¹ 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, art. IV: (“The States Parties to the present Convention undertake ... (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime”).

²¹² International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205, art. 4 (“States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of ... offences ... including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages”).

²¹³ Convention against Torture, art. 2, para. 1 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”).

Torture;²¹⁴ the 1994 Inter-American Convention on the Forced Disappearance of Persons;²¹⁵ the 1994 Convention on the Safety of United Nations and Associated Personnel;²¹⁶ the 1997 International Convention on the Suppression of Terrorist Bombings;²¹⁷ the 2000 United Nations Convention against Transnational Organized Crime;²¹⁸ the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;²¹⁹ the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime;²²⁰ the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime;²²¹ the 2002 Optional Protocol to the Convention against Torture and Other

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- ²¹⁴ Inter-American Convention to Prevent and Punish Torture, art. 1 (“The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention”). Article 6 provides: “The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction”.
- ²¹⁵ Inter-American Convention on Forced Disappearance of Persons, art. 1 (“The States Parties to this Convention undertake ... (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention”).
- ²¹⁶ Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363, art. 11 (“States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes”).
- ²¹⁷ International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256, art. 15 (“States Parties shall cooperate in the prevention of the offences set forth in article 2”).
- ²¹⁸ United Nations Convention against Transnational Organized Crime, art. 9, para. 1 (“In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials”); art. 9, para. 2 (“Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions”); art. 29, para. 1 (“Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention”); art. 31, para. 1 (“States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime”).
- ²¹⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 9, para. 1 (“States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization”).
- ²²⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2241, No. 39574, p. 480, art. 11, para. 1 (“Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants”); art. 11, para. 2 (“Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol”); art. 14, para. 1 (“States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol”).
- ²²¹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001), United Nations, *Treaty Series*, vol. 2326, No. 39574, p. 208, art. 9 (“A State Party that does not recognize a deactivated firearm as a firearm in accordance with its

Cruel, Inhuman or Degrading Treatment or Punishment;²²² the 2003 United Nations Convention against Corruption;²²³ and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.²²⁴

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;²²⁵ the 1979 Convention on the Elimination of All Forms of Discrimination against Women;²²⁶ and the 2011 Council of Europe Convention on

domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms"); art. 11 ("In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures: (a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and (b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation"); art. 14 ("States Parties shall cooperate with each other and with relevant international organizations, as appropriate, so that States Parties may receive, upon request, the training and technical assistance necessary to enhance their ability to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms").

²²² Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002), United Nations, *Treaty Series*, vol. 2375, No. 24841, p. 237, preamble ("Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures"); art. 3 ("Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment").

²²³ United Nations Convention against Corruption, art. 6, para. 1 ("Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption"); art. 9, para. 1 ("Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption"); art. 12, para. 1 ("Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures").

²²⁴ International Convention for the Protection of All Persons from Enforced Disappearance, preamble ("Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance"); art. 23 ("1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy").

²²⁵ International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195, art. 3 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction").

²²⁶ Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, art. 2 ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women") and art. 3 ("States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the

Preventing and Combating Violence against Women and Domestic Violence.²²⁷ Some treaties do not refer expressly to “prevention” or “elimination” of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to “give effect” to or to “implement” the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights²²⁸ and the 1989 Convention on the Rights of the Child.²²⁹

(5) The International Court of Justice has stated that, when engaging in measures of prevention, “it is clear that every State may only act within the limits permitted by international law”.²³⁰ The Commission deemed it important to express that requirement explicitly in the chapeau of draft article 4, and therefore has included a clause indicating that any measures of prevention must be “in conformity with international law”. Thus, the measures undertaken by a State to fulfil its obligation to prevent crimes against humanity must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(6) Draft article 4 obliges States to prevent crimes against humanity in two specific ways provided for in subparagraphs (a) and (b), respectively.

(7) First, pursuant to subparagraph (a) of draft article 4, States must pursue actively and in advance measures designed to help prevent the offence from occurring, through “effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction”. This text is inspired by article 2, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.²³¹

(8) The term “other appropriate preventive measures” rather than just “other measures” is used to reinforce the point that the measures at issue in subparagraph (a) relate solely to those aimed at prevention. The term “appropriate” offers some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State. The term “effective” implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. In commenting on the analogous provision in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has stated:

purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”).

²²⁷ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 4, para. 2 (“Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women”).

²²⁸ International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, art. 2, para. 2 (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant”).

²²⁹ Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 4 (“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”).

²³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (see footnote 13 above), p. 43, at p. 221, para. 430.

²³¹ Convention against Torture, art. 2, para. 1.

States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.²³²

(9) As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide²³³ that provides some insights into the kinds of measures that are expected in fulfilment of article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution: (a) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";²³⁴ (b) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";²³⁵ and (c) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms".²³⁶

(10) In the regional context, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)²³⁷ contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life), to contain a positive obligation on States parties to safeguard the lives of those within their jurisdiction, consisting of two aspects: (a) the duty to provide a regulatory framework and (b) the obligation to take preventive measures.²³⁸ At the same time, the Court has recognized that the State party's obligation in this regard is limited.²³⁹ The Court has similarly held that States parties have an obligation, pursuant to article 3 of the Convention to prevent torture and other forms of ill-

²³² See Committee against Torture, general comment No. 2 (2007).

²³³ Report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53 (A/70/53)*, chap. II, resolution 28/34 on the prevention of genocide, adopted by the Human Rights Council on 27 March 2015.

²³⁴ *Ibid.*, para. 2.

²³⁵ *Ibid.*, para. 3.

²³⁶ *Ibid.*, para. 4.

²³⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

²³⁸ *Makaratzis v. Greece*, Application No. 50385/99, Judgment of 20 December 2004, Grand Chamber, European Court of Human Rights, ECHR 2004-XI, para. 57; see *Kiliç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, European Court of Human Rights, ECHR 2000-III, para. 62 (finding that article 2, paragraph 1, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction); Application No. 47848/08, Judgment of 17 July 2014, Grand Chamber, European Court of Human Rights, ECHR 2014, para. 130.

²³⁹ *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, First Section, European Court of Human Rights, ECHR 2000-III, para. 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"); see also *Kerimova and others v. Russia*, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, Final Judgment of 15 September 2011, First Section, European Court of Human Rights, para. 246; *Osman v. the United Kingdom*, Judgment of 28 October 1998, Grand Chamber, European Court of Human Rights, *Reports* 1998-VIII, para. 116.

treatment.²⁴⁰ Likewise, although the 1969 American Convention on Human Rights²⁴¹ contains no express obligation to “prevent” violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to “ensure” the free and full exercise of the rights recognized by the Convention,²⁴² has found that this obligation implies a “duty to prevent”, which in turn requires the State party to pursue certain steps. The Court has said:

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.²⁴³

Similar reasoning has animated the Court’s approach to the interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.²⁴⁴

(11) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offences. Such an obligation usually would oblige the State at least to: (a) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (b) continually keep those laws and policies under review and as necessary improve them; (c) pursue initiatives that educate governmental officials as to the State’s obligations under the draft articles; (d) implement training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (e) once the proscribed act is committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.²⁴⁵ Some measures, such as training programmes, may already exist in the State to help

²⁴⁰ *A v. United Kingdom*, Judgment of 23 September 1998, European Court of Human Rights, *Reports of Judgments and Decisions 1998-VI*, para. 22; *O’Keeffe v. Ireland* [Grand Chamber], Application No. 35810/09, Judgment of 28 January 2014 European Court of Human Rights, ECHR 2014, para. 144.

²⁴¹ American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969), Organization of American States, *Treaty Series*, vol. 1144, No. 17955, p. 123.

²⁴² Article 1, paragraph 1, reads: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination”. It is noted that article 1 of the African Charter on Human and Peoples’ Rights provides that the States parties “shall recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them”. African Charter on Human and Peoples’ Rights (“Banjul Charter”) (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

²⁴³ *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Inter-American Court of Human Rights, Series C, No. 4, para. 175; see also *Gómez-Paquiyaqui Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 110, para. 155; *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 99, paras. 137 and 142.

²⁴⁴ *Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 114, para. 159; see also *Gómez-Paquiyaqui Brothers v. Peru* (footnote 243 above), para. 155.

²⁴⁵ For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988) on effective national machinery and publicity, paras. 1–2, *Official Records of the General Assembly, Forty-third Session, Supplement No. 38 (A/43/38)*, chap. V, para. 770; Committee on the Elimination of Discrimination against Women, general recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS), *ibid.*, *Forty-fifth Session, Supplement No. 38 (A/45/38)*, chap. IV, para. 438; Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9, *ibid.*, *Forty-seventh Session, Supplement No. 38 (A/47/38)*, chap. I; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 9, *ibid.*, *Fifty-ninth Session, Supplement No. 41 (A/59/41)*, annex XI; Human Rights Committee, general comment

prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obliged to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.²⁴⁶

(12) Subparagraph (a) of draft article 4, refers to a State pursuing effective legislative, administrative, judicial or other preventive measures “in any territory under its jurisdiction”. Such a formulation, which is used at various places in the draft articles, covers the territory of a State, but also covers other territory under the State’s jurisdiction. As the Commission has previously explained,

it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by [the International Court of Justice] in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia.²⁴⁷

(13) Second, pursuant to subparagraph (b) of draft article 4, States have an obligation to pursue certain forms of cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations, which indicates that one of the purposes of the Charter is to “achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”. Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge “to take joint and separate action in cooperation with the

No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paras. 6-7, in *ibid.*, *Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III; Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 50–63, *ibid.*, *Sixty-first Session, Supplement No. 41 (A/61/41)*, annex II; Committee on the Elimination of Racial Discrimination, general recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5, *ibid.*, *Sixtieth Session, Supplement No. 18 (A/60/18)*, chap. IX, para. 460; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, principle 3 (a) (“The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations”).

²⁴⁶ Training or dissemination programmes may already exist in relation to international humanitarian law and the need to prevent the commission of war crimes. Common article 1 to the 1949 Geneva Conventions obliges High Contracting Parties “to respect and ensure respect” for the rules of international humanitarian law, which may have encouraged pursuit of such programmes. See ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 145–146, 150, 154, 164 and 178 (on common article 1). Further, article 49 of Geneva Convention I (a provision common to the other Conventions) also imposes obligations to enact legislation to provide effective penal sanctions and to suppress acts contrary to the Convention. See *ibid.*, paras. 2842, 2855 and 2896 (on article 49).

²⁴⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. (12) of the commentary to art. 1 of the draft articles on the prevention of transboundary harm from hazardous activities, p. 151 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118). See also *Yearbook ... 2006*, vol. II (Part Two), p. 70, para. (25) of the commentary to principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 29 (referring to “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”).

Organization for the achievement of” certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms for all”. Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that “States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose”.²⁴⁸

(14) Consequently, subparagraph (b) of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term “relevant” is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization’s functions and mandate, on the legal relationship of the State to that organization, and on the context in which the need for cooperation arises. Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations, such as the components of the International Red Cross and Red Crescent Movement, within the limits of their respective mandates.²⁴⁹ These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term “as appropriate” is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

Article 5 ***Non-refoulement***

1. No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Commentary

(1) Consistent with the broad objective of prevention addressed in draft article 4, draft article 5, paragraph 1, provides that no State shall send a person to another State where there are substantial grounds for believing that such person would be in danger of being subjected

²⁴⁸ Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

²⁴⁹ The International Red Cross and Red Crescent Movement (Movement) consists of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and 191 National Red Cross and Red Crescent Societies. In accordance with their respective mandates set out, *inter alia*, in the Statutes of the Movement, the components of the Movement have different roles in ensuring respect for international humanitarian law, including by preventing violations of it, which may also include crimes against humanity. The limits of the Movement’s engagement in the prevention of international crimes are found in the Fundamental Principles of the Movement, in particular that of neutrality. Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 1986 and amended in 1995 and 2006, preamble, available at www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf. In accordance with this principle, the components of the Movement do not participate, contribute or associate themselves with the investigation and prosecution of such crimes as this may be perceived as supporting one side against another or as engaging in controversies of a political, racial, religious or ideological nature. See generally www.icrc.org/en/who-we-are/movement.

to a crime against humanity. Thus, this provision uses the principle of *non-refoulement* to prevent persons in certain circumstances from being exposed to crimes against humanity.

(2) As a general matter, the principle of *non-refoulement* obligates a State not to return or otherwise transfer a person to another State where there are substantial grounds for believing that he or she will be in danger of persecution or some other specified harm. Paragraph 1 refers to such transfer “to another State” rather than “to territory under the jurisdiction of another State” so as also to encompass situations where the person is transferred from the control of one State to that of another even if it occurs within the same territory or occurs outside any territory (such as on or over the high seas). The principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,²⁵⁰ but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees.²⁵¹ Other conventions and instruments²⁵² addressing refugees have incorporated the principle, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.²⁵³

(3) The principle also has been applied with respect to all aliens (not just refugees) in various instruments²⁵⁴ and treaties, such as the 1969 American Convention on Human Rights²⁵⁵ and the 1981 African Charter on Human and Peoples’ Rights.²⁵⁶ Indeed, the principle was addressed in this broader sense in the Commission’s 2014 draft articles on the expulsion of aliens.²⁵⁷ The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in article 7 of the 1966 International Covenant on Civil and Political Rights²⁵⁸ and article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms²⁵⁹ respectively, as implicitly imposing an obligation of *non-refoulement* even though these conventions contain no such express obligation. Further, the

²⁵⁰ Geneva Convention IV, art. 45. ICRC interprets common article 3 to the four Geneva Conventions as implicitly including a *non-refoulement* obligation. ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 708–716 on common article 3.

²⁵¹ Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33, para. 1 (“No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”).

²⁵² See, for example, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, Colombia, 22 November 1984, conclusion 5.

²⁵³ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, art. II, para. 3.

²⁵⁴ See, for example, Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII) of 14 December 1967 (A/6716), art. 3; Final of the 1966 Bangkok Principles on the Status and Treatment of Refugees, adopted by the Asian-African Legal Consultative Organization at its fortieth session, held in New Delhi on 24 June 2001, art. III; Council of Europe, recommendation No. R(84)1 of the Committee of Ministers to member States on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees, adopted by the Committee of Ministers on 25 January 1984.

²⁵⁵ American Convention on Human Rights, art. 22, para. 8.

²⁵⁶ African Charter on Human and Peoples’ Rights (“Banjul Charter”), art. 12, para. 3.

²⁵⁷ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/69/10)*, para. 44, art. 23, para. 1, of the draft articles on the expulsion of aliens (“No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law”).

²⁵⁸ See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 9, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”).

²⁵⁹ See, for example, *Chahal v. United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, Grand Chamber, European Court of Human Rights, ECHR 1996-V, para. 80.

principle of *non-refoulement* is often reflected in extradition treaties, by stating that nothing in the treaty shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing the request has been made to persecute the alleged offender on specified grounds. Draft article 13, paragraph 11, of the present draft articles is a provision of this type.

(4) Of particular relevance for the present draft articles, the principle has been incorporated in treaties addressing specific crimes, such as torture and enforced disappearance. For example, article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(5) This provision was modelled on the 1951 Convention relating to the Status of Refugees, but added the additional element of “extradition” to cover another possible means by which a person is physically transferred to another State.²⁶⁰ Similarly, article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides that:

1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

(6) While, as in earlier conventions, the State’s obligation under draft article 5, paragraph 1, is focused on avoiding exposure of a person to crimes against humanity, this obligation is without prejudice to other obligations of *non-refoulement* arising from treaties or customary international law. Indeed, the obligations of States contained in all relevant treaties continue to apply in accordance with their terms.

(7) Draft article 5, paragraph 1, provides that the State shall not send the person to another State “where there are substantial grounds for believing that he or she would be in danger” of being subjected to a crime against humanity. This “substantial grounds” standard has been addressed by various expert treaty bodies and by international courts. For example, the Committee against Torture, in considering communications alleging that a State has violated article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has stated that “substantial grounds” exist whenever the risk of torture is “foreseeable, personal, present, and real”.²⁶¹ It has also explained that each person’s

²⁶⁰ A similar provision is included in the Charter of Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, art. 19, para. 2 (“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”).

²⁶¹ Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (CAT/C/GC/4), para. 11. For relevant communications, see Committee against Torture, *Dadar v. Canada*, communication No. 258/2004, Views adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, annex VIII, sect. A, p. 241, para. 8.4; *N.S. v. Switzerland*, communication No. 356/2008, Views adopted on 6 May 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 44 (A/65/44)*, annex XIII, sect. A, p. 335, para. 7.3; *Subakaran R. Thirugnanasampanthar v. Australia*, communication No. 614/2014, Decision adopted on 9 August 2017 (CAT/C/61/D/614/2014), para. 8.3.

“case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards”.²⁶²

(8) In guidance to States, the Human Rights Committee has indicated that a State has an obligation “not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”.²⁶³ In interpreting this standard, the Human Rights Committee has concluded that States must refrain from exposing individuals to a real risk of violations of their rights under the Covenant, as a “necessary and foreseeable consequence” of expulsion.²⁶⁴ It has further maintained that the existence of such a real risk must be decided “in the light of the information that was known, or ought to have been known” to the State party’s authorities at the time and does not require “proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk”.²⁶⁵

(9) The European Court of Human Rights has found that a State’s obligation is engaged where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.²⁶⁶ In applying this legal test, States must examine the “foreseeable consequences” of sending an individual to the receiving country.²⁶⁷ While a “mere possibility” of ill-treatment is not sufficient, it is not necessary according to the European Court to show that subjection to ill-treatment is “more likely than not”.²⁶⁸ The European Court has stressed that the examination of evidence of a real risk must be “rigorous”.²⁶⁹ Further, and similarly to the Human Rights Committee, the evidence of the risk “must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion”,²⁷⁰ though regard can be had to information that comes to light subsequently.²⁷¹

(10) Draft article 5, paragraph 2, provides that States shall take into account “all relevant considerations” when determining whether there are substantial grounds for the purposes of paragraph 1. Such considerations include, but are not limited to, “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of

²⁶² Committee against Torture, general comment No. 4, para. 13.

²⁶³ Human Rights Committee, general comment No. 31, para. 12. See also Human Rights Committee, general comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36) [this general comment has not yet been published so citations and paragraph numbers may be subject to change in the final version], para. 30.

²⁶⁴ See, for example, Human Rights Committee, *Chitat Ng v. Canada*, communication No. 469/1991, Views adopted on 5 November 1993, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex IX, sect. CC, para. 15.1 (a); *A.R.J. v. Australia*, communication No. 692/1996, Views adopted on 28 July 1997, *ibid.*, *Fifty-second Session, Supplement No. 40 (A/52/40)*, vol. II, annex VI, sect. T, para. 6.14; *Hamida v. Canada*, communication No. 1544/2007, Views adopted on 18 March 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 40 (A/65/40)*, vol. II, annex V, sect. V, para. 8.7.

²⁶⁵ See, for example, Human Rights Committee, *Maksudov and others v. Kyrgyzstan*, communication Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, Views adopted on 16 July 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40 (A/63/40)*, vol. II, annex V, sect. W, para. 12.4.

²⁶⁶ See, for example, *Soering v. United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, European Court of Human Rights, Series A, vol. 161, para. 88; *Chahal v. United Kingdom* (footnote 259 above), para. 74.

²⁶⁷ See, for example, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, Grand Chamber, European Court of Human Rights, ECHR 2008-II, para. 130.

²⁶⁸ *Ibid.*, paras. 131 and 140.

²⁶⁹ *Ibid.*, para. 128.

²⁷⁰ *Ibid.*, para. 133.

²⁷¹ See, for example, *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment of 13 December 2012, Grand Chamber, European Court of Human Rights, ECHR 2012-VI, para. 214.

serious violations of international humanitarian law”. Indeed, various considerations may be relevant. When interpreting the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee has stated that all relevant factors should be considered, and that “[t]he existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed”.²⁷² The Committee against Torture has developed, for the purposes of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a detailed list of “non-exhaustive examples of human rights situations that may constitute an indication of risk of torture, to which [States parties] should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of ‘non-refoulement’”.²⁷³ When considering whether it is appropriate for States to rely on assurances made by other States,²⁷⁴ the European Court of Human Rights considers such factors as whether the assurances are specific or are general and vague,²⁷⁵ whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms,²⁷⁶ and whether there is an effective system of protection against the violation in the receiving State.²⁷⁷

(11) The 1951 Convention relating to the Status of Refugees contains exceptions to the *non-refoulement* obligation to allow return where the person has committed a crime or presented a serious security risk.²⁷⁸ Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.²⁷⁹ The Commission deemed it appropriate for draft article 5 to contain no such exception.

Article 6
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.
2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
 - (a) committing a crime against humanity;

²⁷² *Maksudov v. Kyrgyzstan* (see footnote 265 above), para. 12.4.

²⁷³ Committee against Torture, general comment No. 4, para. 29.

²⁷⁴ *Ibid.*, para. 20 (“[T]he Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State”).

²⁷⁵ See, for example, *Saadi v. Italy*, (footnote 267 above), paras. 147–148.

²⁷⁶ See, for example, *Chentiev and Ibragimov v. Slovakia*, Application Nos. 21022/08 & 51946/08, Decision as to admissibility of 14 September 2010, Fourth Section, European Court of Human Rights.

²⁷⁷ See, for example, *Soldatenko v. Ukraine*, Application No. 2440/07, Judgment of 23 October 2008, Fifth Section, European Court of Human Rights, para. 73. Other factors that Court might consider include: whether the terms of assurances are disclosed to the Court; who has given assurances and whether those assurances can bind the receiving State; if the assurances were issued by the central government of a State, whether local authorities can be expected to abide by such assurances; whether the assurances concern treatment which is legal or illegal in the receiving State; the length and strength of bilateral relations between the sending and receiving States; whether the individual has been previously ill-treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending State. *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, Fourth Section, European Court of Human Rights, ECHR 2012 (extracts), para. 189.

²⁷⁸ Convention relating to the Status of Refugees, art. 33, para. 2.

²⁷⁹ See, for example, *Maksudov v. Kyrgyzstan* (footnote 265 above), para. 12.4; *Othman (Abu Qatada) v. United Kingdom* (footnote 277 above), para. 185; Committee against Torture, *Tapia Paez v. Sweden*, communication No. 39/1996, Views adopted on 28 April 1997, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44 (A/52/44)*, annex V, sect. sect. B.4, para. 14.5; *Abdussamatov et al. v. Kazakhstan*, communication No. 444/2010, Views adopted on 1 June 2012, *ibid.*, *Sixty-seventh Session, Supplement No. 44 (A/67/44)*, annex XIV, sect. A, p. 530, para. 13.7.

- (b) attempting to commit such a crime; and
- (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Commentary

(1) Draft article 6 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude certain defences or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. Measures of this kind are essential for the proper functioning of the subsequent draft articles relating to the establishment and exercise of jurisdiction over alleged offenders.

Ensuring that “crimes against humanity” are offences in national criminal law

(2) Draft article 6, paragraph 1, provides that each State “shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.” The International Military Tribunal at Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.²⁸⁰ The Commission’s 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.²⁸¹ The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provided in its preamble that “the effective punishment of ... crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security”. The preamble to the 1998 Rome Statute affirms “that the

²⁸⁰ *Judgment of 30 September 1946* (see footnote 92 above), p. 466.

²⁸¹ *Yearbook ... 1950*, vol. II, document [A/1316](#), Part III, p. 374, para. 97 (principle 1).

most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

(3) Many States have adopted laws on crimes against humanity that provide for the prosecution of such crimes in their national system. The 1998 Rome Statute, in particular, has inspired the enactment or revision of a number of national laws on crimes against humanity that define such crimes in terms identical to or very similar to the offence as defined in article 7 of that Statute. At the same time, many States have adopted national laws that differ, sometimes significantly, from the definition set forth in article 7. Moreover, still other States have not adopted any national law on crimes against humanity. Those States typically do have national criminal laws that provide for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape. Yet those States have not criminalized crimes against humanity as such and this lacuna may preclude prosecution and punishment of the conduct, including in terms commensurate with the gravity of the offence.²⁸²

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that: “Each State Party shall ensure that all acts of torture are offences under its criminal law”.²⁸³ The Committee against Torture has stressed the importance of fulfilling such an obligation so as to avoid possible discrepancies between the crime as defined in the Convention and the crime as it is addressed in national law:

Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.²⁸⁴

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 6, paragraph 1, provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 6, paragraphs 2 and 3 (discussed below), then further obligate the State to criminalize certain ways by which natural persons might engage in such crimes.

(6) Since the term “crimes against humanity” is defined in draft article 2, paragraphs 1 and 2, the obligation set forth in draft article 6, paragraph 1, requires that the crimes so defined are made offences under the State’s national criminal laws. While there might be some deviations from the exact language of draft article 2, paragraphs 1 and 2, so as to take account of terminological or other issues specific to any given State, such deviations should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity as defined in draft article 2, paragraphs 1 and 2. The term “crimes against humanity” used in draft article 6 (and in other draft articles), however, does not include the “without prejudice” clause contained in draft article 2, paragraph 3. While that clause recognizes the possibility of a broader definition of “crimes against humanity” in any international instrument, in customary international law or in national law, for the purposes of these draft articles the definition of “crimes against humanity” is limited to draft article 2, paragraphs 1 and 2.

²⁸² See *Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12 OA, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, Appeals Chamber, International Criminal Court, paras. 63-72 (finding that a national prosecution for ordinary domestic crimes was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

²⁸³ Convention against Torture, art. 4, para. 1.

²⁸⁴ See Committee against Torture, general comment No. 2 (2007), para. 9. See also Committee against Torture, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44 (A/58/44)*, chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Slovenia, para. 115 (a), and Belgium, para. 130.

(7) Like the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many treaties in the areas of international humanitarian law, human rights and international criminal law require that a State party ensure that the prohibited conduct is an “offence” or “punishable” under its national law, though the exact wording of the obligation varies.²⁸⁵ Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide²⁸⁶ and the 1949 Geneva Conventions,²⁸⁷ contain an obligation to enact “legislation”, but the Commission viewed it appropriate to model draft article 6, paragraph 1, on more recent treaties, such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Committing, attempting to commit, assisting in or contributing to a crime against humanity

(8) Draft article 6, paragraph 2, provides that each State shall take the necessary measures to ensure that certain ways by which natural persons might engage in crimes against humanity are criminalized under national law, specifically: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

(9) In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized “crimes against humanity” impose criminal responsibility upon a person who “commits” the offence (sometimes referred to in national law as “direct” commission, as “perpetration” of the act or as being a “principal” in the commission of the act). For example, the Nürnberg Charter, in article 6, provided jurisdiction for the International Military Tribunal over “persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes”. Likewise, the Statutes of both the International Criminal Tribunal for the Former Yugoslavia²⁸⁸ and the International Criminal Tribunal for Rwanda²⁸⁹ provided that a person who “committed” crimes against humanity “shall be individually responsible for the crime”. The 1998 Rome Statute provides that: “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment” and “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual [or] jointly with another”.²⁹⁰ Similarly, the

²⁸⁵ See, for example: Convention against Torture, art. 4; Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, art. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2; International Convention against the Taking of Hostages, art. 2; Inter-American Convention to Prevent and Punish Torture, art. 6; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 1; Inter-American Convention on Forced Disappearance of Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty Series*, vol. 2178, No. 38349, p. 197, art. 4; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), *ibid.*, vol. 2219, No. 39464, p. 179, art. 2 (a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 5, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Association of Southeast Asian Nations Convention on Counter Terrorism (Cebu, 13 January 2007), art. IX, para. 1, in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 336.

²⁸⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

²⁸⁷ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See ICRC, *Commentary on the First Geneva Convention*, 2016, para. 896 (on common article 3 regarding conflicts not of an international character) and paras. 2838–2846 (on article 49 regarding penal sanctions). See also Additional Protocol I, arts. 85 and 86, para. 1.

²⁸⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1.

²⁸⁹ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

²⁹⁰ See Rome Statute, art. 25, paras. 2 and 3 (a).

instruments regulating the Special Court for Sierra Leone,²⁹¹ the Special Panels for Serious Crimes in East Timor,²⁹² the Extraordinary Chambers in the Courts of Cambodia,²⁹³ the Supreme Iraqi Criminal Tribunal²⁹⁴ and the Extraordinary African Chambers within the Senegalese Judicial System²⁹⁵ all provide for the criminal responsibility of a person who “commits” crimes against humanity. National laws that address crimes against humanity invariably criminalize the “commission” of such crimes. Treaties addressing other types of crimes also call upon States parties to adopt national laws proscribing “commission” of the offence. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the “commission” of genocide,²⁹⁶ while the 1949 Geneva Conventions and Additional Protocol I call upon States parties to enact any legislation necessary to provide effective penal sanctions for persons “committing” any of the grave breaches of those treaties.²⁹⁷ In light of the above, paragraph 2 (a) requires each State to take the necessary measures to ensure the act of “committing a crime against humanity” is an offence under its criminal law.

(10) Second, almost all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in the form of an “attempt” to commit the offence. The Statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contained no provision for such responsibility. In contrast, the 1998 Rome Statute provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime.²⁹⁸ In the *Banda and Jerbo* case, a pre-trial chamber asserted that criminal responsibility for attempt “requires that, in the ordinary course of events, the perpetrator’s conduct [would] have resulted in the crime being completed, had circumstances outside the perpetrator’s control not intervened”.²⁹⁹ With this in mind, paragraph 2 (b) requires each State to take the necessary measures to ensure the act of “attempting to commit” a crime against humanity is an offence under its criminal law.

(11) Third, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in the form of “accessorial” responsibility. Such a concept is addressed in international instruments through various terms, such as “ordering”, “soliciting”, “inducing”, “instigating”, “inciting”, “aiding and abetting”, “conspiracy to commit”, “being an accomplice to”, “participating in”, “planning”, or “joint criminal enterprise”. Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime

²⁹¹ Statute of the Special Court for Sierra Leone, art. 6.

²⁹² United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 14.3 (a) (2000) (hereinafter “East Timor Tribunal Charter”).

²⁹³ Extraordinary Chambers of Cambodia Law, art. 29. See also Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

²⁹⁴ Statute of the Iraqi Special Tribunal, *International Legal Materials*, vol. 43 (2004), p. 231, art. 15 (2004) (hereinafter, “Supreme Iraqi Criminal Tribunal Statute”). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal’s name to “Supreme Iraqi Criminal Tribunal”. See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

²⁹⁵ Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, *International Law Materials*, vol. 52 (2013), p. 1028, arts. 4 (b), 6 and 10.2 (hereinafter “Extraordinary African Chambers Statute”).

²⁹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, arts. III (a) and IV.

²⁹⁷ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See also Additional Protocol I, arts. 11 and 85.

²⁹⁸ Rome Statute, art. 25, para. 3 (f).

²⁹⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the confirmation of charges”, 7 March 2011, Pre-Trial Chamber I, International Criminal Court, para. 96.

referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime”.³⁰⁰ The Statute of the International Criminal Tribunal for Rwanda used virtually identical language.³⁰¹ Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.³⁰² Similarly, the instruments regulating the Special Court for Sierra Leone,³⁰³ the Special Panels for Serious Crimes in East Timor,³⁰⁴ the Extraordinary Chambers in the Courts of Cambodia,³⁰⁵ the Supreme Iraqi Criminal Tribunal³⁰⁶ and the Extraordinary African Chambers within the Senegalese Judicial System³⁰⁷ all provided for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

(12) The 1998 Rome Statute provides for criminal responsibility if the person commits “such a crime ... through another person”, if the person “[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted”, if the person “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission” or if the person “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose”, subject to certain conditions.³⁰⁸ So as to allow national legal systems to approach such accessorial responsibility in a manner consistent with their criminal laws, the Commission decided to use a streamlined version of the various terms set forth in the 1998 Rome Statute as the basis for the terms used in draft article 6, subparagraph 2 (c).

(13) The Commission considered whether to refer expressly to “conspiracy” or “incitement” in draft article 6, paragraph 2. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide addresses not just the commission of genocide, but also “[c]onspiracy to commit genocide” and “[d]irect and public incitement to commit genocide”.³⁰⁹ The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity broadly provides that: “If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission”.³¹⁰ The Commission referred expressly to “incitement” and “conspiracy” in its 1996 draft Code of Crimes against the Peace and Security of Mankind, but only included them in circumstances where “the crime ... in fact occur[ed]”.³¹¹ The Rome Statute does not refer to either “conspiracy” or “incitement” with respect to crimes against humanity, an approach which the Commission has elected to follow

³⁰⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Tadić*, Judgment, 15 July 1999 (footnote 152 above) (finding that “the notion of common design as a form of accomplice liability is firmly established in customary international law”).

³⁰¹ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

³⁰² See, for example, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 246 (finding that “[i]f [the defendant] is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor”).

³⁰³ Statute of the Special Court for Sierra Leone, art. 6, para. 1.

³⁰⁴ East Timor Tribunal Charter, sect. 14.

³⁰⁵ Extraordinary Chambers of Cambodia Law, art. 29.

³⁰⁶ Supreme Iraqi Criminal Tribunal Statute, art. 15.

³⁰⁷ Extraordinary African Chambers Statute, art. 10.2.

³⁰⁸ Rome Statute, art. 25, para. 3 (a)–(d).

³⁰⁹ Convention on the Prevention and Punishment of the Crime of Genocide, art. III (b)–(c).

³¹⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 2.

³¹¹ See the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 18, para. 50, at art. 2, para. 3 (e) (an individual is responsible if that person “[d]irectly participates in planning or conspiring to commit such a crime which in fact occurs”); *ibid.*, art 2, para. 3 (f) (an individual is responsible if that person “[d]irectly and publicly incites another individual to commit such a crime which in fact occurs”).

for the present draft articles. The Rome Statute does refer to direct and public incitement to commit genocide,³¹² but the negotiating history indicates that States consciously chose not to include in the Rome Statute direct and public incitement to commit crimes against humanity.³¹³ Paragraph 2 does not cover the concept of incitement as an inchoate or incomplete offence (i.e., an offence that can occur even if the crime is not consummated, such as “attempt” in subparagraph 2 (b)). At the same time, the various terms found in paragraph 2 (c) do encompass the concept of incitement to a crime against humanity when the crime in fact occurs.

(14) The concept in these various instruments of “ordering” the crime differs from (and complements) the concept of “command” or other superior responsibility. Here, “ordering” concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. In contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a failure to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures in their power to prevent such acts or to punish the perpetrators.

(15) As a general matter, treaties addressing the establishment and exercise of national jurisdiction over crimes other than crimes against humanity typically call for criminal responsibility of persons using broad terminology, so as not to require States to alter the preferred terminology or modalities that are well settled in national criminal law. In other words, such treaties use general terms rather than detailed language, allowing States to spell out the precise contours of the criminal responsibility through existing national statutes, jurisprudence and legal tradition. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance broadly provides: “Each State Party shall take the necessary measures to hold criminally responsible at least ... [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”.³¹⁴ The language of draft article 6, paragraph 2, takes a similar approach.

Command or other superior responsibility

(16) Draft article 6, paragraph 3, addresses the issue of command or other superior responsibility. In general, this paragraph provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has failed to take measures with respect to the subordinates’ conduct.

(17) International jurisdictions that have addressed crimes against humanity impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances.³¹⁵ Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach

³¹² See Rome Statute, art. 25, para. 3 (e) (in conjunction with article 6). Similarly, the constituent instruments for the International Criminal Tribunal for the Former Yugoslavia (Statute, art. 4), the International Criminal Tribunal for Rwanda (Statute, art. 2), and the Panels with Exclusive Jurisdiction over Serious Criminal Offences for East Timor (East Timor Tribunal Charter, sect. 14 (e)) provided for the crime of direct and public incitement to commit genocide, but only inducement or instigation of crimes against humanity.

³¹³ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, draft statute and draft final act, [A/CONF.183/2/Add.1](#), p. 50. See also W.K. Timmermann, “Incitement in international criminal law”, *International Review of the Red Cross*, vol. 88 (December 2006), p. 843 (“During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression”).

³¹⁴ International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

³¹⁵ See, for example, *United States of America v. Wilhelm von Leeb, et al.* (“The High Command Case”), in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. 11 (Washington D.C., United States Government Printing Office, 1950), pp. 543–544.

that influenced later tribunals.³¹⁶ As indicated by a trial chamber of the International Criminal Tribunal for Rwanda in *Prosecutor v. Alfred Musema*: “As to whether the form of individual criminal responsibility referred to under Article 6(3) of the [International Criminal Tribunal for Rwanda] Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle”.³¹⁷

(18) Article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions contains a general provision addressing command/superior responsibility:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.³¹⁸

(19) The Statute of the International Criminal Tribunal for the Former Yugoslavia followed this general approach. It provides that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.³¹⁹

Several defendants were convicted by the Tribunal on such a basis.³²⁰ The same language appears in the Statute of the International Criminal Tribunal for Rwanda,³²¹ which also convicted several defendants on such a basis.³²² Similar language appears in the instruments regulating the Special Court for Sierra Leone,³²³ the Special Tribunal for Lebanon,³²⁴ the Special Panels for Serious Crimes in East Timor,³²⁵ the Extraordinary Chambers in the Courts

³¹⁶ See *ibid.*; *International Criminal Law: International Enforcement*, M.C. Bassiouni, ed., vol. III, 3rd ed. (Leiden, Martinus Nijhoff, 2008), p. 461; K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262–263.

³¹⁷ See *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and sentence, 27 January 2000, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 132.

³¹⁸ Protocol I, art. 86, para. 2. See ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2855 (on article 49) (“Commanders and other superiors can be held criminally responsible for grave breaches and other serious violations of humanitarian law committed pursuant to their orders. They can also be held individually responsible for failing to take proper measures to prevent their subordinates from committing such violations, or, if already committed, for failing to punish the persons responsible. It is essential for national law to provide for the effective sanctioning of commanders or superiors, if the system of repression is to be effective during armed conflict”). Such a standard also exists in other treaties addressing crimes. See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (b).

³¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 3.

³²⁰ See, for example, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 6*, June/July 1999, paras. 66-81 and 90-118; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 330-400 and 605-775.

³²¹ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 3.

³²² See, for example, *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and sentence, 4 September 1998, Trial Chamber, International Criminal Tribunal for Rwanda, para. 40.

³²³ Statute of the Special Court for Sierra Leone, art. 6, para. 3.

³²⁴ Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

³²⁵ East Timor Tribunal Charter, sect. 16.

of Cambodia,³²⁶ the Supreme Iraqi Criminal Tribunal³²⁷ and the Extraordinary African Chambers within the Senegalese Judicial System.³²⁸

(20) Article 28 of the 1998 Rome Statute contains a more detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander with regard to the acts of others.³²⁹ As a general matter, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the commander knew or should have known that his or her subordinates were committing or about to commit the offence; and (c) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution.³³⁰ Article 28 also addresses the issue of other “superior and subordinate relationships” arising in a non-military or civilian context.³³¹ Such superiors include civilians that “lead” but are not “embedded” in military activities.

(21) National laws and military manuals also often contain this type of criminal responsibility for war crimes, and sometimes for genocide and crimes against humanity, under the influence of both treaty obligations and calls by relevant international bodies.³³² Based on a detailed analysis of State practice, as well as of international and national jurisprudence, the 2005 ICRC study on *Customary International Humanitarian Law* formulated a general standard for war crimes as follows:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.³³³

(22) Draft article 6, paragraph 3, uses similar language to express a general standard for addressing command/superior responsibility in the context of crimes against humanity. While a more detailed standard might be used, draft article 6 as a whole generally seeks not to be overly prescriptive, allowing States instead to implement their international obligations in a manner that takes account of existing national laws, practice and jurisprudence. Doing so for paragraph 3 does not, however, foreclose any State from adopting a more detailed standard in its national law, such as appears in article 28 of the Rome Statute, should it wish to do so.

³²⁶ Extraordinary Chambers of Cambodia Law, art. 29.

³²⁷ Supreme Iraqi Criminal Tribunal Statute, art. 15 (d).

³²⁸ Extraordinary African Chambers Statute, art. 10, para. 4.

³²⁹ Rome Statute, art. 28 (a). See, for example, *Kordić*, Judgment, 26 February 2001 (footnote 81 above), para. 369.

³³⁰ An Appeals Chamber of the International Criminal Court applied this standard in 2018 when reversing Trial Chamber III’s 2016 conviction of Jean-Pierre Bemba Gombo of crimes against humanity and war crimes. The Trial Chamber had found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo (MLC) forces under his effective authority and control were committing or about to commit the crimes charged. *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 697 and 700. Yet the Appeals Chamber concluded that the Trial Chamber had made serious errors in its finding that Mr. Bemba had failed to take all necessary and reasonable measures to prevent or repress the commission of crimes of the MLC forces during military operations in 2002 and 2003 in the Central African Republic. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, Appeals Chamber, International Criminal Court, paras. 170-173 and 189-194.

³³¹ Rome Statute, art. 28 (b).

³³² See Commission on Human Rights report on the sixty-first session, *Official Records of the Economic and Social Council, 2005, Supplement No. 3 (E/2005/23-E/CN.4/2005/135)*, resolution 2005/81 on impunity of 21 April 2005, para. 6 (urging “all States to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under international law for ... crimes against humanity ... including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control”).

³³³ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, 2005, pp. 558–563 (Rule 153).

Superior orders

(23) Draft article 6, paragraph 4, provides that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate.

(24) All jurisdictions that address crimes against humanity provide grounds for excluding substantive criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffered from a mental disease that prevented the person from appreciating the unlawfulness of his or her conduct. Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances. The fact that the person acted in self-defence may also preclude responsibility, as may duress resulting from a threat of imminent harm or death. In some instances, the person must have achieved a certain age to be criminally responsible. The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.

(25) At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence to criminal responsibility that they were ordered by a superior to commit the offence.³³⁴ Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Consistent with article 8, the International Military Tribunal found that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality".³³⁵ Likewise, article 6 of the Charter of the Tokyo Tribunal provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".³³⁶

(26) While article 33 of the 1998 Rome Statute allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the defence.³³⁷ The instruments regulating the International Criminal Tribunal for the Former Yugoslavia,³³⁸ the International Criminal Tribunal for Rwanda,³³⁹ the Special Court for Sierra Leone,³⁴⁰ the Special Tribunal for Lebanon,³⁴¹ the Special Panels for Serious Crimes in East Timor,³⁴² the Extraordinary

³³⁴ See Commission on Human Rights, resolution 2005/81 on impunity, para. 6 (urging all States "to ensure that all relevant personnel are informed of the limitations that international law places on the defence of superior orders").

³³⁵ *Judgment of 30 September* (see footnote 92 above), p. 466.

³³⁶ Tokyo Charter, art. 6.

³³⁷ Rome Statute, art. 33 (the defence is not available if the order was manifestly unlawful and, "[f]or purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful"). On availability of the defence with respect to war crimes, see ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2856 (on article 49) ("[I]t is widely accepted that obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act. A corollary of this rule is that every combatant has a duty to disobey a manifestly unlawful order. The fact that a war crime was committed as a result of superior orders has nevertheless been taken into account as a factor mitigating the punishment").

³³⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 4.

³³⁹ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4.

³⁴⁰ Statute of the Special Court for Sierra Leone, art. 6, para. 4.

³⁴¹ Statute of the Special Tribunal for Lebanon, art. 3, para. 3.

³⁴² East Timor Tribunal Charter, sect. 21.

Chambers in the Courts of Cambodia,³⁴³ the Supreme Iraqi Criminal Tribunal³⁴⁴ and the Extraordinary African Chambers within the Senegalese Judicial System³⁴⁵ all similarly exclude superior orders as a defence for crimes against humanity. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage.³⁴⁶

(27) Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;³⁴⁷ the 1985 Inter-American Convention to Prevent and Punish Torture;³⁴⁸ the 1994 Inter-American Convention on Forced Disappearance of Persons;³⁴⁹ and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.³⁵⁰ In the context of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue.³⁵¹ In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.³⁵²

Official position

(28) Draft article 6, paragraph 5, provides that the fact that the offence was committed "by a person holding an official position" does not exclude substantive criminal responsibility. The inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal courts and tribunals is a well-established principle of international law. The Nürnberg Charter provided: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".³⁵³ The

³⁴³ Extraordinary Chambers of Cambodia Law, art. 29.

³⁴⁴ Supreme Iraqi Criminal Tribunal Statute, art. 15 (e).

³⁴⁵ Extraordinary African Chambers Statute, art. 10, para. 5.

³⁴⁶ See, for example, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 4; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4; Statute of the Special Court for Sierra Leone, art. 6, para. 4; East Timor Tribunal Charter, sect. 21. See in particular *Prosecutor v. Darko Mrđa*, Case No. IT-02-59-S, Sentencing Judgment, 31 March 2004, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 65 and 67.

³⁴⁷ Convention against Torture, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

³⁴⁸ Inter-American Convention to Prevent and Punish Torture, art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

³⁴⁹ Inter-American Convention on Forced Disappearance of Persons, art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

³⁵⁰ International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72. See also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6.

³⁵¹ Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

³⁵² See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44 (A/59/44)*, chap. III, consideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i). See also, *ibid.*, *Sixtieth Session, Supplement No. 44 (A/60/44)*, chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (a) (praising Argentina for declaring its due obedience act "absolutely null and void").

³⁵³ Nürnberg Charter, art. 7.

Commission's 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided: "The fact that a person who committed an act which constitutes a crime under international law [i.e., crimes against humanity, crimes against peace, and war crimes] acted as Head of State or responsible Government official does not relieve him from responsibility under international law".³⁵⁴ The Tokyo Charter provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".³⁵⁵

(29) The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind provided: "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".³⁵⁶ The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind provided: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".³⁵⁷ The 1998 Rome Statute provides: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".³⁵⁸

(30) The inability to use official position as a substantive defence to criminal responsibility is also addressed in some treaties relating to national criminal jurisdiction. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, provides that individuals "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".³⁵⁹ The 1973 Convention on the Suppression and Punishment of the Crime of Apartheid provides that "[i]nternational criminal responsibility shall apply ... to ... representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State".³⁶⁰

(31) In light of such precedents, the Commission deemed it appropriate to include paragraph 5, which provides that each "State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility". For the purposes of the present draft articles, paragraph 5 means that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.³⁶¹ Further, paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction".

³⁵⁴ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto, *Yearbook ... 1950*, vol. II, document A/1316 Part III, p. 375, principle III. Although principle III is based on article 7 of the Nürnberg Charter, the Commission omitted the phrase "or mitigating punishment", because it viewed mitigation as an issue "for the competent Court to decide" (*ibid.*, para. 104).

³⁵⁵ Tokyo Charter, art. 6.

³⁵⁶ *Yearbook ... 1954*, vol. II, p. 152, para. 54, art. 3.

³⁵⁷ *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 26, art. 7.

³⁵⁸ Rome Statute, art. 27, para. 1.

³⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide, art. IV.

³⁶⁰ International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III.

³⁶¹ See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J. Reports 2002*, p.3, at p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

(32) The Commission did not find it necessary to include language in paragraph 5 specifying that one's official position cannot be raised as a ground for mitigation or reduction of sentence, because the issue of punishment is addressed in draft article 6, paragraph 7. According to that paragraph, States are required, in all circumstances, to ensure that crimes against humanity be punishable by appropriate penalties that take into account their grave nature. Such language should be understood as precluding the invoking of official position as a ground for mitigation or reduction of sentence.

Statutes of limitations

(33) One possible restriction on the prosecution of a person for crimes against humanity in national law concerns the application of a "statute of limitations" (or "period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution. Draft article 6, paragraph 6, provides that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations. This provision does not obligate a State to prosecute offences referred to in the draft article that took place before such offences have been criminalized in the State's national law. Further, as noted in the commentary with respect to draft article 1, if the present draft articles ultimately serve as the basis for a convention, the obligations of a State party under that convention, unless a different intention appears, would only operate with respect to acts or facts that took place, or any situation that existed, after the convention enters into force for that State.

(34) No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or Tokyo Charters, or in the constituent instruments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".³⁶² Likewise, the Rome Statute expressly addresses the matter, providing that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".³⁶³ The drafters of the Statute strongly supported this provision as applied to crimes against humanity.³⁶⁴ Similarly, the Law on the Establishment of Extraordinary Chambers in Cambodia, the Statute of the Supreme Iraqi Criminal Tribunal and the East Timor Tribunal Charter all explicitly defined crimes against humanity as offences for which there is no statute of limitations.³⁶⁵

(35) With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly noted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".³⁶⁶ The following

³⁶² Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5.

³⁶³ Rome Statute, art. 29.

³⁶⁴ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June-17 July 1998, *Official Records*, vol. II, 2nd meeting (A/CONF.183/13), p. 138, paras. 45-74.

³⁶⁵ Extraordinary Chambers of Cambodia Law, art. 5; Supreme Iraqi Criminal Tribunal Statute, art. 17 (d); East Timor Tribunal Charter, sect. 17.1. See also report of the Third Committee (A/57/806), para. 10 (Khmer Rouge trials) and General Assembly resolution 57/228 B of 13 May 2003. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia were provided jurisdiction over crimes against humanity committed decades prior to its establishment, between 1975 and 1979, when the Khmer Rouge held power.

³⁶⁶ General Assembly resolution 2338 (XXII) of 18 December 1967, entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity",

year, States adopted the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires States parties to adopt “any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment” of these two types of crimes.³⁶⁷ Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which uses substantially the same language.³⁶⁸ At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.

(36) Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations. For example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no prohibition on the application of a statute of limitations to torture-related offences. Even so, the Committee against Torture has stated that, taking into account their grave nature, such offences should not be subject to any statute of limitations.³⁶⁹ Similarly, while the 1966 International Covenant on Civil and Political Rights³⁷⁰ does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.³⁷¹ The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires a long statutory period,³⁷² as do the United Nations Convention against Transnational Organized Crime³⁷³ and the United Nations Convention against Corruption.³⁷⁴ The 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides: “A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence”.³⁷⁵ The *travaux préparatoires* of the Convention indicate that this provision was intended to distinguish between those offences that might constitute a crime against

preamble. See also General Assembly resolution 2712 (XXV) of 15 December 1970; General Assembly resolution 2840 (XXVI) of 18 December 1971.

³⁶⁷ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. IV.

³⁶⁸ European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

³⁶⁹ See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 44 (A/62/44)*, chap. III, consideration of reports by States parties under article 19 of the Convention, Italy, para. 40 (19).

³⁷⁰ International Covenant on Civil and Political Rights, p. 171.

³⁷¹ See, for example, report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40 (A/63/40)*, vol. I, chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (sect. A, para. 79), para. (7).

³⁷² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988), United Nations, *Treaty Series*, vol. 1582, No. 27627, p. 95, art. 3, para. 8 (“Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice”).

³⁷³ United Nations Convention against Transnational Organized Crime, art. 11, para. 5 (“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice”).

³⁷⁴ United Nations Convention against Corruption, art. 29 (“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice”).

³⁷⁵ International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, article VII of the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations.

humanity – for which there should be no statute of limitations – and all other offences under the Convention.³⁷⁶

Appropriate penalties

(37) Draft article 6, paragraph 7, provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences.

(38) The Commission provided in its 1996 draft Code of Crimes against the Peace and Security of Mankind that: “An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime”.³⁷⁷ The commentary further explained that the “character of a crime is what distinguishes that crime from another crime ... The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author”.³⁷⁸ Thus, “while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty”.³⁷⁹

(39) To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The Statute of the International Criminal Tribunal for the Former Yugoslavia provides that: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”.³⁸⁰ Furthermore, the International Criminal Tribunal for the Former Yugoslavia is to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.³⁸¹ The Statute of the International Criminal Tribunal for Rwanda includes identical language, except that recourse is to be had to “the general practice regarding prison sentences in the courts of Rwanda”.³⁸² Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. Article 77 of the 1998 Rome Statute also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”.³⁸³ Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,³⁸⁴ the Special Tribunal for Lebanon,³⁸⁵ the Special Panels for Serious Crimes in East Timor,³⁸⁶ the Supreme Iraqi Criminal Tribunal,³⁸⁷ and the Extraordinary African Chambers within the Senegalese Judicial System.³⁸⁸ Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be commensurate with the gravity of the offence.

(40) International treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, allow them the discretion to determine the punishment, based on the circumstances of the particular offender and offence.³⁸⁹ The 1948

³⁷⁶ See Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), paras. 43–46.

³⁷⁷ *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 3.

³⁷⁸ *Ibid.*, para. (3) of the commentary to art. 3.

³⁷⁹ *Ibid.*

³⁸⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 1.

³⁸¹ *Ibid.*, art. 24, para. 2.

³⁸² Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 1.

³⁸³ Rome Statute, art. 77.

³⁸⁴ Statute of the Special Court for Sierra Leone, art. 19.

³⁸⁵ Statute of the Special Tribunal for Lebanon, art. 24.

³⁸⁶ East Timor Tribunal Charter, sect. 10.

³⁸⁷ Supreme Iraqi Criminal Tribunal Statute, art. 24.

³⁸⁸ Extraordinary African Chambers Statute, art. 24.

³⁸⁹ See the report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance

Convention on the Prevention and Punishment of the Crime of Genocide simply calls for “effective penalties for persons guilty of genocide or any of the other acts enumerated ...”.³⁹⁰ The 1949 Geneva Conventions also provide a general standard and leave to individual States the discretion to set the appropriate punishment, by simply requiring “[t]he High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for ... any of the grave breaches of the present Convention ...”.³⁹¹ More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be “appropriate”. Although the Commission initially proposed the term “severe penalties” for use in its draft articles on diplomatic agents and other protected persons, the term “appropriate penalties” was instead used by States in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.³⁹² That term has served as a model for subsequent treaties. At the same time, the provision on “appropriate” penalties in the 1973 Convention was accompanied by language calling for the penalty to take into account the “grave nature” of the offence. The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important “world interests” at stake in punishing such an offence.³⁹³ Since 1973, this approach – that each “State Party shall make these offences punishable by the appropriate penalties which take into account their grave nature” – has been adopted for numerous treaties, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁹⁴ In some treaties, the issue of gravity is expressed using terms such as “extreme seriousness”, “serious nature” or “extreme gravity” of the offences.³⁹⁵

Legal persons

(41) Paragraphs 1 to 7 of draft article 6 are directed at criminal liability of offenders who are natural persons, although the term “natural” is not used, which is consistent with the approach taken in treaties addressing crimes. Paragraph 8, in contrast, addresses the liability of “legal persons” for the offences referred to in draft article 6.

(42) Criminal liability of legal persons has become a feature of the national laws of many States in recent years, but it is still unknown in many other States.³⁹⁶ In States where the

(E/CN.4/2004/59), para. 58 (indicating that “[s]everal delegations welcomed the room for manoeuvre granted to States” in this regard); Commission on Human Rights resolution 2005/81 on impunity, para. 15 (calling upon “all States ... to ensure that penalties are appropriate and proportionate to the gravity of the crime committed”).

³⁹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

³⁹¹ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 2838–2846 (on article 49).

³⁹² Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2 (“[e]ach State Party shall make these crimes punishable by appropriate penalties ...”).

³⁹³ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to draft article 2, para. 2.

³⁹⁴ Convention against Torture, art. 4. See also International Convention against the Taking of Hostages, art. 2; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 5; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 4 (b); International Convention for the Suppression of the Financing of Terrorism, art. 4 (b); United Nations Convention against Transnational Organized Crime, art. 11, para. 1; United Nations Convention against Corruption, art. 30, paras. 1, 5 and 7; International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005), United Nations, *Treaty Series*, vol. 2445, No. 44004, p. 89, arts. 5 (b) and 6; OAU Convention on the Prevention and Combating of Terrorism, art. 2 (a).

³⁹⁵ See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Inter-American Convention to Prevent and Punish Torture, art. 6; Inter-American Convention on Forced Disappearance of Persons, art. III.

³⁹⁶ See, for example, *New TV S.A.L. Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision of 2 October 2014 on interlocutory appeal concerning personal

concept is known, such liability sometimes exists with respect to international crimes.³⁹⁷ Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, officers, or through some other position or agency of the legal person. Such liability, in States where the concept exists, is typically imposed when the offence at issue was committed by a natural person on behalf of or for the benefit of the legal person.

(43) Criminal liability of legal persons has not featured significantly to date in international criminal courts and tribunals. The Nürnberg Charter, in articles 9 and 10, authorized the International Military Tribunal to declare any group or organization as a criminal organization during the trial of an individual, which could lead to the trial of other individuals for membership in the organization. In the course of the Tribunal's proceedings, as well as subsequent proceedings under Control Council Law No. 10, a number of such organizations were so designated, but only natural persons were tried and punished.³⁹⁸ The International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, nor does the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the 1998 Rome Statute noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"³⁹⁹ and, although proposals for inclusion of a provision on such responsibility were made, the Statute ultimately did not contain such a provision.

(44) Liability of legal persons also has not been included in many treaties addressing crimes at the national level, including: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1997 International Convention for the Suppression of Terrorist Bombings; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind only addressed the criminal responsibility of "an individual".⁴⁰⁰

(45) On the other hand, the 2014 African Union protocol amending the statute of the African Court of Justice and Human Rights, though not yet in force, provides jurisdiction to the reconstituted African Court over legal persons (with the exception of States) for international crimes, including crimes against humanity.⁴⁰¹ Further, although criminal jurisdiction over legal persons (as well as over crimes against humanity) is not expressly provided for in the statute of the Special Tribunal for Lebanon, the Tribunal's Appeals Panel concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.⁴⁰²

jurisdiction in contempt proceedings, Appeals Panel, Special Tribunal for Lebanon, para. 58 ("[T]he practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems").

³⁹⁷ See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento, Año 1, N° 180*, 10 February 2014, art. 90 (providing, in a section addressing crimes against humanity, that: "When a legal person is responsible for any of the crimes of this Section, it will be penalized by its dissolution").

³⁹⁸ See, for example, *United States v. Krauch and others (The I.G. Farben Case)*, in *Trials of War Criminals before the Nuernberg Military Tribunals*, vols. VII–VIII (Washington D.C., Nürnberg Military Tribunals, 1952).

³⁹⁹ See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records*, vol. III (A/CONF.183/13), art. 23, para. 6, footnote 71.

⁴⁰⁰ *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 23, art. 3.

⁴⁰¹ See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, art. 46C.

⁴⁰² *Al Khayat*, Decision of 2 October 2014 (see footnote 396 above), para. 74. The Tribunal ultimately found that the legal person, Al Jadeed TV, was not guilty. See *Al Jadeed [Co.] S.A.L./New*

(46) Moreover, there are several treaties that address the liability of legal persons for criminal offences, notably: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;⁴⁰³ the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;⁴⁰⁴ the 1999 International Convention for the Suppression of the Financing of Terrorism;⁴⁰⁵ the 2000 United Nations Convention against Transnational Organized Crime;⁴⁰⁶ the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;⁴⁰⁷ the 2003 United Nations Convention against Corruption;⁴⁰⁸ and a series of treaties concluded within the Council of Europe.⁴⁰⁹ Other regional instruments address the issue as well, mostly in the context of corruption.⁴¹⁰ Such treaties typically do not define the term “legal person”, leaving it to national legal systems to apply whatever definition would normally operate therein.

(47) The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

(48) Paragraph 8 of draft article 6 is modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol was adopted by the General Assembly in 2000 and entered into force in 2002. As of mid-2019, 176 States are party to the Optional Protocol and another 9 States have signed but not yet ratified it. Article 3, paragraph 1, of the Optional

T.V.S.A.L.(N.T.V.) Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, Contempt Judge, Decision of 18 September 2015, Special Tribunal for Lebanon, para. 55; *Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/A/AP, Appeals Panel, Decision of 8 March 2016.

⁴⁰³ See International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I, para. 2 (“The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid”).

⁴⁰⁴ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57, art. 2, para. 14 (“For the purposes of this Convention: ... ‘Person’ means any natural or legal person”) and art. 4, para. 3 (“The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal”).

⁴⁰⁵ International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to art. 5, see “Measures to eliminate international terrorism: report of the working group” (A/C.6/54/L.2) (26 October 1999).

⁴⁰⁶ United Nations Convention against Transnational Organized Crime, art. 10.

⁴⁰⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000), United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227, art. 3, para. 4.

⁴⁰⁸ United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E. 10.V.13), pp. 233–235 and *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed. (2012), pp. 107–113. For the analogous convention adopted by the Organisation for Economic Co-operation and Development, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 21 November 1997), art. 2 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”).

⁴⁰⁹ See, for example, Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations, *Treaty Series*, vol. 2216, No. 39391, p. 225, art. 18, supplemented by the Additional Protocol (Strasbourg, 15 May 2003) (relating to bribery of arbitrators and jurors), *ibid.*, vol. 2466, No. 39391, p. 168.

⁴¹⁰ See, for example, Inter-American Convention against Corruption (Caracas, 29 March 1996), *International Legal Materials*, vol. 35, No. 3 (May 1996), p. 727, art. VIII; Southern African Development Community Protocol against Corruption (Blantyre, Malawi, 14 August 2001), art. 4, para. 2. See also African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), art. 11 (“State Parties undertake to: 1) Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector”).

Protocol obligates States parties to ensure that certain acts are covered under its criminal or penal law, such as the sale of children for sexual exploitation or the offering of a child for prostitution. Article 3, paragraph 4, then reads: “Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative”.

(49) Paragraph 8 of draft article 6 uses the same language, but replaces “State Party” with “State” and replaces “for offences established in paragraph 1 of the present article” with “for the offences referred to in this draft article”. As such, paragraph 8 imposes an obligation upon the State that it “shall take measures”, meaning that it is required to pursue such measures in good faith. At the same time, paragraph 8 provides the State with considerable flexibility to shape those measures in accordance with its national law. First, the clause “[s]ubject to the provisions of its national law” should be understood as according to the State considerable discretion as to the measures that will be adopted; the obligation is “subject to” the State’s existing approach to liability of legal persons for criminal offences under its national law. For example, in most States, liability of legal persons for criminal offences will only apply under national law with respect to certain types of legal persons and not to others. Indeed, under most national laws, “legal persons” in this context likely excludes States, Governments, other public bodies in the exercise of State authority, and public international organizations.⁴¹¹ Likewise, the liability of legal persons under national laws can vary based on: the range of natural persons whose conduct can be attributed to the legal person; which modes of liability of natural persons can result in liability of the legal person; whether it is necessary to prove the *mens rea* of a natural person to establish liability of the legal person; or whether it is necessary to prove that a specific natural person committed the offence.⁴¹²

(50) Second, each State is obliged to take measures to establish the legal liability of legal persons “where appropriate”. Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity.

(51) For measures that are adopted, the second sentence of paragraph 8 provides that: “Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative”. Such a sentence appears not just in the 2000 Optional Protocol, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime⁴¹³ and the 2003 United Nations Convention against Corruption.⁴¹⁴ The flexibility indicated in such language again acknowledges and accommodates the diversity of approaches adopted within national legal systems. As such, there is no obligation to establish criminal liability if doing so is inconsistent with a State’s national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative. In any event, whether criminal, civil or

⁴¹¹ See, for example, the Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 1 (d), “For the purposes of this Convention: ... ‘legal person’ shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations”).

⁴¹² For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see *Al Jadeed*, Contempt Judge, Decision of 18 September 2015 (footnote 402 above), paras. 63–67.

⁴¹³ United Nations Convention against Transnational Organized Crime, art. 10, para. 2 (“Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”). See also the International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 (“Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative”).

⁴¹⁴ United Nations Convention against Corruption, art. 26, para. 2 (“Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”).

administrative, such liability is without prejudice to the criminal liability of natural persons provided for in draft article 6.

Article 7

Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Commentary

(1) Draft article 7 provides that each State must establish jurisdiction over the offences covered by the present draft articles in certain cases, such as when the crime occurs in any territory under its jurisdiction, has been committed by one of its nationals or when the offender is present in any territory under its jurisdiction.

(2) As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes" set out in the draft Code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".⁴¹⁵ The breadth of such jurisdiction was necessary because: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court".⁴¹⁶ The preamble to the 1998 Rome Statute provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

(3) As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Human Rights Commission convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective".⁴¹⁷ At the same time, such treaties typically only obligate a State party to *exercise* its jurisdiction when an alleged offender is present in the State party's territory (see draft article 9 below), leading

⁴¹⁵ *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 8.

⁴¹⁶ *Ibid.*, para. (5) of the commentary to art. 8.

⁴¹⁷ Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

either to a submission of the matter to the prosecuting authorities within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see draft article 10 below).

(4) Reflecting on the acceptance of a treaty obligation to establish jurisdiction, and in the context of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.⁴¹⁸

(5) Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes.⁴¹⁹ While no treaty yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that:

The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.⁴²⁰

(6) Draft article 7, paragraph 1 (a), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". Rather than refer solely to a State's "territory", the Commission considered it appropriate to refer to any territory "under [the State's] jurisdiction" which, as is the case for draft article 4, is intended to encapsulate the territory *de jure* of the State, as well as any other territory under its jurisdiction. Draft article 7, paragraph 1 (a), also requires that a State exercise jurisdiction when the offence occurs on board a vessel or aircraft registered in that State. States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.

(7) Draft article 7, paragraph 1 (b), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (b) also indicates that the State may, on an

⁴¹⁸ See *Questions relating to the Obligation to Prosecute or Extradite* (footnote 23 above), p. 451, para. 75.

⁴¹⁹ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, para. 1 (a)–(b); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 3; International Convention against the Taking of Hostages, art. 5; Convention against Torture, art. 5; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American Convention on Forced Disappearance of Persons, art. IV; International Convention for the Suppression of Terrorist Bombings, art. 6; International Convention for the Suppression of the Financing of Terrorism, art. 7; OAU Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime, art. 15; United Nations Convention against Corruption, art. 42; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras. 1–2; Inter-American Convention to Prevent and Punish Torture, art. 12; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VII, paras. 1–3.

⁴²⁰ *Arrest Warrant of 11 April 2000* (see footnote 361 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

optional basis, establish jurisdiction where the offender is “a stateless person who is habitually resident in the territory of that State”.⁴²¹ This formulation is based on the language of certain existing conventions, such as article 5, paragraph 1 (b), of the 1979 International Convention against the Taking of Hostages.

(8) Draft article 7, paragraph 1 (c), concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as “passive personality jurisdiction”. Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional; a State may establish such jurisdiction “if that State considers it appropriate”, but the State is not obliged to do so. This formulation is also based on the language of a wide variety of existing conventions.

(9) Draft article 7, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender “is present” in the territory under the State’s jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is obliged to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence. When taking the “necessary measures” to establish this type of jurisdiction, States should adopt procedural safeguards to ensure its proper exercise.⁴²²

(10) Draft article 7, paragraph 3, makes clear that, while each State is obliged to enact these types of jurisdiction, it does not exclude any other jurisdiction that is available under the national law of that State. Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, and without prejudice to any applicable rules of international law, treaties addressing crimes typically leave open the possibility that a State party may have established other jurisdictional grounds upon which to hold an alleged offender accountable.⁴²³ In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture, and stated:

We reject the suggestion that the battle against impunity is ‘made over’ to international treaties and tribunals, with national courts having no competence in such

⁴²¹ See Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117, art. 1 (“[T]he term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”).

⁴²² At the request of the General Assembly of the United Nations, the Secretary-General has produced a series of reports compiling information on national laws and procedures concerning “The scope and application of the principle of universal jurisdiction,” which includes a section on “Conditions, restrictions or limitations to the exercise of jurisdiction”. See [A/73/123](#) (2018), sect. II.B. For examples of national laws and procedures in this regard, see Spain, Organic Act No. 1/2014, art. 23, para. 5 (b) (2) (whereby the offence will not be prosecuted in Spain if there are proceedings to investigate and prosecute the offence initiated in the State in which the offence was committed or in the State of nationality of the accused person, unless the Supreme Court determines that such State is unwilling or unable genuinely to carry out the investigation); United Kingdom, Government, “Note on the Investigation and Prosecution of Crimes of Universal Jurisdiction” (2018) (providing that initiation of United Kingdom proceedings be subject to the express consent of a high-level official, that the necessary evidentiary threshold required for initiating preliminary measures in such cases not be lower than the threshold generally necessary in each particular criminal jurisdiction, and other procedural safeguards).

⁴²³ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime ([A/AC.254/4/Rev.4](#)), p. 20, footnote 102. See also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, *European Treaty Series*, No. 173, para. 83 (“Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well”).

matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.⁴²⁴

(11) Establishment of the various types of national jurisdiction set out in draft article 7 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 10 below. In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the “system” set up under treaties of this sort:

Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.* Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States.⁴²⁵

(12) Treaties addressing crimes typically require various States to *establish* jurisdiction over the crime, but do not seek to require States to *exercise* such jurisdiction unless the alleged offender is present in any territory under the State’s jurisdiction (see draft articles 9 and 10 below). Once an alleged offender is present, it is possible that one or more other States will have established jurisdiction over the offence and will wish to exercise such jurisdiction, in which case they may seek extradition of the alleged offender from the State where he or she is present. If so, draft article 13, paragraph 12, requires that the State where the alleged offender is present “give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred”.⁴²⁶

Article 8 Investigation

Each State shall ensure that its competent authorities proceed to a prompt, thorough and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Commentary

(1) Draft article 8 addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State’s jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. Such an investigation, which must be conducted in good faith, can lay the foundation not only for identifying alleged offenders and their location, but also for helping to stop (pursuant to draft article 3) the continuance of ongoing crimes or their recurrence by identifying their source. Such an investigation should be contrasted with a preliminary inquiry into the facts concerning a particular alleged offender who is present in a State, which is addressed below in draft article 9, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.⁴²⁷ For example, article 12 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. That obligation is different from the State party’s obligation under article 6,

⁴²⁴ *Arrest Warrant of 11 April 2000* (see footnote 361 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

⁴²⁵ *Ibid.*, Separate Opinion of Judge Guillaume, para. 9 (emphasis added).

⁴²⁶ See commentary to draft article 13 below, at paras. (29)–(30) and paras. (33)–(34).

⁴²⁷ See, for example, Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 2; see also Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 55, para. 1.

paragraph 2, of the 1984 Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender.

(3) Draft article 8 requires that the investigation be carried out whenever there is “reasonable ground to believe” that the offence has been committed. According to the Committee against Torture, such a belief arises when relevant information is presented or available to the competent authorities but does not require that victims have formally filed complaints with those authorities.⁴²⁸ Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints will be made, a violation of article 12 of the 1984 Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must proceed automatically to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with “no special importance being attached to the grounds for the suspicion”.⁴²⁹

(4) The requirement of a “prompt” investigation means that as soon as there is a reasonable ground to believe that crimes against humanity have been or are being committed, the State must initiate an investigation without delay. In most cases where the Committee against Torture found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered “that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention”.⁴³⁰ The rationale underlying the promptness requirement is that physical traces that may prove torture can quickly disappear and that victims may be in danger of further torture, which a prompt investigation may be able to prevent.⁴³¹

(5) The requirement of a “thorough” investigation means that a State must proceed with its investigation in a manner that takes all reasonable steps available to that State to secure evidence and that enables the serious assessment of that evidence.⁴³² Inclusion of this element is consistent with article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance. The General Assembly of the United Nations,⁴³³ the Human

⁴²⁸ See Committee against Torture, *Encarnación Blanco Abad v. Spain*, communication No. 59/Views adopted on 14 May 1998, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44)*, annex X, sect. A.3, para. 8.2; *Danilo Dimitrijevic v. Serbia and Montenegro*, communication No. 172/2000, Views adopted on 16 November 2005, *ibid.*, *Sixty-first Session, Supplement No. 44 (A/61/44)*, annex VIII, sect. A, para. 7.3.

⁴²⁹ See *Dhaou Belgacem Thabti v. Tunisia*, communication No. 187/2001, Views adopted on 14 November 2003, *ibid.*, *Fifty-ninth Session, Supplement No. 44 (A/59/44)*, annex VII, sect. A, para. 10.4.

⁴³⁰ *Qani Halimi-Nedzibi v. Austria*, communication No. 8/1991, Views adopted on 18 November 1993, *ibid.*, *Forty-ninth Session, Supplement No. 44 (A/49/44)*, annex V. See also *Bairamov v. Kazakhstan*, communication No. 497/2012, 14 May 2014, paras. 8.7–8.8, *ibid.*, *Sixty-ninth Session, Supplement No. 44 (A/69/44)*, annex XIV, para. 13.5.

⁴³¹ *Encarnación Blanco Abad v. Spain* (see footnote 428 above), para. 8.2.

⁴³² See, for example, *Barabanshchikov v. Russia*, Application No. 36220/02, Judgment, 8 January 2009, First Section, European Court of Human Rights, para. 54 (“thorough” means “that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard”).

⁴³³ Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 13, para. 1.

Rights Committee,⁴³⁴ and regional human rights courts have also emphasized the requirement of a thorough investigation.⁴³⁵

(6) The requirement of an “impartial” investigation means that the State must proceed with its investigation in a serious, effective and unbiased manner. Such investigation might be done by a governmental authority, but could also be done by some other entity, such as an independent commission of inquiry, a truth and reconciliation commission, or a national human rights institution. In some instances, the Committee against Torture has recommended that investigation of offences be “under the direct supervision of independent members of the judiciary”.⁴³⁶ In other instances, it has stated that “all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so”.⁴³⁷ The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.⁴³⁸

(7) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. The 1949 Geneva Conventions call on States parties to search for and prosecute alleged offenders. This has been interpreted as implying that each State party must provide in its national legislation for the mechanisms and procedures to ensure that it can actively search for alleged offenders, make a preliminary inquiry into facts and, when so warranted, submit any such cases to the appropriate authorities for prosecution.⁴³⁹ In addition, although the 1966 International Covenant on Civil and Political Rights contains no such express obligation to investigate, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations of the Covenant.⁴⁴⁰ Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.⁴⁴¹

⁴³⁴ See, for example, Human Rights Committee, general comment No. 36 (2018), paras. 28 and Human Rights Committee, general comment No. 31, para. 15; Human Rights Committee, general comment No. 6 (1982) on the right to life, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4; *Bousroual v. Algeria*, communication No. 992/2001, Views adopted on 30 March 2006, *ibid.*, *Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. I, paras. 9.11 and 11; annex V I, paras. 9.11 and 11, (CCPR/C/86/D/992/2001); *Herrera Rubio v. Colombia*, communication No. 161/1983, 2 November 1987, *ibid.*, *Forty-third Session, Supplement No. 40 (A/43/40)*, vol. II, annex VII, sect. B, para. 10.3.

⁴³⁵ See, for example, *Kurt v. Turkey*, Judgment of 25 May 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-III, para. 140.

⁴³⁶ Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44 (A/49/44)*, chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Ecuador, paras. 97–105, at para. 105. See Economic and Social Council resolution 2006/23 of 27 July 2006 on strengthening basic principles of judicial conduct, annex (Bangalore Principles of Judicial Conduct), value 2.

⁴³⁷ Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44 (A/56/44)*, chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Guatemala, paras. 67–76, at para. 76 (d).

⁴³⁸ *Khaled Ben M'Barek v. Tunisia*, communication No. 60/1996, 10 November 1999, *ibid.*, *Fifty-fifth Session, Supplement No. 44 (A/55/44)*, annex VIII, sect. A, paras. 11.9–11.10.

⁴³⁹ See Geneva Convention I, art. 49, para. 2; ICRC, *Commentary on the First Geneva Convention*, 2016, paras 2859–2860 (on article 49).

⁴⁴⁰ See Human Rights Committee, general comment No. 31, para. 15. See also *Nazriev v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. P, para. 8.2; *Kouidis v. Greece*, communication No. 1070/2002, Views adopted on 28 March 2006, *ibid.*, sect. T, para. 9; *Agabekov v. Uzbekistan*, communication No. 1071/2002, views adopted on 16 March 2007, *ibid.*, *Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. II, annex VII, sect. I, para. 7.2; *Karimov v. Tajikistan and Nursatov v. Tajikistan*, communication Nos. 1108/2002 and 1121/2002, Views adopted on 26 March 2007, *ibid.*, sect. H, para. 7.2.

⁴⁴¹ See, for example, *Ergi v. Turkey*, Judgment of 28 July 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-IV, paras. 82 and 85–86; *Bati and Others v. Turkey*, Application Nos. 33097/96 and 57834/00, Final Judgment of 3 September 2004, First Section, European Court of Human Rights, ECHR 2004-IV, para. 133; *Paniagua Morales et al. v. Guatemala*,

Article 9

Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Commentary

- (1) Draft article 9 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State, upon being satisfied that the circumstances so warrant,⁴⁴² to take the person into custody or take other legal measures⁴⁴³ to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender, and to prevent tampering of evidence by the alleged offender.
- (2) Paragraph 2 provides that the State shall immediately make a preliminary inquiry into the facts. The national criminal laws of States typically provide for such a preliminary inquiry to determine whether a prosecutable offence exists.
- (3) Paragraph 3 provides that the State shall also, after taking the person into custody, immediately notify the States referred to in draft article 7, paragraph 1, of the detention and of the circumstances which warrant it. Further, after making its preliminary inquiry, the State shall promptly report its findings to those States and shall indicate whether it intends to exercise jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition. In some situations, the State may not be fully aware of which other States have established jurisdiction (such as another State that optionally has established jurisdiction with respect to a stateless person who is habitually resident in that State's territory); in such situations, the feasibility of fulfilling the obligation may depend on the circumstances. The State's reporting of its findings need only be "as appropriate", meaning that in some circumstances the State may need to withhold some of the information it has uncovered, for example, to protect the identities of victims or witnesses or to protect an ongoing investigation. Nevertheless, such withholding of reporting must be undertaken in good faith.
- (4) Both the General Assembly and the Security Council have recognized the importance of such preliminary measures in the context of crimes against humanity. Thus, the General

judgment of 8 March 1998, Inter-American Court of Human Rights, Series C, No. 37; *Extrajudicial Executions and Forced Disappearances of Persons v. Peru*, Report No. 101/01, 11 October 2001, Inter-American Commission of Human Rights, OEA/Ser./L/V/II.114 doc. 5 rev., p. 563.

⁴⁴² Such "circumstances" refer not just to factual circumstances relating to the prior conduct of the alleged offender, but also the legal circumstances (to include any procedural safeguards) concerning the exercise of jurisdiction over an alleged offender.

⁴⁴³ See United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), General Assembly resolution 45/110 of 14 December 1990, annex; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229 of 21 December 2010, annex.

Assembly has called upon “all the States concerned to take the necessary measures for the thorough investigation of ... crimes against humanity ... and for the detection, arrest, extradition and punishment of all ... persons guilty of crimes against humanity who have not yet been brought to trial or punished”.⁴⁴⁴ Similarly, it has said that “refusal by States to cooperate in the arrest, extradition, trial and punishment of persons guilty of ... crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law”.⁴⁴⁵ The Security Council has emphasized “the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for ... crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation”.⁴⁴⁶

(5) Treaties addressing crimes typically provide for such preliminary measures,⁴⁴⁷ such as article 6 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁴⁸ Reviewing, *inter alia*, the provisions contained in article 6, the International Court of Justice has explained that “incorporating the appropriate legislation into domestic law ... would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts ..., a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution ...”.⁴⁴⁹ The Court found that the preliminary inquiry is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who conduct the inquiry have the task of drawing up a case file containing relevant facts and evidence; “this may consist of documents or witness statements relating to the events at issue and to the suspect’s possible involvement in the matter concerned”.⁴⁵⁰ The Court further noted that “the choice of means for conducting the inquiry remains in the hands of the States parties”, but that “steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case”.⁴⁵¹ Further, the purpose of such preliminary measures is “to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts”.⁴⁵² With respect to the appropriate timing for making a preliminary inquiry, the Court found a violation of article 6 where Senegal had “not immediately initiate[d] a preliminary inquiry as soon as [it] had reason to suspect [the alleged perpetrator], who was in [its] territory, of being responsible for acts of torture”.⁴⁵³

⁴⁴⁴ General Assembly resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 1.

⁴⁴⁵ General Assembly resolution 2840 (XXVI) of 18 December 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 4.

⁴⁴⁶ Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

⁴⁴⁷ See, for example, Geneva Convention I, art. 49, para. 2; ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2860 (on article 49); Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6; International Convention against the Taking of Hostages, art. 6; Inter-American Convention to Prevent and Punish Torture, art. 6; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; OAU Convention on the Prevention and Combating of Terrorism, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII.

⁴⁴⁸ Convention against Torture, art. 6.

⁴⁴⁹ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), p. 450, para. 72.

⁴⁵⁰ *Ibid.*, p. 453, para. 83.

⁴⁵¹ *Ibid.*, p. 454, para. 86.

⁴⁵² *Ibid.*, p. 451, para. 74.

⁴⁵³ *Ibid.*, p. 454, para. 88.

Article 10

Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Commentary

(1) Draft article 10 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the case to its competent authorities for the purpose of prosecution. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal court or tribunal that is willing and able itself to submit the case to prosecution. This obligation is commonly referred to as the principle of *aut dedere aut judicare*, a principle that has been recently studied by the Commission⁴⁵⁴ and that is contained in numerous multilateral treaties addressing crimes.⁴⁵⁵ While a literal translation of *aut dedere aut judicare* may not fully capture the meaning of this obligation, the Commission chose to retain the term in the title, given its common use when referring to an obligation of this kind.

(2) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind defined crimes against humanity in article 18 and further provided, in article 9, that: "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual".⁴⁵⁶

(3) Most multilateral treaties containing such an obligation⁴⁵⁷ use what is referred to as "the Hague formula", after the 1970 Hague Convention for the Suppression of Unlawful

⁴⁵⁴ See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. VI.

⁴⁵⁵ Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", study by the Secretariat (A/CN.4/630).

⁴⁵⁶ *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 9. See also Commission on Human Rights resolution 2005/81 on impunity, para. 2 (recognizing "that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as ... crimes against humanity ... in accordance with their international obligations in order to bring them to justice, and urg[ing] all States to take effective measures to implement these obligations").

⁴⁵⁷ See Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971), United Nations, *Treaty Series*, vol. 1438, No. 24371, p. 195, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977), *ibid.*, vol. 1490, No. 25573, p. 89, arts. 8 and 9, paras. 2–3; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid.*, vol. 1137, No. 17828, p. 93, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 174, art. IV; Inter-American Convention on Forced Disappearance of Persons, art. VI; Inter-American Convention on International Traffic in Minors (Mexico, 18 March 1994), OAS, *Treaty Series*, No. 79, art. 9; Inter-American Convention against Corruption, art. XIII, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Washington, D.C., 14 November 1997), art. XIX, para. 6; League of Arab States, Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 178, art. 5; Council of Europe, Criminal Law Convention on Corruption, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999), annex to resolution 59/26-P, art. 6; Council of Europe, Convention on Cybercrime (Budapest, 23 November

Seizure of Aircraft.⁴⁵⁸ Under that formula, the obligation arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition.⁴⁵⁹ Although regularly termed the obligation to extradite or “prosecute”, the obligation is to “submit the case to its competent authorities for the purpose of prosecution”, meaning to submit the matter to police and prosecutorial authorities, who may or may not decide to prosecute in accordance with relevant procedures and policies. For example, if the competent authorities determine that there is insufficient evidence of guilt, or that the allegations have already been investigated elsewhere and found to be without basis, then the accused need not be indicted, nor stand trial or face punishment.⁴⁶⁰ The *travaux préparatoires* of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft indicate that the formula established “the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution”.⁴⁶¹

(4) In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed the Hague formula in the context of article 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the ‘obligation to prosecute’) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven ...

...

2001), *European Treaty Series*, No. 185, art. 24, para. 6; African Union Convention on Preventing and Combating Corruption, art. 15, para. 6; Council of Europe, Convention on the Prevention of Terrorism (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 196, art. 18, para. 1; Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 197, art. 31, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. XIII, para. 1.

⁴⁵⁸ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 7.

⁴⁵⁹ Under the 1949 Geneva Conventions, the obligations to search, investigate and prosecute are listed before the possibility of extradition. These obligations exist independently of any extradition request. ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2859 (on article 49).

⁴⁶⁰ Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, study by the Secretariat (A/CN.4/630), pp. 74–75.

⁴⁶¹ Statement of Chairperson Gilbert Guillaume (delegate from France), International Civil Aviation Organization, *Legal Committee, Seventeenth Session, Montreal, 9 February–11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Montreal, 1970), 30th meeting (3 March 1970) (Doc. 8877-LC/161), para. 15.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

...

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is 'to make more effective the struggle against torture' (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

...

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.⁴⁶²

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;⁴⁶³ referral of the matter to a regional organization;⁴⁶⁴ or difficulties with implementation under the State's internal law.⁴⁶⁵

(6) The first sentence of draft article 10 recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender to a State. As was noted with respect to draft article 7, it is possible that one or more other States will have established jurisdiction over the offence and will wish to exercise such jurisdiction, in which case they may seek extradition of the alleged offender from the State where he or she is present. If so, draft article 13, paragraph 12, requires that a State where the alleged offender is present "give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred".⁴⁶⁶

(7) The first sentence of draft article 10 also recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender to an international criminal court or tribunal that is competent to prosecute the offender. This other option has arisen in conjunction with the establishment of the International Criminal Court and other international

⁴⁶² *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), pp. 454–461, paras. 90–91, 94–95, 114–115 and 120.

⁴⁶³ *Ibid.* p. 460, para. 112.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*, para. 113.

⁴⁶⁶ See commentary to draft article 13 below, paras. (31)–(32).

criminal courts and tribunals.⁴⁶⁷ The term “competent” serves two purposes; it captures the notion that the international criminal court or tribunal must have jurisdiction over the offence and the offender, and the notion that the State concerned is in a legal relationship with the court or tribunal that would allow for such extradition or surrender. Thus, it encompasses the idea expressed in some treaties that the court or tribunal must be one whose jurisdiction the sending State has recognized.⁴⁶⁸

(8) While the term “extradition” is often associated with the sending of a person to a State and the term “surrender” is often used for the sending of a person to a competent international criminal court or tribunal, draft article 10 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in international relations can vary⁴⁶⁹ and, for that reason, the Commission considered that a more general formulation is preferable.

(9) The second sentence of draft article 10 provides that, when a State submits the matter to prosecution, its “authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State”. Most treaties containing the Hague formula include such a clause, the objective of which is to ensure that the normal procedures and standards relating to serious offences are applied. Such authorities retain prosecutorial discretion as they may have under national law, in particular in determining whether there is a reasonable factual or legal basis to proceed with the case. In the context of the Rome Statute, such discretion is informed by whether the information available “provides a reasonable basis to believe that a crime ... has been or is being committed” and by whether prosecution of the person is “in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.⁴⁷⁰ While such discretion may exist, a State that refrains from pursuing prosecution or that conducts a “sham” proceeding solely to shield an alleged offender from accountability has not fulfilled the obligation set forth in draft article 10.

(10) The obligation upon a State to submit the case to the competent authorities may have implications for a State’s effort to implement an amnesty, meaning legal measures that have the effect of prospectively barring criminal prosecution of certain individuals (or categories of individuals) in respect of specified criminal conduct alleged to have been committed before the amnesty’s adoption, or legal measures that retroactively nullify legal liability previously established.⁴⁷¹ An amnesty granted by a State in which crimes have occurred may arise pursuant to its constitutional, statutory, or other law, and might be the product of a peace agreement ending an armed conflict. Such an amnesty might be general in nature or might be conditioned by certain requirements, such as disarmament of a non-State armed group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender.

(11) With respect to prosecution before international criminal courts or tribunals, the possibility of including a provision on amnesty was debated during the negotiation of the 1998 Rome Statute of the International Criminal Court, but no such provision was included. Nor was such a provision included in the statutes of the international criminal tribunals for the former Yugoslavia or Rwanda. The former, however, held that an amnesty adopted in

⁴⁶⁷ See report of the International Law Commission on the work of its sixty-sixth session (2014), *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. VI, sect. C (final report on the topic of *aut dedere aut judicare*), pp. 155-156, paras. (34)-(35).

⁴⁶⁸ See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

⁴⁶⁹ See, for example, European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L 190, 18 July 2002, p. 1. Article 1 of the framework decision provides: “The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and *surrender* by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order” (emphasis added).

⁴⁷⁰ Rome Statute, art. 53, paras. 1–2.

⁴⁷¹ Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), [HR/PUB/09/1](#), p. 5.

national law in relation to the offence of torture “would not be accorded international legal recognition”.⁴⁷² The instrument establishing the Special Court for Sierra Leone⁴⁷³ provided that an amnesty adopted in national law is not a bar to its jurisdiction. The instrument establishing the Extraordinary Chambers in the Courts of Cambodia provided that the government shall not request an amnesty for persons investigated for or convicted of crimes against humanity, while leaving to the Extraordinary Chambers to determine the scope of any prior amnesty.⁴⁷⁴ Additionally, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia recognized that there is, respectively, a “crystallising international norm”⁴⁷⁵ or “emerging consensus”⁴⁷⁶ prohibiting amnesties in relation to serious international crimes, particularly in relation to blanket or general amnesties, based on a duty to investigate and prosecute those crimes and punish their perpetrators. An International Criminal Court Pre-Trial Chamber has found that “granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights”.⁴⁷⁷

(12) With respect to prosecution before national courts, recently negotiated treaties addressing crimes in national law have not expressly precluded amnesties, including treaties addressing serious crimes. For example, the possibility of including a provision on amnesty was raised during the negotiation of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, but no such provision was included.⁴⁷⁸ Regional human rights courts and bodies, including the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples’ Rights, however, have found amnesties to be impermissible or as not precluding accountability under regional human rights treaties.⁴⁷⁹ Expert treaty bodies have interpreted their respective treaties as precluding a State party from passing, applying or not revoking

⁴⁷² See *Prosecutor v. Furundžija*, Judgment, 10 December 1998 (footnote 302 above), para. 155.

⁴⁷³ Statute of the Special Court for Sierra Leone, art. 10 (“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution”).

⁴⁷⁴ Extraordinary Chambers of Cambodia Law, art. 40 (“The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers”).

⁴⁷⁵ See *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras. 66–74 and 82–84.

⁴⁷⁶ See *Decision on Ieng Sary’s Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Judgment of 3 November 2011, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, paras. 40-53.

⁴⁷⁷ *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 5 April 2019, Pre-Trial Chamber I, International Criminal Court, para. 77.

⁴⁷⁸ Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), paras. 73–80.

⁴⁷⁹ See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75, paras. 41–44; *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006 (see footnote 24 above), para. 114; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/02, Decision of 15 May 2006, African Commission on Human and Peoples’ Rights, paras. 211–212. The European Court of Human Rights has taken a more cautious approach, recognizing a “growing tendency in international law” to regard amnesties for grave breaches of fundamental human rights as unacceptable, as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes, but also indicating: “Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.” See *Marguš v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, Grand Chamber, European Court of Human Rights, ECHR 2014 (extracts), para. 139.

amnesty laws.⁴⁸⁰ Further, the position of the Secretary-General of the United Nations is not to recognize or condone amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights for United Nations-endorsed peace agreements.⁴⁸¹ Since the entry into force of the Rome Statute, several States have adopted national laws that prohibit amnesties and similar measures with respect to crimes against humanity.⁴⁸²

(13) With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence.⁴⁸³ Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others.

Article 11

Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights

⁴⁸⁰ See, for example, Human Rights Committee, general comment No. 20, para. 15; Human Rights Committee, general comment No. 31, para. 18; Human Rights Committee, *Hugo Rodríguez v. Uruguay*, communication No. 322/1988, Views adopted on 19 July 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex IX, sect. B, para. 12.4. The Committee against Torture has held that amnesties against torture are incompatible with the obligations of States parties under the Convention against Torture. See, for example, Committee against Torture, general comment No. 3 (2012) on the implementation of article 14, para. 41. The Committee on the Elimination of Discrimination against Women has also recommended that States parties ensure that substantive aspects of transitional justice mechanisms guarantee women's access to justice by, *inter alia*, rejecting amnesties for gender-based violence. Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, *ibid.*, *Sixty-ninth Session, Supplement No. 38 (A/69/38)*, chap. VII, para. 44, and *CEDAW/C/GC/30*, para. 81 (b).

⁴⁸¹ See, for example, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies of 23 August 2004 (*S/2004/616*), paras. 10, 32 and 64 (c). This practice was first manifested when the Special Representative of the Secretary-General of the United Nations attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (*S/2000/915*), para. 23. For additional views, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), HR/PUB/09/1, p. 11 ("Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations"); Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (*A/56/156*), para. 33.

⁴⁸² See, for example, Argentina, Ley 27.156, 31 July 2015, art. 1; Burkina Faso, Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé, art. 14; Burundi, Loi n°1/05 du 22 avril 2009, Code pénal du Burundi, art. 171; Central African Republic, Loi No. 08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles, 13 October 2008, art. 2; Colombia, Acuerdo de Paz, 24 November 2016, art. 40; Comoros, Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome, art. 14; Democratic Republic of Congo, Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques, art. 4; Panama, Código Penal de Panamá, art. 115, para. 3; Uruguay, Ley 18.026, 4 October 2006, art. 8.

⁴⁸³ See, for example, *Ould Dah v. France*, Application No. 13113/03, Decision on admissibility of 17 March 2009, Fifth Section, European Court of Human Rights, ECHR 2009, para. 49.

under applicable national and international law, including human rights law and international humanitarian law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

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

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Commentary

(1) Draft article 11 is focused on the obligation of the State to accord to any person, against whom measures are being taken in connection with an offence covered by the draft articles, fair treatment and full protection of his or her rights. Moreover, draft article 11 acknowledges the right of such a person, who is not of the State's nationality but who is in prison, custody or detention, to communicate with and have access to a representative of his or her State.

(2) The title of draft article 11 refers to fair treatment of an "alleged offender", but the scope of the draft article is broader, covering any "person" against whom measures are being taken "at all stages of the proceedings". Thus, measures might be taken in connection with an offence covered by the present draft articles before the person is indicted (such as an investigation), while a person is being extradited or surrendered, or after the person has been convicted (such as imprisonment). In such circumstances, the person might not be regarded as an "alleged" offender. Nevertheless, draft article 11 is intended to cover measures taken at all such stages against persons, recognizing that the rights to which the person is entitled may vary depending on the stage; for example, after conviction there would no longer be a presumption of innocence.⁴⁸⁴

(3) Major human rights instruments seek to specify the standards to be applied, such as those set forth in article 14 of the 1966 International Covenant on Civil and Political Rights, while treaties addressing punishment of crimes within national law typically provide a broad standard of "fair treatment".⁴⁸⁵ Treaties addressing national law do not define the term "fair

⁴⁸⁴ Compare, for example, Rome Statute, art. 55 (rights of persons during an investigation) with arts. 66–67 (presumption of innocence and rights of the accused).

⁴⁸⁵ See, for example, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 9; International Convention against the Taking of Hostages, art. 8, para. 2; Convention against Torture, art. 7, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 10, para. 2; Convention on the Rights of the Child, art. 40, para. 2 (b); International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989), *ibid.*, vol. 2163, No. 37789, p. 75, art. 11; International Convention for the Suppression of Terrorist Bombings, art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999), United Nations, *Treaty Series*, vol. 2253, No. 3511, art. 17, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 17; United Nations Convention against Transnational Organized Crime, art. 16, para. 13; United Nations Convention against Corruption, art. 44, para. 14; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 12; International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. 8, para. 1.

treatment”, but the term is viewed as incorporating the specific rights possessed by an alleged offender under international law.

(4) Thus, when crafting article 8 of the draft articles on crimes against diplomatic agents, the Commission asserted that the formulation of “fair treatment at all stages of the proceedings” was “intended to incorporate all the guarantees generally recognized to a detained or accused person”, and that an “example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights”.⁴⁸⁶ Further, the Commission noted that the “expression ‘fair treatment’ was preferred, because of its generality, to more usual expressions such as ‘due process’, ‘fair hearing’ or ‘fair trial’ which might be interpreted in a narrow technical sense”.⁴⁸⁷

(5) While the term “fair treatment” includes the concept of a “fair trial”, in many treaties reference to a fair trial is expressly included to stress its particular importance. Indeed, the Human Rights Committee has found the right to a fair trial to be a “key element of human rights protection” and a “procedural means to safeguard the rule of law”.⁴⁸⁸ Consequently, draft article 11, paragraph 1, refers to fair treatment “including a fair trial”.

(6) In addition to fair treatment, paragraph 1 provides that the person is entitled to the full protection of his or her rights, whether arising under applicable national or international law. With respect to national law, generally all States provide within their law protections of one degree or another for persons whom they investigate, detain, try or punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial decision. Further, detailed rules may be codified or a broad standard may be set referring to “fair treatment”, “due process”, “judicial guarantees” or “equal protection”. Such protections are extremely important in ensuring that the extraordinary power of the State’s criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State’s allegations before an independent court (hence, allowing for an “equality of arms”).

(7) With respect to international law, both human rights law and international humanitarian law are of particular relevance. At the most general level, human rights protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,⁴⁸⁹ while more specific standards binding upon States are set forth in article 14 of the 1966 International Covenant on Civil and Political Rights, in regional human rights treaties⁴⁹⁰ or in other applicable instruments.⁴⁹¹ With respect to international humanitarian law, the 1949 Geneva Conventions require minimum basic guarantees of fair treatment, fair trial, and full protection of rights for those who face criminal prosecution in the course of armed conflict, applicable in both international armed conflict and non-international armed

⁴⁸⁶ *Yearbook ... 1972*, vol. II, document [A/8710/Rev.1](#), chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), p. 320, commentary to art. 8.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ 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 (A/62/40)*, vol. I, annex VI, para. 2.

⁴⁸⁹ Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, arts. 10–11.

⁴⁹⁰ See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples’ Rights, art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6.

⁴⁹¹ See, for example, American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States; Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex; Charter of the Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1; United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly resolution 70/175 of 17 December 2015, annex, rule 62; the Bangkok Rules (footnote 443 above), rule 2, para. 1; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly resolution 67/187 of 28 March 2013, annex, principles 3 and 6.

conflict.⁴⁹² While the scope and application of these guarantees may depend on the form of armed conflict at issue, many, if not all, of these guarantees are seen as customary international law in all forms of armed conflict.⁴⁹³ Relevant rights under international law include: the right of the accused to be informed of the charges against him or her; the right not to be compelled to incriminate himself or herself; the right to face punishment only for an act that was criminalized by law at the time the act was performed (the principle of *nullum crimen, nulla poena sine lege*); and the right to be presumed innocent until proven guilty.

(8) Paragraph 2 of draft article 11 addresses the State's obligations with respect to a person who is not of the State's nationality and who is in "prison, custody or detention". That term is to be understood as embracing all situations where the State restricts the person's ability to communicate freely with and be visited by a representative of: (a) his or her State of nationality; (b) a State which is otherwise entitled to protect the person's rights or (c) if such person is a stateless person, the State which, at that person's request, is willing to protect that person's rights. In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States concerned. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights.

(9) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations,⁴⁹⁴ which accords rights to both the detained person and to the State of nationality,⁴⁹⁵ and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 11, paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights).⁴⁹⁶ As is the case for paragraph 1, such rights may operate differently in a context where international humanitarian law applies, such as through communications and visits undertaken by a Protecting Power or by the International Committee of the Red Cross.

(10) Paragraph 3 of draft article 11 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under

⁴⁹² See, for example, Geneva Convention I, art. 49, para. 4; Geneva Conventions, common art. 3; Additional Protocol I, art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609 (hereinafter "Additional Protocol II"), art. 6; ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 685-686 (on common article 3) and paras. 2901-2902 (on article 49). These include *inter alia*: the obligation to inform the accused of the nature and cause of the offence alleged; the requirement that an accused must have the necessary rights and means of defence; the right to be presumed innocent; the right to be tried in one's own presence; the right not to be compelled to testify against oneself or to confess guilt; the right to be present and examine witnesses; the right not to be prosecuted or punished more than once by the same Party to the same act or on the same charge (*non bis in idem*).

⁴⁹³ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules* (footnote 333 above), pp. 352-371 (Rule 100).

⁴⁹⁴ Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 36, para. 1.

⁴⁹⁵ *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at p. 492, para. 74 ("Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection"), and, at p. 494, para. 77 ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights").

⁴⁹⁶ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6, para. 3; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 6, para. 2; International Convention against the Taking of Hostages, art. 6, para. 3; Convention against Torture, art. 6, para. 3; Convention on the Safety of United Nations and Associated Personnel, art. 17, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 3; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 3; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 4.

whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Those national laws and regulations may relate, for example, to the ability of an investigating magistrate to impose restrictions on communication for the protection of victims or witnesses, as well as standard conditions with respect to visitation of a person being held at a detention facility. A comparable provision exists in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations⁴⁹⁷ and has been included as well in many treaties addressing crimes.⁴⁹⁸ The Commission explained this provision in its commentary to what became the 1963 Vienna Convention as follows:

“(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.

...

(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question.”⁴⁹⁹

(11) In the *LaGrand* case, the International Court of Justice found that the reference to “rights” in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations “must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual”.⁵⁰⁰

Article 12 **Victims, witnesses and others**

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at

⁴⁹⁷ Vienna Convention on Consular Relations, art. 36, para. 2.

⁴⁹⁸ See, for example, International Convention against the Taking of Hostages, art. 6, para. 4; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 4; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 4; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 4; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 5.

⁴⁹⁹ *Yearbook ... 1961*, vol. II, document A/4843, draft articles on consular relations and commentary, commentary to art. 36, paras. (5) and (7).

⁵⁰⁰ *LaGrand* (see footnote 495 above), p. 497, para. 89.

appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Commentary

(1) Draft article 12 addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity.

(2) Many treaties addressing crimes under national law prior to the 1980s did not contain provisions with respect to victims or witnesses⁵⁰¹ and, even after the 1980s, most global treaties concerned with terrorism have not addressed the rights of victims and witnesses.⁵⁰² Since the 1980s, however, many treaties concerning other crimes have included provisions similar to those appearing in draft article 12,⁵⁰³ including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance.⁵⁰⁴ Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the 1998 Rome Statute,⁵⁰⁵ have addressed the rights of victims and witnesses, and the General Assembly of the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity.⁵⁰⁶

(3) Most treaties that address the rights of victims within national law do not define the term “victim”, allowing States instead to apply their existing law and practice,⁵⁰⁷ provided that it is consistent with their obligations under international law. At the same time, practice associated with those treaties and under customary international law provides guidance as to how the term should be viewed. For example, the 2006 International Convention for the

⁵⁰¹ See, for example, Convention on the Prevention and Punishment of the Crime of Genocide; Convention for the Suppression of Unlawful Seizure of Aircraft; International Convention on the Suppression and Punishment of the Crime of Apartheid; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages.

⁵⁰² See, for example, International Convention for the Suppression of Terrorist Bombings; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism; International Convention for the Suppression of Acts of Nuclear Terrorism; Association of Southeast Asian Nations Convention on Counter Terrorism.

⁵⁰³ See, for example, United Nations Convention against Transnational Organized Crime, arts. 24–25; United Nations Convention against Corruption, arts. 32–33.

⁵⁰⁴ See, for example, Convention against Torture, arts. 13–14; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 12 and 24.

⁵⁰⁵ See, for example, Rome Statute, art. 68; Rules of Procedure and Evidence of the International Criminal Court, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1)*, chap. 4, section III.1, rules 86–88 (hereinafter “Rules of Procedure and Evidence of the International Criminal Court”). For other tribunals, see Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Extraordinary Chambers of Cambodia Law, art. 33; Statute of the Special Court of Sierra Leone, art. 16, para. 4; Statute of the Special Tribunal for Lebanon, art. 12, para. 4.

⁵⁰⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985, annex; 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, General Assembly resolution 60/147 of 16 December 2005, annex.

⁵⁰⁷ See, for example, the General Victims’ Law of Mexico (Ley General de Víctimas, *Diario Oficial de la Federación* el 9 de enero de 2013), which has detailed provisions on the rights of victims, but does not contain restrictions on who may claim to be a victim.

Protection of All Persons from Enforced Disappearance defines “victim” for purposes of that Convention as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.⁵⁰⁸ The Convention on Cluster Munitions defines “cluster munition victims” for purposes of that Convention as “all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities”.⁵⁰⁹

(4) While the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not define what is meant in article 14 by “victim”, the Committee against Torture has provided detailed guidance as to its meaning. In general comment No. 3, the Committee stated:

Victims are persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term ‘victim’ also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.⁵¹⁰

(5) At the regional level, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms allows applications to be filed by “any person, non-governmental organisation or group of individuals” claiming to be a “victim” of a violation of the Convention.⁵¹¹ The European Court of Human Rights has found that such “victims” may be harmed either directly or indirectly,⁵¹² and that family members of a victim of a serious human rights violation may themselves be “victims”.⁵¹³ While the guarantees contained in the 1969 American Convention on Human Rights are restricted to natural persons,⁵¹⁴ the Inter-American Court of Human Rights has also recognized both direct and indirect individual victims, including family members,⁵¹⁵ as well as victim groups.⁵¹⁶ The African Charter on Human and Peoples’ Rights (Banjul Charter) does not use the term “victim”, but the African Commission on Human and Peoples’ Rights, in its general comment No. 4, stated that “[v]ictims are persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African

⁵⁰⁸ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 1.

⁵⁰⁹ Convention on Cluster Munitions (Dublin, 1 August 2010), United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39, art. 2, para. 1.

⁵¹⁰ Committee against Torture, general comment No. 3, para. 3.

⁵¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34.

⁵¹² See, for example, *Vallianatos and Others v. Greece*, Application Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, Grand Chamber, European Court of Human Rights, ECHR 2013 (extracts), para. 47.

⁵¹³ The European Court of Human Rights has stressed that whether a family member is a victim depends on the existence of special factors that give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements include the closeness of the familial bond and the way the authorities responded to the relative’s enquiries. See, for example, *Çakici v. Turkey*, Application No. 23657/94, Judgment of 8 July 1999, Grand Chamber, European Court of Human Rights, ECHR 1999-IV, para. 98; *Elberte v. Latvia*, Application No. 61243/08, Judgment of 13 January 2015, Fourth Section, European Court of Human Rights, ECHR 2015, para. 137.

⁵¹⁴ American Convention on Human Rights, art. 1.

⁵¹⁵ See, for example, *Street Children (Villagrán-Morales et al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Inter-American Court of Human Rights, Series C, No. 63, paras. 174–177 and 238; *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), Inter-American Court of Human Rights, Series C, No. 70, paras. 159–166.

⁵¹⁶ See, for example, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 125, para. 176.

Charter”.⁵¹⁷ Further, the Commission concluded that an “individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim”.⁵¹⁸ Under all such treaties, the term “victim” is not construed narrowly or in a discriminatory manner.

(6) Likewise, while the statutes of international criminal courts and tribunals do not define the term “victim”, guidance may exist in the rules or jurisprudence of the tribunals. Thus, rule 85 (a) of the Rules of Procedure and Evidence of the International Criminal Court defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”,⁵¹⁹ which is understood as including both direct and indirect victims,⁵²⁰ while rule 85 (b) extends the definition to legal persons provided such persons have suffered direct harm.⁵²¹

(7) Draft article 12, paragraph 1, provides that each State shall take the necessary measures to ensure that any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities, and further obliges States to protect from ill-treatment or intimidation those who complain or otherwise participate in proceedings within the scope of the draft articles. A similar provision

⁵¹⁷ African Commission on Human Rights, general comment No. 4 (2017) on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (art. 5), para. 16.

⁵¹⁸ *Ibid.*, para. 17.

⁵¹⁹ Rules of Procedure and Evidence of the International Criminal Court, rule 85 (a). The Court has found that rule 85 (a) “establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered”. *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04, public redacted version of decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, 17 January 2006, Pre-Trial Chamber I, International Criminal Court, para. 79. Further, the harm suffered by a victim for the purposes of rule 85 (a) must be “personal” harm, though it does not necessarily have to be “direct” harm. See *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, Appeals Chamber, International Criminal Court, paras. 32–39.

⁵²⁰ See *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, redacted version of decision on indirect victims, 8 April 2009, Trial Chamber I, International Criminal Court, paras. 44–52. In the context of crimes against humanity involving cultural heritage, an International Criminal Court Trial Chamber identified persons “affected” by the crime as “not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community”. *Prosecutor v. Ahmad Al Faqi Al Madhi*, Case No. ICC-01/12-01/15, Reparations Order, 17 August 2017, Trial Chamber VIII, International Criminal Court, para. 51. The Chamber, however, limited its assessment for the purpose of reparations “only to the harm suffered by or within the community of Timbuktu, *i.e.* organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack”. *Ibid.*, para. 56.

⁵²¹ Rules of Procedure and Evidence of the International Criminal Court, rule 85 (b) (“Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”). Paragraph 8 of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of the General Assembly provides: “For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” For a similar definition, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 1–2.

is included in international treaties, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵²² and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁵²³

(8) Subparagraph (a) of paragraph 1 extends the right to complain to “any person” who alleges that acts constituting crimes against humanity have been or are being committed. The term “any person” includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations.

(9) Such persons have a right to complain to “competent authorities”, which, to be effective, in some circumstances may need to be judicial authorities. Following a complaint, State authorities have a duty to proceed to a prompt and impartial investigation whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the State’s jurisdiction, in accordance with draft article 8.

(10) Subparagraph (b) of paragraph 1 obliges States to protect “complainants” as well as the other categories of persons listed even if they did not file a complaint; those other categories are “victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles”. Recent international treaties have similarly expanded the category of persons to whom protection shall be granted, including the 2000 United Nations Convention against Transnational Organized Crime,⁵²⁴ the 2003 United Nations Convention against Corruption,⁵²⁵ and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁵²⁶ Protective measures for these persons are required not just under treaties addressing crimes in national law, but also in the statutes of international criminal courts and tribunals.⁵²⁷

(11) Subparagraph (b) of paragraph 1 requires that the listed persons be protected from “ill-treatment and intimidation” as a consequence of any complaint, information, testimony or other evidence given. The term “ill-treatment” relates not just to the person’s physical well-being, but also includes the person’s psychological well-being, dignity or privacy.⁵²⁸

(12) Subparagraph (b) does not provide a list of protective measures to be taken by States, as the measures will inevitably vary according to the circumstances at issue, the capabilities of the relevant State, and the preferences of the persons concerned. Such measures, however, might include: the presentation of evidence by electronic or other special means rather than in person;⁵²⁹ measures designed to protect the privacy and identity of witnesses and victims;⁵³⁰ *in camera* proceedings;⁵³¹ withholding evidence or information if disclosure may

⁵²² Convention against Torture, art. 13.

⁵²³ International Convention for the Protection of All Persons from Enforced Disappearance, art. 12.

⁵²⁴ United Nations Convention against Transnational Organized Crime, art. 24, para. 1.

⁵²⁵ United Nations Convention against Corruption, art. 32, para. 1.

⁵²⁶ International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 1.

⁵²⁷ See, for example, Rome Statute, art. 68, para. 1; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Extraordinary Chambers of Cambodia Law, art. 33; Statute of the Special Court of Sierra Leone, art. 16; Statute of the Special Tribunal for Lebanon, art. 12.

⁵²⁸ See, for example, Rome Statute, art. 68, para. 1.

⁵²⁹ See, for example, Rome Statute, art. 68, para. 2; United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (b); United Nations Convention against Corruption, art. 32, para. 2 (b).

⁵³⁰ See, for example, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 1 (e); Extraordinary Chambers of Cambodia Law, art. 33.

⁵³¹ See, for example, Rome Statute, art. 68, para. 2; Extraordinary Chambers of Cambodia Law, art. 33.

lead to the grave endangerment of the security of a witness or his or her family;⁵³² the relocation of victims and witnesses;⁵³³ and protective measures with respect to children.⁵³⁴

(13) At the same time, States must be mindful that some protective measures may have implications with respect to the rights of an alleged offender, such as the right to confront witnesses against him or her. As a result, subparagraph (b) of paragraph 1 stipulates that protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.⁵³⁵

(14) Draft article 12, paragraph 2, provides that each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings. While expressing a firm obligation, the clauses “in accordance with its national law” and “appropriate stages” provide flexibility to the State as to implementation of the obligation, allowing States to tailor the requirement to the unique characteristics of their criminal law system. For example, in some jurisdictions this obligation might be fulfilled by allowing the victim to deliver an impact statement at the time of sentencing. Although addressed only to “victims”, it may also be appropriate for States to permit others (such as family members or representatives) to present their views and concerns, especially in circumstances where a victim of a crime against humanity has died or disappeared. Paragraph 2 is without prejudice to other obligations of States that exist under international law.

(15) Examples of a provision such as paragraph 2 may be found in various treaties, such as: the 1998 Rome Statute;⁵³⁶ the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;⁵³⁷ the 2000 United Nations Convention against Transnational Organized Crime;⁵³⁸ the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;⁵³⁹ and the 2003 United Nations Convention against Corruption.⁵⁴⁰

(16) Draft article 12, paragraph 3, addresses the right of a victim of a crime against humanity to obtain reparation. The opening clause – “Each State shall take the necessary measures to ensure in its legal system” – obliges States to have or enact necessary laws, regulations, procedures or mechanisms to enable victims to pursue claims against and secure redress for the harm they have suffered from those who are responsible for the harm, be it the State itself or some other actor.⁵⁴¹ At the same time, for any given situation of crimes against humanity, the State or States that must implement such measures will depend upon the context. The States concerned are those: (a) to which the acts constituting crimes against

⁵³² See, for example, Rome Statute, art. 68, para. 5.

⁵³³ See, for example, United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (a); United Nations Convention against Corruption, art. 32, para. 2 (a).

⁵³⁴ See, for example, United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 69/194 of 18 December 2014, annex, measures VI, VIII, XII; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (footnote 491 above), principles 4–5 and guidelines 7 and 10; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20 of 22 July 2005, annex.

⁵³⁵ Other relevant international treaties provide a similar protection, including the Rome Statute, art. 68, para. 1; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 6; United Nations Convention against Transnational Organized Crime, art. 24, para. 2; United Nations Convention against Corruption, art. 32, para. 2.

⁵³⁶ Rome Statute, art. 68, para. 3.

⁵³⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 1.

⁵³⁸ United Nations Convention against Transnational Organized Crime, art. 25, para. 3.

⁵³⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 2.

⁵⁴⁰ United Nations Convention against Corruption, art. 32, para. 5.

⁵⁴¹ 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, principles 12 to 23.

humanity are attributable under international law; and (b) that exercise jurisdiction over the territory where the crimes were committed.

(17) Paragraph 3 refers to the victim's "right to obtain reparation". Treaties and instruments addressing this issue have used different terminology, sometimes referring to the right to a "remedy" or "redress", sometimes using the term "reparation", and sometimes referring only to a specific form of reparation, such as "compensation".⁵⁴² Thus, the right to an "effective remedy" may be found in the 1948 Universal Declaration of Human Rights,⁵⁴³ the 1966 International Covenant on Civil and Political Rights,⁵⁴⁴ and in some regional human rights treaties.⁵⁴⁵ The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in article 14, refers to the victim's ability to obtain "redress" and to a right to "compensation" including "rehabilitation".⁵⁴⁶ The 2006 International Convention for the Protection of All Persons from Enforced Disappearance, in article 24, refers to a "right to obtain reparation and prompt, fair and adequate compensation".⁵⁴⁷

(18) The Commission decided to refer to a "right to obtain reparation" as a means of capturing redress in a comprehensive sense, an approach that appears to have taken root in various treaty regimes. Thus, while the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment quoted above refers to the terms "redress", "compensation" and "rehabilitation", the Committee against Torture considers that the provision as a whole embodies a "comprehensive reparative concept",⁵⁴⁸ according to which:

The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.⁵⁴⁹

(19) This movement towards a more comprehensive concept of reparation has led to some treaty provisions that list various forms of reparation. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance indicates that the "right to obtain reparation", which covers "material and moral damages", may consist of not only compensation, but also, "where appropriate, other forms of reparation such as: (a)

⁵⁴² See, for example, International Convention for the Suppression of the Financing of Terrorism, art. 8, para. 4; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 9, para. 4; United Nations Convention against Transnational Organized Crime, art. 14, para. 2, and art. 25, para. 2; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 6; United Nations Convention against Corruption, art. 35.

⁵⁴³ Universal Declaration of Human Rights, art. 8.

⁵⁴⁴ International Covenant on Civil and Political Rights, art. 2, para. 3. See also Human Rights Committee, general comment No. 31, paras. 16–17.

⁵⁴⁵ See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13; American Convention on Human Rights, arts. 25 and 63. See also Organization of African Unity, 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), Office of the United Nations High Commissioner for Refugees (UNHCR), *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, *Regional Instruments, Africa, Middle East, Asia, Americas*, Geneva, UNHCR, 2007, p. 1040, at p. 1045, art. 27.

⁵⁴⁶ Convention against Torture, art. 14, para. 1.

⁵⁴⁷ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 4.

⁵⁴⁸ Committee against Torture, general comment No. 3, para. 2; *Urra Guridi v. Spain*, communication No. 212/2002, decision adopted on 24 May 2005, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44 (A/60/44)*, annex VIII, sect. A, p. 147, para. 6.8.

⁵⁴⁹ Committee against Torture, general comment No. 3, para. 5.

Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition”.⁵⁵⁰

(20) Draft article 12, paragraph 3, follows this approach by setting forth a list of forms of reparation, which include, but are not limited to, restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition. In the context of crimes against humanity, all traditional forms of reparation are potentially relevant. Restitution, or the return to the status quo *ex ante*, may be an appropriate form of reparation and includes the ability for a victim to return to his or her home, the return of moveable property, or the reconstruction of public or private buildings, including schools, hospitals and places of religious worship. Compensation may be appropriate with respect to both material and moral damages. Rehabilitation programmes for large numbers of persons in certain circumstances may be required, such as programmes for medical treatment, provision of prosthetic limbs, or trauma-focused therapy. Satisfaction, such as issuance of a statement of apology or regret, may also be a desirable form of reparation. Likewise, reparation for a crime against humanity might consist of assurances or guarantees of non-repetition.

(21) The illustrative list of forms of reparation, however, is preceded by the words “as appropriate”. Such wording acknowledges that States must have some flexibility and discretion to determine the appropriate form of reparation, recognizing that, in the aftermath of crimes against humanity, various scenarios may arise, including those of transitional justice, and reparations must be tailored to the specific context. For example, in some situations, a State may be responsible for crimes against humanity while, in other situations, non-State actors may be responsible. The crimes may have involved mass atrocities in circumstances where, in their wake, a State may be struggling to rebuild itself, leaving it with limited resources or any capacity to provide material redress to victims. The ability of any given perpetrator to make reparation will also vary. Even so, the State concerned must implement this obligation in good faith and not abuse its flexibility so as to avoid appropriate reparation. Paragraph 3 is without prejudice to other obligations of States that exist under international law.

(22) Paragraph 3 provides that such reparation may be “on an individual or collective basis”. Reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation. Measures to preclude any statute of limitations on civil claims should be considered in appropriate circumstances. In some situations, however, only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. This may be especially the case where a State is grappling with the aftermath of a period of large-scale human rights abuses, necessitating creative transitional justice mechanisms. In still other situations, a combination of individual and collective reparations may be appropriate.

(23) Support for this approach may be seen in the approach to reparations taken by international criminal courts and tribunals. The statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda contained provisions exclusively addressing the possibility of restitution of property, not compensation or other forms of reparation.⁵⁵¹ Yet, when establishing other international criminal courts and tribunals, States appear to have recognized that focusing solely on restitution is inadequate (instead the more general term “reparation” is used) and that establishing only an individual right to reparation for each victim may be problematic in the context of a mass atrocity. Instead, allowance is made for the possibility of reparation for individual victims or for reparation on a collective basis.⁵⁵² For example, the Rules of Procedure and Evidence of the International Criminal Court

⁵⁵⁰ International Convention for the Protection of All Persons from Enforced Disappearance, arts. 24, paras. 4–5.

⁵⁵¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 3; Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 3.

⁵⁵² See, for example, 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, principle 13.

provide that, in awarding reparation to victims pursuant to article 75, “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”, taking into account the scope and extent of any damage, loss or injury.⁵⁵³ In the context of the atrocities in Cambodia under the Khmer Rouge, only “collective and moral reparations” are envisaged under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.⁵⁵⁴

(24) Specification of the rights set forth in draft article 12 should not be read as excluding the existence of other rights for victims, witnesses or others under international or national law. For example, while treaties addressing human rights do not explicitly contain an obligation of the State to provide information to victims of serious human rights abuses, nevertheless a “right to information” or “right to truth” for victims has been inferred from such treaties by some bodies. For example, the Human Rights Committee has inferred such a right from the 1966 International Covenant on Civil and Political Rights as a way to end or prevent the occurrence of psychological torture of families of victims of enforced disappearances or secret executions.⁵⁵⁵ The Committee also has found that, to fulfil its obligation to provide an effective remedy, a State party should provide information about the violation or, in cases of death of a missing person, the location of the burial site.⁵⁵⁶ Likewise, the European Court of Human Rights has inferred from the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as part of the right to be free from torture or ill-treatment, the right to an effective remedy and the right to an effective investigation and to be informed of the results.⁵⁵⁷ The African Commission on Human and Peoples’ Rights has followed a similar approach with respect to the African Charter on Human and Peoples’ Rights.⁵⁵⁸ The Inter-American Commission on Human Rights has characterized such a right in the American Convention on Human Rights as not just for the benefit of the victims, but for society as a whole, since ensuring rights for the future requires a society to learn from the abuses of the past.⁵⁵⁹

Article 13 **Extradition**

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.
2. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
3. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

⁵⁵³ Rules of Procedure and Evidence of the International Criminal Court, rule 97, para. 1.

⁵⁵⁴ Internal Rules of the Extraordinary Chambers in the Court of Cambodia (Rev. 9) as revised on 16 January 2015, rules 23 and 23 *quinquies*.

⁵⁵⁵ See, for example, *Lyashkevich v. Belarus*, Communication No 887/1999, Views adopted on 3 April 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. II, annex V, appendix P, para. 9.2.

⁵⁵⁶ *Ibid.*, para. 11.

⁵⁵⁷ See, for example, *Kurt v. Turkey* (footnote 435 above), paras. 130-134 and 140; *Taş v. Turkey*, Application No. 24396/94, Judgment, 14 November 2000, European Court of Human Rights, paras. 79-80 and 91; *Cyprus v. Turkey*, Application No. 25781/94, Judgment, Grand Chamber, European Court of Human Rights, ECHR 2001-IV, paras. 156-158.

⁵⁵⁸ *Amnesty International v. Sudan*, communications No. 48/90, 50/91, 52/91, 89/93, decision of 15 November 1999, African Commission on Human and Peoples’ Rights, para. 54. See also African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union document DOC/OS(XXX)247, principle C, para. (b) (providing that “the right to an effective remedy includes: ... 3. access to the factual information concerning the violations.”).

⁵⁵⁹ Inter-American Commission, *Case of Ignacio Ellacría et al. v. El Salvador*, Case No. 10.488, Report No. 136/99 of 22 December 1999, paras. 221–228.

Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

4. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

5. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

6. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.

9. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions, or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.

13. Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Commentary

(1) Draft article 13 addresses the rights, obligations and procedures applicable to the extradition of an alleged offender under the present draft articles. Extradition normally refers to the process whereby one State (the requesting State) asks another State (the requested State) to send to the requesting State someone present in the requested State in order that he or she may be brought to trial on criminal charges in the requesting State. The process also may arise where an offender has escaped from lawful custody following conviction in the

requesting State and is found in the requested State. Often extradition between two States is regulated by a multilateral⁵⁶⁰ or bilateral treaty,⁵⁶¹ although not all States require the existence of a treaty for an extradition to occur.

(2) In 1973, the General Assembly of the United Nations in resolution 3074 (XXVIII) highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment.⁵⁶² In 2001, the Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights reaffirmed the principles set forth in General Assembly resolution 3074 (XXVIII)⁵⁶³ and urged “all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity”.⁵⁶⁴

(3) Draft article 13 should be considered in the overall context of the present draft articles. Draft article 7, paragraph 2, provides that each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction, and the State does not extradite or surrender the person. When an alleged offender is present and has been taken into custody, the State is obliged under draft article 9, paragraph 3, to notify other States that have jurisdiction to prosecute the alleged offender, which may result in those States seeking the alleged offender’s extradition. Further, draft article 10 obligates the State to submit the case to its competent authorities for prosecution, unless the State extradites or surrenders the person to another State or competent international criminal court or tribunal.

(4) Thus, under the present draft articles, a State may satisfy the *aut dedere aut judicare* obligation set forth in draft article 10 by extraditing (or surrendering) the alleged offender to another State for prosecution. There is no obligation to extradite the alleged offender; the obligation is for the State in the territory under whose jurisdiction the alleged offender is present to submit the case to its competent authorities for the purpose of prosecution, unless the person is extradited or surrendered to another State (or competent international criminal court or tribunal). Yet that obligation may be satisfied, in the alternative, by extraditing the alleged offender to another State. To facilitate such extradition, it is useful to have in place clearly stated rights, obligations and procedures with respect to the extradition process, which is the purpose of draft article 13.

(5) The Commission decided to model draft article 13 on article 44 of the 2003 United Nations Convention against Corruption, which in turn was modelled on article 16 of the 2000 United Nations Convention against Transnational Organized Crime. Although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the underlying crime, and the Commission was of the view that article 44 provides ample guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity. Moreover, the provisions of article 44 are well understood by the 186 States parties (as of mid-2019) to the 2003 United Nations Convention against Corruption, especially

⁵⁶⁰ See, for example, European Convention on Extradition (Paris, 13 December 1957), United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273; Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, *Treaty Series*, vol. 1752, No. 30597, p. 177. See also Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Luxembourg, 2002), *Official Journal of the European Communities*, No. L 190, vol. 45 (18 July 2002), p. 1.

⁵⁶¹ The 1990 United Nations Model Treaty on Extradition is one effort to help States in developing bilateral extradition agreements capable of addressing a wide range of crimes. See General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997).

⁵⁶² General Assembly resolution 3074 (XXVIII) of 3 December 1973.

⁵⁶³ International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, para. 3, in report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session (E/CN.4/2002/2-E/CN.4/Sub.2/2001/40). The Sub-Commission largely replicated in its resolution the principles of the General Assembly, but with some modifications.

⁵⁶⁴ *Ibid.*, para. 2.

through the detailed guides and other resources developed by the United Nations Office on Drugs and Crime.⁵⁶⁵

Application of the draft article when an extradition request is made

(6) Draft article 13, paragraph 1, provides that the draft article applies to the offences covered by the present draft articles whenever a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of the requested State. The language is modelled on article 44, paragraph 1, of the 2003 United Nations Convention against Corruption.

(7) As noted above, the draft articles do not contain any obligation for a State to extradite a person to another State. Rather, pursuant to draft article 10, whenever an alleged offender is present in a State, that State is obliged to submit the matter to prosecution, *unless* the person is extradited or surrendered to another State (or competent international criminal court or tribunal). Thus, extradition is an option that a State may choose to exercise if so requested by another State. When such a request occurs, then the provisions of this draft article become relevant.

Inclusion as an extraditable offence in existing and future extradition treaties

(8) Draft article 13, paragraph 2, is modelled on article 44, paragraph 4, of the 2003 United Nations Convention against Corruption. It obligates a requested State to regard the offences covered by the present draft articles (see draft article 6, paragraphs 1 to 3, above) as extraditable offences in any existing extradition treaty between it and the requesting State, as well as any such treaties concluded by those States in the future.⁵⁶⁶ This provision is commonly included in other conventions.⁵⁶⁷

⁵⁶⁵ See, for example, United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption; Technical Guide to the United Nations Convention against Corruption* (New York, United Nations, 2009); and Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption. The United Nations Office on Drugs and Crime has developed similar resources for the United Nations Convention against Transnational Organized Crime, which contains many of the same provisions as the United Nations Convention against Corruption in its article on extradition. See, for example, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2). See also report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, addendum on Interpretative notes for the *official records (travaux préparatoires)* of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto ([A/55/383/Add.1](#)).

⁵⁶⁶ See article 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, pp. 319–320; and article 10 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook...1996*, vol. II (Part Two), p. 32.

⁵⁶⁷ Similar provisions appear in: Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 1; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 1; Convention against Torture, art. 8, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 1; United Nations Convention against Transnational Organized Crime, art. 16, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, paras. 2–3. The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind provides, in art. 10, para. 1, that, “[t]o the extent that [genocide, crimes against humanity, crimes against the United Nations and associated personnel and war crimes] are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them”. *Yearbook...1996*, vol. II (Part Two), p. 32.

Exclusion of the “political offence” exception to extradition

(9) Paragraph 3 of draft article 13 excludes the “political offence” exception as a ground for refusing an extradition request.

(10) Under some extradition treaties, the requested State may decline to extradite if it regards the offence for which extradition is requested as political in nature. Yet there is support for the proposition that crimes such as genocide and war crimes should not be regarded as “political offences”. For example, article VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide and other enumerated acts “shall not be considered as political crimes for the purpose of extradition”.⁵⁶⁸ Similarly, article 1 of the Additional Protocol to the 1957 European Convention on Extradition provides that the list of war crimes contained in the 1949 Geneva Conventions cannot be considered to amount to political offences and be exempted from extradition on that basis.⁵⁶⁹ There are similar reasons not to regard crimes against humanity as a “political offence” so as to preclude extradition.⁵⁷⁰ The United Nations Revised Manual on the Model Treaty on Extradition provides that “certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition”.⁵⁷¹ The Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights declared that persons “charged with war crimes and crimes against humanity shall not be allowed to claim that the actions fall within the ‘political offence’ exception to extradition”.⁵⁷²

(11) Contemporary bilateral extradition treaties often specify particular offences that should not be regarded as “political offences” so as to preclude extradition.⁵⁷³ Although some treaties addressing specific crimes do not address the issue,⁵⁷⁴ many contemporary multilateral treaties addressing specific crimes contain a provision barring the political offence exception to extradition for that particular crime.⁵⁷⁵ For example, article 13,

⁵⁶⁸ Convention on the Prevention and Punishment of the Crime of Genocide, art. VII.

⁵⁶⁹ Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975), United Nations, *Treaty Series*, vol. 1161, No. 5146, p. 450, art. 1.

⁵⁷⁰ See, for example, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook*, United States District Court, S. D. New York, 924 F. Supp. 565 (1996), p. 577 (“[I]f the act complained of is of such heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception”).

⁵⁷¹ United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, para. 45.

⁵⁷² Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, para. 3.

⁵⁷³ See, for example, the Extradition Treaty between the Government of the United States of America and the Government of South Africa (Washington, 16 September 1999), United Nations, *Treaty Series*, [vol. not published yet], No. 50792, art. 4, para. 2 (“For the purposes of this Treaty, the following offences shall not be considered political offences: ... (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; ...”); the Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), *ibid.*, vol. 1642, No. 28218, art. 4, para. 1 (a) (“Reference to a political offence shall not include ... (ii) an offence in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties; and (iii) an offence against the law relating to genocide”); Treaty of Extradition between the Government of the United Mexican States and the Government of Canada (Mexico City, 16 March 1990), *ibid.*, vol. 1589, No. 27824, art. IV, subpara. (a) (“For the purpose of this paragraph, political offence shall not include an offence for which each Party has the obligation, pursuant to a multilateral international agreement, to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution”).

⁵⁷⁴ See, for example, International Convention against the Taking of Hostages; Convention against Torture.

⁵⁷⁵ See, for example, International Convention for the Suppression of Terrorist Bombings, art. 11; International Convention for the Suppression of the Financing of Terrorism, art. 14; United Nations Convention against Corruption, art. 44, para. 4.

paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides:

For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

(12) The Commission viewed the text of article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance as an appropriate model for draft article 13, paragraph 3. Paragraph 3 clarifies that the *act* of committing a crime against humanity cannot be regarded as a “political offence”. This issue differs, however, from whether a requesting State is pursuing the extradition because of the individual’s political opinions; in other words, it differs from whether the State is alleging a crime against humanity and making its request for extradition as a means of persecuting an individual for his or her political views. The latter issue of persecution is addressed separately in draft article 13, paragraph 11. The final clause of paragraph 3 “on these grounds alone” signals that there may be other grounds that the State may invoke to refuse extradition (see paragraphs (18) to (20) and (27) to (30) below), provided such other grounds in fact exist.

States requiring a treaty to extradite

(13) Draft article 13, paragraphs 4 and 5, address the situation where a requested State requires the existence of a treaty before it can extradite an individual to the requesting State.

(14) Paragraph 4 provides that, in such a situation, the requested State “may” use the present draft articles as the legal basis for the extradition in respect of crimes against humanity. As such, a State is not obliged to use the present draft articles for such purpose, but may elect to do so. This paragraph is modelled on article 44, paragraph 5, of the 2003 United Nations Convention against Corruption, which reads: “If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies”.⁵⁷⁶ The same or a similar provision may be found in numerous other treaties,⁵⁷⁷ and the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.⁵⁷⁸

(15) Paragraph 5 is modelled on article 44, paragraph 6, of the 2003 United Nations Convention against Corruption. Paragraph 5 (a) obliges each State that makes extradition conditional on the existence of a treaty to inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for extradition in relation to crimes against humanity.

(16) Draft article 13, paragraph 5 (b), obliges a State party that does not use the draft articles as the legal basis for extradition to “seek, where appropriate, to conclude” extradition treaties with other States. As such, States are not obliged under the present draft articles to

⁵⁷⁶ United Nations Convention against Corruption, art. 44, para. 5.

⁵⁷⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; International Convention against the Taking of Hostages, art. 10, para. 2; Convention against Torture, art. 8, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 4.

⁵⁷⁸ *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 2 (“If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State”).

conclude extradition treaties with every other State with respect to crimes against humanity but, rather, are encouraged to pursue appropriate efforts in that regard.⁵⁷⁹

States not requiring a treaty to extradite

(17) Draft article 13, paragraph 6, applies to States that do not make extradition conditional on the existence of a treaty. With respect to those States, paragraph 6 obliges them to “recognize the offences covered by the present draft articles as extraditable offences between themselves”. This paragraph is modelled on article 44, paragraph 7, of the 2003 United Nations Convention against Corruption.⁵⁸⁰ Similar provisions may be found in many other treaties addressing crimes.⁵⁸¹ The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.⁵⁸²

Requirements of the requested State’s national law or applicable treaties

(18) Draft article 13, paragraph 7, provides that extradition “shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition”. Similar provisions may be found in various global⁵⁸³ and regional⁵⁸⁴ treaties. This paragraph is modelled on article 44, paragraph 8, of the 2003 United Nations Convention against Corruption, but does not retain language after the word “including” that reads “*inter alia*, conditions in relation to the minimum penalty requirement for extradition and”.⁵⁸⁵ The Commission was of the view that reference to minimum penalty requirements was inappropriate in the context of allegations of crimes against humanity.

(19) This paragraph states the general rule that, while the extradition is to proceed in accordance with the rights, obligations and procedures provided for in the present draft articles, it remains subject to conditions set forth in the requested State’s national law or in extradition treaties. Such conditions may relate to procedural steps, such as the need for a decision by a national court or a certification by a minister prior to the extradition, or may

⁵⁷⁹ See Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Analytical report of the Secretariat on the Implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle (CTOC/COP/2005/2/Rev.1), para. 69.

⁵⁸⁰ United Nations Convention against Corruption, art. 44, para. 7 (“States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves”).

⁵⁸¹ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 3; International Convention against the Taking of Hostages, art. 10, para. 3; Convention against Torture, art. 8, para. 3; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 5.

⁵⁸² *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 3 (“States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State”).

⁵⁸³ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; Convention against Torture, art. 8, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 6.

⁵⁸⁴ See, for example, Inter-American Convention to Prevent and Punish Torture, art. 13; Inter-American Convention on Forced Disappearance of Persons, art. V; Council of Europe Criminal Law Convention on Corruption, art. 27, para. 4.

⁵⁸⁵ United Nations Convention against Corruption, art. 44, para. 8 (“Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition”).

relate to situations where extradition is prohibited, such as: a prohibition on the extradition of the State's nationals or permanent residents; a prohibition on extradition where the offence at issue is punishable by the death penalty; a prohibition on extradition to serve a sentence that is based upon a trial *in absentia*; or a prohibition on extradition based on the rule of speciality.⁵⁸⁶ At the same time, some grounds for refusal found in national law would be impermissible under the present draft articles, such as the invocation of a statute of limitations in contravention of draft article 6, paragraph 6, or may be impermissible under other rules of international law.

(20) Whatever the reason for refusing extradition, in the context of the present draft articles, the requested State in which the offender is present remains obliged to submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 10.

Expedition of extradition procedures and simplification of evidentiary requirements

(21) Draft article 13, paragraph 8, provides that the requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto. This text is modelled on article 44, paragraph 9, of the 2003 United Nations Convention against Corruption. The Working Group on International Cooperation of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has evaluated and recommended methods for expediting such procedures and simplifying such requirements.⁵⁸⁷

Deeming the offence to have occurred in the requesting State

(22) Draft article 13, paragraph 9, addresses the situation where a requested State, under its national law, may only extradite a person to a State where the crime occurred.⁵⁸⁸ To facilitate extradition to a broader range of States, paragraph 9 provides that, “[i]f necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1”. This text is modelled on article 11, paragraph 4, of the 1999 International Convention for the Suppression of the Financing of Terrorism⁵⁸⁹ and has been used in many treaties addressing crimes.⁵⁹⁰

(23) Treaty provisions of this kind refer to “States that have established jurisdiction” under the treaty on the basis of connections such as the nationality of the alleged offender or of the victims of the crime (hence, the cross-reference in draft article 13, paragraph 9, to draft article 7, paragraph 1). Such provisions do not refer to States that have established jurisdiction based on the presence of the offender (draft article 7, paragraph 2), because the State requesting extradition is never the State in which the alleged offender is already present. In this instance,

⁵⁸⁶ See, for example, the United Kingdom Extradition Act, sect. 17.

⁵⁸⁷ See, for example, Report on the meeting of the Working Group on International Cooperation held in Vienna on 16 October 2018 (CTOC/COP/WG.3/2018/6); Challenges faced in expediting the extradition process, including addressing health and safety and other human rights issues, as well as litigation strategies utilized by defendants to delay the resolution of an extradition request (CTOC/COP/WG.3/2018/5).

⁵⁸⁸ See *Yearbook ... 1996*, vol. II (Part Two), p. 33, para. (3) of the commentary to draft article 10 (“Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred”).

⁵⁸⁹ International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 4.

⁵⁹⁰ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 4; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 4; International Convention against the Taking of Hostages, art. 10, para. 4; Convention against Torture, art. 8, para. 4; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 4; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 4. Some recent treaties, however, have not contained such a provision. See, for example, United Nations Convention against Transnational Organized Crime; United Nations Convention against Corruption; International Convention for the Protection of All Persons from Enforced Disappearance.

there is also no cross-reference to draft article 7, paragraph 3, which does not require States to establish jurisdiction but, rather, preserves the right of States to establish national jurisdiction beyond the scope of the present draft articles.

(24) In its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, which contains a similar provision in article 10, paragraph 4,⁵⁹¹ the Commission stated that “[p]aragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party ... with respect to the crimes” established in the draft Code, and that “[t]his broader approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes”.⁵⁹²

Enforcement of a sentence imposed upon a State’s own nationals

(25) Draft article 13, paragraph 10, concerns situations where the national of a requested State is convicted and sentenced in a foreign State, and then flees to the requested State, but the requested State is unable under its law to extradite its nationals. In such a situation, paragraph 10 provides that “the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof”. Similar provisions are found in the 2000 United Nations Convention against Transnational Organized Crime⁵⁹³ and the 2003 United Nations Convention against Corruption.⁵⁹⁴

(26) The Commission also considered inclusion of a paragraph in draft article 13 that would expressly address the situation where the requested State can extradite one of its nationals, but only if the alleged offender will be returned to the requested State to serve any sentence imposed by the requesting State. Such a provision may be found in the 2000 United Nations Convention against Transnational Organized Crime⁵⁹⁵ and the 2003 United Nations Convention against Corruption.⁵⁹⁶ The Commission deemed such a situation as falling within the scope of conditions that may be applied under draft article 13, paragraph 7, of the present draft articles and therefore decided that an express provision on this issue was not necessary.

Extradition requests based on impermissible grounds

(27) Draft article 13, paragraph 11, makes clear that nothing in draft article 13 requires a State to extradite an individual to a State where there are substantial grounds for believing that the extradition request is being made on grounds that are universally recognized as impermissible under international law. Such a provision appears in various multilateral⁵⁹⁷ and

⁵⁹¹ *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 4 (“Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party”).

⁵⁹² *Ibid.*, p. 33 (para. (3) of the commentary to draft article 10).

⁵⁹³ United Nations Convention against Transnational Organized Crime, art. 16, para. 12.

⁵⁹⁴ United Nations Convention against Corruption, art. 44, para. 13.

⁵⁹⁵ United Nations Convention against Transnational Organized Crime, art. 16, para. 11.

⁵⁹⁶ United Nations Convention against Corruption, art. 44, para. 12.

⁵⁹⁷ See, for example, European Convention on Extradition, art. 3, para. 2; Inter-American Convention on Extradition, art. 4, para. 5.

bilateral treaties,⁵⁹⁸ and in national laws,⁵⁹⁹ that address extradition generally, and appears in treaties addressing extradition with respect to specific crimes.⁶⁰⁰

(28) Paragraph 11 is modelled on article 16, paragraph 14, of the 2000 United Nations Convention against Transnational Organized Crime, and article 44, paragraph 15, of the 2003 United Nations Convention against Corruption, which both read as follows:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

While modelled on this provision, the term "sex" in English was replaced by "gender", and the term "culture" was added to the list of factors, in line with the language used in draft article 2, paragraph 1 (h). Further, the term "membership of a particular social group" was added to the list, as in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁶⁰¹ Paragraph 11 may be considered as one aspect of guaranteeing to the alleged offender, at all stages, full protection of his or her rights under international law, as required by draft article 11, paragraph 1. Indeed, there may be other reasons relating to full protection the alleged offender's human rights that would preclude extradition.

(29) Given that the present draft articles contain no obligation to extradite any individual, paragraph 11, strictly speaking, is not necessary for an extradition occurring solely pursuant to the present draft articles. Under the present draft articles, a State may decline to extradite for any reason, so long as it submits the case to its own competent authorities for the purpose of prosecution. Nevertheless, the paragraph may be of relevance if an extradition is being requested pursuant to a State's extradition treaties or national law and if such treaties or law require extradition in certain circumstances. Paragraph 11 helps ensure that any provision in such treaties or law that precludes extradition in circumstances such as those described in

⁵⁹⁸ See, for example, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic (Paris, 24 January 2003), art. 3, para. 3; Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa, art. 4, para. 3; Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), art. 4, para. 1 (b); Treaty of Extradition between the Government of the United Mexican States and the Government of Canada, art. IV (b). The United Nations Model Treaty on Extradition at article 3 (b) contains such a provision. The Revised Manual on the Model Treaty on Extradition, states at paragraph 47, that: "Subparagraph (b) ... is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world".

⁵⁹⁹ See, for example, the Extradition Law of the People's Republic of China: Order of the President of the People's Republic of China, No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000, art. 8, para. 4 ("The request for extradition made by a foreign State to the People's Republic of China shall be rejected if ... the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings"); and the United Kingdom Extradition Act, sect. 13 ("A person's extradition ... is barred by reason of extraneous considerations if (and only if) it appears that (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions").

⁶⁰⁰ See, for example, International Convention against the Taking of Hostages, art. 9; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, para. 6; International Convention for the Suppression of Terrorist Bombings, art. 12; International Convention for the Suppression of the Financing of Terrorism, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

⁶⁰¹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

paragraph 11 will remain unaffected by the present draft articles. As such, the Commission considered it appropriate to include such a provision in the present draft articles.

(30) Paragraph 11 is to be distinguished from draft article 5 on *non-refoulement*. The latter provision broadly addresses *any* transfer of a person from one State to another. Such transfers may well occur in a context where the person is not alleged to have committed crimes against humanity or to have committed any crime at all. The focus of draft article 5 is on ensuring that the person is not transferred to a State if by doing so he or she would be in danger of being subjected to a crime against humanity. To the extent that there is overlap between draft article 5 and draft article 13, paragraph 11, with respect to the extradition of a person, the difference between the two provisions may be explained as follows. Draft article 5 is focused on preventing the extradition of any person for any alleged crime to a place where he or she would be in danger of being subjected to a crime against humanity. Draft article 13, paragraph 11, is focused on the extradition of a person alleged to have committed a crime against humanity, and makes clear that the draft articles impose no obligation on the requested State to extradite if it is believed that the request is being pursued on grounds that are impermissible under international law.

Due consideration to the request of the State where the offence occurred

(31) Draft article 13, paragraph 12 requires that “due consideration” be given by the requested State to a request for extradition from the State in the territory under whose jurisdiction the alleged offence has occurred.

(32) The State where the alleged offence has occurred may be best placed to proceed with a prosecution if it is the principal location of the victims, witnesses or other evidence relating to the offence. In that regard, it has been observed that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is focused on prosecution of alleged offenders “by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.⁶⁰² Additional Protocol I to the 1949 Geneva Conventions contains a provision reading:

Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.⁶⁰³

Moreover, the complementarity system of the Rome Statute,⁶⁰⁴ in practice, often accords deference to the State where the crime occurred (or the State of nationality of the alleged offender, which is often the same) if that State is able and willing to exercise jurisdiction.

Consultations prior to refusal to extradite

(33) Draft article 13, paragraph 13, provides that, before the requested State refuses extradition, it “shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation”. Such consultation may allow the requesting State to modify its request in a manner that addresses the concerns of the requested State. The phrase “where appropriate”, however, acknowledges that there may be times when the requested State is refusing extradition but consultation is not appropriate, for example when the requested State has decided to submit the case to its own competent authorities for the purpose of prosecution, or when consultations are not possible due to reasons of confidentiality. Even so, it is stressed that, in the context of the present draft articles, draft article 10 requires the requested State, if it does not extradite, to submit the matter to its own prosecutorial authorities.

⁶⁰² Convention on the Prevention and Punishment of the Crime of Genocide, art. VI (emphasis added).

⁶⁰³ Additional Protocol I, art. 88, para. 2.

⁶⁰⁴ Rome Statute, art. 17, para. 1 (“[T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution ...”).

(34) Paragraph 13 is modelled on the 2000 United Nations Convention against Transnational Organized Crime⁶⁰⁵ and the 2003 United Nations Convention against Corruption,⁶⁰⁶ which both provide that, “[b]efore refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation”.

Multiple requests for extradition

(35) Treaties addressing extradition generally or in the context of specific crimes typically do not seek to regulate which requesting State should have priority if there are multiple requests for extradition. At the most, such instruments might acknowledge the discretion of the requested State to determine whether to extradite and, if so, to which requesting State. For example, the 1990 United Nations Model Treaty on Extradition, in article 16, simply provides: “If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited”.⁶⁰⁷

(36) Consequently, in line with existing treaties, the Commission decided not to include a provision in the present draft articles specifying a preferred outcome if there are multiple requests, other than the obligation of “due consideration” set forth in paragraph 12. Even so, when such a situation occurs, a State may benefit from considering various factors in exercising its discretion. For example, the Código Orgánico Integral Penal (2014) of Ecuador provides in section 405 that “la o el juzgador ecuatoriano podrá determinar la jurisdicción que garantice mejores condiciones para juzgar la infracción penal, la protección y reparación integral de la víctima” (“the judge may determine the jurisdiction which guarantees better conditions to prosecute the criminal offence, the protection and the integral reparation of the victim”).⁶⁰⁸ In the context of the European Union, relevant factors include “the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order”.⁶⁰⁹

Dual criminality

(37) Extradition treaties typically contain a “dual criminality” requirement, whereby obligations with respect to extradition only arise in circumstances where, for a specific request, the conduct at issue is criminal in both the requesting State and the requested State.⁶¹⁰ Such a requirement is also sometimes included in treaties on a particular type of crime, if that treaty contains a combination of mandatory and non-mandatory offences, with the result that the offences existing in any two States parties may differ. For example, the 2003 United Nations Convention against Corruption establishes both mandatory⁶¹¹ and non-mandatory⁶¹² offences relating to corruption.

(38) By contrast, treaties focused on a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement. Thus, treaties such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which define specific offences and obligate States parties to take the necessary measures to ensure that they constitute offences under national

⁶⁰⁵ United Nations Convention against Transnational Organized Crime, art. 16, para. 16.

⁶⁰⁶ United Nations Convention against Corruption, art. 44, para. 17.

⁶⁰⁷ United Nations Model Treaty on Extradition, art. 16.

⁶⁰⁸ Código Orgánico Integral Penal, section 405.

⁶⁰⁹ See, for example, Council framework decision of 13 June 2002, art. 16, para. 1.

⁶¹⁰ See, for example, United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, p. 10, para. 20 (“The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law”).

⁶¹¹ United Nations Convention against Corruption, arts. 15, 16, para. 1, and arts. 17, 23 and 25.

⁶¹² *Ibid.*, arts. 16, para. 2, and arts. 18–22 and 24.

criminal law, contain no dual criminality requirement in their respective extradition provisions. The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to impose a dual criminality requirement. While there may be some marginal differences as between two States in the manner by which their national laws have incorporated the crime, imposing a dual criminality requirement is still unnecessary since that requirement allows for such differences, so long as the crime in substance exists in both jurisdictions. A further rationale is that treaties focused on a particular type of crime typically do not contain an absolute obligation to extradite; rather, they contain an *aut dedere aut judicare* obligation, whereby the requested State may always choose not to extradite, so long as it submits the case to its competent authorities for prosecution.

(39) The present draft articles on crimes against humanity define crimes against humanity in draft article 2 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the “offences” of “crimes against humanity” exist under the national criminal law of each State.⁶¹³ As such, when an extradition request from one State is sent to another State for an offence covered by the present draft articles, the offence should be criminal in both States, and therefore dual criminality is automatically satisfied. Moreover, the *aut dedere aut judicare* obligation set forth in draft article 10 does not obligate States to extradite; rather, the State can satisfy its obligation under draft article 10 by submitting the case to its competent authorities for the purpose of prosecution. Consequently, the Commission decided that there was no need to include in draft article 13 a dual criminality requirement, such as appears in the first three paragraphs of article 44 of the 2003 United Nations Convention against Corruption.

Article 14 **Mutual legal assistance**

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.
2. In relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State, mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings.
3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:
 - (a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
 - (b) taking evidence or statements from persons, including by video conference;
 - (c) effecting service of judicial documents;
 - (d) executing searches and seizures;
 - (e) examining objects and sites, including obtaining forensic evidence;
 - (f) providing information, evidentiary items and expert evaluations;
 - (g) providing originals or certified copies of relevant documents and records;

⁶¹³ Draft article 2, paragraph 3, provides that the draft article is without prejudice to a broader definition of crimes against humanity provided for in any national law. An extradition request based on a broader definition than is contained in draft article 2, paragraphs 1 and 2, however, would not be based on an offence covered by the present draft articles.

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State;
or

(j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance between the States in question.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

9. States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

Commentary

(1) A State investigating or prosecuting an offence covered by the present draft articles may wish to seek assistance from another State in gathering information and evidence, including through documents, sworn declarations and oral testimony by victims, witnesses or others. Cooperation on such matters is referred to as “mutual legal assistance”. Having a legal framework regulating such assistance is useful for providing a predictable means for cooperation between the requesting and requested State. For example, certain treaties have provisions relevant to mutual legal assistance with respect to the prosecution of war crimes.⁶¹⁴

(2) At present, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of this kind occurs, it does so through voluntary cooperation by States as a matter of comity or, where they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties). While mutual

⁶¹⁴ See, for example, Additional Protocol I, art. 88, para. 1 (“The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol”); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 19, para. 1 (“Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings”). See also ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 2892–2893 (on article 49).

legal assistance relating to crimes against humanity can occur through such treaties, in many instances there will be no mutual legal assistance treaty between the requesting and requested States.⁶¹⁵ As is the case for extradition, any given State often has no treaty relationship with a large number of other States on mutual legal assistance with respect to crimes generally, so that when cooperation is needed with respect to crimes against humanity, there is no legal framework in place to facilitate such cooperation.

(3) Draft article 14 seeks to provide that legal framework. Paragraphs 1 to 8 are designed to address various important elements of mutual legal assistance that will apply between the requesting and requested States, bearing in mind that in some instances there may exist a mutual legal assistance treaty between those States, while in other instances there may not. As discussed further below, draft article 14 and the draft annex both apply to the requesting and requested States if there exists no mutual legal assistance treaty between them. If there does exist a mutual legal assistance treaty between them, then that treaty applies, except that: (a) if particular paragraphs of draft article 14 require the provision of a higher level of assistance than is provided for under the other mutual legal assistance treaty, then those paragraphs shall be applied as well; and (b) the draft annex additionally applies if the requesting and requested States agree to use it to facilitate cooperation.

(4) The detailed provisions on mutual legal assistance appearing in draft article 14 and in the draft annex also appear in several recent conventions addressing specific crimes. While there is also precedent for less detailed provisions,⁶¹⁶ States appear attracted to the more detailed provisions, as may be seen in the drafting history of the 2000 United Nations Convention against Transnational Organized Crime. During the initial drafting, the article on mutual legal assistance was a two-paragraph provision.⁶¹⁷ The negotiating States decided early on,⁶¹⁸ however, that this less detailed approach should be replaced with a more detailed article based on article 7 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁶¹⁹ The result was the detailed provisions of article 18 of the 2000 United Nations Convention against Transnational Organized Crime, which were reproduced almost in their entirety in article 46 of the 2003 United Nations Convention against Corruption. Comparable provisions may also be seen in the 1999 International Convention for the Suppression of the Financing of Terrorism.⁶²⁰

(5) The Commission decided that the more detailed provisions were best suited for draft articles on crimes against humanity. Such provisions provide extensive guidance to States, which is especially useful when there exists no mutual legal assistance treaty between the requesting and requested States.⁶²¹ Moreover, as was the case for the detailed provisions on extradition contained in draft article 13, such provisions on mutual legal assistance have proven acceptable to States. For example, as of mid-2019, the 2000 United Nations

⁶¹⁵ See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (United Nations publication, Sales No. E.98.XI.5), p. 185, para. 7.22 (finding that “[t]here are still ... many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter”).

⁶¹⁶ See, for example, Convention against Torture, art. 9; International Convention for the Suppression of Terrorist Bombings, art. 10; International Convention for the Protection of All Persons from Enforced Disappearance, art. 14.

⁶¹⁷ See Commission on Crime Prevention and Criminal Justice, report of the Secretary-General on the question of the elaboration of an International Convention against Organized Transnational Crime (E/CN.15/1997/7/Add.1), p. 15.

⁶¹⁸ *Ibid.* (suggestions of Australia and Austria).

⁶¹⁹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7.

⁶²⁰ The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered among several articles, many of which concern both mutual assistance and extradition. See International Convention for the Suppression of the Financing of Terrorism, art. 7, para. 5, and arts. 12-16. More commonly, mutual legal assistance provisions are aggregated in a single article.

⁶²¹ See United Nations Office on Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (New York, United Nations, 2nd ed., 2017), pp. 221-225.

Convention against Transnational Organized Crime has 190 States parties and the 2003 United Nations Convention against Corruption has 186 States parties. No State party has made a reservation to the language or content of the mutual legal assistance article in either convention. Additionally, such provisions are applied on a regular basis by national law enforcement authorities, and have been explained in numerous guides and other resources, such as those issued by the United Nations Office on Drugs and Crime.⁶²²

(6) Draft article 14 and the draft annex are modelled on article 46 of the 2003 United Nations Convention against Corruption, but with some modifications. As a structural matter, the Commission viewed it as useful to include in the body of the draft articles provisions relevant whether or not the two States concerned had in place a mutual legal assistance treaty, while placing in the draft annex provisions that only apply when there is no such treaty (although, even if there is, application of the draft annex might be deemed useful to facilitate cooperation). Doing so helps to preserve a sense of balance in the draft articles, while grouping together in a single place (the draft annex) provisions automatically applicable only in certain situations. In addition, as explained below, some of the provisions of article 46 have been revised, relocated, or deleted.

(7) Draft article 14, paragraph 1, establishes a general obligation for States parties to “afford one another the widest measure of mutual legal assistance” with respect to offences arising under the present draft articles. The text is verbatim from article 46, paragraph 1, of the 2003 United Nations Convention against Corruption,⁶²³ except for the reference to “offences covered by the present draft articles”. Importantly, States are obliged to afford each other such assistance not just in “investigations” but also in “prosecutions” and “judicial proceedings”. As such, the obligation is intended to ensure that the broad goals of the present draft articles are furthered by comprehensive cooperation among States at all stages of the law enforcement process.

(8) Draft article 14, paragraph 2, addresses such cooperation in the specific context of the liability of legal persons, using a different standard than exists in paragraph 1. Such cooperation is to occur only “to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State”. This standard is a recognition that national legal systems differ considerably in their treatment of legal persons in relation to crimes, differences that also led to the language set forth in draft article 6, paragraph 8. Given those differences, mutual legal assistance in this context must be contingent on the extent to which such cooperation is possible.

(9) The text of draft article 14, paragraph 2, is almost verbatim from article 46, paragraph 2, of the 2003 United Nations Convention against Corruption,⁶²⁴ but for three changes. First,

⁶²² See United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, para. 45.

⁶²³ United Nations Convention against Corruption, art. 46, para. 1 (“States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention”). See also United Nations Convention against Transnational Organized Crime, art. 18, para. 1; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 1.

⁶²⁴ United Nations Convention against Corruption, art. 46, para. 2 (“Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party”). During the negotiations for the 2000 United Nations Convention against Transnational Organized Crime, the issue of the variety of national practice on the question of liability of legal persons, particularly in criminal cases, led several delegations to propose a specific mutual legal assistance provision on legal persons, which was ultimately adopted as paragraph 2 of article 18. During the later negotiation of the 2003 United Nations Convention against Corruption, three proposals were put forward for the provision on mutual legal assistance, one of which failed to include an express provision on mutual legal assistance regarding legal persons. See United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption* (New York, United Nations, 2010), pp. 374–377, footnote 5. By the second negotiating meeting, that proposal was dropped from

the final clause of article 46, paragraph 2, is moved up to the beginning of draft article 14, paragraph 2, so as to make clear at the outset that this paragraph concerns mutual legal assistance in relation to legal persons. Second, the cross-reference in that clause has been adjusted as needed for these draft articles. Third, the words “and other” have been added in “investigations, prosecutions, judicial *and other* proceedings”. This third change was regarded as useful given that, under some national legal systems, other types of proceedings might be relevant with respect to legal persons, such as administrative proceedings.

(10) Draft article 14, paragraph 3, lists types of assistance that may be requested. The phrase “any of the following purposes” means one or more of such purposes. These types of assistance are drafted in broad terms and, in most respects, replicate the types of assistance listed in many multilateral⁶²⁵ and bilateral⁶²⁶ mutual legal assistance treaties. Indeed, such terms are broad enough to encompass the range of assistance that might be relevant for the investigation and prosecution of a crime against humanity, including the seeking of: police and security agency records; court files; citizenship, immigration, birth, marriage, and death records; health records; forensic material; and biometric data. The list is not exhaustive, as it provides in subparagraph (j) a catch-all provision relating to “any other type of assistance that is not contrary to the national law of the requested State”.

(11) Paragraph 3 is modelled on article 46, paragraph 3, of the 2003 United Nations Convention against Corruption. Under that Convention, any existing bilateral mutual legal assistance treaty between States parties that lack the forms of cooperation listed in paragraph 3 are generally considered “as being automatically supplemented by those forms of cooperation”.⁶²⁷ The Commission made some modifications to the text of article 46, paragraph 3, for the purposes of draft article 14, paragraph 3, given that the focus of the present draft articles is on crimes against humanity, rather than on corruption.

(12) In that regard, a new subparagraph (a) was added to highlight mutual legal assistance for the purpose of “identifying and locating alleged offenders and, as appropriate, victims, witnesses or others”. The phrase “as appropriate” recognizes that privacy concerns should be considered with respect to such persons, while the phrase “others” should be understood as including experts or other individuals helpful to the investigation or prosecution of an alleged offender. Subparagraph (b) was also modified to include the possibility of a State providing mutual legal assistance through video conferencing for purposes of obtaining testimony or other evidence from persons. This modification was considered appropriate given the growing use of such testimony and its particular advantages for transnational law enforcement, as is also recognized in paragraph 16 of the draft annex.⁶²⁸ Subparagraph (e), which allows a State to request mutual legal assistance in “examining objects and sites”, was modified to emphasize the ability to collect forensic evidence relating to crimes against

consideration (*ibid.*, p. 378, footnote 7), leading ultimately to the adoption of paragraph 2 of article 46.

⁶²⁵ See, for example, Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; Association of Southeast Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters (Kuala Lumpur, 29 November 2004), United Nations, *Treaty Series*, vol. 2336, No. 41878, p. 271, art. 1, para. 2; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 3.

⁶²⁶ See, for example, United Nations Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990 (as subsequently amended by General Assembly resolution 53/112 of 9 December 1998), annex, art. 1, para. 2; Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters (Moscow, 17 June 1999), United Nations, *Treaty Series*, vol. 2916, No. 50780, art. 2.

⁶²⁷ *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

⁶²⁸ Paragraph 16 permits a State to allow a “hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State”. This paragraph is based on paragraph 18 of article 46 of the 2003 United Nations Convention against Corruption.

humanity, given the importance of such evidence (such as exhumation and examination of grave sites) in investigating fully such crimes.

(13) Subparagraph (g), which allows a State to request assistance in obtaining “originals or certified copies of relevant documents and records”, was modified to delete the illustrative list contained in the 2003 United Nations Convention against Corruption;⁶²⁹ that list was viewed as unduly focused on financial records. While such records may be relevant with respect to crimes against humanity, other types of records (such as death certificates and police reports) are likely to be just as, if not more, relevant. Similarly, two types of assistance listed in the 2003 United Nations Convention against Corruption – at subparagraphs (j) and (k)⁶³⁰ – were not included, as they refer to that Convention’s detailed provisions on asset recovery, which are not included in the present draft articles.

(14) Although the 2003 United Nations Convention against Corruption lists together “[e]xecuting searches and seizures, and freezing”,⁶³¹ the Commission deemed it appropriate to move the word “freezing” to subparagraph (h), which deals with proceeds of the crime, so as to read “identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes”. The words “or other purposes” were added so as to capture purposes that are not evidentiary in nature, such as restitution of property to victims.

(15) Draft article 14, paragraph 4, provides that States “shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy”. This same language is used in article 46, paragraph 8, of the 2003 United Nations Convention against Corruption⁶³² and similar language appears in other multilateral and bilateral treaties on mutual legal assistance.⁶³³ While such a provision may not be commonly needed for the present draft articles, given that the offences at issue are not likely to be financial in nature, a crime against humanity can entail a situation where assets are stolen, and where mutual legal assistance regarding those assets might be valuable, not just for proving the crime but also for the recovery and return of those assets to the victims. While the reference is to “bank” secrecy, the provision is intended to cover all financial institutions whether or not technically regarded as a bank.⁶³⁴

(16) Draft article 14, paragraph 5, provides that “States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article”. While this provision, which is based on article 46, paragraph 30, of the 2003 United Nations Convention against Corruption,⁶³⁵ does not obligate States to take any particular action in this

⁶²⁹ United Nations Convention against Corruption, art. 46, para. 3 (“(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records”).

⁶³⁰ *Ibid.*, art. 46, para. 3 (“(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention”).

⁶³¹ *Ibid.*, art. 46, para. 3 (c).

⁶³² See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 171, paras. 611–12; *State of Implementation of the United Nations Convention against Corruption*, pp. 228–229.

⁶³³ See, for example, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 5; United Nations Convention against Transnational Organized Crime, art. 18, para. 8; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 2; ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, art. 3, para. 5.

⁶³⁴ The Model Treaty on Mutual Assistance in Criminal Matters refers to not refusing assistance on the ground of secrecy of “banks and similar financial institutions”. Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 2. Most treaties, however, refer solely to “bank secrecy”, which is interpreted as covering other financial institutions as well. See, for example, *State of Implementation of the United Nations Convention against Corruption*, pp. 183–184.

⁶³⁵ United Nations Convention against Corruption, art. 46, para. 30. See United Nations Convention against Transnational Organized Crime, art. 18, para. 30; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 20.

regard, it encourages States to consider concluding additional multilateral or bilateral treaties to improve the implementation of article 14.

(17) Draft article 14, paragraph 6, acknowledges that a State may transmit information to another State, even in the absence of a formal request, if it is believed that doing so could assist the latter in undertaking or successfully concluding investigations, prosecutions and judicial proceedings, or might lead to a formal request by the latter State. Though innovative when first used in the 2000 United Nations Convention against Transnational Organized Crime,⁶³⁶ this provision was replicated in article 46, paragraph 4, of the 2003 United Nations Convention against Corruption. The provision is stated in discretionary terms, providing that a State “may” transmit information, and is further conditioned by the clause “without prejudice to national law”. In practice, States frequently engage in such informal exchanges of information.⁶³⁷

(18) In both the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption, there is a further provision providing more detail as to the treatment of transmitted information.⁶³⁸ While such details may be useful in some circumstances, for the purposes of the present draft articles the Commission deemed draft article 14, paragraph 6, to be sufficient in providing a basis for such cooperation.

(19) Draft article 14, paragraph 7, addresses the relationship of draft article 14 to any mutual legal assistance treaty existing between the requesting and requested States. Paragraph 7 makes clear that the “provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance between the States in question”. In other words, the obligations contained in any other mutual legal assistance treaty in place between the two States continue to apply,⁶³⁹ notwithstanding the existence of draft article 14. At the same time, if particular paragraphs of draft article 14 require the provision of a higher level of assistance than is provided for under the other mutual legal assistance treaty, then the obligations set forth in those paragraphs shall be applied as well.⁶⁴⁰ This provision draws upon the language of earlier treaties addressing crimes.⁶⁴¹

⁶³⁶ United Nations Convention against Transnational Organized Crime, art. 18, para. 4.

⁶³⁷ *State of Implementation of the United Nations Convention against Corruption*, p. 227-228.

⁶³⁸ United Nations Convention against Transnational Organized Crime, art. 18, para. 5; United Nations Convention against Corruption, art. 46, para. 5. During the adoption of the United Nations Convention against Transnational Organized Crime, an official interpretative note indicated that: “(a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State”. See *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 37.

⁶³⁹ Para. (1) of the commentary to art. 10, *Yearbook...1972*, vol. II, p. 321 (asserting that, with respect to a similar provision in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons: “Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article”).

⁶⁴⁰ See, for example, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 184, para. 7.20 (regarding article 7, paragraph 6: “[W]here the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual legal assistance treaty, the provisions of the Convention will prevail.”).

⁶⁴¹ United Nations Convention against Corruption, art. 46, para. 6. (“The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance”). See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 6; United Nations Convention against Transnational Organized Crime, art. 18, para. 6.

(20) Draft article 14, paragraph 8, addresses the application of the draft annex, which is an integral part of the present draft articles. Paragraph 8, which is based on article 46, paragraph 7, of the 2003 United Nations Convention against Corruption,⁶⁴² provides that the draft annex applies when there exists no mutual legal assistance treaty between the requesting and requested State. As such, the draft annex does not apply when there exists a mutual legal assistance treaty between the requesting and requested State. Even so, paragraph 8 notes that the two States could agree to apply the provisions of the draft annex if they wish to do so, and are so encouraged if doing so facilitates cooperation.

(21) Draft article 14, paragraph 9, provides that “States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity”. A precedent for addressing cooperation between States and the United Nations in situations where serious crimes are being committed can be found in Additional Protocol I to the 1949 Geneva Conventions.⁶⁴³ While paragraph 9 is not concerned with the “horizontal” mutual legal assistance between States that is the primary focus of draft article 14, such cooperation regarding punishment is important and would complement the cooperation between States and international organizations addressed in draft article 4 in the context of prevention. It has been noted that some States require statutory authority or a formal framework in order to cooperate with such international mechanisms.⁶⁴⁴ Paragraph 9 encourages States to consider concluding agreements or arrangements in order to allow for such cooperation. Like paragraph 5 of this draft article, however, paragraph 9 does not obligate States to take any particular action in this regard.

(22) Paragraph 9 is not directed at the cooperation of States with international criminal courts or tribunals, which have a mandate to prosecute alleged offenders. Such cooperation remains governed by the constituent instruments of, and the legal relationship of any given State to, those courts or tribunals.

(23) As was the case with respect to draft article 13 on extradition, the Commission decided that there was no need to include in draft article 14 a dual criminality requirement, such as appears in article 46, paragraph 9, of the 2003 United Nations Convention against Corruption.⁶⁴⁵ As previously noted, the present draft articles on crimes against humanity define crimes against humanity in draft article 2 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the “offences” of “crimes against humanity” exist under national criminal laws of each State. As such, dual criminality should automatically be satisfied in the case of a request for mutual legal assistance under the present draft articles.

Article 15

Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

⁶⁴² See United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 7; United Nations Convention against Transnational Organized Crime, art.18, para. 7. See also *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 185, para. 7.23; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 171, para. 608.

⁶⁴³ Additional Protocol I, art. 89 (“In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”).

⁶⁴⁴ See Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (A/73/295), para. 39.

⁶⁴⁵ United Nations Convention against Corruption, art. 46, para. 9. See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 172, para. 616 (“States parties still have the option to refuse such requests on the basis of lack of dual criminality. At the same time, to the extent this is consistent with the basic concepts of their legal system, States parties are required to render assistance involving non-coercive action”).

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.
3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Commentary

(1) Draft article 15 addresses the settlement of disputes concerning the interpretation or application of the present draft articles. There is currently no obligation upon States to resolve disputes arising between them specifically in relation to the prevention and punishment of crimes against humanity. To the extent that such disputes are addressed, it occurs in the context of an obligation relating to dispute settlement that is not specific to such crimes.⁶⁴⁶ Crimes against humanity also have been mentioned in the European Court of Human Rights and the Inter-American Court of Human Rights when evaluating issues such as fair trial rights,⁶⁴⁷ *ne bis in idem*,⁶⁴⁸ *nullum crimen, nulla poena sine praevia lege poenali*⁶⁴⁹ and the legality of amnesty provisions.⁶⁵⁰

(2) Draft article 15, paragraph 1, provides that “States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations”. This text is modelled on article 66, paragraph 1, of the 2003 United Nations Convention against Corruption.⁶⁵¹ The *travaux préparatoires* relating to the comparable provision of the 2000 United Nations Convention against Transnational Organized Crime indicate that such a provision “is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies”.⁶⁵²

(3) Draft article 15, paragraph 2, provides that a dispute concerning the interpretation or application of the present draft articles that “is not settled through negotiation” shall be

⁶⁴⁶ For example, crimes against humanity arose before the International Court of Justice in the context of counter-claims filed by Italy in the case brought by Germany under the 1957 European Convention for the Peaceful Settlement of Disputes. *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 310, at pp. 311–312, para. 3. In that instance, however, the Court found that, since the counterclaim by Italy related to facts and situations existing prior to the entry into force of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, they fell outside the scope of the Court’s jurisdiction. *Ibid.*, pp. 320–321, para. 30.

⁶⁴⁷ *Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-II (concurring opinion of Judge Loucaides); and *K.-H. W. v. Germany*, Application No. 37201/97, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-II (extracts) (concurring opinion of Judge Loucaides).

⁶⁴⁸ *Almonacid-Arellano*, Judgment, 26 September 2006 (see footnote 24 above), para. 154.

⁶⁴⁹ *Kolk and Kislyiy v. Estonia*, Application Nos. 23052/04 and 24018/04, Decision on admissibility of 17 January 2006, Fourth Section, European Court of Human Rights, ECHR 2006-1.

⁶⁵⁰ *Barrios Altos v. Peru*, Judgment of 14 March 2001 (see footnote 479 above) (concurring opinion of Judge Sergio García-Ramírez), para. 13; *Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Inter-American Court of Human Rights, Series C, No. 221, paras. 198 and 210; and *Marguš v. Croatia* (see footnote 479 above), paras. 130–136.

⁶⁵¹ See also United Nations Convention against Transnational Organized Crime, art. 35, para. 1; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 1.

⁶⁵² Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official Records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime, Tenth session, Vienna, 17–28 July 2000 (A/AC.254/33)*, para. 34.

submitted to compulsory dispute settlement. Although there is no prescribed means or period of time for pursuing such negotiation, a State should make a genuine attempt at negotiation⁶⁵³ and not simply protest the conduct of the other State.⁶⁵⁴ If negotiation fails, most treaties addressing crimes within national law oblige an applicant State to pursue arbitration prior to submission of the dispute to the International Court of Justice.⁶⁵⁵ The Commission, however, deemed it appropriate in the context of the present draft articles, which address crimes against humanity, to provide for immediate resort to the International Court of Justice, unless the two States agree to submit the matter to arbitration. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide likewise provides for immediate resort to the International Court of Justice for dispute settlement.⁶⁵⁶

(4) Draft article 15, paragraph 3, provides that a “State may declare that it does not consider itself bound by paragraph 2”, in which case “other States shall not be bound by paragraph 2” with respect to that State. Most treaties that address crimes under national law and that provide for inter-State dispute settlement allow a State party to opt out of compulsory dispute settlement.⁶⁵⁷ For example, article 66, paragraph 3, of the 2003 United Nations Convention against Corruption provides that “[e]ach State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be

⁶⁵³ For analysis of similar provisions, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 132, para. 157 (finding that there must be, “at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute”); *ibid.*, p. 133, para. 159 (“the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”); *Questions relating to the Obligation to Prosecute or Extradite* (footnote 23 above), at pp. 445–446, para. 57 (“The requirement . . . could not be understood as referring to a theoretical impossibility of reaching a settlement.”); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 345 (the requirement implies that “no reasonable probability exists that further negotiations would lead to a settlement”).

⁶⁵⁴ See, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 40–41, para. 91.

⁶⁵⁵ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 12, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1; International Convention against the Taking of Hostages, art. 16, para. 1; Convention against Torture, art. 30, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 1; United Nations Convention against Transnational Organized Crime, art. 35, para. 2; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 2; United Nations Convention against Corruption, art. 66, para. 2. Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination requires the dispute to be submitted first to the Committee on the Elimination of Racial Discrimination, which in turn may place the matter before an ad hoc conciliation commission. International Convention on the Elimination of All Forms of Racial Discrimination, arts. 11–13 and 22.

⁶⁵⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. IX. See also OAU Convention on the Prevention and Combating of Terrorism, art. 22, para. 2.

⁶⁵⁷ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 12, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 2; International Convention against the Taking of Hostages, art. 16, para. 2; Convention against Torture, art. 30, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 2; United Nations Convention against Transnational Organized Crime, art. 35, para. 3; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 2.

bound by paragraph 2 of this article with respect to any State Party that has made such a reservation”. As previously noted, as of mid-2019 there are 186 States parties to the 2003 United Nations Convention against Corruption; of those, more than 40 States parties have communicated that they do not consider themselves bound by paragraph 2 of article 66.⁶⁵⁸

(5) Treaties containing such a provision typically specify that the declaration may be made no later than at the time of the expression by the State of consent to be bound by the treaty. In accordance with the Commission’s practice, and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included in the present draft articles language characteristic of treaties (for example, that such a declaration shall be made by a State party no later than at the time of the State’s ratification, acceptance, approval, or accession to the convention).

(6) Draft article 15, paragraph 4, provides that “[a]ny State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration”. Recent treaties that address crimes under national law and that provide for inter-State dispute settlement also contain such a provision.⁶⁵⁹ For example, article 66, paragraph 4, of the 2003 United Nations Convention against Corruption provides: “Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations”.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

⁶⁵⁸ The European Union also filed a declaration to article 66, paragraph 2, stating: “With respect to Article 66, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 66, paragraph 2, of the Convention, in disputes involving the Community, only dispute settlement by way of arbitration will be available”.

⁶⁵⁹ See, for example, United Nations Convention against Transnational Organized Crime, art. 35, para. 4; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 3.

4. A request for mutual legal assistance shall contain:
 - (a) the identity of the authority making the request;
 - (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
 - (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
 - (d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;
 - (e) where possible, the identity, location and nationality of any person concerned; and
 - (f) the purpose for which the evidence, information or action is sought.
5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.
7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.
8. Mutual legal assistance may be refused:
 - (a) if the request is not made in conformity with the provisions of this draft annex;
 - (b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
 - (c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
 - (d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.
9. Reasons shall be given for any refusal of mutual legal assistance.
10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.
12. The requested State:
 - (a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

- (a) the person freely gives his or her informed consent; and
- (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

- (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Commentary

(1) As indicated in draft article 14, paragraph 8, both draft article 14 and the draft annex apply to the requesting and requested States if there exists no mutual legal assistance treaty between them. If there does exist a mutual legal assistance treaty between them, then the draft annex additionally applies only if the requesting and requested States choose to apply it so as to facilitate cooperation.

(2) The draft annex is an integral part of the draft articles. Consequently, paragraph 1 of the draft annex provides that the draft annex “applies in accordance with draft article 14, paragraph 8”.

Designation of a central authority

(3) Paragraph 2 of the draft annex requires the State to designate a central authority responsible for handling incoming and outgoing requests for assistance and to notify the Secretary-General of the United Nations of the chosen central authority. In designating a “central authority”, the focus is not on the geographical location of the authority, but rather its centralized institutional role with respect to the State or a region thereof.⁶⁶⁰ This paragraph is based on article 46, paragraph 13, of the 2003 United Nations Convention against Corruption.⁶⁶¹ As of 2017, all but eight States parties to that convention had designated a central authority.⁶⁶²

⁶⁶⁰ See *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 40.

⁶⁶¹ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 8; United Nations Convention against Transnational Organized Crime, art. 18, para. 13.

⁶⁶² *State of Implementation of the United Nations Convention against Corruption*, p. 231.

Procedures for making a request

(4) Paragraphs 3 to 5 of the draft annex address the procedures by which a State makes a request to another State for mutual legal assistance.

(5) Paragraph 3 of the draft annex stipulates that requests must be written and made in a language acceptable to the requested State. Further, it obligates each State to notify the Secretary-General of the United Nations about the language or languages acceptable to that State. This paragraph is based on article 46, paragraph 14, of the 2003 United Nations Convention against Corruption.⁶⁶³

(6) Paragraph 4 of the draft annex indicates what must be included in any request for mutual legal assistance, such as the identity of the authority making the request, the purpose for which the evidence, information or action is sought, and a statement of the relevant facts. While this provision lays out the minimum requirements for a request for mutual legal assistance, it should not be read to preclude the inclusion of further information if it will expedite or clarify the request. This paragraph is based on article 46, paragraph 15, of the 2003 United Nations Convention against Corruption.⁶⁶⁴

(7) Paragraph 5 of the draft annex allows the requested State to request supplemental information when it is either necessary to carry out the request under its national law, or when additional information would prove helpful in doing so. This paragraph is intended to encompass a broad array of situations, such as where the national law of the requested State requires more information for the request to be approved and executed or where the requested State requires new information or guidance from the requesting State on how to proceed with a specific investigation.⁶⁶⁵ This paragraph is based on article 46, paragraph 16, of the 2003 United Nations Convention against Corruption.⁶⁶⁶

Response to the request by the requested State

(8) Paragraphs 6 to 12 of the draft annex address the response by the requested State to the request for mutual legal assistance.

(9) Paragraph 6 of the draft annex provides that the request “shall be executed in accordance with the national law of the requested State” and, to the extent not contrary to such law and where possible, “in accordance with the procedures specified in the request”. This provision is narrowly tailored to address only the process by which the State executes the request; it does not provide grounds for refusing to respond to a request, which are addressed in paragraph 8 of the draft annex. This paragraph is based on article 46, paragraph 17, of the 2003 United Nations Convention against Corruption.⁶⁶⁷

(10) Paragraph 7 of the draft annex provides that the request shall be addressed as soon as possible, taking into account any deadlines suggested by the requesting State, and that the requested State shall keep the requesting State reasonably informed of its progress in handling the request. Read in conjunction with paragraph 6, paragraph 7 obligates the requested State to execute a request for mutual legal assistance in an efficient and timely

⁶⁶³ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 9; United Nations Convention against Transnational Organized Crime, art. 18, para. 14. See also *State of Implementation of the United Nations Convention against Corruption*, p. 234-235.

⁶⁶⁴ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 10; United Nations Convention against Transnational Organized Crime, art. 18, para. 15; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 189-190, para. 7.30-7.33.

⁶⁶⁵ See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 189-190, para. 7.34.

⁶⁶⁶ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 11; United Nations Convention against Transnational Organized Crime, art. 18, para. 16.

⁶⁶⁷ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 12; United Nations Convention against Transnational Organized Crime, art. 18, para. 17.

manner. At the same time, paragraph 7 is to be read in light of the permissibility of a postponement for the reason set forth in paragraph 10. Paragraph 7 is based on article 46, paragraph 24, of the 2003 United Nations Convention against Corruption.⁶⁶⁸

(11) Paragraph 8 of the draft annex indicates four circumstances under which a request for mutual legal assistance may be refused, and is based on article 46, paragraph 21, of the 2003 United Nations Convention against Corruption.⁶⁶⁹ Subparagraph (a) allows a requested State to refuse mutual legal assistance when the request does not conform to the requirements of the draft annex. Subparagraph (b) allows a requested State to refuse to provide mutual legal assistance “if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests”. Subparagraph (c) allows mutual legal assistance to be refused “if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence” if it were being prosecuted in the requested State. Subparagraph (d) allows a requested State to refuse mutual legal assistance when granting the request would be contrary to the requested State’s legal system. The Commission considered whether to add an additional ground for refusal based on a principle of non-discrimination, but decided that the existing grounds (especially (b) and (d)) were sufficiently broad to embrace such a ground. Among other things, it was noted that a proposal to add such an additional ground was contemplated during the drafting of the 2000 United Nations Convention against Transnational Organized Crime, but was not included because it was viewed as already encompassed in subparagraph (b).⁶⁷⁰

(12) Paragraph 9 of the draft annex provides that “[r]easons shall be given for any refusal of mutual legal assistance”. Such a requirement ensures the requesting State understands why the request was rejected, thereby allowing better understanding as to constraints that exist not just for that particular request but also for future requests. This paragraph is based on article 46, paragraph 23, of the 2003 United Nations Convention against Corruption.⁶⁷¹

(13) Paragraph 10 of the draft annex provides that mutual legal assistance “may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding”. This provision allows the requested State some flexibility to delay the provision of information if necessary to avoid prejudicing an ongoing investigation or proceeding of its own. This paragraph is based on article 46, paragraph 25, of the 2003 United Nations Convention against Corruption.⁶⁷²

(14) Paragraph 11 of the draft annex obliges the requested State, before refusing a request, to “consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions”. In some cases, the reason for refusal may be a purely technical matter which can be easily remedied by the requesting

⁶⁶⁸ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 24.

⁶⁶⁹ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 15; United Nations Convention against Transnational Organized Crime, art. 18, para. 21; European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 1. For commentary, see Council of Europe, Explanatory report to the European Convention on Mutual Assistance in Criminal Matters, document 20.IV.1959, pp. 4-5; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 194-196, paras. 7.46-7. See also *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 42.

⁶⁷⁰ See *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 42.

⁶⁷¹ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 16; United Nations Convention against Transnational Organized Crime, art. 18, para. 23; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 5.

⁶⁷² See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17; United Nations Convention against Transnational Organized Crime, art. 18, para. 25; United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 3.

State, in which case consultations will help clarify the matter and allow the request to proceed. A formulation of this paragraph in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances indicated only that consultations should take place regarding possible postponement of requests for mutual legal assistance.⁶⁷³ The 2000 United Nations Convention against Transnational Organized Crime, however, expanded the application of this provision to cover refusals of assistance as well.⁶⁷⁴ This approach was replicated in article 46, paragraph 26, of the 2003 United Nations Convention against Corruption,⁶⁷⁵ upon which paragraph 11 is based.

(15) Paragraph 12 of the draft annex addresses the provision of government records, documents and information from the requested State to the requesting State, indicating that such information that is publicly available “shall” be provided, while information that is not publicly available “may” be provided. Such an approach encourages but does not require a requested State to release confidential information. This paragraph is based on article 46, paragraph 29, of the 2003 United Nations Convention against Corruption.⁶⁷⁶

Use of information by the requesting State

(16) Paragraphs 13 and 14 of the draft annex address the use of information received by the requesting State from the requested State.

(17) Paragraph 13 of the draft annex precludes the requesting State from transmitting the information to a third party, such as another State, and precludes it from using the information “for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State”. As noted with respect to paragraph 4 of the draft annex, the requesting State must indicate in its request “the purpose for which the evidence, information or action is sought”. At the same time, when the information received by the requesting State is exculpatory to an accused person, the requesting State may disclose the information to that person (as it may be obliged to do under its national law), after providing advance notice to the requested State when possible. This paragraph is based on article 46, paragraph 19, of the 2003 United Nations Convention against Corruption.⁶⁷⁷

(18) Paragraph 14 of the draft annex allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent necessary to execute the request. This paragraph is based on article 46, paragraph 20, of the 2003 United Nations Convention against Corruption.⁶⁷⁸

Testimony of person from the requested State

(19) Paragraphs 15 and 16 of the draft annex address the procedures for a requesting State to secure testimony from a person present in the requested State.

(20) Paragraph 15 of the draft annex is essentially a “safe conduct” provision, which gives a person traveling from the requested State to the requesting State protection from prosecution, detention, punishment or other restriction of liberty by the requesting State during the person’s testimony, with respect to acts that occurred prior to the person’s

⁶⁷³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17.

⁶⁷⁴ United Nations Convention against Transnational Organized Crime, art. 18, para. 26.

⁶⁷⁵ United Nations Convention against Corruption, art. 46, para. 26 (“Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions”).

⁶⁷⁶ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 29.

⁶⁷⁷ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 13; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 19. For commentary, see *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 193, para. 7.43.

⁶⁷⁸ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 20; Model Treaty on Mutual Assistance in Criminal Matters, art. 9.

departure from the requested State. As set forth in paragraph 15, such protection does not extend to acts committed after the person's departure nor does it continue indefinitely after the testimony is given. This paragraph is based on article 46, paragraph 27, of the 2003 United Nations Convention against Corruption.⁶⁷⁹

(21) Paragraph 16 of the draft annex addresses testimony by witnesses through video conferencing, a cost-effective technology that is becoming increasingly common. While testimony by video conference is not mandatory, if it is “not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State”, then the requested State may permit the hearing to take place by video conference. This will only occur, however, when “possible and consistent with fundamental principles of national law”, a clause which refers to the laws of both the requesting and the requested States. This paragraph is based on article 46, paragraph 18, of the 2003 United Nations Convention against Corruption.⁶⁸⁰ The 2017 implementation report for the 2003 United Nations Convention against Corruption indicates that the use of this provision is widespread:

[T]he hearing of witnesses and experts by videoconference is generally recognized as a useful tool in saving time and costs in the context of mutual legal assistance in criminal matters, as well as in overcoming practical difficulties, such as when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Videoconferencing is permissible under the domestic law of the majority of States parties ...⁶⁸¹

Transfer for testimony of person detained in the requested State

(22) Paragraphs 17 to 19 of the draft annex address the situation where a requesting State seeks the transfer from the requested State of a person who is being detained or serving a sentence in the latter.

(23) Paragraph 17 of the draft annex allows for the transfer of a person who is in the custody of the requested State to the requesting State where the person to be transferred “freely gives his or her informed consent” and the “competent authorities” of the requesting State and requested State agree to the transfer. The provision should be understood as covering persons who are in custody for criminal proceedings or serving a sentence, who are performing mandatory community service, or who are confined to particular areas under a probationary system. Although testimony may be the principal reason for such transfers, the provision also broadly covers transfer for any type of assistance sought from such a person for “investigations, prosecutions or judicial proceedings”. This paragraph is based on article 46, paragraph 10, of the 2003 United Nations Convention against Corruption.⁶⁸²

(24) Paragraph 18 of the draft annex describes the obligation of the requesting State to keep the person transferred in custody, unless otherwise agreed, and to return the transferee to the requested State in accordance with the transfer agreement, without the requested State needing to initiate extradition proceedings. This paragraph also addresses the obligation of the requested State to give credit to the transferee for the time which he or she spends in

⁶⁷⁹ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 27; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 18; United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 15; European Convention on Mutual Assistance in Criminal Matters, art. 12; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 197–198, para. 7.55.

⁶⁸⁰ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 18; *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 41; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 174–175, para. 629.

⁶⁸¹ *State of Implementation of the United Nations Convention against Corruption*, p. 236.

⁶⁸² See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 1; United Nations Convention against Transnational Organized Crime, art. 18, para. 10; *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 39.

custody in the requesting State. This paragraph is based on article 46, paragraph 11, of the 2003 United Nations Convention against Corruption.⁶⁸³

(25) Paragraph 19 of the draft annex is similar to the “safe conduct” provision contained in paragraph 15, whereby the transferred person is protected from prosecution, detention, punishment or other restriction to liberty by the requesting State during the course of the person’s presence in the requesting State, with respect to acts that occurred prior to the person’s departure from the requested State. Paragraph 19, however, allows the requested State to agree that the requesting State may undertake such actions. Further, this provision must be read in conjunction with paragraph 18, which obliges the requesting State to keep the transferee in custody, unless otherwise agreed, based upon his or her detention or sentence in the requested State. This paragraph is based on article 46, paragraph 12, of the 2003 United Nations Convention against Corruption.⁶⁸⁴

Costs

(26) Paragraph 20 of the draft annex addresses the issue of costs, stating, *inter alia*, that “[t]he ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned”. The second sentence of the provision allows for States to consult with each other where the expenses to fulfil the request will be “of a substantial or extraordinary nature”. This paragraph is based on article 46, paragraph 28, of the 2003 United Nations Convention against Corruption.⁶⁸⁵

(27) Various interpretive notes or commentary with respect to comparable provisions in other treaties provide guidance as to the meaning of this provision. For example, the commentary to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides:

This rule makes for simplicity, avoiding the keeping of complex accounts, and rests on the notion that over a period of time there will be a rough balance between States that are sometimes the requesting and sometimes the requested party. In practice, however, that balance is not always maintained, as the flow of requests between particular pairs of parties may prove to be largely in one direction. For this reason, the concluding words of the first sentence enable the parties to agree to a departure from the general rule even in respect of ordinary costs.⁶⁸⁶

(28) A footnote to the United Nations Model Treaty on Mutual Assistance in Criminal Matters indicates that:

For example, the requested State would meet the ordinary costs of fulfilling the request for assistance except that the requested State would bear (a) the exceptional or extraordinary expenses required to fulfil the request, where required by the requested State and subject to previous consultations; (b) the expenses associated with conveying any person to or from the territory of the requested State, and any fees, allowances or expenses payable to that person while in the requesting State ... ; (c) the expenses associated with conveying custodial or escorting officers; and (d) the expenses involved in obtaining reports of experts.⁶⁸⁷

(29) An interpretative note to the 2000 United Nations Convention against Transnational Organized Crime states:

⁶⁸³ See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 11.

⁶⁸⁴ See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 12.

⁶⁸⁵ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 19; United Nations Convention against Transnational Organized Crime, art. 18, para. 28; United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 20.

⁶⁸⁶ *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 198, para. 7.57.

⁶⁸⁷ United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 20, footnote 27.

The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests [regarding the transfer of persons or video conferencing] would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.⁶⁸⁸

(30) Finally, according to the *travaux préparatoires* of the 2003 United Nations Convention against Corruption:

Further, the *travaux préparatoires* will also indicate the understanding that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.⁶⁸⁹

⁶⁸⁸ *Interpretative notes for the Official Records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1)*, para. 43.

⁶⁸⁹ *Interpretative notes for the Official Records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption (A/58/422/Add.1)*, para. 44.

Chapter V

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

A. Introduction

46. At its sixty-seventh session (2015), the Commission decided to include the topic “*Jus cogens*” in its programme of work and appointed Mr. Dire Tladi as Special Rapporteur for the topic.⁶⁹⁰ The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

47. The Special Rapporteur submitted three reports from 2016 to 2018, which the Commission considered at its sixty-eighth to seventieth sessions (2016–2018),⁶⁹¹ respectively. Following the debates on those reports, the Commission decided to refer the draft conclusions contained in those reports to the Drafting Committee. The Commission heard interim reports from the Chairpersons of the Drafting Committee on peremptory norms of general international law (*jus cogens*) containing the draft conclusions provisionally adopted by the Drafting Committee at the sixty-eighth to seventieth sessions, respectively.

48. At its sixty-ninth session (2017), following a proposal by the Special Rapporteur in his second report,⁶⁹² the Commission decided to change the title of the topic from “*Jus cogens*” to “Peremptory norms of general international law (*jus cogens*)”.⁶⁹³

B. Consideration of the topic at the present session

49. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/727). The fourth report discussed the previous consideration of the topic in the Commission and the Sixth Committee of the General Assembly. It also addressed the questions of regional *jus cogens* and the inclusion of an illustrative list of peremptory norms of general international law (*jus cogens*) in the draft conclusions. On the basis of his analysis, the Special Rapporteur proposed one draft conclusion containing a non-exhaustive list of peremptory norms of general international law (*jus cogens*).

50. The Commission considered the fourth report at its 3459th to 3463rd, and 3465th meetings, from 8 to 10 May, and from 14 to 16 May 2019.

51. At its 3465th meeting, on 16 May 2019, the Commission referred draft conclusion 24, as contained in the Special Rapporteur’s fourth report, to the Drafting Committee on the understanding that the list contained in the draft conclusion would be moved to an annex and that it would be limited to those peremptory norms of general international law (*jus cogens*) that the Commission had previously referred to.

52. The Commission considered the report of the Drafting Committee (A/CN.4/L.936) at its 3472nd meeting, held on 31 May 2019, and adopted the draft conclusions on peremptory norms of general international law (*jus cogens*) on first reading (see section C.1 below).

53. At its 3499th to 3504th meetings, from 5 to 7 August 2019, the Commission adopted the commentaries to the aforementioned draft conclusions (see section C.2 below).

54. At its 3504th meeting, on 7 August 2019, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (see section C below),

⁶⁹⁰ At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10)*, para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, para. 23).

⁶⁹¹ A/CN.4/693 (first report), A/CN.4/706 (second report) and A/CN.4/714 and Corr.1 (third report).

⁶⁹² A/CN.4/706, para. 90.

⁶⁹³ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 146).

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 2020.

55. At its 3504th meeting, on 7 August 2019, the Commission further expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Dire Tladi, which had enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*).

C. Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on first reading

1. Text of the draft conclusions

56. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

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

Part One

Introduction

Conclusion 1

Scope

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

Conclusion 2 Definition of a peremptory norm of general international law (*jus cogens*)

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

Conclusion 3

General nature of peremptory norms of general international law (*jus cogens*)

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

Part Two

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

Conclusion 4

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

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

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

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

Conclusion 5

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

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

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

Conclusion 6

Acceptance and recognition

1. The requirement of “acceptance and recognition” as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law.

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

Conclusion 7

International community of States as a whole

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

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

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

Conclusion 8

Evidence of acceptance and recognition

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

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

Conclusion 9

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

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).

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

Part Three

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

Conclusion 10

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

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

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

Conclusion 11

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

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

2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

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

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

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

Conclusion 12

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

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

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

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

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

Conclusion 13

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

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

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

Conclusion 14

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

1. A rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general

international law (*jus cogens*) by a subsequent norm of general international law having the same character.

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

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

Conclusion 15

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

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

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

Conclusion 16

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

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

Conclusion 17

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

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

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

Conclusion 18

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

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

Conclusion 19

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

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

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

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

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

Conclusion 20

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

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

Conclusion 21

Procedural requirements

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

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

3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.

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

Part Four

General provisions

Conclusion 22

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

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

Conclusion 23

Non-exhaustive list

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

Annex

- (a) The prohibition of aggression;
- (b) The prohibition of genocide;

- (c) The prohibition of crimes against humanity;
- (d) The basic rules of international humanitarian law;
- (e) The prohibition of racial discrimination and apartheid;
- (f) The prohibition of slavery;
- (g) The prohibition of torture;
- (h) The right of self-determination.

2. Text of the draft conclusions on peremptory norms of general international law (*jus cogens*) and commentaries thereto

57. The text of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission, on first reading, together with commentaries thereto, is reproduced below.

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

Part One

Introduction

Conclusion 1

Scope

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

Commentary

- (1) As is always the case with the Commission's outputs, the draft conclusions are to be read together with the commentaries.
- (2) These draft conclusions concern peremptory norms of general international law (*jus cogens*), which have increasingly been referred to by international and regional courts, national courts, States and other actors. These draft conclusions are aimed at providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences. Given the importance and potentially far-reaching implications of peremptory norms, it is essential that the identification of such norms and their legal consequences be done systematically and in accordance with a generally accepted methodology.
- (3) Draft conclusion 1 is introductory in nature and sets out the scope of the present draft conclusions. It provides in simple terms that the present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*). The draft conclusions, dealing with identification and legal consequences, are primarily concerned with methodology. They do not attempt to address the content of individual peremptory norms of general international law (*jus cogens*). It should also be noted that the commentaries will refer to different materials to illustrate methodological approaches in practice. The materials referred to, as examples of practice, including views of States, serve to illustrate the methodology for the identification and consequences of peremptory norms of general international law (*jus cogens*). They do not imply the agreement with, or endorsement of, the views expressed therein by the Commission.
- (4) The draft conclusions are concerned primarily with the method for establishing whether a norm of general international law has the added quality of having a peremptory character (that is, being accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character). The draft conclusions are thus not concerned with the determination of the content of the peremptory norms themselves. The process of identifying whether a norm of international law is peremptory or not requires the application of the criteria developed in these draft conclusions.

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

(6) The terms “*jus cogens*”, “peremptory norms” and “peremptory norms of general international law” are sometimes used interchangeably in State practice, international jurisprudence and scholarly writings.⁶⁹⁴ The Commission settled on the phrase “peremptory norms of general international law (*jus cogens*)” because it is clearer and is the phrase used in the 1969 Vienna Convention on the Law of Treaties (“1969 Vienna Convention”).⁶⁹⁵

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

(8) The word “norm” is sometimes understood to have a broader meaning than other related words such as “rules” and “principles” and to encompass both. It is, however, to be noted that in some cases, the words “rules”, “principles” and “norms” can be used interchangeably. The Commission, in its 1966 draft articles on the law of treaties, used the word “norm” in draft article 50 which became article 53 of the 1969 Vienna Convention. However, in the commentaries, the Commission used the word “rules”.⁶⁹⁶ To be consistent with that Convention, which uses the word “norm” in both its articles 53 and 64, the word “norm” is retained.

Conclusion 2

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

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

Commentary

(1) Draft conclusion 2 provides a definition of peremptory norms of general international law (*jus cogens*). It is based upon article 53 of the 1969 Vienna Convention with modifications to fit the context of the draft conclusions. First, only the second sentence of article 53 of the 1969 Vienna Convention is reproduced. The first sentence, which concerns the invalidity of treaties, does not form part of the definition. It is rather a legal consequence of peremptory norms of general international law (*jus cogens*), which is addressed in draft conclusion 10. Second, the phrase “[f]or the purposes of the present Convention” is omitted from the definition. As will be demonstrated below, the definition in article 53, though initially used for the purposes of the 1969 Vienna Convention, has come to be accepted as a general definition which applies beyond the law of treaties. Finally, in keeping with the general approach in this topic, the Commission has decided to insert the phrase “*jus cogens*” in parentheses after “peremptory norm of general international law”.

⁶⁹⁴ For a discussion on nomenclature, see D. Costelloe, *Legal Consequences of Peremptory Norms in International Law*, Cambridge University Press, 2017, at pp. 11 *et seq.*

⁶⁹⁵ See, for example, article 53 of the 1969 Vienna Convention.

⁶⁹⁶ See draft article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, p. 183, where the word “norm” is used. The commentaries, however, refer to “general rule[s] of international law ... having the character of *jus cogens*” and “rules of *jus cogens*” (*ibid.*, p. 248, paras. (2)–(3) of the commentary to draft article 50).

(2) This formulation was chosen because it is the most widely accepted definition in the practice of States and in the decisions of international courts and tribunals. It is also commonly used in scholarly writings. States have generally supported the idea of proceeding on the basis of 1969 Vienna Convention.⁶⁹⁷ Decisions of national courts have generally also referred to article 53 when defining peremptory norms of general international law (*jus cogens*).⁶⁹⁸ Similarly, international courts and tribunals have used article 53 of the 1969 Vienna Convention as a basis when addressing peremptory norms of general international law (*jus cogens*).⁶⁹⁹ Article 53 of the 1969 Vienna Convention is also accepted as the general definition of peremptory norms of general international law (*jus cogens*) in scholarly writings.⁷⁰⁰ While the formulation in article 53 of the 1969 Vienna Convention is for “the purposes of the Convention”, it also applies in other contexts including in relation to State responsibility.⁷⁰¹ The Commission has, when addressing peremptory norms of general

⁶⁹⁷ See, for example, the statement by the Czech Republic (A/C.6/71/SR.24, para. 72). See also the statements by Canada (A/C.6/71/SR.27, para. 9), Chile (A/C.6/71/SR.25, para. 101), China (A/C.6/71/SR.24, para. 89), the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118) (“The aim of the Commission’s work on the topic was not to contest the two criteria established under article 53 On the contrary, the goal was to elucidate the meaning and scope of the two criteria”), and Poland (*ibid.*, para. 56). See, further, the statement by Ireland (A/C.6/71/SR.27, para. 19) (“Her delegation agreed with the view that articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties should be central to work on the topic”).

⁶⁹⁸ See, for example, *Al Shimari, et al. v. ACI Premier Technology, Inc., No. 1:08-cv-827 (LMB/JFA)*, Opinion of 22 March 2019, 2019 WL 1320052 (E.D. Va. 2019), at p. 26; *Committee of United States Citizens Living in Nicaragua v. Reagan, Case No. 87-5053, Opinion of 14 October 1988*, 859 F.2d 929 (D.C. Cir. 1988), at p. 940; *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Case No. 1A 45/2007, Administrative appeal judgment of 14 November 2007*, Federal Supreme Court of Switzerland, BGE 133 II 450, para. 7.1; *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another, Case No. CC 02/14, Judgment of 30 October 2014*, Constitutional Court of South Africa, [2014] ZACC 30, para. 35; *Priebke, Erich s/ solicitud de extradición, Case No. 16.063/94, Judgment of 2 November 1995*, Supreme Court of Argentina, para. 70; *Bouzari v. Islamic Republic of Iran, Docket C38295, Decision of 30 June 2004*, Court of Appeal for Ontario, 71 OR (3d) 675 (Ont CA), ILDC [International Law in Domestic Courts] 175 (CA 2004), para. 86; and *Gabriel Orlando Vera Navarrete, EXP. No. 2798-04-HC/TC, Decision of 9 December 2004*, Constitutional Tribunal of Peru, para. 8.

⁶⁹⁹ See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment of 10 December 1998*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, at p. 571, para. 155; and *Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment of 14 December 1999*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, pp. 431–433, para. 60. See also *Jaime Córdoba Triviño, Case No. C-578/95, Sentence of 4 December 1995*, Constitutional Tribunal of Colombia. See, especially, the separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 88, para. 8.

⁷⁰⁰ See, for example, S. Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms*, Zurich, Schulthess, 2015, at p. 19 (“Given that Article 53 provides the only written legal definition of the effects of *jus cogens* ... as well as of the process by which such norms come into being ... it is the necessary starting point for analyzing this concept”); S. Kadelbach, “Genesis, function and identification of *jus cogens* norms”, *Netherlands Yearbook of International Law 2015*, vol. 46 (2016), pp. 147–172, at p. 166, noting that “treatises on *jus cogens* usually start” with article 53 of the 1969 Vienna Convention and, at p. 162, assessing enhanced responsibility and the *erga omnes* effects of *jus cogens* on the basis of article 53 of the 1969 Vienna Convention; and U. Linderfalk, “Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism”, *ibid.*, pp. 51–84, at p. 52. See also, generally, Costelloe (footnote 694 above), who, though never stating that article 53 of the 1969 Vienna Convention is the definition, certainly proceeds on that basis. Similarly, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Helsinki, Finnish Lawyers’ Publishing Company, 1988, especially at pp. 5–12; and L. A. Alexidze, “Legal nature of *jus cogens* in contemporary international law”, *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), pp. 219–263, at p. 246.

⁷⁰¹ See T. Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, 2015, at pp. 6–7 (“Although the Vienna Convention concerns the law of treaties and binds only signatories ... Article 53 reflected a concept with legal effect beyond the treaty context. ... The

international law (*jus cogens*) in the context of other topics, also used the definition in article 53 of the 1969 Vienna Convention.⁷⁰² It is therefore appropriate for these draft conclusions to rely on article 53 for the definition of peremptory norms of general international law (*jus cogens*).

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

Conclusion 3

General nature of peremptory norms of general international law (*jus cogens*)

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

Commentary

(1) Draft conclusion 3 describes the general nature of peremptory norms of general international law (*jus cogens*). The general nature is described in terms of essential characteristics associated with peremptory norms of general international law (*jus cogens*). The draft conclusion is placed at the end of Part One in order to indicate that it provides a general orientation for the provisions that follow. A view was expressed, however, that such “characteristics” have an insufficient basis in international law, unnecessarily conflate the identification and effects of these norms, and risk being viewed as additional criteria for determining whether a specific peremptory norm of general international law (*jus cogens*) exists.

contemporary practice of international and domestic judicial organs, to refer to Article 53 for any consideration of *jus cogens*, is consistent with this view of a concept existing outside the treaty context”); E. Santalla Vargas, “In quest of the practical value of *jus cogens* norms”, *Netherlands Yearbook of International Law* 2015, vol. 46 (2016), pp. 211–240, at pp. 223–224 (“However, the potential effects of *jus cogens* not only expand beyond treaty law but they even appear more significant in situations that are not concerned with treaty law”); and A. Cassese, “For an enhanced role of *jus cogens*”, in A. Cassese (ed.), *Realizing Utopia: the Future of International Law*, Oxford University Press, 2012, pp. 158–171, at p. 160 (“Fortunately states, national courts, and international judicial bodies have invoked peremptory norms with regard to *areas other than treaty-making*. By so doing, these entities have expanded the scope and normative impacts of peremptory norms” (emphasis in original)). See also H. Charlesworth and C. Chinkin, “The gender of *jus cogens*”, *Human Rights Quarterly*, vol. 15 (1993), pp. 63–76, at p. 63 (“A formal, procedural definition of the international law concept of *jus cogens* is found in the Vienna Convention on the Law of Treaties”).

⁷⁰² See paragraph (5) of the commentary to article 26 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85 (“The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law ... but further that it should be recognized as having peremptory character by the international community of States as whole”). See also the Conclusions of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.702), conclusion (32) (“A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, [article 53 of the 1969 Vienna Convention]), that is, norms ‘accepted and recognized by the international community of States as a whole from which no derogation is permitted’”). See, further, the Report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (finalized by Martti Koskenniemi) (A/CN.4/L.682 and Corr.1 and Add.1), para. 375 (“The starting-point [for establishing the criteria] must be the formulation of article 53 itself, identifying *jus cogens* by reference to what is ‘accepted and recognized by the international community of States as a whole’”).

(2) The first characteristic referred to in draft conclusion 3 is that peremptory norms of general international law “reflect and protect fundamental values of the international community”. The Commission chose the words “reflect and protect” to underline the dual function that fundamental values play in relation to peremptory norms of general international law. The word “reflect” is meant to indicate that the fundamental value(s) in question provide, in part, a rationale for the peremptory status of the norm of general international law at issue. Further, the word “reflect” seeks to establish the idea that the norm in question gives effect to particular values. The word “protect” is meant to convey the effect of the peremptory norm on the value – that a specific peremptory norm serves to protect the value(s) in question. In some ways these are mutually reinforcing concepts. A value reflected by a peremptory norm of general international law (*jus cogens*) will be protected by compliance with that norm.

(3) The characteristic that peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community relates to the content of the norm in question. Already in 1951, before the adoption of the 1969 Vienna Convention or the 1966 draft articles on the law of treaties, the International Court of Justice had linked the prohibition of genocide, a prohibition today widely accepted and recognized as a peremptory norm, to fundamental values, noting that the prohibition was inspired by the commitment “to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations”.⁷⁰³

(4) The references in the Court’s Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* to “the conscience of mankind” and “moral law” evoke fundamental values shared by the international community. In subsequent decisions, the International Court of Justice has reaffirmed this description of the underlying basis for the prohibition of genocide and, at the same time, affirmed the peremptory status of the prohibition of genocide.⁷⁰⁴ Moreover, in its 2007 judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court referred to peremptory norms along with “obligations which protect essential humanitarian values”, thus indicating a relationship between them.⁷⁰⁵ The connection between values and the peremptory character of norms has also been made by other international courts and tribunals.⁷⁰⁶

⁷⁰³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23. See also P. Bisazza, “Les crimes à la frontière du *jus cogens*”, in L. Moreillon, et al. (eds.), *Droit pénal humanitaire*, Series II, vol. 4, Brussels, Bruylant, 2009, at p. 164, where she evokes, quoting Bassiouni, *la conscience de l’humanité*; and L. Boisson de Chazournes, “Commentaire”, in R. Huesa Vinaixa and K. Wellens (eds.), *L’influence des sources sur l’unité et la fragmentation du droit international : travaux du séminaire tenu à Palma, les 20–21 Mai 2005*, Brussels, Bruylant, 2006, at p. 76, referring to a *conscience universelle*.

⁷⁰⁴ See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 110–111, para. 161; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 46, para. 87.

⁷⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote above), p. 104, para 147.

⁷⁰⁶ *Prosecutor v. Furundžija* (see footnote 699 above), p. 569, paras. 153–154, where the Tribunal expressly linked the status of the prohibition of torture as a peremptory norm of general international law (*jus cogens*) to the “importance of the values it protects”, noting that “[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community”. This holding was quoted with approval by the European Court of Human Rights in *Al-Adsani v. the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-XI*, para. 30. In the *Case of Goiburú, et al. v. Paraguay (Judgment of 22 September 2006 on Merits, Reparations and Costs*, Inter-American Court of Human Rights, *Series C*, No. 153, para. 128), the Court described offences prohibited by *jus cogens* as those that “harm essential values and rights of the international community”. See also *Michael Domingues v. United States (Case 12.285, Inter-American Commission on Human Rights, Report No. 62/02 of 22*

(5) The link between peremptory norms of general international law (*jus cogens*) and fundamental values has equally been recognized in the decisions of national courts.⁷⁰⁷ For example, in *Siderman de Blake v. Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit quoted with approval the statement that peremptory norms of general international law (*jus cogens*) are “derived from values taken to be fundamental by the international community”.⁷⁰⁸ The Constitutional Tribunal of Peru referred to the “extraordinary importance of the values underlying” *jus cogens* obligations.⁷⁰⁹ Similarly, in the *Arancibia Clavel* case, the Supreme Court of Argentina held that the purpose of peremptory norms of general international law (*jus cogens*) was “to protect States from agreements concluded against some values and general interests of the international community of States as a whole”.⁷¹⁰

(6) The relationship between peremptory norms of general international law (*jus cogens*) and values is also accepted in scholarly writings. Kolb states that the idea that peremptory norms of general international law (*jus cogens*) are somehow connected with fundamental values “is the absolutely predominant theory”.⁷¹¹ Hannikainen, describing the role of

October 2002, para. 49), where that Commission linked peremptory norms of general international law (*jus cogens*) to “public morality” and, more importantly, stated that they “derive their status from fundamental values held by the international community”, noting that violations of *jus cogens* “shock the conscience of humankind”.

⁷⁰⁷ See, for example, *Bayan Muna as represented by Representative Satur Ocampo et al v. Alberto Romulo, in his capacity as Executive Secretary et al*, Supreme Court of the Republic of the Philippines (2011), at p. 56 noting that *jus cogens* norms are “deemed ... fundamental to the existence of a just international order”. *Kaunda and Others v. President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa intervening as Amicus Curiae)* 2005 (4) SA 235 (CC); *Minister of Justice and Others v Southern African Litigation Centre and Others*, where the Court states that it agrees with the following sentiment: “As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations”. *Alessi and Others v Germany and Presidency of the Council of Ministers of the Italian Republic* (intervening), Referral to the Constitutional Court, Order No 85/2014, ILDC 2725 (IT 2014), 21 January 2014, Italy; Tuscany; Florence; Court of First Instance (*Non è in contestazione la natura di crimine internazionale del fatto oggetto di causa e la sua potenzialità lesiva di diritti fondamentali della persona umana come consacrati nella Costituzione italiana e nella Carta dei diritti fondamentali dell’Unione Europea (2000/C 364/01). Anche considerato che nell’ordinamento interno, i diritti fondamentali della persona riconosciuti dalla Costituzione si saldano necessariamente con le norme di jus cogens poste a tutela dei diritti fondamentali della persona dal diritto internazionale venendo in rilievo i medesimi valori tendenzialmente universali di tutela della dignità della persona*) (Even considering that in the internal legal system, the fundamental rights of the person recognized by the Constitution necessarily merge with the norms of *jus cogens* set up to protect the fundamental rights of the person from international law, highlighting the same generally universal values of protecting the dignity of the person).

⁷⁰⁸ *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals, 965 F.2d 699 (9th Cir 1992), p. 715. This decision was cited with approval by lower courts in the Ninth Circuit including: *Estate of Hernandez-Rojas v. United States*, 2013 U.S. Dist. LEXIS136922 (SD Cal. 2013), at p. 13; *Estate of Hernandez-Rojas v. United States*, 2014 U.S. Dist. LEXIS101385 (SD Cal. 2014), at p. 9; and *Doe I v. Reddy*, 2003 U.S. Dist. LEXIS26120 (ND Cal 2003), at pp. 32 and 34. See also the Ninth Circuit’s opinion in *Alvarez-Machain v. United States* (331 F.3d 604 (9th Cir. 2003), p. 613.

Although that decision was eventually overturned by the Supreme Court in *Sosa v. Alvarez-Machain*, et al. (542 U.S. 692 (2004)), the idea of peremptory norms reflecting values of the international community was itself not addressed by the Supreme Court.

⁷⁰⁹ *25% del número legal de Congresistas contra el Decreto Legislativo N° 1097, EXP. No. 0024-2010-PI/TC, Judgment of the Jurisdictional Plenary of 21 March 2011*, Constitutional Tribunal of Peru, para. 53 (*de la extraordinaria importancia de los valores que subyacen a tal [jus cogens] obligación* (“of the extraordinary importance of the values that underlie [the *jus cogens*] obligation”)).

⁷¹⁰ *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, Case No. 259, Judgment of 24 August 2004*, Supreme Court of Argentina, para. 29 (*es proteger a los Estados de acuerdos concluidos en contra de algunos valores e intereses generales de la comunidad internacional de Estados en su conjunto*).

⁷¹¹ R. Kolb, *Peremptory International Law: Jus Cogens – a General Inventory*, Oxford, Hart Publishing, 2015, at p. 32. H. Olasolo Alonso, A. Mateus Rugeles and A. Contreras Fonseca, “La naturaleza

peremptory norms of general international law (*jus cogens*), observes that “a legal community may find it necessary to establish peremptory norms for the protection of such overriding interests and values of the community itself”.⁷¹² Similarly, Pellet sees peremptory norms of general international law (*jus cogens*) as paving a way towards a more “moral value oriented public order”,⁷¹³ while Tomuschat describes them as “the class of norms that protect the fundamental values of the international community”.⁷¹⁴

(7) It will be noted from the discussion above that courts and scholarly writers have employed different terms to signify the relevance of values. For example, the phrases “fundamental values”⁷¹⁵ and “interests”,⁷¹⁶ or variations thereof, have been employed interchangeably. These different choices of words, however, are not mutually exclusive and they indicate the important normative and moral background of the norm in question.

(8) As a second characteristic, draft conclusion 3 states that peremptory norms of general international law are hierarchically superior to other norms of international law. The fact that peremptory norms of general international law (*jus cogens*) are hierarchically superior to other norms of international law is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*). It is a consequence in that the identification of a norm as a peremptory norm of general international law (*jus cogens*) has the effect that it will be superior to other norms. It is, however, also a characteristic since hierarchical superiority describes the nature of the peremptory norms of general international law (*jus cogens*).

(9) International courts and tribunals have often referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*). The International Criminal Tribunal for the Former Yugoslavia, for example, held that a feature of the prohibition of

imperativa del principio ‘no hay paz sin justicia’ respecto a los máximos responsables del fenómeno de la lesa humanidad y sus consecuencias para el ámbito de actuación de la llamada ‘justicia de transición’”, *Boletín mexicano de derecho comparado*, vol. 49 (2016), pp. 135–171; C. Zelada, “Ius cogens y derechos humanos: luces y sombras para una adecuada delimitación de conceptos”, *Agenda Internacional*, vol. 8 (2002), pp. 129–156, at p. 139. A.A. Cançado Trindade, “*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law”, XXXV Course of International Law organized by the OAS Inter-American Juridical Committee in Rio de Janeiro (August 2008), at pp. 6 and 12; K. Hossain, “The concept of *jus cogens* and the obligation under the U.N. Charter”. *Santa Clara Journal of International Law*, vol. 3 (2005), pp. 72–98, at p. 73; L. Henkin, “International law and the inter-State sys”, *Collected Courses of the Hague Academy of International Law*, vol. 216 (1989), at p. 60; J.R. Argés, “‘Ius cogens’: descripción, valoración y propuestas de aplicación actual de un tópico jurídico clásico”, doctoral dissertation, Universidade de Santiago de Compostela, 2017, at p. 273; A. de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Leiden, Brill, 2019), pp. 79–83. E. Petrič, “Principles of the Charter of the United Nations: *Jus cogens*?” *Czech Yearbook of Public and Private International Law*, vol. 17 (2016).

⁷¹² Hannikainen (see footnote 700 above), at p. 2.

⁷¹³ A. Pellet, “Comments in response to Christine Chinkin and in defense of *jus cogens* as the best bastion against the excesses of fragmentation”, *Finnish Yearbook of International Law*, vol. 17 (2006), pp. 83–90, at p. 87.

⁷¹⁴ C. Tomuschat, “The Security Council and *jus cogens*”, in E. Cannizzaro (ed.), *The Present and Future of Jus Cogens*, Sapienza Università Editrice, 2015, at p. 8, who describes *jus cogens* as “the class of norms that protect the fundamental values of the international community”. See also H. Ruiz Fabri, “Enhancing the rhetoric of *jus cogens*”, *European Journal of International Law*, vol. 23, No. 4 (2012), p. 1049, at p. 1050; M. den Heijer and H. van der Wilt “*Jus cogens* and the humanization and fragmentation of international law”, *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 3–21, at p. 15; and D. Shelton, “Sherlock Holmes and the mystery of *jus cogens*”, *ibid.*, pp. 23–50, especially from p. 42.

⁷¹⁵ Tomuschat, “The Security Council and *jus cogens*” (see footnote 714 above), at p. 8. See also *Siderman de Blake v. Republic of Argentina* (footnote 708 above), at p. 715, where the United States Court of Appeal referred to “values taken to be fundamental by the international community” and the Constitutional Tribunal of Peru in *25% del número legal de Congresistas*, referring to “extraordinary importance of the values” (see footnote 709 above).

⁷¹⁶ Hannikainen (see footnote 700 above), at p. 2, referring to “overriding interests”. See, also, *Arancibia Clavel* (footnote 710 above), where the Supreme Court of Argentina referred to “general interests of the international community” as the underlying source of peremptory norms.

torture “relates to the hierarchy of rules in the international normative order” and that the prohibition “has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”.⁷¹⁷ The Inter-American Court of Human Rights has similarly accepted the hierarchical superiority of peremptory norms of general international law (*jus cogens*).⁷¹⁸ In *Kadi v. Council and Commission*, the Court of First Instance of the European Communities described peremptory norms of general international law (*jus cogens*) as a “body of higher rules of public international law”.⁷¹⁹ The European Court of Human Rights, in *Al-Adsani v. the United Kingdom*, has similarly described a peremptory norm of general international law (*jus cogens*) as “a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”.⁷²⁰

(10) The recognition of the hierarchical superiority of peremptory norms of general international law (*jus cogens*) can also be seen in the practice of States. For example, the High Court of Zimbabwe, in *Mann v. Republic of Equatorial Guinea*, described peremptory norms of general international law (*jus cogens*) as those norms “endowed with primacy in the hierarchy of rules that constitute the international normative order”.⁷²¹ Courts in the United States have similarly recognized the hierarchical superiority of norms of peremptory norms of general international law (*jus cogens*). In *Siderman de Blake v. Republic of Argentina*, the Court of Appeals for the Ninth Circuit stated that peremptory norms of general international law (*jus cogens*) were those norms “deserving of the highest status in international law”.⁷²² Various terms denoting hierarchical superiority have been used by different national courts to describe peremptory norms of general international law (*jus cogens*). They have been held to have “the highest hierarchical position amongst all other customary norms and principles”,⁷²³ to be “not only above treaty law, but over all other sources of law”,⁷²⁴ and to be norms which “prevail over both customary international law and

⁷¹⁷ *Prosecutor v. Furundžija* (see footnote 699 above), at p. 569, para. 153.

⁷¹⁸ *García Lucero, et al. v. Chile, Judgment 28 August 2013*, Inter-American Court of Human Rights, Series C, No. 267, para. 123, note 139, quoting with approval *Prosecutor v. Furundžija* (see footnote 699 above). See also *Michael Domingues v. United States* (footnote 706 above), para. 49, describing *jus cogens* norms as being derived from a “superior order of legal norms”.

⁷¹⁹ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, Case No. T-315-01, Judgment of 21 September 2005*, Second Chamber, Court of First Instance of the European Communities, [2005] ECR II-3649, para. 226. See also *Hassan v. Council of the European Union and Commission of the European Communities, Case No. T-49/04, Judgment of 12 July 2006*, Second Chamber, Court of First Instance of the European Communities, para. 92.

⁷²⁰ *Al-Adsani v. the United Kingdom* (see footnote 706 above), para. 60.

⁷²¹ *Mann v. Republic of Equatorial Guinea, Case No. 507/07, Judgment of 23 January 2008*, High Court of Zimbabwe, [2008] ZWHHC 1.

⁷²² *Siderman de Blake v. Republic of Argentina* (see footnote 708 above), at p. 717.

⁷²³ *Bayan Muna as represented by Representative Satur Ocampo, et al. v. Alberto Romulo, in his capacity as Executive Secretary, et al., Case G.R. No. 159618, Judgment of 1 February 2011*, Supreme Court of the Republic of the Philippines, ILDC 2059 (PH2011), at para. 92. See also *Certain Employees of Sidhu & Sons Nursery Ltd., et al., Case Nos. 61942, 61973, 61966, 61995, Decision of 1 February 2012*, BCLRB No. B28/2012, para. 44, where the British Columbia Labour Relations Board (Canada), identified peremptory norms of general international law (*jus cogens*) as enjoying a “higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”. See also *R (on the application of Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another, Case No. C1/2006/1064, Judgment of 12 October 2006*, England and Wales Court of Appeal (Civil Division), [2006] EWCA Civ 1279; and *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet Ugarte (No. 3), Decision of 24 March 1999*, England, House of Lords, [2000] 1 A.C. 147, p. 198.

⁷²⁴ *Julio Héctor Simón y otros s/ privación ilegítima de la libertad, Case No. 17.768, Judgment of 14 June 2005*, Supreme Court of Argentina, para. 48 (*que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho* (“which is not only above treaties but even above all sources of law”). See also *Julio Lilo Mazzeo y otros s/rec. de casación e inconstitucionalidad, Judgment of 13 July 2007*, Supreme Court of Argentina, para. 15 (*jus cogens* “is the highest source of international law” (*se trata de la más alta fuente del derecho internacional*)).

treaties”.⁷²⁵ States have also, in their statements, referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*).⁷²⁶

(11) The hierarchical superiority of peremptory norms of general international law (*jus cogens*) was recognized in the conclusions of the work of the Commission’s Study Group on the fragmentation of international law.⁷²⁷ This characteristic is also generally recognized in the writings of scholars.⁷²⁸

(12) Finally, with respect to the third characteristic, draft conclusion 3 provides that peremptory norms of general international law (*jus cogens*) are universally applicable. The universal applicability of peremptory norms of general international law (*jus cogens*) means that they are binding on all subjects of international law that they address. The idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability. The fact that a norm is non-derogable, by extension, means that it is applicable to all since States cannot derogate from it by creating their own special rules that conflict with it. The universal application of peremptory norms of general international law (*jus cogens*) is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*).

(13) In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice referred to “the universal character of the condemnation of genocide”, which it considered to be a consequence of the fact that genocide “shocks the conscience of mankind and results in great

⁷²⁵ *Mani Kumari Sabbithi, et al. v. Major Waleed KH N.S. Al Saleh, et al.*, 605 F. Supp 2d 122 (United States District Court for the District of Columbia 2009), p. 129. See also *Mario Luiz Lozano v. the General Prosecutor for the Italian Republic, Case No. 31171/2008, Appeal Judgment* of 24 July 2008, First Criminal Division, Supreme Court of Cassation, Italy, p. 6 (*dandosi prevalenza al principio di rango più elevato e di jus cogens* (“priority should be given to the principle of higher rank and of *jus cogens*”)).

⁷²⁶ See, for example, the statements by the Netherlands (A/C.6/68/SR.25, para. 101) (“*Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law”); and the United Kingdom (*Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF./39/11)*, 53rd meeting, para. 53) (“in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out”).

⁷²⁷ Conclusion (32) of the Conclusions of the work of the Study Group on the fragmentation of international law (see footnote 702 above), at p. 182, para. 251 (“[a] rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*)”). See, further, the Report of the Study Group on the fragmentation of international law (footnote 702 above).

⁷²⁸ See, for support in the literature for the hierarchical superiority of peremptory norms of general international law (*jus cogens*), A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford, 2006, at p. 8; G. M. Danilenko, “International *jus cogens*: issues of law-making”, *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 42–65, at p. 42; and W. Conklin, “The peremptory norms of the international community”, *ibid.*, vol. 23, No. 3, pp. 837–861, at p. 838 (“[T]he very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the ‘fundamental standards of the international community’ at the pinnacle”). See also M. M. Whiteman, “*Jus cogens* in international law, with a projected list”, *Georgia Journal of International and Comparative Law*, vol. 7, No. 2 (1977), pp. 609–626, at p. 609; and M. W. Janis, “The nature of *jus cogens*”, *Connecticut Journal of International Law*, vol. 3, No. 2 (Spring 1988), pp. 359–363, at p. 359. Tomuschat, for example, describes it as a certainty that peremptory norms of general international law (*jus cogens*) are superior to other norms. See C. Tomuschat, “Reconceptualizing the debate on *jus cogens* and obligations *erga omnes*: concluding observations”, in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden, Martinus Nijhoff, 2006, at p. 425 (“One thing is certain, however: the international community accepts today that there exists a class of legal precepts which is hierarchically superior to ‘ordinary’ rules of international law”). See also Cassese (footnote 701 above), at p. 159. For a contrary view, see Kolb (footnote 711 above), at p. 37, suggesting that the language of hierarchy should be avoided and that the focus should be on voidness since the former concept – of hierarchy – leads to confusion and misunderstanding.

losses to humanity, and [which] is contrary to moral law”.⁷²⁹ The universal character of peremptory norms of general international law (*jus cogens*) was affirmed by the judgments of the International Criminal Tribunal for the Former Yugoslavia.⁷³⁰ The Inter-American Court of Human Rights has described peremptory norms of general international law (*jus cogens*) as being “applicable to all States” and as norms that “bind all States”.⁷³¹ Similarly, in *Michael Domingues v. United States*, the Inter-American Commission on Human Rights has determined that peremptory norms of general international law (*jus cogens*) “bind the international community as a whole, irrespective of protest, recognition or acquiescence”.⁷³²

(14) The universal character of peremptory norms of general international law (*jus cogens*) is further reflected in decisions of national courts. In *Tel-Oren et al. v. Libyan Arab Republic, et al.*, the United States Court of Appeals for the District of Columbia referred to peremptory norms of general international law (*jus cogens*) as “universal and obligatory norms”.⁷³³ In *Youssef Nada v. State Secretariat for Economic Affairs*, the Swiss Federal Supreme Court described peremptory norms of general international law (*jus cogens*) as those norms that were “binding on all subjects of international law”.⁷³⁴ The view that peremptory norms of general international law (*jus cogens*) have a universal character is also reflected in the writings of scholars.⁷³⁵

(15) The characteristic of universal applicability of peremptory norms of general international law (*jus cogens*) itself has two implications. First, the persistent objector rule or doctrine is not applicable to peremptory norms of general international law (*jus cogens*). This aspect is considered further in draft conclusion 14. As described in paragraph (7) of the commentary to draft conclusion 1, a second implication of the universal application of peremptory norms of general international law (*jus cogens*) is that such norms do not apply on a regional or bilateral basis.⁷³⁶

⁷²⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 703 above), at p. 23. This language has been reaffirmed by the International Court of Justice in recent judgments. See, for example, the judgments referred to in footnote 699 above.

⁷³⁰ See, for example, *Prosecutor v. Furundžija* (footnote 699 above), at p. 571, para. 156. See also *Prosecutor v. Jelisić* (footnote 699 above), p. 399 and pp. 431–433, para. 60.

⁷³¹ *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States*, Inter-American Court of Human Rights, Series A, No. 18, p. 113, paras. 4–5.

⁷³² *Michael Domingues v. United States* (see footnote 706 above), at para. 49.

⁷³³ *Tel-Oren, et al. v. Libyan Arab Republic, et al., Judgment of 3 February 1984*, 726 F.2d 774 (D.C. Cir. 1984), 233 U.S.App. D.C. 384. See also *Smith v. Socialist People’s Libyan Arab Jamahiriya, Judgment of 26 November 1996*, 101 F.3d 239 (2nd. Cir. 1996), at p. 242, in which the United States Court of Appeals for the Second Circuit stated that peremptory norms “do not depend on the consent of individual states, but are universally binding by their very nature”.

⁷³⁴ *Youssef Nada v. State Secretariat for Economic Affairs* (see footnote 698 above), para. 7.

⁷³⁵ See, for example, Conklin (footnote 728 above); C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam, North-Holland Publishing Company, 1976, at p. 78; G. Gaja, “*Jus cogens* beyond the Vienna Convention”, in *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), pp. 271–289, at p. 283; G. M. Danilenko, *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff Publishers, 1993, at p. 211; Alexidze (footnote 700 above); P.-M. Dupuy and Y. Kerbrat, *Droit international public*, 11th ed., Paris, Précis Dalloz, 2012, at p. 322 (*la cohésion de cet ensemble normatif exige la reconnaissance par tous ses sujets d’un minimum de règles impératives* (“the cohesion of this set of standards requires recognition by all its subjects of a minimum of mandatory rules”)) (emphasis in original); A. Rohr, *La responsabilidad internacional del Estado por violación al jus cogens*, Buenos Aires, SGN Editora, 2015, at p. 6; D. Dubois, “The authority of peremptory norms in international law: State consent or natural law?”, *Nordic Journal of International Law*, vol. 78 (2009), pp. 133–175, at p. 135 (“A *jus cogens* or peremptory norm ... is applicable to all States regardless of their consenting to it”); and M. Saul, “Identifying *jus cogens* norms: the interaction of scholars and international judges”, *Asian Journal of International Law*, vol. 5 (2014), pp. 26–54, at p. 31 (“*Jus cogens* norms are supposed to be binding on all states”).

⁷³⁶ States were virtually unanimous on this point: see, for example, Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24, para. 126); Greece (A/C.6/73/SR.27, para. 9); Malaysia (*ibid.*, para. 104); Portugal (A/C.6/73/SR.26, para. 119); South Africa (A/C.6/73/SR.27, para. 46); Thailand (A/C.6/73/SR.26, para. 96); the United Kingdom (A/C.6/73/SR.22, para. 84); and the United States (A/C.6/73/SR.29, para. 34).

(16) The characteristics contained in draft conclusion 3 are themselves not criteria for the identification of peremptory norms of general international law (*jus cogens*). The criteria for the identification of peremptory norms of general international law (*jus cogens*) are contained in Part Two of the draft conclusions. Though themselves not criteria, the existence of the characteristics contained in draft conclusion 3 may provide an indication of the peremptory status of a particular norm of general international law. In other words, evidence that a norm reflects and protects fundamental values of the international community of States as a whole, is hierarchically superior to other norms of international law and is universally applicable, may serve to support or confirm the peremptory status of a norm. A view was expressed in the Commission that the difference between “criteria” and “characteristics” is obscure, as is the proposition that such “characteristics” provide supplementary evidence.

Part Two

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

Conclusion 4

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

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

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

Commentary

(1) Draft conclusion 4 sets out the criteria for the identification of a peremptory norm of general international law (*jus cogens*). The criteria are drawn from the definition of peremptory norms contained in article 53 of the 1969 Vienna Convention, which was reproduced in draft conclusion 2. Such criteria must be shown to be present in order to establish that a norm has a peremptory character.

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

(3) On the basis of the definition contained in draft conclusion 2, draft conclusion 4 sets forth two criteria. First, the norm in question must be a norm of general international law. This criterion is derived from the phrase “norm of general international law” in the definition of peremptory norms (*jus cogens*) and is the subject of draft conclusion 5. Second, the norm must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a norm having the same character. It bears pointing out that this second criterion, though composed of various elements, is a single composite criterion. This criterion is the subject of draft conclusions 6 to 9. The two criteria are cumulative: they are both necessary conditions for the establishment of the peremptory character of a norm of general international law.

(4) The language of article 53 of the 1969 Vienna Convention is complex and has given rise to different interpretations. The phrase “and which can be modified only by a subsequent norm of general international law having the same character” could, for example, be viewed as a separate criterion.⁷³⁷ Yet, the essence of the second criterion is the *acceptance and*

⁷³⁷ But see Knuchel (footnote 700 above), at pp. 49–136. See also the statement by the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118), where the two criteria identified are said to be, first, a norm

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

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

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

The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question meet all the criteria for recognition as a norm of general international law, binding as such, but *further* that it should be recognized as having peremptory character by the international community of States as a whole.⁷³⁸

Conclusion 5

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

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 5 concerns the bases of peremptory norms of general international law (*jus cogens*). It addresses the first criterion specified in draft conclusion 4 to identify peremptory norms of general international law (*jus cogens*), namely that the norm in question must be a norm of “general international law”. The draft conclusion is composed of two parts.

recognized by the international community of States as a whole as a norm from which no derogation was permitted, and, second, a norm that could be modified only by a subsequent *jus cogens* norm.

⁷³⁸ Paragraph (5) of the commentary to article 26 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85 above (emphasis added). See also Rivier, *Droit international public*, 2nd ed., Paris, Presses universitaires de France, 2013, at p. 566 (*Ne peut accéder au rang de règle impérative qu'une provision déjà formalisée en droit positif et universellement acceptée comme règle de droit* (“Only a provision already formalized in positive law and universally accepted as law can achieve the rank of peremptory norm”). See also U. Linderfalk, “The creation of *jus cogens* – making sense of article 53 of the Vienna Convention”, *Heidelberg Journal of International Law*, vol. 71 (2011), pp. 359–378, at p. 371 (“by ‘the creation of a rule of *jus cogens*’ I mean, not the creation of a rule of law, but rather the elevation of a rule of law to a *jus cogens* status”).

The first paragraph deals with customary international law as the basis for peremptory norms of general international law (*jus cogens*), while the second paragraph addresses treaty provisions and general principles of law as possible bases of such norms.

(2) The Study Group on fragmentation of international law established by the Commission observed that “there is no accepted definition of ‘general international law’”.⁷³⁹ The meaning of general international law will always be context-specific.⁷⁴⁰ In some contexts, “general international law” could be construed in contradistinction to *lex specialis*.⁷⁴¹ In the context of peremptory norms of general international law (*jus cogens*), however, the term “general international law” is not a reference to *lex generalis* or law other than *lex specialis*. Rather, the word “general” in “norms of general international law”, in the context of peremptory norms, refers to the scope of applicability of the norm in question. Norms of general international law are thus those norms of international law that, in the words of the International Court of Justice, “must have equal force for all members of the international community”.⁷⁴²

(3) The words “basis” in the first paragraph and “bases” in the second paragraph of draft conclusion 5 are to be understood flexibly and broadly. They are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law.

(4) The first paragraph of draft conclusion 5 states that customary international law, which refers to a general practice accepted as law (*opinio juris*), is the most common basis for peremptory norms of general international law (*jus cogens*). This is because customary international law is the most obvious manifestation of general international law.⁷⁴³ This position is borne out by State practice which confirms that customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).⁷⁴⁴ The

⁷³⁹ Report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.702), para. 14 (10), note 11.

⁷⁴⁰ *Ibid.* See also footnote 667 to paragraph (2) of the commentary to draft conclusion 1 of the draft conclusions on the identification of customary international law, *Report of the International Law Commission on the work of its Seventieth Session (A/73/10)* (“general international law” is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law.)

⁷⁴¹ See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at pp. 137–138, para. 274. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 76, para. 132.

⁷⁴² *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at pp. 38–39, para. 63.

⁷⁴³ See Cassese (footnote 701 above), at p. 164 (“The second question amounts to asking by which means an international tribunal should ascertain whether a general rule or principle of international law has acquired the status of a peremptory norm. Logically, this presupposes the existence of such a customary rule or principle”) (emphasis in original); G. Cahin, *La coutume internationale et les organisations internationales : l’incidence de la dimension institutionnelle sur le processus coutumier*, Paris, Pédone, 2001, at p. 615, who states that customary international law is the normal, if not exclusive, means of formation of *jus cogens* norms (*voie normale et fréquente sinon exclusive*). See also Rivier (footnote 738 above), at p. 566 (*Le mode coutumier est donc au premier rang pour donner naissance aux règles destinées à alimenter le droit impératif* (“Customary international law is thus a primary source of rules that will form the basis of peremptory law”). See, further, J.E. Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, Zurich, Schulthess, 2016, p. 115 (“As the most likely source of general international law, customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms”); and A. Bianchi, “Human rights and the magic of *jus cogens*”, *European Journal of International Law*, vol. 19 (2008), p. 491, at p. 493 (“The possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law”). See, for a contrary view, Janis (footnote 728 above), at p. 361.

⁷⁴⁴ For statements by States, see the statement by Pakistan at the thirty-fourth session of the General Assembly (A/C.6/34/SR.22, para. 8) (“The principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter [of the United Nations], but also because they had become norms of customary international law recognized by the international community”). See also the statements by the United Kingdom (A/C.6/34/SR.61, para. 46) and Jamaica (A/C.6/42/SR.29, para. 3) (“The right of peoples to self-determination and independence was a right

Supreme Court of Argentina, for example, recognized that peremptory norms relative to war crimes and crimes against humanity emerged from rules of customary international law already in force.⁷⁴⁵ Similarly, the Constitutional Tribunal of Peru stated that peremptory norms of general international law (*jus cogens*) referred to “customary international norms under the auspices of an *opinio juris seu necessitatis*”.⁷⁴⁶ In *Bayan Muna v. Alberto Romulo*, the Supreme Court of the Philippines defined *jus cogens* as “the highest hierarchical position among all other customary norms and principles”.⁷⁴⁷ Similarly, in *The Kenya Section of the International Commission of Jurists v. The Attorney-General and Others*, the High Court of Kenya determined the “duty to prosecute international crimes” to be both a rule of customary international law and a peremptory norm of general international law (*jus cogens*).⁷⁴⁸ In *Kazemi Estate v. Islamic Republic of Iran*, the Supreme Court of Canada described peremptory norms of general international law (*jus cogens*) as a “higher form of customary international law”.⁷⁴⁹ In *Siderman de Blake v. Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit described peremptory norms of general international law (*jus cogens*) as “an elite subset of the norms recognized as customary international law”.⁷⁵⁰ That court also noted that, in contrast to ordinary rules of customary international law, *jus cogens* “embraces customary laws considered binding on all nations”.⁷⁵¹ In *Buell v. Mitchell*, the United States Court of Appeals for the Sixth Circuit noted that “[s]ome customary norms of international law reach a ‘higher status’”, namely that of peremptory norms of general international law (*jus cogens*).⁷⁵² In determining that the prohibition of the death penalty was not a peremptory norm of general international law (*jus cogens*), the court made the following observation:

Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as *jus cogens*, or a norm from which no derogation is permitted.⁷⁵³

(5) The jurisprudence of the International Court of Justice equally provides strong evidence of the basis of peremptory norms of general international law (*jus cogens*) in customary international law. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court recognized the prohibition of torture as “part of customary

under customary international law, and perhaps even a peremptory norm of general international law”).

⁷⁴⁵ *Arancibia Clavel* (see footnote 710 above), para. 28.

⁷⁴⁶ *25% del número legal de Congresistas* (see footnote 709 above), para. 53 (*Las normas de ius cogens parecen pues encontrarse referidas a normas internacionales consuetudinarias que bajo el auspicio de una opinio iuris seu necessitatis* (“*jus cogens* norms seem like they refer more to international customary norms than to *opinio juris seu necessitatis*”).

⁷⁴⁷ *Bayan Muna v. Alberto Romulo* (see footnote 723 above), para. 92.

⁷⁴⁸ *The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others, Miscellaneous Criminal Application 685 of 2010, Judgment of 28 November 2011*, High Court of Kenya, [2011] eKLR, p. 14.

⁷⁴⁹ *Kazemi Estate v. Islamic Republic of Iran, File No. 35034, Appeal decision of 10 October 2014*, Supreme Court of Canada, 2014 SCC 62, [2014] 3 S.C.R. 176, at p. 249, para. 151. *Germany v. Milde (Max Josef), Case No. 1072/2009, Appeal Judgment of 13 January 2009*, First Criminal Section, Supreme Court of Cassation, Italy, ILDC 1224 (IT 2009), para. 6 (“customary rules aiming to protect inviolable human rights did not permit derogation because they belonged to peremptory international law or *jus cogens*”).

⁷⁵⁰ *Siderman de Blake v. Republic of Argentina* (see footnote 708 above), at p. 715, citing *Committee of United States Citizens Living in Nicaragua v. Reagan* (see footnote 698 above), at p. 940.

⁷⁵¹ *Ibid.* This contrast between “ordinary” rules of customary international law and *jus cogens* – suggesting the latter constitutes extraordinary rules of customary international law – is often based on the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundžija* (see footnote 699 above), at p. 569, para. 153, where a similar distinction is drawn. It has been mentioned, with approval, in several decisions, including decisions of the courts of the United Kingdom. See, for example, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet Ugarte (No. 3)* (footnote 723 above), at p. 198. See also *R (on the application of Al Rawi and Others) (ibid.)*.

⁷⁵² *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001), at pp. 372–373.

⁷⁵³ *Ibid.*, at p. 373.

international law” that “has become a peremptory norm (*jus cogens*)”.⁷⁵⁴ Similarly, the Court’s description of “many [of the] rules of humanitarian law” as constituting “intransgressible principles of international customary law” suggests that peremptory norms – referred to here as “intransgressible principles” – have a customary basis.⁷⁵⁵

(6) Other international courts and tribunals have also accepted customary international law as the basis for peremptory norms of general international law (*jus cogens*).⁷⁵⁶ The International Criminal Tribunal for the Former Yugoslavia, for example, has noted that the prohibition of torture is a “norm of customary international law” and that it “further constitutes a norm of *jus cogens*”.⁷⁵⁷ In *Prosecutor v. Furundžija*, that Tribunal described peremptory norms as those that “enjoy a higher rank in the hierarchy of international law than treaty law or even ‘ordinary’ customary rules”.⁷⁵⁸ Similarly, in *Prosecutor v. Jelisić*, the Tribunal stated that “[t]here can be absolutely no doubt” that the prohibition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide falls “under customary international law” and is now “on the level of *jus cogens*”.⁷⁵⁹

(7) While customary international law is the most common basis for the emergence of peremptory norms of general international law (*jus cogens*), other sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice may also form the basis of peremptory norms of general international law (*jus cogens*) to the extent that they can be regarded as norms of general international law. The second paragraph of draft conclusion 5 captures this idea by stating that “[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)”. The words “may also” are meant to indicate that it is not impossible for provisions of a treaty and general principles of law to form the basis of peremptory norms of general international law.

(8) The phrase “general principles of law” in the second paragraph of draft conclusion 5 refers to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It is appropriate to refer to the possibility of general principles of law forming the basis of peremptory norms of general international law (*jus cogens*).⁷⁶⁰ General principles of law are part of general international law since they have a general scope of application with equal force for all members of the international community.⁷⁶¹ In the context of the interpretation of treaties under article 31, paragraph 3 (c), of the 1969 Vienna Convention, the conclusions of the Study Group on fragmentation of

⁷⁵⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.

⁷⁵⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 699 above), at p. 257, para. 79.

⁷⁵⁶ See, for example, “*Las Dos Erres*” Massacre v. Guatemala, Judgment of 24 November 2009, Inter-American Court of Human Rights, Series C, No. 211, at p. 41, para. 140.

⁷⁵⁷ *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Judgment of 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, at para. 454.

⁷⁵⁸ *Prosecutor v. Furundžija* (see footnote 699 above), at p. 569, para. 153.

⁷⁵⁹ *Prosecutor v. Jelisić* (see footnote 699 above), at pp. 431–433, para. 60.

⁷⁶⁰ While there is little practice in support of general principles of law as a basis for peremptory norms of general international law (*jus cogens*), the following cases, among others, may be considered in this connection: *Prosecutor v. Jelisić* (footnote 699 above), at pp. 431–433, para. 60, where the International Criminal Tribunal for the Former Yugoslavia, having accepted that the prohibition of genocide was a norm of *jus cogens*, stated that the principles underlying the prohibition were “principles ... recognized by civilised nations”. The Inter-American Court of Human Rights determined the right to equality to be a peremptory norm of general international law flowing from its status as a general principle of law in its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants* (see footnote 731 above), at p. 99, para. 101: “Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.” See also the statement by the Islamic Republic of Iran (A/C.6/71/SR.26, para. 120): “The general principles of law to which [A]rticle 38 of the Statute of the International Court of Justice referred were the best normative foundation for norms of *jus cogens*”.

⁷⁶¹ See *North Sea Continental Shelf* (footnote 742 above), at pp. 38–39, para. 63, where the Court described general international law as rules that, “by their very nature, must have equal force for all members of the international community.”

international law distinguished between the application of treaty law on the one hand, and of general international law on the other.⁷⁶² The latter, according to the Commission, consists of both “customary international law and general principles of law”.⁷⁶³ There is, moreover, support in writings for general principles of law as a source of peremptory norms of general international law.⁷⁶⁴ The view was expressed, however, that there was insufficient support from either the position of States or international jurisprudence to support the proposition that peremptory norms of general international law (*jus cogens*) may be based on general principles of law.

(9) Treaties are an important source of international law, as provided for in Article 38, paragraph 1 (a) of the Statute of the International Court of Justice. The second paragraph of draft conclusion 5 also identifies treaty provisions as a possible basis for peremptory norms of general international law. The phrase “treaty provisions” is used instead of “treaties” to indicate that what is at issue are the one or more norms contained in the treaty rather than the treaty itself. Treaties, in most cases, are not “general international law” since they do not usually have a general scope of application with “equal force for all members of the international community”.⁷⁶⁵ There is, however, support in scholarly writings that provisions in treaties can form the basis of the peremptory norms of international law (*jus cogens*).⁷⁶⁶

⁷⁶² Conclusions of the Study Group on the fragmentation of international law (see footnote 727 above), at paras. 20–21.

⁷⁶³ *Ibid.*

⁷⁶⁴ See, for example, Knuchel (footnote 700 above), at p. 52 (“general principles [of law] may be elevated to *jus cogens* if the international community of States as a whole accepts and recognizes them as such”); Shelton, “Sherlock Holmes and the mystery of *jus cogens*” (footnote 714 above), at pp. 30–34; A. A. Cançado Trindade, “*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law”, in Organization of American States, Inter-American Juridical Committee, XXXV *Curso de Derecho Internacional*, 2008, at p. 27. See also Weatherall (footnote 701 above), at p. 133; and T. Kleinlein, “*Jus cogens* as the ‘highest law’? Peremptory norms and legal hierarchies”, *Netherlands Yearbook of International Law*, vol. 46 (2016), p. 173, at p. 195 (“a peremptory norm must first become general international law i.e. customary international law or general principles of law pursuant to Article 38(1) of the [Statute of the International Court of Justice]”). See also Conklin (footnote 728 above), at p. 840; O. M. Dajani, “Contractualism in the law of treaties”, *Michigan Journal of International Law*, vol. 34 (2012), p. 1, at p. 60; R. Nieto-Navia, “International peremptory norms (*jus cogens*) and international humanitarian law”, in L. Chand Vorah, *et al.* (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, The Hague, 2003, p. 595, at pp. 613 *et seq.* (“One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties ... and (ii) General principles of law recognized by civilized nations”); Orakhelashvili (footnote 728 above), at p. 126; and Santalla Vargas (footnote 701 above), at p. 214 (“*jus cogens* derives from customary law and general principles of international law”).

⁷⁶⁵ *North Sea Continental Shelf* (see footnote 742 above), at pp. 38–39, para. 63 (“for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; – whereas this cannot be so in the case of general or customary international law rules and obligations which, by their very nature, must have equal force for all members of the international community”). See also Bianchi (footnote 743 above), at p. 493 (“The possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law”).

⁷⁶⁶ G.I. Tunkin, “Is general international law customary law only?”, *European Journal of International Law*, vol. 4 (1993), at p. 534, especially p. 541 (“I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international law”). See, specifically in the context of *jus cogens*, G. I. Tunkin, “*Jus cogens* in contemporary international law”, *The University of Toledo Law Review*, vol. 1971, Nos. 1–2 (Fall–Winter 1971), p. 107, at p. 116 (“principles of *jus cogens* consist of ‘rules which have been accepted either expressly by treaty or tacitly by custom ...’. Many norms of general international law are created jointly by treaty and custom”). See also Knuchel (footnote 700 above), at p. 50 (“Contemporary international law comprises, in the words of the [International Court of Justice], ‘instruments of a universal or quasi-universal character,’ and nothing precludes future conventions from creating universally binding norms which could be elevated to *jus cogens*”). See also Nieto-Navia (footnote 764 above), at p. 613 (“One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties ... and (ii) General principles of law recognized by civilized nations”). See however, Weatherall (footnote 701 above), at pp. 125–126; Hannikainen (footnote 700 above), at p. 92; E. J. Criddle and E. Fox-Decent, “A fiduciary theory of

While recognizing the special character of the Charter of the United Nations, it is noteworthy that in the commentary to draft article 50 of the 1966 draft articles on the law of treaties, the Commission identified “the law of the Charter [of the United Nations] concerning the prohibition of the use of force” as a “conspicuous example of a rule of international law having the character of *jus cogens*”.⁷⁶⁷ The role of treaties as an exceptional basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law as described by the International Court of Justice in *North Sea Continental Shelf* cases.⁷⁶⁸ In that case, the Court observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law,⁷⁶⁹ or the conclusion of a treaty rule can help crystallize an emerging general rule of international law,⁷⁷⁰ or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.⁷⁷¹ This general approach can also be seen in judgments of other international courts and tribunals.⁷⁷²

(10) The phrase “accepted and recognized” has a particular relevance for the sources which can serve as a basis for peremptory norms of general international law (*jus cogens*). The text “accepted and recognized by the international community of States as a whole” was adopted at the United Nations Conference on the Law of Treaties on the basis of a joint proposal of Finland, Greece and Spain with regard to what later became article 53 (“recognized by the international community”),⁷⁷³ to which the Drafting Committee at the Conference inserted the word “accepted”. As explained by the Chairperson of the Drafting Committee, this was done because Article 38 of the Statute of the International Court of Justice includes both the words “recognized” and “accepted”; “recognized” was used in connection with conventions and treaties and general principles of law, while “accepted” was used in connection with customary international law.⁷⁷⁴

Conclusion 6 **Acceptance and recognition**

jus cogens”, *Yale Journal of International Law*, vol. 34 (2009), p. 331. See, further, Orakhelashvili (footnote 728 above), at p. 113 (“The propensity for academics to place emphasis on custom seems to follow from the general acknowledgment of the unsuitability of treaties to create peremptory norms”); and U. Linderfalk, “The effect of *jus cogens* norms: whoever opened Pandora’s Box, did you ever think about the consequences?”, *European Journal of International Law*, vol. 18 (2007), p. 853, at p. 860.

⁷⁶⁷ Paragraph (1) of the commentary to article 50 of the draft articles on the law of treaties (see footnote 696 above), vol. II, p. 247.

⁷⁶⁸ *North Sea Continental Shelf* (see footnote 742 above). See also draft conclusion 11 of the draft conclusions on the identification of customary international law.

⁷⁶⁹ *North Sea Continental Shelf* (see footnote 742 above), at p. 38, para. 61.

⁷⁷⁰ *Ibid.*, at pp. 38–41, paras. 61–69.

⁷⁷¹ *Ibid.*, at pp. 41–43, paras. 70–74. See also *Margellos and Others v. Federal Republic of Germany, Case No. 6/2002, Petition for Cassation, Judgment of 17 September 2002*, Special Supreme Court of Greece, para. 14 (“the provisions contained in the ... Hague Regulations attached to the Hague Convention IV of 1907 have become customary rules of international law (*jus cogens*)”).

⁷⁷² See for example, *Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment of 12 December 2012*, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, at para. 733 (“These provisions of the [Convention on the Prevention and Punishment of the Crime of Genocide] are widely accepted as customary international law rising to the level of *jus cogens*”); and *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above). See also the statement by Mr. Ago at the 828th meeting of the Commission in 1966, *Yearbook ... 1966*, vol. I (Part One), p. 37, para. 15 (“Even if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty ... , it was already a rule of general international law”).

⁷⁷³ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, 26 March-24 May 1968 and 9 April-22 May 1969*, vol. III, *Documents of the Conference*, p. 174, document A/CONF.39/C.1/L.306 and Add.1 and 2.

⁷⁷⁴ *Ibid.*, *First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, Summary record of the eightieth meeting of the Committee of the Whole, p. 471 at para. 4.

1. The requirement of “acceptance and recognition” as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law.
2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Commentary

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

(2) The first paragraph of draft conclusion 6 seeks to make clear that the acceptance and recognition referred to in the draft conclusion is distinct from the acceptance and recognition required for other rules of international law. In other words, the “acceptance and recognition” addressed in draft conclusion 6 is not the same as, for example, acceptance as law (*opinio juris*), which is an element for the identification of customary international law. The acceptance and recognition referred to in draft conclusion 6 is qualitatively different. Acceptance as law (*opinio juris*) addresses the question whether States accept a practice as a rule of law and is a constitutive element of customary international law. Recognition as a general principle of law addresses the question whether a principle has been recognized as provided for in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Acceptance and recognition, as a criterion of peremptory norms of general international law (*jus cogens*), concerns the question whether the international community of States as a whole recognizes a rule of international law as having peremptory character.

(3) The second paragraph explains what is meant by the acceptance and recognition required to elevate a norm of general international law to the status of a peremptory norm of general international law (*jus cogens*). It states that the norm in question must be accepted and recognized as one from which no derogation is permitted, and which can be modified only by a subsequent norm having the same character. This implies that in order to show that a norm is a peremptory norm of general international law (*jus cogens*), it is necessary to provide evidence that the norm is accepted and recognized as having the qualities mentioned, in other words that it is a norm from which no derogation is permitted and that can only be modified by a subsequent norm having the same character. Although draft conclusion 6 requires evidence of recognition and acceptance of two elements, it is not necessary to provide evidence showing first recognition and, separately, acceptance. It is sufficient to show, in general, the “acceptance and recognition” of the norm of general international law as being peremptory in nature.

(4) The word “evidence” is used to indicate that it is not sufficient merely to assert that a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. It is necessary to substantiate such a claim by means of providing evidence. The evidence that may be relied upon is addressed in draft conclusions 8 and 9.

(5) This framework of acceptance and recognition by the international community of States as a whole is based on the generally accepted interpretation of article 53 of the 1969 Vienna Convention.⁷⁷⁵

Conclusion 7

International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).
2. Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition.

Commentary

(1) As already indicated in draft conclusion 6, the second criterion for the peremptory character of a norm is that the norm in question must be accepted and recognized as having a peremptory character. Draft conclusion 7 is concerned with the question of whose acceptance and recognition is relevant for the identification of peremptory norms of general international law (*jus cogens*). It is worth recalling that the Commission itself, when adopting draft article 50 of its 1966 draft articles on the law of treaties, had not included the element of recognition and acceptance by the international community of States as a whole, stating only that a peremptory norm of general international law (*jus cogens*) is one “from which no derogation is permitted”.⁷⁷⁶ Rather, this element was added by States in the course of the 1968–1969 United Nations Conference on the Law of Treaties leading to the adoption of the 1969 Vienna Convention. However, even during the deliberations in the Commission, the link between peremptory norms of general international law (*jus cogens*) and the acceptance and recognition of the “international community of States” had been expressed by some members of the Commission.⁷⁷⁷

⁷⁷⁵ See *Committee of United States Citizens Living in Nicaragua* (footnote 698 above), at p. 940 (“Finally, in order for such a customary norm of international law to become a peremptory norm, there must be a further recognition by ‘the international community ... as a whole [that this is] a norm from which no derogation is permitted’”); and *Michael Domingues v. United States* (footnote 706 above), at para. 85 (“Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision”). See also *Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment of 17 October 2002*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, at para. 34. See, for discussion, J. Vidmar, “Norm conflicts and hierarchy in international law: towards a vertical international legal system?”, in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: the Place of Human Rights*, Oxford, 2011, p. 26. See also C. Costello and M. Foster, “Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test”, *Netherlands Yearbook of International Law*, vol. 46 (2016), p. 273, at p. 281 (“to be *jus cogens*, a norm must meet the normal requirements for customary international law ... and furthermore have that additional widespread endorsement as to its non-derogability”); and A. Hameed, “Unravelling the mystery of *jus cogens* in international law”, *British Yearbook of International Law*, vol. 84 (2014), p. 52, at p. 62. See, further, G. A. Christenson, “*Jus cogens*: guarding interests fundamental to international society”, *Virginia Journal of International Law*, vol. 28 (1987–1988), p. 585, at p. 593 (“The evidence would also need to demonstrate requisite *opinio juris* that the obligation is peremptory, by showing acceptance of the norm’s overriding quality”).

⁷⁷⁶ See article 50 of the draft articles on the law of treaties, (footnote 696 above), p. 247.

⁷⁷⁷ See the statement by Mr. Luna, summary records, 828th meeting (footnote 772 above), at para. 34 (“[*jus cogens*] was positive law created by States, not as individuals but as organs of the international community”).

(2) The first paragraph of draft conclusion 7 states that it is the acceptance and recognition by the international community of States as a whole that is relevant. This paragraph seeks to make clear that it is the position of States that is relevant and not that of other actors. While there have been calls for the inclusion of other actors whose acceptance and recognition might be pertinent for the establishment of peremptory norms of general international law (*jus cogens*),⁷⁷⁸ the current state of international law retains States as the entities whose acceptance and recognition is relevant. In the context of the draft articles on the law of treaties between States and international organizations or between international organizations, the Commission considered using the phrase “international community as a whole” and thus excluding the words “of States” from the phrase.⁷⁷⁹ However, on reflection, the Commission decided that “in the present state of international law, it is States that are called upon to establish or recognize peremptory norms”.⁷⁸⁰

(3) State practice and the decisions of international courts and tribunals have continued to link the elevation of norms of general international law to peremptory status with State acceptance and recognition. The International Criminal Court, for example, has stated that a peremptory norm of general international law (*jus cogens*) requires recognition by States.⁷⁸¹ The International Court of Justice, likewise, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite*, determined the peremptory character of the prohibition of torture on the basis of instruments developed by States.⁷⁸² Domestic courts have similarly continued to link the establishment of peremptory norms of general international law (*jus cogens*) with State recognition. For example, in determining that the prohibition of the death penalty was not a peremptory norm of general international law (*jus cogens*), the United States Court of Appeals for the Sixth Circuit stated, in *Buell v. Mitchell*, that “only sixty-one countries, or approximately thirty-two-percent of countries, had completely abolished the use of the death penalty”.⁷⁸³ While peremptory norms of general international law (*jus cogens*) continue to be linked to notions of the conscience of mankind in practice and scholarly writings,⁷⁸⁴ even then the material advanced to illustrate recognition of the norms as peremptory norms of general international law (*jus cogens*) remains acts and practice generated by States, including within international organizations, such as treaties and General Assembly resolutions.

⁷⁷⁸ See, for example, Canada (A/C.6/71/SR.27, para. 9), indicating that “it would be beneficial for the Commission ... to enlarge the idea of the acceptance and recognition of peremptory norms to include other entities, such as international and non-governmental organizations”.

⁷⁷⁹ See paragraph (3) of the commentary to draft article 53 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), p. 56. See also, in the context of the current topic, the statement by Canada (footnote above).

⁷⁸⁰ Paragraph (3) of the commentary to draft article 53 of the draft articles on the law of treaties between States and international organizations or between international organizations.

⁷⁸¹ *Prosecutor v. Katanga, Case No. ICC-01/04-01/07-34-05-tENG, Decision on the Application for the Interim Release of Detained Witnesses of 1 October 2013*, Trial Chamber II, International Criminal Court, at para. 30 (“peremptoriness [of the principle of *non-refoulement*] finds increasing recognition among States”).

⁷⁸² *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above), at para. 99. The Court cites, amongst others, the Universal Declaration of Human Rights, the Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights, General Assembly resolution 3452 (XXX) of 9 December 1975, and domestic legislation.

⁷⁸³ See, for example, *Buell v. Mitchell* (footnote 752 above), at p. 373. See also *On Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction, Ruling No. 5 of 10 October 2003 as amended on 5 March 2013*, decision of the Plenary Session of the Supreme Court of the Russian Federation, at para. 1 (“The universally recognized principles of international law should be understood as the basic imperative norms of international law, accepted and recognized by the international community of states as a whole, deviation from which is inadmissible”).

⁷⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 704 above), at p. 46, para. 87; and A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium (I)*, Leiden, 2010, at p. 316 (“It is my view that there is, in the multicultural world of our times, an irreducible minimum, which, in so far as international law-making is concerned, rests on its ultimate material source: human conscience”).

(4) Although draft conclusion 7 states that it is the acceptance and recognition of States that is relevant for determining whether a norm has a peremptory character, that does not mean that other actors do not play a role. Other actors may provide context and may contribute to the assessment of the acceptance and recognition by the international community of States as a whole. The subsidiary role of other actors has been recognized by the Commission in other topics. In its draft conclusions on the identification of customary international law, the Commission stated that it is “primarily ... the practice of States that contributes to the formation, or expression, of rules of customary international law”, while noting that “[i]n certain cases the practice of international organizations also contributes to the formation, or expression, of rules of customary international law”. It went on to note that the conduct of non-State actors, even though not practice for such purposes, “may be relevant when assessing the practice” of States.⁷⁸⁵ Likewise, in the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, the Commission concluded that the conduct of non-State actors did not constitute practice for the purposes of article 31 of the 1969 Vienna Convention but that it may “be relevant when assessing the subsequent practice of parties to a treaty”.⁷⁸⁶ Acts and practice of international organizations may provide evidence for the acceptance and recognition of States when determining whether a norm has a peremptory character.⁷⁸⁷ Ultimately, however, the positions of entities other than States are not, of themselves, sufficient to establish the acceptance and recognition required for the elevation of a norm of general international law to peremptory status. This consideration is reflected in the third paragraph of draft conclusion 7.

(5) The second paragraph of draft conclusion 7 seeks to explain what is meant by “as a whole”. It states that what is required is the acceptance and recognition by a very large majority of States. As explained by the Chairperson of the Drafting Committee during the United Nations Conference on the Law of Treaties, the words “as a whole” are meant to indicate that it was not necessary for the peremptory nature of the norm in question “to be accepted and recognized ... by all States” and that it would be sufficient if “a very large majority did so”.⁷⁸⁸ This sense is also captured by the phrase “community of States” as opposed to simply “States”. The combination of the phrases “as a whole” and “community of States” serves to emphasize that it is States as a collective or community, that must accept and recognize the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*).

(6) The Commission considered that acceptance and recognition by a simple “majority” of States was not sufficient to establish the peremptory status of a norm. Rather, the majority had to be very large. Determining whether there was a very large majority of States accepting and recognizing the peremptory status of a norm was not, however, a mechanical exercise in which the number of States is to be counted. The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures.⁷⁸⁹ The view was expressed that in the light of

⁷⁸⁵ Draft conclusion 4 of the draft conclusions on the identification of customary international law.

⁷⁸⁶ Draft conclusion 5 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/73/10, chap. IV).

⁷⁸⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 703 above), p. 23: “The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope”; see also conclusion 12 of the conclusions on the identification of customary international law.

⁷⁸⁸ Mr. Yasseen, Chairperson of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (see footnote 726 above), 80th meeting, at para. 12. See also E. de Wet, “*Jus cogens* and obligations *erga omnes*”, in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 541, at p. 543 (“This threshold for gaining peremptory status is high, for although it does not require consensus among all states ... it does require the acceptance of a large majority of states”). See, further, Christófolo (footnote 743 above), at p. 125 (“[The formation of peremptory norms reflects] a common will represent[ing] the consent of an overwhelming majority of States. Neither one State nor a very small number of States can obstruct the formative process of peremptory norms”).

⁷⁸⁹ See *Michael Domingues v. United States* (footnote 706 above), at para. 85 (“The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been

importance of State consent and the extraordinarily strong legal effect of peremptory norms of general international law (*jus cogens*), the recognition and acceptance of the “overwhelming majority of States”, “virtually all States”, “substantially all States” or “the entire international community of States as a whole” was required.⁷⁹⁰

Conclusion 8

Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

Commentary

(1) To identify a norm as a peremptory norm of general international law (*jus cogens*), it is necessary to show the acceptance and recognition by the international community of States as a whole of the non-derogability of such a norm. As implied in the second paragraph of draft conclusion 7, this requires that evidence of acceptance and recognition must be adduced. Draft conclusion 8 concerns the types of evidence necessary to identify that the international community of States as a whole accepts and recognizes that a norm has a peremptory character. Other subsidiary materials which may be relevant for the identification of peremptory norms of general international law (*jus cogens*) is addressed in draft conclusion 9.

(2) The first paragraph of draft conclusion 8 is a general statement. It provides that evidence of acceptance and recognition may take a wide range of forms. In its judgment in *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice relied on a variety of materials as evidence of the peremptory character of the prohibition of torture.⁷⁹¹ It should be recalled that what is at stake is the acceptance and recognition of the international community of States as a whole. Therefore, any material capable of expressing or reflecting the views of States would be relevant as evidence of acceptance and recognition.

(3) The second paragraph of draft conclusion 8 describes the forms of materials that may be used as evidence that a norm is a peremptory norm of general international law (*jus cogens*). In keeping with the statement above that evidence of acceptance and recognition may take various forms, the second paragraph of draft conclusion 8 states that the forms of evidence “include, but are not limited to”. The list contained in the second paragraph of draft conclusion 8 is therefore not a closed list. Other forms of evidence not mentioned in the second paragraph of draft conclusion 8, if reflecting or expressing the acceptance and recognition of States, may be adduced in support of the peremptory character of a norm.

(4) It will be noted that the forms of evidence listed in paragraph 2 of draft conclusion 8 are similar to those provided for in paragraph 2 of conclusion 10, which concerns forms of evidence of acceptance of law (*opinio juris*), of the Commission’s conclusions on the identification of customary international law.⁷⁹² This similarity is because the forms of evidence identified are those from which, as a general matter, the positions, opinions and views of States can be gleaned. The potential uses of these materials for the purposes of satisfying the acceptance and recognition criterion for peremptory norms of general international law (*jus cogens*), on one hand, and their use for the purposes of the identification

vigorously condemned by members of the international community as impermissible under contemporary human rights standards”).

⁷⁹⁰ See, for example, *Continental Shelf (Libyan Arab Jarmahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, at p. 30, para. 27.

⁷⁹¹ *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above), para. 99.

⁷⁹² Conclusion 10 of the conclusions on the identification of customary international law. General Assembly resolution 73/203 of 20 December 2018, annex.

of customary international law must be distinguished, on the other hand. For the former, the materials must establish acceptance and recognition by the international community of States as a whole that the norm in question is one from which no derogation is permitted, while for the latter the materials are used to assess whether States accept the norm as a rule of customary international law.

(5) The non-exhaustive list of forms of evidence in the second paragraph of draft conclusion 8 have in common that they are materials expressing or reflecting the views of States. These materials are the result of processes capable of revealing the positions and views of States. Treaties and resolutions adopted by States in international organizations or at intergovernmental conferences may be an obvious example of such materials.⁷⁹³ Decisions of national courts may also be a reflection of the views of States and have been relied upon in the determination of the peremptory character of norms.⁷⁹⁴ Legislative and administrative measures are yet another way by which States express their views and may thus also provide evidence of the peremptory character of a norm of general international law.⁷⁹⁵ States also routinely express their views about the peremptory character of particular norms through public statements and statements in international fora.⁷⁹⁶

⁷⁹³ In the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above), para. 99, the International Court of Justice referred to both treaties (“the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966”) and resolutions (“the Universal Declaration of Human Rights of 1948; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment”), in expressing its recognition of the prohibition of torture as a peremptory norm of general international law (*jus cogens*). See also *Prosecutor v. Mucić*, Judgment, the International Criminal Tribunal for the Former Yugoslavia, 16 November 1998 (IT-96-21-T) and *Prosecutor v. Delalić, et al.* (see footnote 757 above), at para. 454, relying on the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the 1966 International Covenant on Civil and Political Rights, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, and the 1969 American Convention on Human Rights (“Pact of San José, Costa Rica”). See also *Prosecutor v. Furundžija* (footnote 699 above), at p. 563, para. 144. In reaching its decision on the peremptory character of the prohibition of the execution of individuals under the age of 18, the Inter-American Commission on Human Rights in *Michael Domingues v. United States* (see footnote 706 above), at para. 85, relied on the ratification by States of treaties such as the 1966 International Covenant on Civil and Political Rights, the 1989 Convention on the rights of the child, and the 1969 American Convention on Human Rights (“Pact of San José, Costa Rica”), which it said were “treaties in which this proscription is recognized as non-derogable”. See also the separate opinion of Vice-President Ammoun in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, at p. 79, relying on General Assembly and Security Council resolutions for the conclusion that the right to self-determination is a peremptory norm. See also the Written Observations Submitted by the Government of the Solomon Islands to the International Court of Justice on the request by the World Health Organization for an Advisory Opinion on the Legality of the Use of Nuclear Weapons in View of their Effects on Human Health and the Environment, at pp. 39–40, para. 3.28 (“It is quite normal in international law for the most common and the most fundamental rules to be reaffirmed and repeatedly incorporated into treaties”).

⁷⁹⁴ See, for example, *Prosecutor v. Furundžija* (footnote 699 above), at p. 569, note 170. See also *Al-Adsani v. the United Kingdom* (footnote 706 above), at paras. 60–61, where the Court relied, *inter alia*, on *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet Ugarte (No. 3)* (footnote 723 above) and “other cases before ... national courts” in its assessment of the peremptory character of the prohibition of torture.

⁷⁹⁵ In coming to the conclusion that the prohibition of torture was of a peremptory character, the International Court of Justice in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above), at para. 99, referred to the fact that the prohibition had “been introduced into the domestic law of almost all States”. Similarly, in its decision on the prohibition of the execution of individuals below the age of 18, the Inter-American Commission in *Michael Domingues v. United States* (see footnote 706 above), at para. 85, took account of the fact that States had introduced relevant amendments to their national legislation.

⁷⁹⁶ See, for example, on aggression: Ghana (*Official Records of the United Nations Conference on the Law Treaties, First Session ...* (footnote 726 above), 53rd meeting, para. 15); the Netherlands

(6) In addition to the caveat that the forms of evidence in the second paragraph of draft conclusion 8 are non-exhaustive, it should also be recalled that such materials must speak to whether the norm has a peremptory character. The question is not whether a particular norm has been reflected in these materials but, rather, whether the materials establish the acceptance and recognition of the international community of States as a whole that the norm in question is one from which no derogation is permitted. These materials are not, individually, conclusive of the peremptory character of a norm. The materials have to be weighed and assessed together, in their context, in order to determine whether they evince a acceptance and recognition of the international community of States as a whole of the peremptory character of the norm in question.

Conclusion 9

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

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).

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

Commentary

(1) To identify a norm as being a peremptory norm of general international law (*jus cogens*), it is necessary to provide evidence that the international community of States as a whole accepts and recognizes the said norm as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character. As explained in draft conclusion 8, the forms of evidence relevant for this purpose are materials expressing or reflecting the views of States. Other materials, not reflecting the views of States, may also be relevant as subsidiary means for the determination of the peremptory character of a norm. Draft conclusion 9 concerns some such subsidiary means. It is important to emphasize that the word “subsidiary” in this context is not meant to diminish the importance of such materials, but is rather aimed at expressing the idea that those materials facilitate the identification of “acceptance and recognition” but do not, themselves, constitute such acceptance and recognition.⁷⁹⁷ Draft conclusion 9 concerns such other materials.

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

(A/C.6/SR.781, para. 2); Uruguay (*Official Records of the United Nations Conference on the Law Treaties, First Session ...* (footnote 726 above), 53rd meeting, para. 48); Japan (S/PV.2350); Belarus (A/C.6/73/SR.26, para. 90); and Mozambique (A/C.6/73/SR.28, para. 3). In this respect, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 754 above), at para. 99, the International Court of Justice referred to the fact that “acts of torture are regularly denounced within national and international fora” in asserting the peremptory character of the prohibition of torture.

⁷⁹⁷ See also paragraph (2) of the commentary to conclusion 13 of the draft conclusions on customary international law (footnote 740 above) (“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”).

Justice refers to “judicial decisions”, which includes both decisions of international courts and decisions of national courts, the first paragraph of draft conclusion 9 refers only to decisions of international courts and tribunals. In addition to serving as subsidiary means under Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, decisions of national courts may also constitute primary evidence under draft conclusion 8.

(3) There is an abundance of examples of decisions of international courts relying on other decisions of international courts and tribunals. As an example, the International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor v. Furundžija*, determined that the prohibition of torture was a peremptory norm of general international law (*jus cogens*) on the basis of, *inter alia*, the extensiveness of the prohibition including the fact that States are prohibited “from expelling, returning or extraditing” a person to a place where they may be subject to torture.⁷⁹⁸ To demonstrate the extensiveness of this prohibition, the Court referred to judgments of, *inter alia*, the European Court of Human Rights.⁷⁹⁹ The judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundžija* has itself often been referred to, to illustrate the peremptory status of the prohibition of torture.⁸⁰⁰ The Special Tribunal for Lebanon in *Prosecutor v. Ayyash, et al.*, concluded that “[t]he principle of legality (*nullum crimen sine lege*) ... [is] so frequently upheld by international criminal courts with regard to international prosecution of crimes that it is warranted to hold that by now it has the status of a peremptory norm (*jus cogens*)”.⁸⁰¹ The Special Tribunal for Lebanon, in *El Sayed*, determined that the right to access to justice has “acquired the status of a peremptory norm (*jus cogens*)” based on, *inter alia*, jurisprudence of both national and international courts.⁸⁰² The decision in *El Sayed* provides a particularly apt illustration of the manner in which decisions of international courts and tribunals can be a subsidiary means for the identification of peremptory norms of general international law (*jus cogens*). There, the Tribunal, in the judgment written by its then-President, Antonio Cassese, relied on various forms of evidence, including evidence listed in draft conclusion 8, to come to the conclusion that, taken as a whole, the evidence suggested that there was an acceptance and recognition of the peremptory character of the right of access to courts.⁸⁰³ The decision then refers to the decision in *Case of Goiburú, et al. v. Paraguay*, in which the Inter-American Court of Human Rights determined that the right of access to the courts is a peremptory norm of general international law (*jus cogens*), in order to give context to the primary evidence relied upon and to solidify that evidence.⁸⁰⁴

(4) The first paragraph of draft conclusion 9 explicitly mentions the International Court of Justice as a subsidiary means for the determination of the peremptory character of norms. There are several reasons for the express mention of the International Court of Justice. First,

⁷⁹⁸ *Prosecutor v. Furundžija* (see footnote 699 above), para. 144.

⁷⁹⁹ *Soering v. the United Kingdom, Application no. 14038/88, Judgment of 7 July 1989*, European Court of Human Rights; *Cruz Varas and Others v. Sweden, Application no. 15576/89, Judgment of 20 March 1991*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 201; and *Chahal v. the United Kingdom, Application no. 22414/93, Judgment of 15 November 1996*, Grand Chamber, European Court of Human Rights.

⁸⁰⁰ See, for example, *Al-Adsani v. the United Kingdom* (footnote 706 above), at para. 30; and *García Lucero, et al. v. Chile* (footnote 718 above), at paras. 123–124, especially note 139. See also, generally, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet Ugarte (No. 3)* (footnote 723 above), where several of the Lords referred to *Prosecutor v. Furundžija* (footnote 699 above).

⁸⁰¹ *Prosecutor v. Ayyash, et al., Case No. STL-11-01/I, Interlocutory Decision of 16 February 2011 on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Appeals Chamber, Special Tribunal for Lebanon, at para. 76. For this decision the Court relied on, *inter alia*, the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Duško Tadić (Case No. IT-94-1-AR-72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Criminal Tribunal for the Former Yugoslavia); *Prosecutor v. Delalić, et al.* (see footnote 757 above); and *Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment of 2 September 1998*, Trial Chamber I, International Criminal Tribunal for Rwanda.

⁸⁰² *El Sayed, Case No. CH/PRES/2010/01, Order of 15 April 2010 assigning Matter to Pre-Trial Judge*, President of the Special Tribunal of Lebanon, para. 29, referring in particular to *Case of Goiburú, et al. v. Paraguay* (see footnote 706 above).

⁸⁰³ See *ibid.*, paras. 21–28.

⁸⁰⁴ *Ibid.*, para. 29.

it is the principal judicial organ of the United Nations and its members are elected by the main political organs of the United Nations. Second, it remains the only international court with general subject-matter jurisdiction. Moreover, while the Court has been reluctant to pronounce on peremptory norms, its jurisprudence has left a mark on the development both of the general concept of peremptory norms and of particular peremptory norms, even in cases where peremptory norms of general international law (*jus cogens*) were not explicitly invoked. In particular, its advisory opinions on *Reservations to the Convention on the Prevention and Punishment of Genocide*, the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as its decisions in *Barcelona Traction, Light and Power Company, Limited, East Timor*, and the *Military and Paramilitary Activities in and against Nicaragua*, have made major contributions to the understanding and evolution of peremptory norms of general international law (*jus cogens*), notwithstanding the fact that they do not expressly and unambiguously invoke, for their respective conclusions, peremptory norms.⁸⁰⁵ When the International Court of Justice has pronounced itself expressly on peremptory norms, its decisions have been even more influential. The judgment of the Court in the *Obligation to Prosecute or Extradite* case, for example, has confirmed the peremptory status of the prohibition of torture.⁸⁰⁶

(5) The second paragraph of draft conclusion 9 concerns other subsidiary means for the determination of the peremptory character of norms of general international law. As with decisions of international courts and tribunals, these other means are subsidiary in the sense that they facilitate the determination of whether there is acceptance and recognition by States but they themselves are not evidence of such acceptance and recognition. The paragraph lists, as examples of other subsidiary means, the works of expert bodies and teachings of the most highly qualified publicists of the various nations, also referred to as scholarly writings. The use of the phrase “may also” in paragraph 2, in contradistinction to the word “are” which is used to qualify decisions of international courts and tribunals in paragraph 1, indicates that less weight may attach to works of expert bodies and scholarly writings in comparison to judicial decisions. The relevance of these other materials as subsidiary means depends on other factors, including on the reasoning of the works or writings, the extent to which the views expressed are accepted by States and the extent to which such views are corroborated either by other forms of evidence listed in draft conclusion 8 or decisions of international courts and tribunals.

(6) The first category relates to the works of expert bodies. The phrase “established by States or international organizations” indicates that the paragraph refers to organs established by international organizations and subsidiary bodies of such organizations, such as the International Law Commission as well as expert treaty bodies. The qualification was necessary to emphasize that the expert body in question had to have an intergovernmental mandate and had to be created by States. The use of the phrase “established by States or by international organizations” means that private organizations which do not have an intergovernmental mandate are not included in the category of expert bodies. This does not mean that the works of expert bodies without an intergovernmental mandate are irrelevant. The works of the Institute of International Law or the International Law Association may, for example, qualify as “teachings of the most highly qualified publicists” under paragraph 2 of draft conclusion 9.⁸⁰⁷ The term “works” covers not only the final outcomes of the expert bodies but also their work leading up to the final outcome.

⁸⁰⁵ See *Reservations to the Convention on the Prevention and Punishment of the Genocide* (footnote 703 above); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 793 above), p. 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136; *Legality of the Threat or Use of Nuclear Weapons* (footnote 699 above); *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3; *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, p. 90; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 741 above).

⁸⁰⁶ See *Questions relating to the Obligation to Prosecute or Extradite* (footnote 754 above), at para. 99.

⁸⁰⁷ See paragraph (5) of the commentary to draft conclusion 14 of the draft conclusions on the identification of customary international law.

(7) The reliance on other materials is also supported by courts. In *RM v. the Attorney-General*, for example, the High Court of Kenya relied on the Human Rights Committee general comment No. 18 on non-discrimination⁸⁰⁸ for its determination that non-discrimination is a peremptory norm of general international law (*jus cogens*).⁸⁰⁹ Similarly, for its conclusion that the principle of *non-refoulement* was a peremptory norm of general international law (*jus cogens*), the International Criminal Court relied on, *inter alia*, an advisory opinion of the Office of the United Nations High Commissioner for Refugees.⁸¹⁰ Similarly, the finding by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundžija* that the prohibition of torture was a norm of *jus cogens* was based, *inter alia*, on observations of the Inter-American Commission of Human Rights, the Human Rights Committee, and a report of a Special Rapporteur, Mr. Kooijmans.⁸¹¹

(8) The Commission has also often been referred to in the assessment of whether a particular norm has attained peremptory status or not. In assessing the status of the prohibition of the use of force, the International Court of Justice observed that the “International Law Commission ... expressed the view that ‘the law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’”.⁸¹² Scholarly writings that provide a list of generally accepted peremptory norms of general international law (*jus cogens*) often rely on the list provided by the Commission in the commentary to draft article 26 of the articles on responsibility of States for internationally wrongful acts.⁸¹³ The Commission’s own work may thus also contribute to the identification of norms of peremptory norms of general international law (*jus cogens*).

(9) The second paragraph refers to “teachings of the most highly qualified publicists”, which may also be useful as subsidiary material for the identification of peremptory norms of international law.⁸¹⁴ This refers to scholarly writings and other works that may be used as

⁸⁰⁸ Human Rights Committee, general comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 1.

⁸⁰⁹ *RM v. Attorney-General*, Civil Case No. 1351 2002 (O.S.), *Judgment of 1 December 2006*, High Court of Kenya at Nairobi, [2006] eKLR, at p. 18.

⁸¹⁰ See *Prosecutor v. Katanga* (footnote 781 above), at para. 30, referring to the 2007 *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* of the Office of the United Nations High Commissioner for Refugees. The Court also referred to the several Executive Committee Conclusions of the Office of the United Nations High Commissioner for Refugees.

⁸¹¹ See *Prosecutor v. Furundžija* (footnote 699 above), at paras. 144 and 153. The Tribunal referred to the Inter-American Convention on Human Rights, General Comment on Article 7 and general comment No. 24 of the Human Rights Committee, and a report by Special Rapporteur Kooijmans.

⁸¹² *Military and Paramilitary Activities in and against Nicaragua* (see footnote 741 above), at pp. 100–101, para. 190. See also *Re Víctor Raúl Pinto, Re, Pinto (Victor Raúl) v. Relatives of Tomás Rojas, Case No. 3125-94, Decision on Annulment of 13 March 2007*, Supreme Court of Chile, ILDC 1093 (CL 2007), at paras. 29 and 31.

⁸¹³ Paragraph (5) of the commentary to article 26 of the articles on the responsibility of States for internationally wrongful acts. See den Heijer and van der Wilt (footnote 714 above), at p. 9, referring to the norms in the list as those “beyond contestation”. See also Christófolo (footnote 743 above), at p. 151; and Weatherall (footnote 701 above), at p. 202. See also de Wet (footnote 788 above), at p. 543. She relies, however, not on a Commission list, but rather on the list from paragraph 374 of the report of the Study Group of the Commission (see footnote 702 above), with a list that is slightly modified from that of the Study Group. For example, in the list de Wet provides, “the right of self-defence” is included as a peremptory norm of general international law (*jus cogens*) in its own right, while the list of the Study Group contains the “prohibition of aggression” but not “self-defence” as an independent peremptory norm of general international law (*jus cogens*).

⁸¹⁴ See, for example, *Nguyen Thang Loi v. Dow Chemical Company (In re Agent Orange Product Liability Litigation)*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), at p. 108, relying on M.C. Bassiouni, “Crimes against humanity”, in R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know*, Norton, 1999; *Prosecutor v. Kallon and Kamara, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision of 13 March 2004 on Challenge to Jurisdiction: Lomé Accord Amnesty*, Appeals Chamber, Special Court for Sierra Leone, at para. 71, relying on L. Moir, *The Law of Internal Armed Conflict*, Cambridge, 2002; and *Bayan Muna v. Alberto Romulo* (see footnote 723 above), at p. 55, citing M.C. Bassiouni, “International crimes: *jus cogens* and *obligatio erga omnes*”,

secondary material in assessing and providing context to the primary forms of acceptance and recognition of peremptory status. It is important to emphasize that the weight to be accorded to such teachings will vary greatly depending on the quality of the reasoning and the extent to which they find support in State practice and in the decisions of international courts and tribunals.⁸¹⁵

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

Part Three

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

Conclusion 10

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

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Commentary

(1) Draft conclusion 10 concerns the invalidity and termination of treaties on account of being in conflict with peremptory norms of general international law (*jus cogens*). The invalidity of treaties is the legal effect that is most closely associated with peremptory norms of general international law.⁸¹⁶ Article 53 of the 1969 Vienna Convention has rarely been relied upon to invalidate a treaty, so much so that it has been questioned whether it remains operative.⁸¹⁷ The fact that treaties have rarely been invalidated on account of a conflict with

Law and Contemporary Problems, vol. 59 (1996), p. 63. See also *Siderman de Blake v. Republic of Argentina* (footnote 708 above), at p. 717, citing several authors, including K. Parker and L.B. Neylon, “*Jus cogens*: compelling the law of human rights”, *Hastings International and Comparative Law Review*, vol. 12, No. 2 (Winter 1989), pp. 411–463; and K. C. Randall, “Universal jurisdiction under international law”, *Texas Law Review*, vol. 66 (1987–1988), pp. 785–841, in support of the proposition that the prohibition of torture is a peremptory norm of general international law (*jus cogens*).

⁸¹⁵ See also paragraph (3) of the commentary to draft conclusion 14 of the draft conclusions on the identification of customary international law (“There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words ‘may serve as’. First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential”).

⁸¹⁶ Danilenko, *Law-Making in the International Community* (see footnote 735 above), at p. 212 (“As originally conceived, within the codification process relating to the law of treaties, the concept of *jus cogens* applies only to treaty relationships ... to invalidate bilateral and multilateral agreements contrary to fundamental community rules recognized as ‘higher law’”). See also Kleinlein (footnote 764 above), at p. 181; K. Kawasaki, “A brief note on the legal effects of *jus cogens* in international law”, *Hitotsubashi Journal of Law and Politics*, vol. 34 (2006), p. 27; and den Heijer and van der Wilt (footnote 714 above), at p. 7.

⁸¹⁷ Costelloe (see footnote 694 above), at p. 55 (“the relevant [provisions of the 1969 Vienna Convention] are very narrow, and the question whether they still have much relevance ... and are now virtually a dead letter, is justified”). See Charlesworth and Chinkin (footnote 701 above), pp. 65–66 (“Despite fears that the inclusion of [article 53 of the Vienna Convention] would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus*

peremptory norms is, however, not because the rule in article 53 is not accepted by States, but simply because States do not generally enter into treaties that conflict with peremptory norms of general international law (*jus cogens*). Thus, the rule that a treaty in conflict with peremptory norms is invalid continues to be applicable even though it has rarely been applied.

(2) While instances of invalidity of treaties on account of conflict with peremptory norms of general international law (*jus cogens*) have been rare, this does not mean that there has been no practice at all that may be relevant to this question. There have been statements made by individual States assessing whether a particular treaty was consistent or not with a peremptory norm of general international law (*jus cogens*) and, accordingly, whether it could be considered as valid or not.⁸¹⁸ The General Assembly has adopted resolutions⁸¹⁹ which some have interpreted as recognizing that the validity of certain agreements is to be determined by reference to their consistency with certain fundamental principles. There have also been judicial decisions that have considered the invalidity of treaties on account of possible inconsistency with peremptory norms of general international law (*jus cogens*). In *Prosecutor v. Taylor*, the Special Court for Sierra Leone had to determine whether the provision in its own Statute which removed immunities of officials was invalid.⁸²⁰ The Court held that since the provision was “not in conflict with any peremptory norm of general

cogens doctrine has been only rarely invoked in this context. It thus has had little practical impact upon the operation of treaties”); and Kadelbach (footnote 700 above), p. 161 (“direct conflict in the sense that a treaty has an illicit subject-matter is a theoretical case”). See also Cassese (footnote 701 above), pp. 159–160 (“Should we conclude that consequently what is normally asserted to be a major advance accomplished by the 1969 Vienna Convention ... has in fact proved over the years to be an outright flop?”). See, for examples, Shelton, “Sherlock Holmes and the mystery of *jus cogens*” (footnote 714 above), at p. 36; and Kadelbach (footnote 700 above), p. 152. See, for discussion, Knuchel (*ibid.*), at p. 141.

⁸¹⁸ For general statements to this effect, see the statement by the Netherlands during the eighteenth session of the Sixth Committee, Agenda Item 69, Report of the International Law Commission, para. 2 (on the question of *jus cogens*, the “Agreement concerning the Sudeten German Territory, signed at Munich on 29 September 1938, was one of the few examples of treaties which had come to be regarded as contrary to international public order”). Cyprus, at the same meeting and in order to show the practice in support of nullity as a consequence of conflict with peremptory norms of general international law (*jus cogens*), listed a number of treaties as providing for nullity on account of conflict with peremptory norm, namely the prohibition on the use of force (“The Covenant of the League of Nations, the General Treaty for the Renunciation of War as an Instrument of National Policy (known as the Briand Kellogg Pact); the Charter of the Nürnberg Tribunal; the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and, most recently, Article 2, paragraph 4, of the Charter of the United Nations made it *lex lata* in modern international law that a treaty procured by the illegal threat or use of force was void *ab initio*”). See also Israel during the eighteenth session of the Sixth Committee, Agenda Item 69, Report of the International Law Commission, para. 8. For more specific statements see *East Timor (Portugal v. Australia)*, Counter-Memorial of the Government of Australia of 1 June 1992, para. 223, declaring that the “Timor Gap Treaty” (the Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia, signed over the zone of cooperation on 11 December 1989, United Nations, *Treaty Series*, vol. 1654, No. 28462, p. 105), if in conflict with the right of self-determination, would be invalid on account of being in breach of a norm of *jus cogens*; the memorandum of the Legal Adviser of the State Department, Roberts B. Owen, to the Acting Secretary of State, 29 December 1979, in *U.S. Digest*, chapter 2, section 1, para. 4, reproduced in M.L. Nash, “Contemporary practice of the United States relating to international law”, *American Journal of International Law*, vol. 74, No. 2 (April 1980), p. 418, at p. 419 (“Nor is it clear that the treaty between the USSR and Afghanistan ... is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention on the Law of Treaties describes as a ‘peremptory norm of general international law’ ... , namely that contained in Article 2, paragraph 4 of the Charter” of the United Nations).

⁸¹⁹ General Assembly resolution 33/28A of 7 December 1978; General Assembly resolution 34/65 B of 29 November 1979; General Assembly resolutions 36/51 of 24 November 1981; and General Assembly resolution 39/42 of 5 December 1984.

⁸²⁰ *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision of 31 May 2004 on Immunity from Jurisdiction, Appeals Chamber, Special Court for Sierra Leone, para. 53. See also *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision of 13 March 2004 on Constitutionality and Lack of Jurisdiction, Appeals Chamber, Special Court for Sierra Leone.

international law, [it] must be given effect” to by the Court.⁸²¹ It seems to follow that had the provision been in conflict it would not have been given effect to by the Court. Similarly, in the *Aloeboetoe, et al. v. Suriname* case before the Inter-American Court of Human Rights, reliance had been placed on an agreement concluded between the Netherlands and the Saramaka community for the purposes of reparation.⁸²² The Court noted that, under some provisions of the treaty, the Saramaka undertook to capture any escaped slaves and return them to slavery.⁸²³ On that account, the Court held that if the agreement in question were a treaty, it would be “null and void because it contradicts the norms of *jus cogens superveniens*”.⁸²⁴

(3) Draft conclusion 10 follows the approach of the 1969 Vienna Convention by distinguishing between, on the one hand, treaties that, at the time of their conclusion, are in conflict with a peremptory norm of general international law (*jus cogens*) (paragraph 1) and, on the other hand, treaties that conflict with a peremptory norm of general international law that emerges subsequent to the conclusion of the treaty (paragraph 2).⁸²⁵ The first alternative is addressed in the first sentence of article 53 of the 1969 Vienna Convention while the second alternative is addressed in article 64 of that Convention. Both paragraphs follow closely the text of the 1969 Vienna Convention.

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

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

⁸²¹ *Prosecutor v. Taylor* (see footnote above), para. 53.

⁸²² *Aloeboetoe and Others v. Suriname, Judgment of 10 September 1993 on Reparation and Costs*, Inter-American Court of Human Rights, *Series C*, No. 15.

⁸²³ *Ibid.*, at para. 57.

⁸²⁴ *Ibid.*

⁸²⁵ See paragraph (6) of the commentary to article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, p. 248 (draft article 50 “has to be read in conjunction with article 61 (Emergence of a new rule of *jus cogens*), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent development establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words ‘*becomes* void and *terminates*’ make it quite clear, the Commission considered that the emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only from the time of the establishment of the new rule of *jus cogens*”) (emphasis in original).

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

Conclusion 11

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

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.
2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:
 - (a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;
 - (b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of any party to be bound by the treaty as a whole; and
 - (c) continued performance of the remainder of the treaty would not be unjust.

Commentary

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

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

(3) The second paragraph addresses circumstances where a treaty (or particular provisions of a treaty) conflict with a peremptory norm which emerges subsequent to the conclusion of the treaty. The formulation of the second paragraph follows closely that in

paragraph 3 of article 44 of the 1969 Vienna Convention. It recognizes the possibility of separation in cases where a treaty becomes invalid due to the emergence of a peremptory norm of general international law subsequent to the conclusion of the treaty.

(4) The *chapeau* of the second paragraph makes plain that, as a general rule, a treaty becomes void as a whole if it conflicts with a peremptory norm of general international law (*jus cogens*), even in cases where the peremptory norm emerges subsequent to the conclusion of the treaty. For that reason, the first part of the *chapeau* of the second paragraph of draft conclusion 11 provides that a treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole. The word “unless”, at the end of the *chapeau*, signifies that it is only in those limited instances which are covered by subparagraphs (a) to (c) where separation may take place. The elements listed in subparagraphs (a) to (c) are cumulative in nature. In other words, all three elements must be present in order for provisions that conflict with a peremptory norm to be separated from the rest of the treaty.

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

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

(7) Pursuant to subparagraph (c), the last condition that has to be met for severance of a provision that conflicts with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of a treaty is that the continued performance under the treaty would not be unjust. The word “unjust”, in this context, is meant to refer to the essential balance of rights and obligations created by the treaty which could be disturbed only if some provisions were separated while others were retained. Furthermore, to decide whether continued performance of the treaty would be “unjust”, consideration needs to be given not only to the impact on the parties of the treaty, but also impacts beyond parties, if relevant and necessary. Whether the conditions set out in the second paragraph are present is to be established by a consideration of all the relevant circumstances, including the subject of the provision, its relation to other clauses of the treaty and the *travaux préparatoires* amongst other factors.⁸²⁶

Conclusion 12

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

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

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

⁸²⁶ See paragraph (5) of the commentary to article 41 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. (II), p. 238.

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

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

Commentary

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

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

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

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

(5) The second paragraph concerns the situation addressed by article 64 of the 1969 Vienna Convention, namely those cases in which a treaty becomes void as a result of a

peremptory norm that emerges subsequent to the adoption of the treaty. The formulation in the second paragraph of draft conclusion 12 follows closely the text of article 71, paragraph 2, of the 1969 Vienna Convention. It must be reiterated that, in such cases, the treaty only becomes invalid after the emergence of the peremptory norm of general international law (*jus cogens*). In other words, during the period between the adoption of the treaty and the emergence of the peremptory norm, the treaty remains valid and consequently acts performed and rights and obligations created pursuant to it, remain valid. There can therefore be no obligation to eliminate consequences of acts validly performed. The draft conclusion states that the termination of a treaty due to conflict with a peremptory norm that emerges subsequent to the adoption of the treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty. Thus, while the treaty becomes void, rights, obligations or legal situations created through the lawful performance under the treaty will not be affected. However, those rights, obligations or legal situations may be maintained or relied upon only to the extent that their continued existence is not itself a violation of a peremptory norm of general international law (*jus cogens*).

Conclusion 13

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

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.
2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Commentary

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

(2) The first paragraph addresses the case where a reservation is entered to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*). The formulation of the first paragraph of draft conclusion 13 is based on the Commission's Guide to Practice on Reservations to Treaties.⁸²⁷ It states that a reservation to a provision in a treaty that reflects a peremptory norm does not affect the binding nature of that norm which shall continue to apply as such. The phrase "as such" is intended to indicate that even when reflected in a treaty provision, a peremptory norm of general international law (*jus cogens*) retains its validity independent of the treaty provision. This means that while the reservation may well affect the treaty rule and the application of the treaty rule, the norm, as a peremptory norm of general international law (*jus cogens*), will not be affected and will continue to apply. The rule reflected in this paragraph of draft conclusion 13 flows from the normal operation of international law. It derives, in particular, from the fact that the treaty provision over which a reservation has been formulated, and the peremptory norm of general international law (*jus cogens*) in question, have a separate existence.⁸²⁸

(3) The rule in the first paragraph of draft conclusion 13 does not relate to the validity of the reservation. Whether the reservation is valid or not, and the consequences of any invalidity, are matters that are governed by the rules contained in the 1969 Vienna Convention. It would be going too far to prohibit a reservation to a provision in a treaty which reflects a peremptory norm of general international law (*jus cogens*) outright since such a determination should always be dependent upon ascertaining the object and purpose of the

⁸²⁷ Guide to Practice on Reservations to Treaties, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10/Add.1)*, guideline 4.4.3.

⁸²⁸ *Military and Paramilitary Activities in and against Nicaragua* (see footnote 741 above), at pp. 93–94, para. 175 (addressing this issue in the context of a reservation to a declaration recognizing as compulsory the jurisdiction of the Court under Article 36, paragraph 2, of its Statute).

treaty in question – an exercise that can only be done through the interpretation of each particular treaty. It is nonetheless important to emphasize that, whatever the validity of the reservation in question, a State cannot escape the binding nature of a peremptory norm of general international law (*jus cogens*) by formulating a reservation to a treaty provision reflecting that norm.

(4) The second paragraph of draft conclusion 13 concerns reservations which, on their face, are neutral and do not relate to peremptory norms, but whose application would be contrary to a peremptory norm of general international law (*jus cogens*). Such reservations are invalid. Drawing on paragraph 2 of guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, draft conclusion 13 states that a reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*). The typical example identified in the commentary to guideline 4.4.3 is a reservation “intended to exclude a category of persons from benefitting from certain rights granted under a treaty”.⁸²⁹ The right to education, though very important, is not, at this time, a peremptory norm of general international law (*jus cogens*). Thus, the formulation of a reservation to a treaty provision proclaiming a right to education would not, as such, be contrary to a peremptory norm of general international law (*jus cogens*) nor would it constitute a reservation to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). However, a reservation that limits the implementation of such right to a particular racial group or excludes a particular racial group from the enjoyment of the treaty right, may well be found to violate the generally recognized peremptory norm of general international law prohibiting racial discrimination.⁸³⁰

Conclusion 14

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

1. A rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.
2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).
3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

Commentary

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

⁸²⁹ Guide to Practice on Reservations to Treaties (see footnote 827 above), para. (5) of the commentary to guideline 4.4.3.

⁸³⁰ See, for example, paragraph (5) of the commentary to article 26 of the articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85.

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

(3) Peremptory norms of general international law (*jus cogens*) are hierarchically superior to other norms of international law and therefore override such norms in the case of conflict. Decisions of national courts have recognized that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law. In *Siderman de Blake v. Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit considered that “[i]ndeed ... the supremacy of *jus cogens* extends over all rules of international law” and noted that “norms that have attained the status of *jus cogens* ‘prevail over and invalidate international agreements and other rules of international law in conflict with them’”.⁸³¹ The Supreme Court of Argentina has similarly stated that crimes against humanity had the “character of *jus cogens*, meaning that [the prohibition is] above both treaty law, and all other sources of international law”.⁸³²

(4) The position that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law has also been recognized in decisions of international courts and tribunals. In the *Jurisdictional Immunities of the State* case, the International Court of Justice noted the proposition of Italy that “*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law”.⁸³³ The Court did not reject that proposition, but declined to find that there was a conflict between the rule on State immunities in civil proceedings and peremptory norms of general international law (*jus cogens*).⁸³⁴ The hierarchical superiority of peremptory norms of general international law (*jus cogens*) over customary international law was also recognized in *Al-Adsani v. the United Kingdom*, in which the European Court of Human Rights determined, having considered *Prosecutor v. Furundžija*, that peremptory norms of general international law (*jus cogens*) are those norms that enjoy “a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”.⁸³⁵ The consequences of peremptory norms of general international law (*jus cogens*) on the existence of a conflicting rule of customary international law is aptly captured in the joint dissenting opinion of Judges Rozakis and Caflisch in the *Al-Adsani v. the United Kingdom* case:

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law For the basic characteristic of a *jus cogens* rule is that ... it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails.⁸³⁶

⁸³¹ *Siderman de Blake v. Republic of Argentina* (see footnote 708 above), p. 715 (citing to the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 102 comment k).

⁸³² *Julio Héctor Simón y otros s/ privación ilegítima de la libertad* (see footnote 724 above), para. 48 (original: “el carácter de *jus cogens* de modo que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho”).

⁸³³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at p. 140, para. 92.

⁸³⁴ *Ibid.*, paras. 92–93. See in this respect, Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (forthcoming, 2019), at section 1.3.1 (examples include the priority-rule implicitly confirmed by the International Court of Justice in the *Jurisdictional Immunities of the State* case: in the event of a conflict between a *jus cogens* norm and a rule of customary international law, States must act upon the former).

⁸³⁵ *Al-Adsani v. the United Kingdom* (see footnote 706 above), para. 60. See also *Prosecutor v. Furundžija* (footnote 699 above), para. 153.

⁸³⁶ Joint dissenting opinion of Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) in *Al-Adsani v. the United Kingdom* (see footnote 706 above), para. 1. See also T.

(5) The rule in the first sentence of the first paragraph of draft conclusion 14, which states that a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*), follows from the fact that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law. Thus, the High Court of Kenya, in *The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others*, stated that peremptory norms of general international law (*jus cogens*) “rendered void any other pre-emptory rules which come into conflict with them”.⁸³⁷

(6) The second sentence of the first paragraph of draft conclusion 14 provides that the general principle captured in the first sentence is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character. This is based on the recognition that, as provided for in draft conclusion 5, customary international law is the most common basis for peremptory norms of general international law (*jus cogens*) and that, therefore, modification of a peremptory norm of general international law (*jus cogens*) is likely to occur through the subsequent acceptance and recognition of a rule of customary international law as a peremptory norm of general international law (*jus cogens*) or the emergence of a new rule of customary international law so accepted and recognized. However, to be able to modify a peremptory norm of general international law (*jus cogens*), the rule of customary international law in question must have the same character as the peremptory norm of general international law (*jus cogens*) being modified. The phrase “having the same character”, which is taken from article 53 of the 1969 Vienna Convention indicates that such a rule of customary international law must itself be recognized and accepted as one from which no derogation is permitted and which can only be modified by a subsequent peremptory norm of general international law (*jus cogens*). That a rule of customary international law could only derogate from, and thus modify, a peremptory norm of general international law (*jus cogens*) if such a rule of customary international law also had a peremptory character is supported by a judgment of the Queen’s Bench Division of the England and Wales High Court of Justice in *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, which, having referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*), stated that their “derogation by States through treaties or rules of customary law not possessing the same status [was] not permitted”.⁸³⁸

(7) The second paragraph of draft conclusion 14 concerns cases in which a rule of customary international law, which at the time of its formation did not conflict with existing peremptory norms of general international law (*jus cogens*), conflicts with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the formation of the rule of customary international law. It provides that such a rule of customary international law “ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)”. The phrase “ceases to exist” indicates that prior to the emergence of the new peremptory norm of general international law (*jus cogens*), the rule of customary international law was in force but that it ceases to exist upon the emergence of the peremptory norm of general international law (*jus cogens*). The phrase “if and to the extent” is meant to indicate that only those parts of the rule of customary international law in question that conflict with the peremptory norm of general international law (*jus cogens*) will cease to exist. This phrase operates like a separability provision, in order to maintain those

Kleinlein (footnote 764 above), p. 187 (“it is a relatively straightforward case to perceive a structural hierarchy between *jus cogens* and regional or local customary rules”).

⁸³⁷ *The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others* (see footnote 748 above). See also *C v. Director of Immigration*, HCAL 132/2006, [2008] 2 HKC 165, [2008] HKCFI 109, ILDC 1119 (HK 2008), 18 February 2008, para. 75.

⁸³⁸ *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, para. 142 (ii). See also A. Caro de Beer and D. Tladi, “The use of force against Syria in response to alleged use of chemical weapons by Syria: a return to humanitarian intervention?”, *Heidelberg Journal of International Law*, vol. 79, No. 2 (2019), p. 217, in which the authors noted that if the prohibition on the use of force were regarded as a peremptory norm of general international law (*jus cogens*), a subsequent rule of customary international law could only emerge if it were “‘accepted and recognized’ as having a peremptory character, in a way that would modify the” pre-existing peremptory norm of general international law (*jus cogens*).

parts of the rule of customary international law that are consistent with the peremptory norm of general international law (*jus cogens*). The qualifier “if and to the extent” does not apply to the first paragraph of draft conclusion 14 since, in the case of a pre-existing peremptory norm of general international law (*jus cogens*), the rule of customary international law in question does not come into existence at all.

(8) The third paragraph of draft conclusion 14 deals with the persistent objector rule. It provides that the persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*). Draft conclusion 15 of the Commission’s draft conclusions on identification of customary international law states that a rule of customary international law is not opposable to a State that has persistently objected to that rule of customary international law while it was in the process of formation for as long as that State maintains its objection. Draft conclusion 15 of the draft conclusions on identification of customary international law also stated, however, that this rule was without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).⁸³⁹

(9) The rule that persistent objection does not apply to peremptory norms of general international law (*jus cogens*) flows from both the universal application and hierarchical superiority of peremptory norms of general international law as reflected in draft conclusion 3.⁸⁴⁰ This means that peremptory norms of general international law (*jus cogens*) apply to all States. In this respect, the Federal Supreme Court of Switzerland, in *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, stated that *jus cogens* norms “were binding on all subjects of international law”.⁸⁴¹ The Inter-American Court of Human Rights has concluded that peremptory norms of general international law (*jus cogens*) “bind all States”.⁸⁴² The rule that, by virtue of their universal application and hierarchical superiority, peremptory norms of general international law (*jus cogens*) cannot be subject to the persistent objector rule has been reflected in statements by States.⁸⁴³

⁸³⁹ Draft conclusion 15 of the draft conclusions on identification of customary international law, report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, p. 121.

⁸⁴⁰ On the universal application of these norms, see, for example, the written statement of 19 June 1995 by the Government of Mexico on the request for an advisory opinion submitted to the International Court of Justice by the General Assembly at its forty-ninth session (resolution 49/75K), para. 7 (“The norms ... are of a legally binding nature for all the States (*jus cogens*)”).

⁸⁴¹ *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (see footnote 698 above), para. 7 (emphasis added).

⁸⁴² *Juridical Condition and Rights of Undocumented Migrants* (see footnote 731 above), p. 113, paras. 4–5.

⁸⁴³ See also the Islamic Republic of Iran, “the ‘persistent objector’ ... had no place in the formation of *jus cogens*” (A/C.6/68/SR.26, para. 4). See also statements by States in the 2016 and 2018 meetings of the Sixth Committee (agenda item 78: report of the International Law Commission), particularly the following: Brazil “welcomed the clarification in draft conclusion 15 [of the draft conclusions on identification of customary international law] that the inclusion of the persistent objector rule was without prejudice to any issues of *jus cogens*” (A/C.6/71/SR.22, para. 18); Chile stated that “[w]here the rules of *jus cogens* were concerned, the persistent objector institution did not apply” (A/C.6/71/SR.21, para. 102); Cyprus “welcomed paragraph 3 [of draft conclusion 15 of the draft conclusions on identification of customary international law] ... [as] without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)” (A/C.6/73/SR.23, para. 43); El Salvador “agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* norms” (A/C.6/71/SR.25, para. 63); Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), “welcomed the inclusion in the draft conclusions [on identification of customary international law] of the persistent objector rule Nonetheless, the category of rule to which the State objected should be taken into account and particular consideration must be given to universal respect for fundamental rules, especially those relating to the protection of individuals” (A/C.6/71/SR.20, para. 52); Greece “reiterated [the] delegation’s doubts about the applicability of the persistent objector rule in relation not only to the rules of *jus cogens* but also to the broader category of the general principles of international law” (A/C.6/71/SR.22, para. 10); Iceland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), stated that “the notion of persistent objector was not compatible with the concept of *jus cogens*” (A/C.6/71/SR.24, para. 63); Mexico stated that “there could be no persistent objection to *jus cogens* rules” (A/C.6/71/SR.22, para. 25); Slovenia “agreed with the enunciation of *jus cogens* norms as being of a special and exceptional nature, reflecting the common

Specifically in response to an argument about the persistent objector rule, the Inter-American Commission on Human Rights, in *Michael Domingues v. United States*, determined that peremptory norms of general international law (*jus cogens*) “bind the international community as a whole, irrespective of protest, recognition or acquiescence”.⁸⁴⁴

(10) A question that arises in scholarly writings is whether a peremptory norm of general international law (*jus cogens*) can ever emerge in the face of persistent objection of one or a few States.⁸⁴⁵ It can because persistent objection to a rule of customary international law by a few States does not prevent the rule’s emergence; rather, such objection merely renders that rule not opposable to the State or States concerned for so long as the objection is maintained. For that reason, the persistent objector rule does not prevent the emergence of a peremptory norm of general international law (*jus cogens*) based on a rule of customary international law to which one or more States have persistently objected. At the same time, if a rule of customary international law, to which a State has persistently objected, becomes accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character, the effect of the persistent objection falls away.

(11) Whether there is such acceptance and recognition of a rule of general international law (*jus cogens*) may be affected by the objections. According to the second paragraph of draft conclusion 7, the phrase “international community of States as a whole” does not require the acceptance and recognition of all States but does require the acceptance and recognition of a very large majority. Thus, if a rule of customary international law was the object of persistent objections from several States, such objections might not be sufficient to preclude the emergence of a rule of customary international law but might be sufficient to preclude the norm from being recognized as a peremptory norm of general international law (*jus cogens*). In other words, to the extent that such persistent objection implies that the norm in question is not accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, then a peremptory norm of general international law (*jus cogens*) might not arise.

(12) A view was expressed that “persistent objection” to a rule of customary international law should not be characterized as a “rule” but rather as a “doctrine”. The Commission, however, decided to use the phrase “persistent objector rule” since this concept is often referred to as a “rule” and since the Commission has already referred to it as either a “rule” or a “doctrine” in its prior work.⁸⁴⁶

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

Conclusion 15

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

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

and overarching values adhered to by the international community. For that reason, [the] delegation reaffirmed its view that the persistent objector was incompatible with the nature of *jus cogens*” (A/C.6/71/SR.26, para. 114); South Africa “agreed with [the Special Rapporteur’s] preliminary observation that there could be no objection to *jus cogens* norms” (A/C.6/71/SR.26, para. 86); and Spain stated that “it was regrettable that it had not been specifically stated in draft conclusion 15 [of the draft conclusions on identification of customary international law] that there could be no persistent objection to peremptory norms of general international law” (A/C.6/73/SR.21, para. 91).

⁸⁴⁴ *Michael Domingues v. United States* (see footnote 706 above), para. 49.

⁸⁴⁵ C. Mik, “*Jus cogens* in contemporary international law”, *Polish Yearbook of International Law*, vol. 33, No. 27 (2013), p. 50. See also D. Costelloe (footnote 694 above), pp. 21–23.

⁸⁴⁶ For example, see the commentary to Part VI, as well as paragraph 4 of the commentary to conclusion 15 of the conclusions on identification of customary international law.

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

Commentary

(1) Draft conclusion 15 addresses the legal consequences of peremptory norms of general international law (*jus cogens*) for unilateral acts of States manifesting the intention to be bound by an obligation under international law.⁸⁴⁷ Draft conclusion 15 is based on the understanding that unilateral acts may, under certain conditions described below, establish obligations for the State performing the unilateral act. The first paragraph of draft conclusion 15 addresses those cases in which the unilateral act, at the time of its performance, is in conflict with a peremptory norm of general international law (*jus cogens*). It provides that, in such cases, the unilateral act does not create any such obligation. This consequence of peremptory norms of general international law (*jus cogens*) mirrors those in the first sentence of draft conclusion 10 and the first paragraph of draft conclusion 14 of the present draft conclusions, namely that no obligations come into existence at all.

(2) The first paragraph of draft conclusion 15 is inspired by article 53 of the 1969 Vienna Convention.⁸⁴⁸ The Commission, in its guiding principles applicable to unilateral declarations of States capable of creating legal obligations, formulated the rule in the following terms: “A unilateral declaration which is in conflict with a peremptory norm of general international law is void”.⁸⁴⁹ Although the guiding principles use the phrase “is void” in the context of a declaration, the present draft conclusion uses broader phrases, “does not create such an obligation” and “ceases to exist”, so as to capture more fully the broader context of the draft conclusion, which is addressing unilateral acts in a broader sense. The focus is therefore on the legal obligations intended to be created by the unilateral act in question. As indicated in the first paragraph, such obligations are not created if they conflict with a peremptory norm of general international law (*jus cogens*).

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

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

⁸⁴⁷ The scope of this draft conclusion is thus broader than the scope of the 2006 International Law Commission guiding principles applicable to unilateral declarations of States capable of creating legal obligations, which “relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international laws” (preambular paragraph 5 of the guiding principles).

⁸⁴⁸ See the Guide to Practice on Reservations to Treaties (footnote 827 above), paragraph (18) of the commentary to guideline 3.1.5.3, stating that it was true that “the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts”.

⁸⁴⁹ Guiding principle 8, *Yearbook ... 2006*, vol. II (Part Two), p. 165.

continue to exist and apply, but only if it is possible to maintain them in the absence of the aspects of the obligations that cease to exist.

(5) Draft conclusion 15 does not concern all unilateral acts, nor does it concern all acts creating obligations. It is concerned with unilateral acts by a State undertaken with the intention to create obligations only for the State itself. This draft conclusion does not concern sources of obligations, such as treaties and customary international law, which are addressed in previous draft conclusions. Similarly, it does not address reservations, which are dealt with in draft conclusion 13. Moreover, draft conclusion 15 does not cover other acts in conflict with peremptory norms of general international law (*jus cogens*), which are addressed by other draft conclusions concerning responsibility for wrongful acts under international law. For example, a unilateral act that is not intended to create obligations on the State but that, nonetheless, constitutes a breach of a peremptory norm of general international law (*jus cogens*) is subject to draft conclusions 17, 18, 19 and 22 of the present draft conclusions. Draft conclusion 15 concerns only those unilateral acts by which a State manifests the intention to unilaterally assume obligations and not other acts.⁸⁵⁰

(6) The first paragraph of draft conclusion 15 describes the unilateral act under consideration as one “manifesting the intention to be bound by an obligation under international law”. The State performing the unilateral act must thus intend to establish obligations under international law. This requires an ascertainment of the intention of the State performing a unilateral act. In *Frontier Dispute* (Burkina Faso/Mali), the International Court of Justice determined that whether a unilateral act could create obligations “all depends on the intention of the State in question”.⁸⁵¹ The words “manifesting the intention” intend to convey that, although it is the subjective intention of the State that is sought, this intention has to be determined from the overall facts and circumstances of each particular case.⁸⁵² The subjective intention is therefore to be sought by relying on objective facts. In the words of the International Court of Justice, whether a unilateral act was intended to create a legal obligation is to be “ascertained by interpretation of the act”.⁸⁵³ Likewise, the second paragraph of draft conclusion 15 only applies to unilateral acts as described in paragraph (5).

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

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

Conclusion 16

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

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

⁸⁵⁰ *Ibid.*, commentary to guiding principle 2.

⁸⁵¹ *Case Concerning Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *I.C.J. Reports 1986*, p. 554, at p. 573, para. 39. See also *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, at p. 267, para. 43 (“When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration”).

⁸⁵² *Frontier Dispute* (see footnote 851 above), para. 40.

⁸⁵³ *Nuclear Tests* (see footnote 851 above), para. 44.

Commentary

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

(2) Draft conclusion 16 applies to resolutions, decisions or other acts of international organizations whatever their designation. The phrase “resolution, decision or other act” of an international organization is intended to convey the same meaning as the description of “resolution” in paragraph (2) of the commentary to draft conclusion 12 of the draft conclusions on identification of customary international law.⁸⁵⁴ It also covers unilateral acts of international organizations manifesting an intention to be bound. The words “that would otherwise have binding effect” serve to limit the scope of the draft conclusion to resolutions, decisions and acts of international organizations that would ordinarily have binding effect, but for the conflict with the peremptory norm of general international law (*jus cogens*). Examples of a resolution, decision or act of an international organization that would otherwise have binding effect include a decision in a resolution of the Security Council, taken under chapter VII of the Charter of the United Nations,⁸⁵⁵ or a decision of the General Assembly admitting a State to become a member of the Organization. The question of whether such a decision has binding effect (or is one that would otherwise have binding effect) is to be determined by an interpretation of the relevant decision.⁸⁵⁶ The European Union also produces acts in the form of directives, regulations and decisions, which are binding on Member States. Other international organizations, such as the International Civil Aviation Organization, the African Union and the World Trade Organization may also produce resolutions, decisions or other acts that, but for the rule set forth in this draft conclusion, would have binding effect. Draft conclusion 16 is thus meant to be broad, covering all resolutions, decisions and acts that would otherwise establish obligations under international law.

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

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

⁸⁵⁴ See paragraph (2) of the commentary to draft conclusion 12 of the draft conclusions on identification of customary international law. See report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, p. 147.

⁸⁵⁵ By virtue of Article 25 of the Charter of the United Nations, which provides that the “Members of the United Nations agree to accept and carry out the decisions of the Security Council”, the decisions of the Security Council under Chapter VII of the Charter are binding.

⁸⁵⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 793 above), p. 53, para. 114 (“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council”).

created through treaties, customary international law and unilateral acts, it follows that such rules cannot be created through resolutions, decisions or other acts of international organizations either. Resolutions, decisions or acts of the Security Council, however, require additional consideration since, pursuant to Article 103 of the Charter of the United Nations, obligations under the Charter prevail over other rules of international law.⁸⁵⁷ For this reason, considering the hierarchical superiority of peremptory norms of general international law (*jus cogens*), the Commission considered it important to highlight that draft conclusion 16 applies equally to binding resolutions, decisions and acts of the Security Council.⁸⁵⁸

(5) The application of the rule in draft conclusion 16 has to be read together with the interpretative rule set out in draft conclusion 20 and the procedural requirements laid down in draft conclusion 21.

Conclusion 17

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

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

⁸⁵⁷ Article 103 of the Charter of the United Nations provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. While this provision speaks only of international agreements, it has been interpreted as applying to customary international law and certainly to resolutions, decisions and acts of other international organizations. See, for discussion, the report of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law (finalized by Martti Koskenniemi) (A/CN.4/L.682, A/CN.4/L.682/Corr.1 and A/CN.4/L.682/Add.1), paras. 344–345, especially at para. 345 (“Therefore it seems sound to join the prevailing opinion that Article 103 should be read extensively – so as to affirm that [C]harter obligations prevail also over United Nations Member States’ customary law obligations”).

⁸⁵⁸ For the statements by States, see for example, Switzerland, on behalf of Germany, Sweden and Switzerland (“some courts have also expressed their willingness to ensure that Security Council decisions comply with” peremptory norms of general international law (*jus cogens*), “from which neither the Member States nor the United Nations may derogate” (S/PV.5446, p. 28); Qatar (while, by virtue of Article 103 of the Charter, obligations flowing from Security Council resolutions supersede other obligations, this did not apply to peremptory norms of general international law (*jus cogens*) (S/PV.5779, p. 23). See also Argentina and Nigeria (S/PV.5474, p. 20; and S/PV.5474 (Resumption 1), p. 19, respectively); Finland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), observed that there was a “widely held view that the powers of the Security Council, albeit exceptionally wide, were limited by the peremptory norms of international law” (A/C.6/60/SR.18, para. 18); and Iran (Islamic Republic of) (A/C.6/66/SR.7, para. 84). For other views by States, see the United States (A/C.6/60/SR.20, para. 36), which cautioned that “general pronouncements about the relationship” between peremptory norms of general international law (*jus cogens*) and Security Council resolutions “should be avoided” and the United Kingdom of Great Britain and Northern Ireland (A/C.6/73/SR.27, para. 73, citing to para. 5 of the annex to the written statement) stated that there is no “State practice to support the contention that a State can refuse to comply with a binding [Security Council] resolution based on an assertion of a breach of a *jus cogens* norm” and the Russian Federation (A/C.6/73/SR.26, para. 131), which emphasized that discussions on the issue of Security Council resolutions in connection with *jus cogens* norms “were not based on any practice”, and that the draft conclusion could be misinterpreted in a way “which would undermine the activities of the Security Council”. For the views of Courts see, e.g. *R (On the Application of Al-Jedda) v. Secretary of State for Defence*, Appeal Judgment of 12 December 2007, House of Lords [2008] 3 All ER 28 (Lord Bingham), para. 35; *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (see footnote 698 above), para. 7 (“Yet *jus cogens*, the peremptory law binding on all subjects of international law, marks the limit of the obligation to apply resolutions of the Security Council. For this reason, it must be determined whether, as the petitioner asserts, the resolutions of the Security Council containing the sanctions violate *jus cogens*”) (original in German, translation courtesy of *Oxford Reports on International Law in Domestic Courts*); *Tadić*, Judgment, 15 July 1999 (footnote 152 above), para. 296; *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (see footnote 719 above), para. 226 (on appeal, European Court did not address the matter).

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

Commentary

(1) Draft conclusion 17 addresses obligations *erga omnes*. It consists of two paragraphs. The first paragraph states that the peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*). The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* has been recognized in the practice of States. The Democratic Republic of the Congo (formerly known as Zaire), for example, in a statement in the Sixth Committee of the General Assembly, proposed a treaty on the prohibition of the use of force and stated that the proposed treaty should have an *erga omnes* effect in view of the fact that the prohibition of the use of force was a peremptory norm of general international law (*jus cogens*).⁸⁵⁹ Similarly, the Czech Republic stated that “*jus cogens* obligations were *erga omnes* obligations, which did not allow for any derogation, including by means of an agreement”.⁸⁶⁰ The Federal Court of Australia, in *Nulyarimma and Others v. Thompson*, also accepted the contention of the parties that “the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole”.⁸⁶¹ Similarly, in *Kane v. Winn*, the United States District Court of Massachusetts determined that “the prohibition against torture” is an obligation *erga omnes* that, “as [a] *jus cogens* norm[s] ... [is] ‘non-derogable and peremptory’”.⁸⁶²

(2) The International Court of Justice has not explicitly pronounced that a link exists between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*. Nevertheless, such a link could be deduced from some of its judgments and advisory opinions. First, every norm described by the Court⁸⁶³ as one having an *erga omnes* character is also one that has been included in the non-exhaustive list of norms previously referred to by the Commission as having peremptory status. This list is reproduced in the annex to the present draft conclusions. Second, the Court has applied the legal consequences under article 41 of the articles on responsibility of States for internationally wrongful acts (which concern

⁸⁵⁹ Zaire (A/C.6/35/SR.32, para. 38). See also the statement of the Netherlands at the 25th meeting of the Sixth Committee during the forty-ninth session of the General Assembly, in which it stated that “an international crime would always involve a breach of a *jus cogens* or *erga omnes* obligation” (A/C.6/49/SR.25, para. 38).

⁸⁶⁰ See also the Czech Republic (A/C.6/49/SR.26, para. 19) and Burkina Faso (A/C.6/54/SR.26).

⁸⁶¹ *Nulyarimma and Others v. Thompson*, Appeal Decision of 1 September 1999, [1999] FCA 1192, 165 ALR 621, 96 FCR 153, ILDC 2773 (AU 1999), para. 81.

⁸⁶² *Kane v. Winn*, 31 F. Supp. 2d 162, 199 (D. Mass. 2004). See also *R and Office of the United Nations High Commissioner for Refugees v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Home Affairs*, Appeal Judgment of 12 October 2006 of the High Court, [2006] ALL ER (D) 138, para. 102, referring to “*ius cogens erga omnes*”. See also *Jorgic case, J (a Bosnian Serb)*, Individual Complaint, Judgment of 12 December 2000 of the German Constitutional Court, 2 BvR 1290/99, ILDC 132 (DE 2000), para. 17.

⁸⁶³ See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, para. 180 (viewing the right to self-determination as having an *erga omnes* character). See also *East Timor (Portugal v. Australia)* (footnote 805 above), p. 102, para. 29, in which the Court described the statement that self-determination had an *erga omnes* character as being “irreproachable”. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at p. 47, para. 87, the Court affirmed “that the Genocide Convention contains obligations *erga omnes*” and “that the prohibition of Genocide has the character of a peremptory norm (*jus cogens*)”. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 805 above), paras. 88, 149 and 155; and *Barcelona Traction, Light and Power Company, Limited* (footnote 805 above), p. 32, paras. 33–34, in which the Court determined “obligations [that] derive ... from the outlawing of acts of aggression, and of genocide ... protection from slavery and racial discrimination”. See also conclusion (33) of the conclusions of the Study Group on fragmentation of international law (A/CN.4/L.702, p. 21). The conclusions also appear in *Yearbook ... 2006*, vol. II (Part Two), para. 251.

breaches of peremptory norms) to breaches of such *erga omnes* obligations.⁸⁶⁴ The Commission itself has been more explicit in recognizing a close relationship between obligations *erga omnes* and peremptory norms of general international law (*jus cogens*).⁸⁶⁵ The relationship between peremptory norms and obligations *erga omnes* has also been recognized in scholarly writings.⁸⁶⁶

(3) Although all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*).⁸⁶⁷ For example, certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of whether they have peremptory status.

(4) The first paragraph of draft conclusion 17 is intended to capture, in a general way, the relationship described above between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*. It states that peremptory norms of general international law (*jus cogens*) “give rise to” obligations *erga omnes*. This wording is based on the Commission’s articles on responsibility of States for internationally wrongful acts, in which obligations *erga omnes* are described as those obligations which “arise under peremptory norms of general international law”.⁸⁶⁸ The phrase “in which all States have a legal interest” describes the main consequence of the *erga omnes* character of peremptory norms of general international law (*jus cogens*).⁸⁶⁹ The words “legal interest” encompasses the protection of the legal norm as such, including rights and obligations.

(5) The second paragraph of draft conclusion 17 builds on the first paragraph by describing a distinct consequence of the connection between obligations *erga omnes* and peremptory norms of general international law (*jus cogens*). It describes, in more precise terms, the implications of the phrase “in which all States have a legal interest” in the first paragraph. This consequence is that any State is entitled to invoke the responsibility of another State for the latter’s breach of a peremptory norm of general international law (*jus cogens*). The words used in the second paragraph of draft conclusion 17 follow the text of article 48 of the Commission’s articles on responsibility of States for internationally wrongful acts, which provides that “[a]ny State ... is entitled to invoke the responsibility of another

⁸⁶⁴ See draft articles on responsibility of States for internationally wrongful acts (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, and the commentaries thereto, para. 77). The articles also appear in General Assembly resolution 56/83 of 12 December 2001, annex, as modified by [A/56/49\(Vol. I\)/Corr.4](#). See, in particular, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 863 above), para. 180 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 805 above), para. 159.

⁸⁶⁵ See Part Two, chapter III, of the articles on responsibility of States for internationally wrongful acts, especially paragraph (4) of the general commentary to that chapter, in which “the recognition of the concept of peremptory norms of international law” is said to be a development “closely related” to obligations *erga omnes*, and paragraph (7) of the general commentary, in which the Commission states that “there is at the very least substantial overlap between” obligations *erga omnes* and peremptory norms of general international law (*jus cogens*).

⁸⁶⁶ See, for example, M. Cherif Bassiouni, “International crimes: *jus cogens* and *obligatio erga omnes*”, *Law and Contemporary Problems*, vol. 59, No. 4 (1996), p. 63; I. Scobbie, “The invocation of responsibility for the breach of ‘obligations under peremptory norms of general international law’”, *European Journal of International Law*, vol. 13, No. 5 (2002), p. 1210 (“Following *Barcelona Traction*, the Commission has taken the view that peremptory norms and obligations ‘owed to the international community as a whole’ are essentially two sides of the one coin”); F. Forrest Martin, “Delineating a hierarchical outline of international law sources and norms”, *Saskatchewan Law Review*, vol. 65 (2002), p. 353; S. Villalpando, *L’émergence de la communauté internationale dans de la Responsabilité des États* (Paris, Presses Universitaires de France, 2005), p. 106; C. Tomuschat, “Reconceptualizing the debate ...” (footnote 728 above), p. 430; A. Pellet, “Conclusions”, in Tomuschat and Thouvenin (*ibid.*).

⁸⁶⁷ See, for example, Villalpando (footnote 866 above) and Forrest Martin (footnote 866 above).

⁸⁶⁸ Articles on responsibility of States for internationally wrongful acts, paragraph (7) of the general commentary to Part Two, chapter III.

⁸⁶⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 863 above), para. 180 (“all States have a legal interest in protecting that right”); *Barcelona Traction, Light and Power Company, Limited* (see footnote 805 above), p. 32, para. 33 (“all States can be held to have a legal interest in their protection”).

State ... if ... the obligation breached is owed to the international community as a whole”.⁸⁷⁰ Although draft conclusion 17 refers to “the responsibility of another State”, it is without prejudice to the responsibility of international organizations. It will be recalled that, under article 49 of the articles on the responsibility of international organizations, a State or an international organization is entitled to invoke the responsibility of an international organization for the breach by that international organization of an obligation owed to the international community of States as a whole.

(6) According to the second paragraph of draft conclusion 17, the right of a State to invoke the responsibility of another State for the latter’s breach of a peremptory norm of general international law (*jus cogens*) is to be exercised in accordance with the rules on the responsibility of States for internationally wrongful acts. This qualification is intended to emphasize the distinction between the invocation of responsibility by an injured State and the invocation of responsibility by any other State. Under the articles on responsibility of States for internationally wrongful acts, the right of an injured State to invoke the responsibility of another State for the breach of a peremptory norm of general international law (*jus cogens*) is to be exercised according to article 42; whereas third States are entitled to invoke the responsibility for such a breach under article 48.⁸⁷¹ When invoking the responsibility of another State in its capacity as an injured State, the injured State is entitled to claim all the forms of reparations provided for in chapter II of Part Two of the articles on responsibility of States for internationally wrongful acts. However, a State other than an injured State that invokes the responsibility of another State for the latter’s breach of a peremptory norm of general international law (*jus cogens*) may only claim “cessation of the internationally wrongful act, and assurances and guarantees of non-repetition”.⁸⁷² A State other than an injured State, may only claim reparations “in the interest of the injured State or of the beneficiaries of the obligation breached” and not for its own benefit.⁸⁷³

Conclusion 18

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

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

Commentary

(1) Draft conclusion 18 addresses circumstances precluding wrongfulness in relation to a breach of peremptory norms of general international law (*jus cogens*). As a general rule, the existence of certain circumstances can serve to preclude the wrongfulness of an act of a State that would otherwise be unlawful.⁸⁷⁴ Draft conclusion 18 sets out an exception to this general rule on State responsibility by providing that where the breach in question concerns a peremptory norm of general international law (*jus cogens*), the circumstances precluding wrongfulness may not be invoked.

(2) Draft conclusion 18 is based on article 26 of the articles on responsibility of States for internationally wrongful acts, which excludes the invocation of grounds precluding wrongfulness as spelt in chapter V of Part One of the articles for any act that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*). The effect of this rule is that, where the responsibility of a State for a breach of a peremptory norm of general international law (*jus cogens*) is invoked, the State against which the breach is invoked cannot seek to excuse itself from responsibility by raising any

⁸⁷⁰ *Ibid.*, art. 48, para. 1 (b).

⁸⁷¹ *Ibid.*, paragraph (1) of the commentary to article 48.

⁸⁷² *Ibid.*, art. 48, para. 2 (a).

⁸⁷³ *Ibid.*, art. 48, para. 2 (b).

⁸⁷⁴ *Ibid.*, see generally Part One, chapter V. Paragraph (1) of the general commentary to Part One, chapter V, states that the existence of these grounds “provides a shield against an otherwise well-founded claim for the breach of an international obligation”.

circumstance that might ordinarily preclude wrongfulness. This applies even where the circumstance precluding wrongfulness itself involves a peremptory norm of general international law (*jus cogens*). As the Commission has previously stated, a genocide cannot be invoked as a justification for the commission of a counter-genocide.⁸⁷⁵

(3) Draft conclusion 18 is without prejudice to the invocation of such circumstances by international organizations and other entities. Article 26 of the articles on the responsibility of international organizations also provides that the wrongfulness of an act of an international organization not in conformity with a peremptory norm of general international law (*jus cogens*) will not be precluded by the invocation of a circumstance precluding the wrongfulness of that act.

Conclusion 19

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

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).
2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.
3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.
4. This draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

Commentary

(1) Draft conclusion 19 concerns particular consequences of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*). It is based on article 41 of the articles on responsibility of States for internationally wrongful acts. Draft conclusion 19 is concerned only with “additional consequences” arising from serious breaches of peremptory norms of general international law (*jus cogens*).⁸⁷⁶ It does not address consequences arising from breaches of rules of international law that are not of a peremptory character nor does it address the consequences of breaches of peremptory norms that are not serious in nature.

(2) The first particular consequence of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is provided in the first paragraph of draft conclusion 19. The first paragraph of draft conclusion 19, which is based on article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, provides that States shall cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*). The obligation to “cooperate to bring to an end through lawful means” serious breaches of peremptory norms of general international law (*jus cogens*) builds upon the general obligation to cooperate under international law.⁸⁷⁷ Although at the time of the adoption of its articles on the law of treaties, the Commission expressed some doubt as to whether the obligation expressed in

⁸⁷⁵ *Ibid.*, paragraph (4) of the commentary to article 26.

⁸⁷⁶ *Ibid.*, paragraph (7) of the general commentary to Part Two, chapter III.

⁸⁷⁷ See, for example, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1 (“States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences”).

paragraph 1 of article 41 constituted customary international law,⁸⁷⁸ the obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is now recognized under international law. The United Kingdom House of Lords in *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v. Secretary of State for the Home Department*, for example, referred explicitly to the obligation under international law “to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law”, and cited both article 41 of the Commission’s articles on responsibility of States for internationally wrongful acts and the Advisory Opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁸⁷⁹ The Commission has recognized the obligation, albeit just in general terms in its draft articles on the protection of persons in the event of disasters.⁸⁸⁰ The International Court of Justice, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, has, since the adoption of the articles on responsibility of States for internationally wrongful acts, determined that there is an obligation to cooperate to bring to an end breaches of “obligations to respect the right ... to self-determination, and certain ... obligations under international humanitarian law”,⁸⁸¹ norms that are widely cited as peremptory. The Court determined that one of the obligations arising from the breaches of such obligations was an obligation on other States “while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from” the breaches are “brought to an end”.⁸⁸² Similarly, in the Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court determined that all States “must cooperate with the United Nations” to bring to an end the breach of obligations arising from the right of self-determination.⁸⁸³ Similarly, in the *Case of La Cantuta v. Peru*, the Inter-American Court of Human Rights identified “the duty of cooperation among States for” the purpose of eradicating breaches as itself a consequence of breaches of obligations arising under peremptory norms of general international law (*jus cogens*).⁸⁸⁴

(3) The obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is to be carried out “through lawful means”. This means that the breach of a peremptory norm of general international law (*jus cogens*) may not serve as a justification for the breach of other rules of international law. Although international law does not prohibit unilateral measures to bring to an end a serious breach of a peremptory norm of general international law (*jus cogens*) if such unilateral measures are consistent with international law, the emphasis in the first

⁸⁷⁸ See paragraph (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts.

⁸⁷⁹ *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v. Secretary of State for the Home Department*, Judgment of the House of Lords of 8 December 2005 [2006] 1 All ER 575, para. 34.

⁸⁸⁰ See draft articles on the protection of persons in the event of disasters, with commentaries (report of the International Law Commission on the work of its sixty-eighth session, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*), paragraph (1) of the commentary to draft article 7 (“The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments”).

⁸⁸¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 805 above), para. 155.

⁸⁸² *Ibid.*, para. 159.

⁸⁸³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 863 above), para. 182.

⁸⁸⁴ *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006, Inter-American Court of Human Rights, para. 160 (“As pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (*jus cogens*). ... In view of the nature and seriousness of the events ... the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states”).

paragraph of draft conclusion 19 is on collective measures. This is the essence of “cooperation”.⁸⁸⁵

(4) Depending on the type of breach and the type of peremptory norm in question, the collective system of the United Nations is the preferred framework for cooperative action. It is for this reason that, in the light of the determination by the International Court of Justice of a breach of “self-determination” and “basic principles of humanitarian law”, the Court stated that “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation”.⁸⁸⁶ Similarly, in its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court referred to the obligation of “all Member States” to “cooperate with the United Nations” to end the breach in question.⁸⁸⁷ Collective measures under other international organizations with a mandate may also be taken to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*). Another example of an organization whose mandate permits it to take measures to bring to an end breaches of peremptory norms of general international law (*jus cogens*) is the African Union.⁸⁸⁸ However, it is not only measures under institutionalized cooperation mechanisms that may be adopted. The obligation to cooperate to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) may also be implemented through non-institutionalized cooperation, including through *ad hoc* arrangements by a group of States acting together to bring to an end a breach of a peremptory norm.⁸⁸⁹ Indeed, the International Court of Justice, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, seems to suggest that, over and above collective action, there is an obligation on individual States to make efforts to bring situations created by the breach to an end.⁸⁹⁰ In that opinion, in addition to referring to the measures that may be adopted by the General Assembly and the Security Council, the Court stated that “[i]t is also for all States” to take measures to end the breach of a peremptory norm of general international law (*jus cogens*). The requirement, however, is that such measures should be consistent with international law.⁸⁹¹

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

⁸⁸⁵ See, for example, paragraph (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts (“What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches”).

⁸⁸⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 805 above), para. 160.

⁸⁸⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 863 above), para. 182.

⁸⁸⁸ See article 4 (h) of the Constitutive Act of the African Union (2000), which permits the African Union to intervene to bring to an end breaches of the prohibition of genocide, crimes against humanity and war crimes.

⁸⁸⁹ See paragraph (2) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts.

⁸⁹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 805 above), para. 159.

⁸⁹¹ *Ibid.* (“It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”) (emphasis added).

corollary of the obligation to cooperate provided for in the first paragraph of draft conclusion 19.

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

(7) Already in 2001, the Commission had recognized that the duties of non-recognition and non-assistance were part of customary international law.⁸⁹² In *Kuwait Airways Corporation v. Iraqi Airways Company and Others*, the United Kingdom House of Lords refused to give legal validity to acts resulting from the Iraqi invasion of Kuwait – a breach of the peremptory norm of general international law (*jus cogens*) relating to the use of force.⁸⁹³ The obligation of non-recognition had been recognized in decisions of the International Court of Justice and in the practice of States acting in international organizations. In its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, for example, the Court recalled that “qualification of a situation as illegal does not by itself put an end to” the situation.⁸⁹⁴ The Court held that there was an obligation on third States “to recognize the illegality and invalidity of South Africa’s continued presence”.⁸⁹⁵ Similarly, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court determined that “all States are under an obligation not to recognize the illegal situation resulting from” the breach of an obligation widely recognized as having peremptory character.⁸⁹⁶ The Security Council has also recognized the obligation on States not to recognize the situation created by a breach of the prohibition of apartheid and the obligation to respect self-determination.⁸⁹⁷ The obligation of non-recognition of acts that are in breach of obligations that arise under the peremptory norms of the right of self-determination and the prohibition of apartheid can also be seen in the General Assembly resolution calling for non-recognition of the Bantustans created by South Africa in the furtherance of apartheid in violation of the right to self-determination.⁸⁹⁸ The obligation not to assist or render aid to the maintenance of a situation created by a serious breach of an

⁸⁹² See paragraphs (6), (11) and (12) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts.

⁸⁹³ *Kuwait Airways Corporation v. Iraqi Airways Company and Others* (Nos. 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, para. 29. See also *A. Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v. Secretary of State for the Home Department* (footnote 879), para. 34.

⁸⁹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 793 above), para. 111.

⁸⁹⁵ *Ibid.*, para. 119.

⁸⁹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 805 above), para. 159.

⁸⁹⁷ See Security Council resolution 276 (1970) of 30 January 1970.

⁸⁹⁸ General Assembly resolution 3411 D (XXX) of 28 November 1975, para. 3.

obligation arising under a peremptory norm has also been recognized in the decisions of the International Court of Justice and resolutions of the United Nations.⁸⁹⁹

(8) While the obligation of non-recognition is settled, this duty is not to be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation.⁹⁰⁰ In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice declared that the consequences of non-recognition should not negatively affect or disadvantage the affected population and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized notwithstanding the breach.⁹⁰¹

(9) The obligations in draft conclusion 19 apply only to serious breaches of peremptory norms of general international law (*jus cogens*). A serious breach is defined in the third paragraph of draft conclusion 19 as a breach that “involves a gross or systematic failure by the responsible State to fulfil that obligation” in question. This definition is taken from article 40, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.⁹⁰² A view was expressed that the word “serious” should be omitted from the text of draft conclusion 19, *inter alia*, since the duties of non-recognition and non-assistance were not onerous.

(10) The fourth paragraph of draft conclusion 19 provides that the obligations in draft conclusion 19 are without prejudice to other consequences that serious breaches may entail under international law.⁹⁰³ Draft conclusion 19, for example, does not specifically address the consequences of the breach for the responsible State. The International Court of Justice has routinely declared an obligation of cessation on the responsible State.⁹⁰⁴ Other examples of consequences of breaches of obligations under international law that are not addressed can be found in chapters I and II of Part Two of the articles on responsibility of States for internationally wrongful acts.⁹⁰⁵ Although not addressed in the present draft conclusions, these other consequences of responsibility continue to apply.

(11) As with draft conclusions 17 and 18, draft conclusion 19 is without prejudice to the application of the duties in draft conclusion 19 to international organizations.⁹⁰⁶

⁸⁹⁹ See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 793 above), para. 119, stating that States are under an obligation “to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia”. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 805 above), para. 159; and General Assembly resolution 3411 D (XXX), para. 3.

⁹⁰⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 793 above), para. 125.

⁹⁰¹ *Ibid.*

⁹⁰² A detailed elaboration of the elements of seriousness, i.e. gross or systematic violations, can be found in paragraphs (7) and (8) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts.

⁹⁰³ See generally paragraph (13) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts.

⁹⁰⁴ See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 863 above), para. 178; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 805 above), para. 149 *et seq.*; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 793 above), para. 118.

⁹⁰⁵ See generally, Part Two of the articles on responsibility of States for internationally wrongful acts. The consequences include cessation and non-repetition (art. 30) and reparation (art. 31). Reparations themselves may take different forms, including restitution (art. 35), compensation (art. 36), satisfaction (art. 37) and interest (art. 38).

⁹⁰⁶ See, in respect of international organizations, articles 41 and 42 of the articles on the responsibility of international organizations. The draft articles and the commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88. The articles themselves appear in the annex to General Assembly resolution 66/100 of 9 December 2011.

Conclusion 20

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

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

Commentary

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

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

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

(4) In the context of treaty rules, the rule in draft conclusion 20 may be seen as an application of article 31, paragraph 3 (c), of the 1969 Vienna Convention, which provides that in the interpretation of treaties “[a]ny relevant rules of international law applicable in the relations between the parties” “shall be taken into account”. Peremptory norms of general international law (*jus cogens*) are rules of international law applicable in relations primarily between States and international organizations and must therefore, where relevant, be taken into account in the interpretation of treaties.⁹⁰⁷

⁹⁰⁷ See, for example, the Report of the Study Group on fragmentation of international law (footnote 857 above), para. 414. This was done for example in *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment of 21 December 2016, Court of Justice of the European Union (Grand Chamber), *Official Journal of the European Union*, C 53/19 (20 February 2017), para. 88 *et seq.*, especially para. 114, in which the Court, having determined that the principle of self-determination was “one of the essential principles of international law” and one establishing *erga omnes* obligations (para. 88), proceeded to interpret a treaty between the European Commission and Morocco in such a way as to respect this rule (“It follows that the Liberalisation Agreement could not be understood at the time of its conclusion as meaning that its territorial scope included the territory of Western Sahara” (para. 114)).

(5) Although the interpretative rule in draft conclusion 20 constitutes a concrete application of article 31, paragraph 3 (c), of the 1969 Vienna Convention, it does not apply only in relation to treaties but to the interpretation and application of all other rules of international law. In this respect, the Commission has stated that “when there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail ... peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts”.⁹⁰⁸

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

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

Conclusion 21 **Procedural requirements**

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.
2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.
3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.
5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned.

Commentary

(1) Draft conclusion 21 concerns the procedure for the invocation of, and the reliance on, the invalidity of rules of international law, including treaties, by reason of being in conflict with peremptory norms of general international law (*jus cogens*). It is important to recall that during the United Nations Conference on the Law of Treaties, States generally supported the provisions relating to peremptory norms of general international law (*jus cogens*) and concerns about articles 53 and 64 arose from the concern that the right to invoke the invalidity

⁹⁰⁸ See paragraph (3) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts. See conclusion 42 of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (*Yearbook ... 2006*, vol. II, Part Two, para. 251); see also Mik (footnote 845 above), p. 73 *et seq.*

of treaties could be abused by States unilaterally invoking articles 53 and 64 and thus threatening the stability of treaty relations.⁹⁰⁹ To address the concern, the 1969 Vienna Convention subjects any reliance on articles 53 and 64 to a process involving judicial settlement procedures.⁹¹⁰ In the context of the present draft conclusions, invocation of the rules set forth in Part Three without some type of mechanism to avoid unilateral measures raises similar concerns as those raised at the United Nations Conference on the Law of Treaties.

(2) The formulation of an appropriate provision for the purposes of the present draft conclusions is, however, not without its difficulties. The principal difficulty is that detailed dispute resolution provisions are embedded in treaties and do not operate as a matter of customary international law. Thus, with respect to peremptory norms of general international law (*jus cogens*), the 1969 Vienna Convention contains an elaborate dispute settlement framework.⁹¹¹ Under this framework, a State party that claims that a treaty is invalid on any ground, including for reason of being in conflict with a peremptory norm of general international law, must notify other State parties of its claim. If, after the expiry of a specified period, no objections to its notification are received, the consequences of invalidity may be implemented. If, however, there is an objection, the 1969 Vienna Convention requires that the State parties concerned seek a solution through the means provided for in the Charter of the United Nations. These means include negotiation, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other peaceful means.⁹¹² If the claim of invalidity is based on a conflict with a peremptory norm under article 53 or article 64 and a solution to the conflict is not found using such means, then any party to the dispute may refer the matter to the International Court of Justice unless there is an agreement to submit it instead to arbitration.

(3) In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice stated that “both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary international law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith”.⁹¹³ This observation by the Court refers primarily to the consultation process leading up to any termination of the agreement. The Court did not, by this statement, determine that there was a customary international law rule concerning the establishment of jurisdiction of the Court for the settlement of disputes relating to invalidation of treaties on the basis of the peremptory norms of general international law (*jus cogens*). The provisions of articles 65 to 67 of the 1969 Vienna Convention, in particular the provisions pertaining to the submission to the International Court of Justice of a dispute, cannot be said to reflect customary international law. As treaty provisions, they cannot be imposed on States that are not party to the 1969 Vienna Convention. Moreover, even amongst States that are party to the Convention, a number have formulated reservations to the application of the dispute settlement mechanism, particularly as it relates to the submission of disputes to the International Court of Justice and arbitration (article 66 (a) of the 1969 Vienna Convention).⁹¹⁴

⁹⁰⁹ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (see footnote 726 above), 4 May 1968, statements by: France, 54th meeting, para. 29 (“[t]he article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*, on the content of which divergent, even conflicting interpretations had been advanced during the discussion. ... Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise notion”); and Norway, 56th meeting, para. 37 (“[t]he article gave no guidance on some important questions, namely, what were the existing rules of *jus cogens* and how did such rules come into being? The Commission’s text stated the effects of those rules but did not define them, so that serious disputes might arise between States; and it provided no effective means of settling such disputes”).

⁹¹⁰ *Ibid.*

⁹¹¹ See the 1969 Vienna Convention, arts. 65 and 66.

⁹¹² See the Charter of the United Nations, Article 33, paragraph 1.

⁹¹³ *Gabčíkovo-Nagymaros Project* (see footnote 741 above), at p. 66, para. 109.

⁹¹⁴ As of April 2019, out of a total 116 States Parties, 23 States have made reservations to the dispute settlement framework. Of these, 15 States sought to exclude the application of article 66 (a) concerning the submission of disputes to the International Court of Justice in relation to claims of

(4) In formulating a provision for dispute settlement in relation to the invalidation of rules of international law on account of inconsistency with peremptory norms of general law (*jus cogens*), the Commission had to ensure, on the one hand, that it did not purport to impose treaty rules on States that are not bound by such rules while, on the other hand, ensuring that the concerns regarding the need to avoid unilateral invalidation of rules was taken account of. Draft conclusion 21 sets out procedural requirements designed to achieve such a balance. Not every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law.

(5) The first three paragraphs of draft conclusion 21 follow article 65 of the 1969 Vienna Convention. The first paragraph requires that a State which seeks to impugn a rule of international law for being in conflict with a peremptory norm of international law (*jus cogens*) is to notify other States of its claim. Although this paragraph follows closely the wording of the 1969 Vienna Convention, the paragraph refers to “a rule of international law”, to signify that the procedural requirements apply to treaties and other international obligations deriving from other sources of international law. Consequently, the paragraph refers to “States concerned” to indicate that the potential addressees of the notification are broader than parties to a treaty. The first paragraph of draft conclusion 21 also provides that the notification is to indicate the measures proposed to remedy the conflict. Such measures may be those referred to in draft conclusions 10 to 13 of the draft conclusions. The requirement to specify the measures proposed is in keeping with the purposes of the notification which is to enable other States to respond appropriately, if necessary. The notification can be distributed to other States through a variety of means, including through the Secretary-General of the United Nations.

(6) Paragraph 2 of draft conclusion 21 states that if no other State raises an objection to the notification, then the State making the claim may carry out the measure it has proposed. The right to carry out these measures, however, can only be exercised after “a period which, except in cases of special urgency, shall not be less than three months”. This means, in the first place, that the notification referred to in paragraph 1 should specify a period within which an objection must be made to the notification. The period should be a reasonable period and the Commission determined that, as a general rule, a minimum of three months was a reasonable period. Second, it is only after the expiry of the said period, and if there has been no objection, that the State invoking the invalidity of a treaty can carry out the measure proposed. There may be cases where a three-month period may be too long. For this purpose, paragraph 2 of draft conclusion 21 sets out the possibility of a shorter period “in cases of special urgency”. The draft conclusions do not define “cases of special urgency”. This is to be determined on the basis of the facts in each particular case. However, it can be said that “cases of special urgency” will be those in which time is of the essence. A view was expressed that there is no basis for the position that customary international law contains such a three-month waiting period (or the twelve-month waiting period in paragraph 4 of the draft conclusion).

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

invalidity on the grounds of conflict with peremptory norms (Algeria, Armenia, Belarus, Brazil, China, Cuba, the Czech Republic, Guatemala, Hungary, the Russian Federation, Saudi Arabia, Slovakia, Tunisia, Ukraine and Viet Nam); and four States have declared that the provisions of article 53 and 64 will not apply in relations between them and those States that have reserved on the application of the dispute settlement framework (Belgium, Denmark, Finland and Portugal). A further four States have declared that the provisions of article 66 do not serve to limit the jurisdiction of the International Court of Justice if it exists under any other instrument (Canada, Germany, New Zealand and the United Kingdom).

(8) Paragraph 4 of draft conclusion 21 provides that if no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved. Paragraph 4 addresses those cases in which the States concerned are not able to find a solution through the means indicated in Article 33 of the Charter of the United Nations. The Commission proceeded from the basis that the invocation of the invalidity of a rule of international law as a result of inconsistency with a peremptory norm of general international law did not, as such, constitute the basis for the jurisdiction of the International Court of Justice.⁹¹⁵ However, in the spirit of avoiding unilateralism, the Commission found it appropriate, without obliging submission of the International Court of Justice, to encourage submission of the dispute to the International Court of Justice.

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

(10) Paragraph 5 is a without prejudice clause. As explained above, draft conclusion 21 does not establish the jurisdiction of the International Court of Justice, nor does it create an obligation on any State to submit a matter to the Court or to accept the Court's jurisdiction. By the same token, draft conclusion 21 does not affect any basis for jurisdiction that may exist under any other rule in international law, including the dispute settlement mechanisms under the 1969 Vienna Convention or other applicable dispute settlement provisions agreed to by the States concerned (including the invoking State).

Part Four

General provisions

Conclusion 22

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

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

Commentary

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

(2) The scope of the present draft conclusions concerns the identification and legal consequences of peremptory norms of general international law (*jus cogens*). As described in paragraph (3) of the commentary to draft conclusion 1, the present draft conclusions are

⁹¹⁵ *Armed Activities on the Territory of the Congo* (see footnote 699 above), at p. 32, para. 64 (“The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court”).

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

(3) The present draft conclusions do not deal with the consequences arising from a conflict between peremptory norms of general international law (*jus cogens*).

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

Conclusion 23

Non-exhaustive list

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

Commentary

(1) Draft conclusion 1 sets out the scope of the present draft conclusions as concerning the identification and legal consequences of peremptory norms of general international law (*jus cogens*). As indicated in paragraph (3) of the commentary to draft conclusion 1 and paragraph (2) of the commentary to draft conclusion 22, the present draft conclusions are methodological in nature and do not attempt to address the content of individual peremptory norms of general international law (*jus cogens*). As a result, the present draft conclusions do not seek to elaborate a list of peremptory norms of general international law (*jus cogens*). To elaborate a list of peremptory norms of general international law (*jus cogens*), including a non-exhaustive list, would require a detailed and rigorous study of many potential norms to determine, first, which of those potential norms meet the criteria set out in Part II of the present draft conclusions and, second, which of the norms that meet the criteria ought to be included in a non-exhaustive list. Such an exercise falls beyond the scope of the exercise of elaborating draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

(2) Although the identification of specific norms that have a peremptory character falls beyond the scope of the present draft conclusions, the Commission has decided to include in an annex a non-exhaustive list of norms previously referred to by the Commission as having peremptory character. Draft conclusion 23 refers to this annex. It provides, first, that this annex is without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*). The phrase “without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)” is meant to indicate that the inclusion of the list in the annex in no way precludes the existence at present of other norms that may have peremptory character or the emergence of other norms in the future having that character. Second, draft conclusion 23 provides, as a statement of fact, that the norms contained in the annex are those that have been previously referred to by the Commission as having peremptory status. Finally, draft conclusion 23 states that the list contained in the annex is non-exhaustive, which serves to reinforce the fact

that this list is without prejudice to other norms having the same character.⁹¹⁶ It is non-exhaustive in two ways. It is non-exhaustive, first, in the sense that beyond the norms identified in the list, there are or may be other peremptory norms of general international law (*jus cogens*). Second, it is non-exhaustive in the sense that, in addition to the norms listed in the annex, the Commission has also referred previously to other norms as having peremptory character. The annex should therefore not be seen as excluding the peremptory character of these other norms.

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

(4) In its previous works, the Commission has used different phrases to qualify the norms to which it has referred. In its commentary to draft article 50 of the draft articles on the law of treaties, it used the phrases “conspicuous example” and “example” respectively when referring to two of the norms.⁹¹⁷ In the commentary to draft article 26 of the draft articles on responsibility of States for internationally wrongful acts, the Commission referred to the norms on its list as those “clearly accepted and recognized”,⁹¹⁸ while in the commentary to article 40 of the same articles, it used the phrase “generally agreed” to qualify the norm of “aggression” as peremptory, and said there “seems to be widespread agreement” with regard to other norms listed in that paragraph.⁹¹⁹

(5) The first norm identified in the annex is the prohibition of aggression. The prohibition of aggression was referred to by the Commission in the commentary to the articles on responsibility of States for internationally wrongful acts.⁹²⁰ In 1966, the Commission stated that the “law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*”.⁹²¹ Although not strictly the output of the Commission itself, the 2006 work of its Study Group on fragmentation of international law is also noteworthy. Like the commentary to the articles on responsibility of States for internationally wrongful acts, the conclusions of the Study Group on fragmentation of international law referred to the prohibition of aggression as a peremptory norm.⁹²² The report of the Study Group on fragmentation of international law, after referring to the Commission’s identification of the prohibition of aggression, included

⁹¹⁶ See also paragraph (6) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts addressing the non-exhaustive nature of the norms referred to in those articles (“It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53”).

⁹¹⁷ See paragraphs (1) and (3) of the commentary to draft article 50 of the draft articles on the law of treaties.

⁹¹⁸ See paragraph (5) of the commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts.

⁹¹⁹ *Ibid.*, paragraph (4) of the commentary to article 40.

⁹²⁰ *Ibid.* (“Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory”). See also paragraph (5) of the commentary to article 26 (“Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression”).

⁹²¹ See paragraph (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, para. 38. In paragraph (3) of the same commentary, the Commission referred to the “unlawful use of force contrary to the principles of the Charter”.

⁹²² See conclusion (33) of the Conclusions of the Study Group on fragmentation of international law (footnote 863 above).

“the prohibition of aggressive use of force” on its list of the “most frequently cited candidates for the status of *jus cogens*”.⁹²³

(6) The second norm identified in the annex is the prohibition of genocide. The prohibition of genocide has been referred to by the Commission with a consistent formulation in all its relevant work. In particular, the draft articles on responsibility of States for internationally wrongful acts, both in the commentary to draft article 26 and in the commentary to draft article 40, referred to the prohibition of genocide.⁹²⁴ Similarly, both the conclusions and the report of the Study Group on fragmentation of international law refer to the prohibition of genocide.⁹²⁵

(7) The prohibition of crimes against humanity is the third norm included in the annex. The fourth paragraph of the preamble to the 2019 draft articles on crimes against humanity recalled that “the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)”.⁹²⁶ In the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, the Commission referred not to the prohibition of crimes against humanity separately, but to the prohibition of “crimes against humanity and torture”.⁹²⁷ The prohibition of crimes against humanity is also referred to in the report of the Study Group on fragmentation of international law as one of the “most frequently cited candidates” for norms with *jus cogens* status.⁹²⁸

(8) The basic rules of international humanitarian law, the fourth norm in the annex, has been referred to by the Commission in its commentary to article 40 of its articles on responsibility of States for internationally wrongful acts.⁹²⁹ The conclusions of the Study Group on fragmentation of international law refer to basic rules of international humanitarian law applicable in armed conflict.⁹³⁰ The report of the Study Group on fragmentation of international law, on the other hand, referred to “the prohibition of hostilities directed at civilian population (‘basic rules of international humanitarian law’).”⁹³¹

(9) The fifth norm in the annex is the prohibition of racial discrimination and apartheid. The prohibition of racial discrimination and apartheid is referred to in the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts.⁹³² The commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, however, only refers to the prohibition of racial discrimination, without any reference to apartheid.⁹³³ The report of the Study Group on fragmentation of international law also refers to the prohibition of racial discrimination and apartheid.⁹³⁴ The conclusions of the Study Group on fragmentation of international law, however, refer to the prohibition of apartheid along with torture, without any reference to racial discrimination.⁹³⁵

⁹²³ Report of the Study Group on fragmentation of international law (see footnote 857 above), para. 374. It should be noted that the report of the Study Group also refers, as a separate norm, to the right to self-defence.

⁹²⁴ See paragraph (5) of the commentary to article 26 and paragraph (4) of the commentary to draft article 40 of the articles on responsibility of States for internationally wrongful acts.

⁹²⁵ Conclusion (33) of the Conclusions of the Study Group on fragmentation of international law (see footnote 863 above) and the report of the Study Group (see footnote 857 above), para. 374.

⁹²⁶ Preamble, draft articles on crimes against humanity, chapter IV of the present report.

⁹²⁷ See paragraph (5) of the commentary to draft article 26 of the articles on responsibility of States for internationally wrongful acts.

⁹²⁸ Report of the Study Group on fragmentation of international law (see footnote 857 above), para. 374.

⁹²⁹ See paragraph (5) of the commentary to draft article 40 of the articles on responsibility of States for internationally wrongful acts.

⁹³⁰ See conclusion (33) of the Conclusions of the Study Group on fragmentation of international law (footnote 863 above).

⁹³¹ Report of the Study Group on fragmentation of international law (see footnote 857 above), para. 374.

⁹³² See paragraph (4) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts.

⁹³³ *Ibid.*, paragraph (5) of the commentary to article 26.

⁹³⁴ Report of the Study Group on fragmentation of international law (see footnote 857 above), para. 374.

⁹³⁵ See conclusion (33) of the conclusions of the Study Group on fragmentation of international law (footnote 863 above).

(10) The annex also includes the prohibition of slavery as the sixth norm on the list of peremptory norms of general international law (*jus cogens*) previously referred to by the Commission. The prohibition of slavery was referred to by the Commission as a peremptory norm of general international law (*jus cogens*) in the commentary to draft article 26 of the articles on responsibility of States for internationally wrongful acts.⁹³⁶ The commentary to draft article 40 of the articles on responsibility of States for internationally wrongful acts refers to the prohibition of slavery and the slave trade.⁹³⁷ The commentary to the draft articles on the law of treaties, for its part, refers to the prohibition of the trade in slaves.⁹³⁸

(11) The prohibition of torture is the seventh norm in the annex. The prohibition of torture is referred to by the Commission in the commentary to draft article 40 of the articles on responsibility of States for internationally wrongful acts.⁹³⁹ In the commentary to draft article 26 of the articles on responsibility of States for internationally wrongful acts, the Commission referred to the prohibition of “crimes against humanity and torture”.⁹⁴⁰ The conclusions of the Study Group on fragmentation of international law, on the other hand, referred to the prohibition of “apartheid and torture”.⁹⁴¹

(12) The final norm listed in the annex is the right of self-determination. In describing the norm as having peremptory character, the Commission has used the formulation “the right of self-determination”, although it has at times referred to the “right to self-determination”.⁹⁴²

(13) As explained in paragraph (2), the list is non-exhaustive not only in the sense that it does not purport to cover all peremptory norms of general international law (*jus cogens*) that may exist or that may emerge in the future, but also in the sense that it does not reflect all the norms that have been referred to in some way by the Commission as having a peremptory character. This includes those norms that the Commission has considered in the course of its deliberations. For example, in the commentary to draft article 50 of the draft articles on the law of treaties, the Commission referred, *inter alia*, to the prohibition of piracy and to the principle of the sovereign “equality of States” – a fundamental principle under the Charter of the United Nations.⁹⁴³ The Commission had also referred to the important role of the Charter of the United Nations, especially those provisions of the Charter which set out the purposes and principles of the United Nations for the development of peremptory norms of general international law (*jus cogens*). In the draft articles adopted on first reading in 1976 under the topic “State responsibility”, the Commission also referred to obligations “of essential importance for the safeguarding and preservation of the human environment, such as those

⁹³⁶ See paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts.

⁹³⁷ *Ibid.*, paragraph (4) of the commentary to article 40. This is similarly the formulation used in the report of the Study Group on fragmentation of international law (see footnote 857 above), para. 374.

⁹³⁸ See paragraph (3) of the commentary to draft article 50 of the draft articles on the law of treaties.

⁹³⁹ See paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts. The report of the Study Group on fragmentation of international law (see footnote 857 above, para. 374) also referred to the prohibition of torture as an example of a peremptory norm of general international law (*jus cogens*).

⁹⁴⁰ See paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts.

⁹⁴¹ See conclusion (33) of the conclusions of the Study Group on fragmentation of international law (footnote 863 above).

⁹⁴² See paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, in which the Commission referred to the “the obligation to respect the right of self-determination”. See also conclusion (33) of the conclusions of the Study Group on fragmentation of international law (footnote 863 above) and the report of the Study Group on fragmentation of international law (footnote 857 above), para. 374. In paragraph (3) of the commentary to draft article 50 of the draft articles on the law of treaties, the Commission referred to the “principle of self-determination”. In paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, the Commission referred to the right to self-determination.

⁹⁴³ See paragraph (3) of the commentary to draft article 50 of the draft articles on the law of treaties.

prohibiting massive pollution of the atmosphere or of the seas” as peremptory norms of general international law (*jus cogens*).⁹⁴⁴

(14) The norms in the annex are presented in no particular order. Their order does not, in any way, signify a hierarchy among them.

Annex

- (a) The prohibition of aggression;
- (b) The prohibition of genocide;
- (c) The prohibition of crimes against humanity;
- (d) The basic rules of international humanitarian law;
- (e) The prohibition of racial discrimination and apartheid;
- (f) The prohibition of slavery;
- (g) The prohibition of torture;
- (h) The right of self-determination.

⁹⁴⁴ Draft article 19, paragraph 3 (d), of the draft articles on State responsibility, *Yearbook ... 1976*, vol. II (Part Two), pp. 95–96, read in conjunction with paragraphs (17) and (18) of the commentary to draft article 19 (*ibid.*, p. 102).

Chapter VI

Protection of the environment in relation to armed conflicts

A. Introduction

58. At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur.⁹⁴⁵

59. The Commission received and considered three reports from its sixty-sixth session (2014) to its sixty-eighth session (2016).⁹⁴⁶ At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.⁹⁴⁷ At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur⁹⁴⁸ and took note of the draft introductory provisions and draft principles, provisionally adopted by the Drafting Committee, which were subsequently renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.⁹⁴⁹ Accordingly, the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, at that session.⁹⁵⁰ At the same session, the Commission also considered the third report of the Special Rapporteur,⁹⁵¹ and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,⁹⁵² without provisionally adopting any commentaries.

60. At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer a member of the Commission.⁹⁵³ The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer a member of the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur to assist with the successful completion of its work on the topic.⁹⁵⁴ Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.⁹⁵⁵

61. At its seventieth session (2018), the Commission established a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18, provisionally adopted by the Drafting Committee at the sixty-ninth session, and taken note of by the Commission at the same session.⁹⁵⁶ The Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, and commentaries thereto, at that session.⁹⁵⁷ Also at the seventieth session, the

⁹⁴⁵ The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

⁹⁴⁶ Documents [A/CN.4/674](#) and [Corr.1](#) (preliminary report), [A/CN.4/685](#) (second report) and [A/CN.4/700](#) (third report).

⁹⁴⁷ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. XI.

⁹⁴⁸ *Ibid.*, *Seventieth Session, Supplement No. 10 (A/70/10)*, chap. IX.

⁹⁴⁹ Documents [A/CN.4/L.870](#) and [A/CN.4/L.870/Rev.1](#).

⁹⁵⁰ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*, para. 188.

⁹⁵¹ *Ibid.*, chap. X.

⁹⁵² Document [A/CN.4/L.876](#).

⁹⁵³ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 255.

⁹⁵⁴ *Ibid.*, para. 260.

⁹⁵⁵ *Ibid.*, para. 262.

⁹⁵⁶ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chap. IX.

⁹⁵⁷ *Ibid.*, para. 218.

Commission considered the first report of the Special Rapporteur⁹⁵⁸ and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.⁹⁵⁹

B. Consideration of the topic at the present session

62. At the present session, at its 3455th meeting on 1 May 2019, the Commission provisionally adopted draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee at the seventieth session.

63. At its 3464th to 3471st meetings, from 15 May to 27 May 2019, the Commission considered the second report of the Special Rapporteur (A/CN.4/728).

64. In her second report, the Special Rapporteur addressed certain questions related to the protection of the environment in non-international armed conflicts, with a focus on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts. The second report also addressed certain questions related to the responsibility and liability of States and non-State actors. The Special Rapporteur thus proposed seven draft principles.⁹⁶⁰

65. At its 3471st meeting, on 27 May 2019, the Commission referred draft principles 6 *bis*, 8 *bis*, 13 *bis*, 13 *ter*, 13 *quater*, 13 *quinquies*, and 14 *bis*, as contained in the second report of the Special Rapporteur, to the Drafting Committee, taking into account the plenary debate in the Commission.

66. At its 3475th meeting, on 8 July 2019, the Chair of the Drafting Committee presented⁹⁶¹ the report of the Drafting Committee on “Protection of the environment in relation to armed conflicts” (A/CN.4/L.937). At the same meeting, the Commission provisionally adopted the entire set of the draft principles on protection of the environment in relation to armed conflicts on first reading (see section C.1 below).

67. At its 3504th to 3506th meetings, on 7 and 8 August 2019, the Commission adopted the commentaries to the draft principles on protection of the environment in relation to armed conflicts (see section C.2 below).

68. At its 3506th meeting, on 8 August 2019, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles on protection of the environment in relation to armed conflicts (see sect. C below), through the Secretary-General, to Governments, international organizations, including from the United Nations and its Environment Programme, and others, including the International Committee of the Red Cross and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.

69. At its 3506th meeting, on 8 August 2019, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Ms. Marja Lehto, which had enabled the Commission to bring to a successful conclusion its first reading of the draft principles on protection of the environment in relation to armed conflicts. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Ms. Marie G. Jacobsson, to the work on the topic.

⁹⁵⁸ Document A/CN.4/720.

⁹⁵⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 172.

⁹⁶⁰ See second report of the Special Rapporteur (A/CN.4/728): draft principle 6 *bis* (Corporate due diligence), draft principle 8 *bis* (Martens Clause), draft principle 13 *bis* (Environmental modification techniques), draft principle 13 *ter* (Pillage), draft principle 13 *quater* (Responsibility and liability), draft principle 13 *quinquies* (Corporate responsibility), and draft principle 14 *bis* (Human displacement).

⁹⁶¹ The statement of the Chair of the Drafting Committee is available from the website of the Commission (<http://legal.un.org/ilc>).

C. Text of the draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading

1. Text of the draft principles

70. The text of the draft principles adopted by the Commission on first reading is reproduced below.

Protection of the environment in relation to armed conflicts

Part One

Introduction

Principle 1

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Principle 2

Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

Part Two [One]

Principles of general application

Principle 3 [4]

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.
2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Principle 4 [I-(x), 5]

Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Principle 5 [6]

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Principle 6 [7]

Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Principle 7 [8]

Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

Principle 10
Corporate due diligence

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Principle 11
Corporate liability

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three [Two]
Principles applicable during armed conflict

Principle 12
Martens Clause with respect to the protection of the environment in relation to armed conflict

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Principle 13 [II-1, 9]
General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

Principle 14 [II-2, 10]

Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Principle 15 [II-3, 11]

Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Principle 16 [II-4, 12]

Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Principle 17 [II-5, 13]

Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

Principle 18

Prohibition of pillage

Pillage of natural resources is prohibited.

Principle 19

Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Part Four

Principles applicable in situations of occupation

Principle 20 [19]

General obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.

2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Principle 21 [20]

Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Principle 22 [21]

Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.

Part Five [Three]

Principles applicable after armed conflict

Principle 23 [14]

Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 24 [18]

Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.
2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Principle 25 [15]

Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Principle 26

Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Principle 27 [16]

Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.
2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.
3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Principle 28 [17]

Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

2. Text of the draft principles on protection of the environment in relation to armed conflicts and commentaries thereto

71. The text of the draft principles and commentaries thereto adopted by the Commission on first reading at its seventy-first session is reproduced below.

Protection of the environment in relation to armed conflicts

Part One

Introduction

Commentary

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

(2) Structurally, the set of draft principles are divided into five parts, including the initial part entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part Two concerns guidance on the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for more than one temporal phase: before, during or after an armed conflict. Part Three pertains to the protection of the environment *during* armed conflict, and Part Four pertains to the protection of the environment in situations of occupation. Part Five contains draft principles relative to the protection of the environment *after* an armed conflict.

(3) The provisions have been cast as draft "principles". The Commission has previously chosen to formulate the output of its work as draft principles, both for provisions that set forth principles of international law and for non-binding declarations intended to contribute to the progressive development of international law and provide appropriate guidance to States.⁹⁶² The present set of draft principles contains provisions of different normative value, including those that can be seen to reflect customary international law, and those of a more recommendatory nature.

(4) The draft principles were prepared bearing in mind the intersection between the international law relating to the environment and the law of armed conflict.

(5) As for the use of terms, the Commission will decide at the time of the second reading, whether to use the term "natural environment" or "environment" in those provisions of Part Three that draw on Additional Protocol I to the Geneva Conventions.⁹⁶³

Principle 1

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Commentary

(1) This provision defines the scope of the draft principles. It provides that they cover three temporal phases: before, during, and after armed conflict. It was viewed as important to signal at the outset that the scope of the draft principles relates to these phases. The

⁹⁶² Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 374. See also principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, pp. 58–90; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook ... 2006*, vol. II (Part Two), para. 176, p. 161.

⁹⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3. See also draft principles 13, 14 and 16 of the present draft principles.

disjunctive “or” seeks to underline that not all draft principles would be applicable during all phases. However, it is worth emphasizing that there is, at times, a certain degree of overlap between these three phases. Furthermore, the formulation builds on discussions within the Commission and in the Sixth Committee of the General Assembly.⁹⁶⁴

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the scope *ratione temporis* of the draft principles. It was considered that addressing the topic from a temporal perspective rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law, would make the topic more manageable and easier to delineate. The temporal phases would address legal measures taken to protect the environment before, during and after an armed conflict. Such an approach allowed the Commission to identify concrete legal issues relating to the topic that arose at the different stages of an armed conflict, which facilitated the development of the draft principles.⁹⁶⁵

(3) Regarding the scope *ratione materiae* of the draft principles, reference is made to the term “protection of the environment” as it relates to the term “armed conflicts”. No distinction is generally made between international armed conflicts and non-international armed conflicts.

Principle 2

Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflict and signals the general kinds of measures that would be required to offer the necessary protection. Such measures include preventive measures, which aim to minimize damage to the environment during armed conflict and remedial measures, which aim to restore the environment after damage has already been caused as a result of armed conflict.

(2) Similar to the provision on scope, the present provision covers all three temporal phases. While it has been recognized both within the Commission⁹⁶⁶ and within the Sixth Committee of the General Assembly⁹⁶⁷ that the three phases are closely connected,⁹⁶⁸ the reference to “preventive measures for minimizing damage” relates primarily to the situation before and during armed conflict, and the reference to “remedial measures” principally concerns the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(3) The term “remedial measures” was preferred to the term “restorative measures” as it was viewed as clearer and broader in scope, encompassing any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

⁹⁶⁴ The topic was put on the long-term programme of work of the Commission in 2011 and moved onto the current programme of work in 2013, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, annex E, and *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 131.

⁹⁶⁵ See *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 135, and *ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 192–213.

⁹⁶⁶ See, e.g., *A/CN.4/685*, para. 18.

⁹⁶⁷ *Ibid.*, footnote 18: Norway (on behalf of the Nordic countries) (*A/C.6/69/SR.25*, para. 133), Portugal (*A/C.6/69/SR.26*, para. 6), Singapore (*A/C.6/69/SR.26*, para. 66), New Zealand (*A/C.6/69/SR.27*, para. 3) and Indonesia (*A/C.6/69/SR.27*, para. 67).

⁹⁶⁸ For example, remedial measures might be required during an occupation.

Part Two

Principles of general application

Principle 3

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.
2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Commentary

(1) Draft principle 3 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States voluntarily to take further effective measures. The phrase “to enhance the protection of the environment”, included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase “in relation to armed conflict”, also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflict and addresses the measures that States are obliged to take to this end. The obligation is denoted by the word “shall”. The requirement is qualified by the expression “pursuant to their obligations under international law”, indicating that the provision does not require States to take measures that go beyond their existing obligations. The specific obligations of a State under this provision will differ according to the relevant obligations under international law by which it is bound.

(3) Consequently, paragraph 1 is formulated broadly in order to cover a wide range of measures. The provision includes examples of the types of measures that can be taken by States, namely, “legislative, administrative, judicial and other measures”. The examples are not exhaustive, as indicated by the open category “other measures”. Instead, the examples aim to highlight the most relevant types of measures to be taken by States.

(4) The law of armed conflict imposes several obligations on States that directly or indirectly contribute to the aim of enhancing the protection of the environment in relation to armed conflict. The notion “under international law” is nevertheless broader and covers also other relevant treaty-based or customary obligations related to the protection of the environment before, during or after an armed conflict, whether derived from international environmental law, human rights law or other areas of law.

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian population contributes to the protection of the environment.⁹⁶⁹ A relevant provision to this end is article

⁹⁶⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 144; Additional Protocol I, art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609, art. 19; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (hereinafter, “Convention on Certain Conventional Weapons”) (Geneva, 10 October 1980), *ibid.*, vol.

83 of Additional Protocol I, which provides that the High Contracting Parties are under the obligation to disseminate information to their forces on, among other provisions, articles 35 and 55.⁹⁷⁰ This obligation can also be linked to common article 1 of the Geneva Conventions, in which States Parties undertake to respect and ensure respect for the Conventions in all circumstances.⁹⁷¹ Such dissemination can take place for instance through the inclusion of relevant information in military manuals,⁹⁷² as encouraged by the International Committee of the Red Cross (ICRC) Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict.⁹⁷³

(6) Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict.⁹⁷⁴ As far as the protection of the environment is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the natural environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct “a weapons review” is found in article 36 of Additional Protocol I. According to this provision, a High Contracting Party is under an obligation to determine whether the employment of a new weapon would, in some or all circumstances, be prohibited by Additional Protocol I or by any other applicable rule of international law.⁹⁷⁵ It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can be used.⁹⁷⁶

1342, No. 22495, p. 137, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

⁹⁷⁰ Article 35 of Additional Protocol I reads:

- “1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”

Article 55 reads:

- “1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.”

⁹⁷¹ Geneva Convention I, art. 1; Geneva Convention II, art. 1; Geneva Convention III, art. 1; Geneva Convention IV, art. 1.

⁹⁷² Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d’Ivoire, France, Germany, Italy, Kenya, Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 8 July 2019).

⁹⁷³ The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex) state, in guideline 17, that: “States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of military and civil instruction”.

⁹⁷⁴ See the ICRC commentary (2016) on article 1 of Geneva Convention I (the commentaries on the Geneva Conventions of 1949 and the Protocols thereto are available from www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions (accessed on 8 July 2019)). The ICRC study on customary international law provides a broader interpretation, according to which the obligation to respect and ensure respect is not limited to the Geneva Conventions but refers to the entire body of international humanitarian law binding upon a particular State (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 969 above), rule 139, p. 495).

⁹⁷⁵ Additional Protocol I, art. 36.

⁹⁷⁶ C. Pilloud and J. Pictet, “Article 35: Basic rules”, *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B.

According to the ICRC commentary on the Additional Protocols, article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality”. A number of States, including States not party to Additional Protocol I, are known to have established such procedures.⁹⁷⁷

(8) The obligation to conduct “a weapons review” binds all High Contracting Parties to Additional Protocol I. The reference to “any other rule of international law” makes it clear that the obligation may go beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. This means, first, an examination of whether the employment of a new weapon, means or method of warfare would, in some or all circumstances, be prohibited by Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. Second, there is a need to go beyond Additional Protocol I and analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination will include taking into account any applicable international environmental law and human rights obligations.⁹⁷⁸

(9) While Additional Protocol I applies only to international armed conflict, the weapons review provided for in article 36 also promotes respect for the law in non-international armed conflicts. Furthermore, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.⁹⁷⁹ These rules are not limited to international armed conflict.⁹⁸⁰ It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. The obligation not to use inherently indiscriminate weapons, means or methods of warfare has the indirect effect of protecting the environment in a non-international armed conflict. Furthermore, the special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm must be observed.

(10) States also have the obligation to effectively exercise jurisdiction and prosecute persons suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions.⁹⁸¹ Examples of grave breaches, the

Zimmerman (eds.) (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on “Article 36: New weapons” refers to this section for an explanation of means and methods on p. 425, para. 1472.

⁹⁷⁷ States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to ICRC include Australia, Belgium, Canada, Denmark, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. Information received from ICRC on 31 December 2017.

⁹⁷⁸ Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey-Maslen, N. Corney and A. Dymond-Bass, “The review of weapons under international humanitarian law and human rights law”, *Weapons under International Human Rights Law*, Casey-Maslen (ed.) (Cambridge University Press, Cambridge, 2014).

⁹⁷⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 969 above), rules 70 and 71, pp. 237–250.

⁹⁸⁰ By virtue of the customary rule that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany, Nigeria and the Republic of Korea. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19 (accessed on 8 July 2019).

⁹⁸¹ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

suppression of which provides indirect protection to certain components of the natural environment, include wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully.

(11) Yet another treaty-based obligation is for States to record the laying of mines in order to facilitate future clearing of landmines.⁹⁸²

(12) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. This paragraph is therefore less prescriptive than paragraph 1 and the word “should” is used to reflect this difference. The phrases “[i]n addition” and “further measures” both serve to indicate that this provision goes beyond the measures that States shall take pursuant to their obligations under international law, which are addressed in paragraph 1. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. Furthermore, they could include special agreements providing additional protection to the natural environment in situations of armed conflict.⁹⁸³

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflict beyond their current obligations under international law, the paragraph captures the recent developments in the practice of States to this end.⁹⁸⁴ One example of how States can continue this development is through providing more explicit guidelines on environmental protection in their military manuals.⁹⁸⁵ Such guidelines may, for instance, aim to ensure training of military personnel involved in peace operations on the environmental aspects of the operation, as well as the conduct of environmental assessments.⁹⁸⁶ Other measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

(14) The overall development that paragraph 2 aims to capture and encourage has its basis also in the practice of international organizations. One example of such practice is the United Nations initiative “Greening the Blue Helmets”, which aims to function as an environmental, sustainable management programme.⁹⁸⁷ A further example of this development is the joint environmental policy developed by the United Nations Department of Peacekeeping Operations and Department of Field Services. The policy includes obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements. References are made to treaties and instruments, including the Declaration of

⁹⁸² See, for example, the amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996) (hereinafter, “amended Protocol II to the Convention on Certain Conventional Weapons”), United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

⁹⁸³ For special agreements, see Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7. See also common art. 3 of the Geneva Conventions.

⁹⁸⁴ See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210; Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. I (A); and Netherlands, note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, para. 5. See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24), para. 89, Cuba (*ibid.*), para. 10, Czech Republic (*ibid.*), para. 45), New Zealand (A/C.6/70/SR.25), para. 102, and Palau (*ibid.*), para. 27.

⁹⁸⁵ Examples of States that have done so include Australia, Burundi, Cameroon, Côte d’Ivoire, the Netherlands, Republic of Korea, Switzerland, Ukraine, the United Kingdom and the United States. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44 (accessed on 8 July 2019). For further examples, see A/CN.4/685, paras. 69–76 and A/CN.4/700, para. 52.

⁹⁸⁶ See the information on the United Nations Environment Programme website regarding post-crisis environmental recovery, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/recovery (accessed on 8 July 2019).

⁹⁸⁷ United Nations Environment Programme, *Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations* (Nairobi, 2012).

the United Nations Conference on the Human Environment (Stockholm Declaration),⁹⁸⁸ the World Charter for Nature,⁹⁸⁹ the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁹⁹⁰ the Convention on Biological Diversity⁹⁹¹ and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),⁹⁹² as standards to be considered when a mission establishes its environmental objectives and procedures.⁹⁹³

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Commentary

(1) Draft principle 4 is entitled “Designation of protected zones” and provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. Part Two (“Principles of general application”), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contains principles of a more general nature that are relevant to more than one temporal phase. Draft principle 4 therefore does not exclude instances in which such areas could be designated either during or soon after an armed conflict. In addition, draft principle 4 has a corresponding draft principle (draft principle 17) which is placed in Part Three “Principles applicable during armed conflict”.

(2) A State may already be taking the necessary measures to protect the environment in general. Such measures may include, in particular, preventive measures in the event that an armed conflict might occur. It is not uncommon that physical areas are assigned a special legal status as a means to protect and preserve a particular area. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also immune from attack during an armed conflict.⁹⁹⁴ As a rule, this is the case with demilitarized and neutralized zones. It should be noted that the term “demilitarized zones” has a special meaning in the context of the law of armed conflict. Demilitarized zones are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.⁹⁹⁵ Demilitarized zones can also be established and implemented in peacetime.⁹⁹⁶ Such zones can cover various degrees of demilitarization,

⁹⁸⁸ *Report of the United Nations Conference on the Human Environment (A/CONF.48/14/Rev.1*; United Nations publication, Sales No. E.73.II.A.14), chap. I.

⁹⁸⁹ General Assembly resolution 37/7 of 28 October 1982, annex.

⁹⁹⁰ Washington, 3 March 1975, United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243.

⁹⁹¹ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), *ibid.*, vol. 1760, No. 30619, p. 79.

⁹⁹² Ramsar, 2 February 1971, *ibid.*, vol. 996, No. 14583, p. 245.

⁹⁹³ United Nations, Department of Peacekeeping Operations and the Department of Field Support, “Environmental Guidelines for UN Field Missions”, 24 July 2009. See also the Department of Field Support website, available at <https://fieldsupport.un.org/en/environment> (accessed on 8 July 2019).

⁹⁹⁴ A/CN.4/685, para. 210.

⁹⁹⁵ See Additional Protocol I, art. 60. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 36, p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

⁹⁹⁶ See e.g. Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71, art. I. See, e.g., the definition found in M. Björklund and A. Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (Åbo, Åbo Academy Press, 1990). The Åland Islands are both demilitarized and neutralized. Björklund and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (*ibid.*, p. 17). See also L. Hannikainen, “The continued validity of the demilitarized and neutralized status of the Åland Islands”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), p. 614, at p. 616.

ranging from areas that are fully demilitarized to ones which are partially demilitarized, such as nuclear weapon-free zones.⁹⁹⁷

(3) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of major environmental importance that are susceptible to the adverse consequences of hostilities.⁹⁹⁸ Granting special protection to areas of major ecological importance was suggested at the time of the drafting of the Additional Protocols to the Geneva Conventions.⁹⁹⁹ While the proposal was not adopted, it should be recognized that it was put forward at a relatively early stage in the development of international environmental law. Other types of zones are also relevant in this context, and will be discussed below.

(4) The areas referred to in this draft principle may be designated by agreement or otherwise. The reference to “agreement or otherwise” is intended to introduce some flexibility. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the reference to the word “State” does not preclude the possibility of agreements being concluded with non-State actors. The area declared has to be of “major environmental and cultural importance”. The formulation leaves open the precise meaning of this requirement on purpose, to allow room for development. While the designation of protected zones could take place at any time, it should preferably be before or at least at the outset of an armed conflict.

(5) It goes without saying that under international law, an agreement cannot, in principle, bind a third party without its consent.¹⁰⁰⁰ Thus two States cannot designate a protected area in a third State. The fact that States cannot regulate areas outside their sovereignty or jurisdiction in a manner that is binding on third States, whether through agreements or otherwise, was also outlined in the second report of the Special Rapporteur.¹⁰⁰¹

(6) Different views were initially expressed as to whether or not the word “cultural” should be included. Ultimately, the Commission opted for the inclusion of the term. It was noted that it is sometimes difficult to draw a clear line between areas which are of environmental importance and areas which are of cultural importance. This is also recognized in the Convention concerning the Protection of the World Cultural and Natural Heritage (hereinafter the World Heritage Convention).¹⁰⁰² The fact that the heritage sites under this Convention are selected on the basis of a set of ten criteria, including both cultural and natural (without differentiating between them) illustrates this point.¹⁰⁰³

⁹⁹⁷ *Ibid.*

⁹⁹⁸ See [A/CN.4/685](#), para. 225. See also C. Droege and M.-L. Tougas, “The protection of the natural environment in armed conflict – existing rules and need for further legal protection”, *Nordic Journal of International Law*, vol. 82 (2013), pp. 21–52, at p. 43.

⁹⁹⁹ The working group of Committee III of the Conference submitted a proposal for a draft article 48 *ter* providing that “publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes”. See C. Pilloud and J. Pictet, “Article 55: Protection of the natural environment” in *ICRC Commentary on the Additional Protocols ...*, Sandoz *et al.* (footnote 976 above), p. 664, paras. 2138–2139.

¹⁰⁰⁰ As recognized by the Permanent Court in the case concerning the *Factory At Chorzów*, *P.C.I.J., Series A, No. 17*, p. 45 and reflected in article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

¹⁰⁰¹ [A/CN.4/685](#), para. 218.

¹⁰⁰² Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), *ibid.*, vol. 1037, No. 15511, p. 151.

¹⁰⁰³ UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (8 July 2015) WHC.15/01, para. 77.1. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with article 11, para. 4, of the World Heritage Convention.

(7) It should be recalled that prior to an armed conflict, States parties to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁰⁰⁴ (hereinafter the 1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the 1999 Protocol to the Convention.¹⁰⁰⁵ In peacetime, State parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

(8) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is separate in its scope and purpose. The Commission underlines that the 1954 Hague Convention and its Protocols are the special regime that governs the protection of cultural property both in times of peace, and during armed conflict. It is not the intention of the present draft principle to replicate that regime. The idea here is to protect areas of major “environmental importance”. The term “cultural” is used in this context to indicate the existence of a close linkage to the environment. The draft principle does not extend to cultural objects *per se*. The term would nevertheless include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(9) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living inside the area concerned. The importance of preserving indigenous culture and knowledge has now been formally recognised in international law under the Convention on Biological Diversity. Article 8 (*j*) states that each Contracting Party shall, as far as possible and as appropriate: “Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”. In addition, the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰⁰⁶ although not a binding instrument, refers to the right to manage, access and protect religious and cultural sites.

(10) The protection of the environment as such and the protection of sites of cultural and natural importance sometimes correspond or overlap. The term “cultural importance”, which is also used in draft principle 17, builds on the recognition of the close connection between the natural environment, cultural objects and characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.¹⁰⁰⁷ Article 2, paragraph 10, defines the term “environment” for the purpose of the Convention to include: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of cultural heritage; and characteristic aspects of the landscape”. In addition, article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that “effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the

¹⁰⁰⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240.

¹⁰⁰⁵ Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172.

¹⁰⁰⁶ General Assembly resolution 61/295, annex, art. 12.

¹⁰⁰⁷ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Council of Europe, *European Treaty Series*, No. 150. For more information on the applicability of multilateral environmental agreements in connection to areas of particular environmental interest, see B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (PhD thesis, Lund University 2016).

interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.¹⁰⁰⁸

(11) Moreover, the Convention on Biological Diversity speaks to the cultural value of biodiversity. The preamble of the Convention on Biological Diversity reaffirms that the parties are: “Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.”¹⁰⁰⁹ Similarly, the first paragraph of annex I to the Convention on Biological Diversity highlights the importance of ensuring protection for ecosystems and habitats “containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes”.

(12) In addition to these binding instruments, a number of non-binding instruments use a lens of cultural importance and value to define protected areas. For instance, the draft convention on the prohibition of hostile military activities in internationally protected areas (prepared by the IUCN Commission on Environmental Law and the International Council of Environmental Law) defines the term “protected areas” as follows: “natural or cultural area [*sic*] of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria”.¹⁰¹⁰

(13) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, the Act on the Protection of Cultural Property of 29 August 1950 of Japan, provides for animals and plants which have a high scientific value to be listed as “protected cultural property”.¹⁰¹¹ The National Parks and Wildlife Act of 1974 of New South Wales in Australia may apply to any area of natural, scientific or cultural significance.¹⁰¹² Finally, the Italian Protected Areas Act of 6 December 1991 defines “nature parks” as areas of natural and environmental value constituting homogeneous systems characterised by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.¹⁰¹³

Principle 5

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

¹⁰⁰⁸ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269.

¹⁰⁰⁹ Convention on Biological Diversity, preamble.

¹⁰¹⁰ International Union for Conservation of Nature, draft convention on the prohibition of hostile military activities in internationally protected areas (1996), art. 1.

¹⁰¹¹ Japan, Law for the Protection of Cultural Property, Law No. 214, 30 May 1950. Available from www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (accessed on 8 July 2019).

¹⁰¹² Australia, New South Wales Consolidated Acts, National Parks and Wildlife Act, Act 80 of 1974. Available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/ (accessed on 8 July 2019).

¹⁰¹³ Italy, Act No. 394 laying down the legal framework for protected areas, 6 December 1991. Available from <http://faolex.fao.org>.

Commentary

(1) Draft principle 5 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures. In the light of the special relationship between indigenous peoples and their environment, these steps should be taken in a manner that consults and cooperates with such peoples, respecting their relationship and through their own leadership and representative structures.

(2) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰¹⁴ as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the land of indigenous peoples has been recognized as having a “fundamental importance for their collective physical and cultural survival as peoples”.¹⁰¹⁵

(3) Paragraph 1 is based, in particular, on article 29, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to “the conservation and protection of the environment and the productive capacity of their lands or territories and resources”,¹⁰¹⁶ and article 7, paragraph 4, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which recognizes that “Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit”.

(4) The specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status.¹⁰¹⁷

¹⁰¹⁴ See International Labour Organization (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, art. 26. The reports of the Special Rapporteur on the rights of indigenous peoples, and the Special Rapporteur on human rights and the environment (formerly the Independent Expert on human rights and the environment) provide an overview of the application of the rights of indigenous peoples in connection to the environment and natural resources (see, for example, [A/HRC/15/37](#) and [A/HRC/4/32](#), respectively).

¹⁰¹⁵ See, for example, *Río Negro Massacres v. Guatemala*, in which the Inter-American Court of Human Rights recognized “the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity”. *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. *C.f. Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

¹⁰¹⁶ See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016*, XLVI-O.2, *Proceedings*, vol. I, resolution AG/RES. 2888 (XLVI-O/16), art. XIX, para. 4.

¹⁰¹⁷ See, for example, “lands or territories, or both as applicable, which they occupy or otherwise use” used in art. 13, 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or “lands, territories and resources” used in the preamble of United Nations Declaration on the Rights of Indigenous Peoples.

(5) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the territories concerned and thereby affecting the survival and well-being of the peoples connected to it. Under paragraph 1, in the event of an armed conflict, States should take appropriate measures to protect the relationship that indigenous peoples have with their ancestral lands. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. The wording of the paragraph is broad enough to allow for the measures to be adjusted according to the circumstances.

(6) For example, the concerned State should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.¹⁰¹⁸ This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 4. In general, the concerned State should consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.¹⁰¹⁹ During an armed conflict, the rights, lands and territories of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.¹⁰²⁰

(7) Paragraph 2 focuses on the phase after an armed conflict has ended. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit.¹⁰²¹ In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph.

(8) In such instance, the concerned States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. In doing so, States should consider the special nature of the relationship between indigenous peoples and their territories – in its

¹⁰¹⁸ See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

“1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.”

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

“3. Indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict, in accordance with international humanitarian law.

4. States, in compliance with international agreements to which they are party, in particular those of international humanitarian law and international human rights law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Protocol II thereof relating to the protection of victims of non-international armed conflicts, shall, in the event of armed conflicts, take adequate measures to protect the human rights, institutions, lands, territories, and resources of indigenous peoples and their communities ...”

¹⁰²¹ According to the United Nations Declaration on the Rights of Indigenous Peoples, article 28, “[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”. Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, states: “Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”

social, political, spiritual, cultural and other aspects. Further, States should consider that this relationship is often of a “collective” nature.¹⁰²²

(9) The need to proceed through appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation in order to obtain their free, prior and informed consent before adopting measures that may affect them.¹⁰²³

Principle 6
Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Commentary

(1) Draft principle 6 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. The phrase “in relation to armed conflict” reflects the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict, since such situations are outside the scope of the topic.

(2) The draft principle is cast in general terms to refer to “agreements concerning the presence of military forces in relation to armed conflict”. The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status-of-forces and status-of-mission agreements. The purpose of the draft principle is to reflect recent developments whereby States and international organizations have begun addressing matters relating to environmental protection in agreements concerning the presence of military forces concluded with host States.¹⁰²⁴ The word “should” indicates that this provision is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces in relation to armed conflict include the United States-Iraq agreement on the withdrawal from and temporary presence of United States forces in Iraq, which contains an

¹⁰²² For example, see article 13 of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which states that “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. Though specific to that Convention’s application, it explicitly notes the collective aspects of the relationship that indigenous peoples have with their lands or territories.

¹⁰²³ See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the “free, prior, and informed consent [of indigenous peoples], according to their customs and traditions”. See *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, para. 134.

¹⁰²⁴ The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (*Official Journal L 082, 29/03/2003 P. 0046 – 0051*, annex; hereinafter, “*Concordia* status-of-forces agreement”), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01)) (accessed on 8 July 2019).

explicit provision on the protection of the environment.¹⁰²⁵ Another example is the status-of-forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.¹⁰²⁶ The status-of-mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.¹⁰²⁷ Relevant treaty practice includes also the agreement between Germany and other NATO States, which states that potential environmental effects shall be identified, analysed and evaluated, in order to avoid environmental burden.¹⁰²⁸ Moreover, the Memorandum of Special Understanding between the United States and the Republic of Korea contains provisions on environmental protection.¹⁰²⁹ Reference can further be made to arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training.¹⁰³⁰

(4) Reference can also be made to other agreements, including those concerning the presence of military forces with a less clear relation to armed conflict, such as the status-of-forces agreement between the United States and Australia, which contains a relevant provision on damage claims,¹⁰³¹ and the Enhanced Defence Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.¹⁰³²

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- ¹⁰²⁵ Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, “United States-Iraq Agreement”). Available at https://www.dcaf.ch/sites/default/files/publications/documents/US-Iraqi_SOFA-en.pdf (accessed on 8 July 2019).
- ¹⁰²⁶ Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Kabul, 30 September 2014), *International Legal Materials*, vol. 54 (2015), pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.
- ¹⁰²⁷ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in article 17, paragraph 2, of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29> (accessed on 8 July 2019).
- ¹⁰²⁸ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, amended by the Agreements of 21 October 1971 and 18 March 1993 (hereinafter, “NATO-Germany Agreement”), art. 54A. See also Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951, art. XV.
- ¹⁰²⁹ Memorandum of Special Understandings on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, “United States-Republic of Korea Memorandum”). Available at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU.Environmental.Protection.pdf (accessed on 8 July 2019).
- ¹⁰³⁰ See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014). Available at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf (accessed on 8 July 2019), reference HE 82/2014. According to art. 5.3 (g), sending nations must follow host nation environmental regulations as well as any host nation’s regulations for the storage, movement, or disposal of hazardous materials.
- ¹⁰³¹ Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (hereinafter, “United States-Australia Agreement”), art. 12, para. 7 (e) (i).
- ¹⁰³² Agreement between the Philippines and the United States on enhanced defense cooperation (hereinafter, “United States-Philippines Agreement”) (Quezon City, 28 April 2014). Available at www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/ (accessed on 8 July 2019).

(5) The draft principle also provides a non-exhaustive list of provisions on environmental protection that may be included in agreements concerning the presence of military forces in relation to armed conflict. Thus the second sentence of the draft principle mentions “preventive measures, impact assessments, restoration and clean-up measures” as examples of what provisions of environmental protection may address. The presence of military forces may risk having an adverse impact on the environment.¹⁰³³ In order to avoid such adverse impact to the extent possible, measures of a preventive nature are of a great importance. Impact assessments are necessary to determine the kind of restoration and clean-up measures that may be needed at the conclusion of the presence of military forces.

(6) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution from facilities and areas granted to the deploying State;¹⁰³⁴ an understanding that the agreement will be implemented in a manner consistent with protecting the environment;¹⁰³⁵ cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment for citizens;¹⁰³⁶ measures to prevent environmental damage;¹⁰³⁷ periodic environmental performance assessments;¹⁰³⁸ review processes;¹⁰³⁹ application of the environmental laws of the host State¹⁰⁴⁰ or, similarly, a commitment by the deploying State to respect the host State’s environmental laws, regulations and standards;¹⁰⁴¹ a duty to respect international norms regarding the sustainable use of natural resources;¹⁰⁴² the taking of restorative measures where detrimental effects are unavoidable;¹⁰⁴³ and the regulation of environmental damage claims.¹⁰⁴⁴

(7) The phrase “as appropriate” signals two different considerations. First, agreements on the presence of military forces in relation to armed conflict are sometimes concluded under urgent circumstances in which it may not be possible to address issues of environmental protection. Second, sometimes it may be especially important that the agreement contains provisions on environmental protection. One such example is provided by a protected zone at risk of being affected by the presence of military forces. The phrase “as appropriate” therefore provides nuance to this provision and allows it to capture different situations.

Principle 7 **Peace operations**

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

¹⁰³³ See e.g. D.L. Shelton and I. Cutting, “If you break it, do you own it?”, *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246, at pp. 210–211, and J. Taylor, “Environment and security conflicts: The U.S. Military in Okinawa”, *Geographical Bulletin*, vol. 48 (2007), pp. 3–13, at pp. 6–7.

¹⁰³⁴ See United States-Republic of Korea Memorandum.

¹⁰³⁵ See United States-Iraq Agreement, art. 8.

¹⁰³⁶ See United States-Republic of Korea Memorandum.

¹⁰³⁷ See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

¹⁰³⁸ These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

¹⁰³⁹ See United States-Philippines Agreement, art. IX, para. 2.

¹⁰⁴⁰ See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

¹⁰⁴¹ See United States-Iraq agreement, art. 8.

¹⁰⁴² As is done in art. 9 of the *Concordia* status-of-forces agreement.

¹⁰⁴³ See NATO-Germany Agreement, art. 54A.

¹⁰⁴⁴ NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

Commentary

(1) Peace operations can relate to armed conflict in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.¹⁰⁴⁵ As the High-level Independent Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.¹⁰⁴⁶ Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights, or rebuilding the capacity of a State.¹⁰⁴⁷ Mandates also include the protection of civilians.¹⁰⁴⁸ Draft principle 7 intends to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

(2) The words “in relation to armed conflict” delineate the scope of the draft principle. They make clear the connection to armed conflict so as to ensure that the obligations are not to be interpreted too broadly (i.e. as potentially applying to every action of an international organization related to the promotion of peace). While the term is to be understood from a broad perspective in the context of the draft principle, it is recognized that not all such operations have a direct link to armed conflict.

(3) The present draft principle covers operations where States and international organizations are involved in peace operations related to armed conflict and where multiple actors may be present. All these actors will have some effect on the environment. For example, the Department of Peacekeeping Operations and the Department of Field Support recognize the potential damage by peacekeeping operations to the local environment.¹⁰⁴⁹

(4) The environmental impact of a peace operation may stretch from the planning phase through its operational part, to the post-operation phase. The desired goal is that peace operations should undertake their activities in such a manner that the impact of their activities on the environment is minimized. The draft principle thus focuses on activities to be undertaken in situations where the environment would be negatively affected by a peace operation. At the same time, it is understood that “appropriate” measures to be taken may differ in relation to the context of the operation. The relevant considerations may include, in particular, whether such measures relate to the pre-, in-, or post- armed conflict phase, and what measures are feasible under the circumstances.

(5) The draft principle reflects the stronger recognition on the part of States and international organizations such as the United Nations, the European Union,¹⁰⁵⁰ and

¹⁰⁴⁵ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in [A/70/95-S/2015/446](#)), para. 23.

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2–3.

¹⁰⁴⁸ See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (1291 (2000)); United Nations Mission in Liberia (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (1545 (2004)); United Nations Stabilization Mission in Haiti (1542 (2004)); United Nations Operation in Côte d’Ivoire (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (1861 (2009)).

¹⁰⁴⁹ See United Nations, Department of Peacekeeping Operations and the Department of Field Support, “DFS Environment Strategy” (2017). Available at https://peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf (accessed on 8 July 2019). The strategy is complemented by an environmental policy and environmental guidelines on environment for United Nations field missions (see footnote 993 above).

¹⁰⁵⁰ See, e.g., European Union, “Military Concept on Environmental Protection and Energy Efficiency for EU-led military operations”, 14 September 2012, document EEAS 01574/12.

NATO,¹⁰⁵¹ of the environmental impact of peace operations and the need to take necessary measures to prevent, mitigate and remediate negative impacts. For example, some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.¹⁰⁵²

(6) There is no clear or definitive definition for “peace operation” or “peacekeeping” in existing international law. The current draft principle is intended to cover broadly all such peace operations that relate to armed conflict. The Agenda for Peace highlighted that “peacemaking” was action to bring hostile parties to agreement, especially through peaceful means;¹⁰⁵³ “peacekeeping” was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;¹⁰⁵⁴ while “peacebuilding” was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.¹⁰⁵⁵ The report of the High-level Independent Panel on Peace Operations includes, for its purposes, “a broad suite of tools ... from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations”.¹⁰⁵⁶ The term “peace operations” aims to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations. There is no reference in the text to “multilateral” peace operations, as it was considered unnecessary to address this expressly in the draft principle. The general understanding of the term “peace operations” is nevertheless that it concerns multilateral operations.

(7) “Prevent” has been used in acknowledgement of the fact that peace operations are not isolated in nature, and that in planning their actions, States and international organizations should plan or aim to minimize negative environmental consequences. While the prevention obligation requires action to be taken at an early stage, the notion of “mitigation” refers to reduction of harm that has already occurred. The notion of “remediation”, in turn, has been used in the same sense as “remedial measures” in draft principle 2, encompassing any measure that may be taken to restore the environment.

(8) Draft principle 7 is distinct in character from draft principle 6. Peace operations, unlike agreements concerning the presence of military forces in relation to armed conflict, do not necessarily involve armed forces or military personnel. Other types of actors such as civilian personnel and various types of specialists may also be present and covered by such operations. Draft principle 7 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

(9) It is understood that the draft principle also encompasses reviews of concluded operations that would identify, analyse and evaluate any detrimental effects of those operations on the environment. This would be a “lessons learned” type of exercise to seek to avoid or minimize the negative effects of future peace operations on the environment and ensure that mistakes are not repeated.

Principle 8 **Human displacement**

States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons

¹⁰⁵¹ See, e.g., NATO, “Joint NATO doctrine for environmental protection during NATO-led military activities”, 8 March 2018, document NSO(Joint)0335(2018)EP/7141.

¹⁰⁵² “The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations”, Report of the Secretary-General (A/70/357-S/2015/682), para 129.

¹⁰⁵³ “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping” (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ *Ibid.*, para. 56.

¹⁰⁵⁶ A/70/95-S/2015/446, para. 18.

displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.

Commentary

(1) Draft principle 8 addresses the inadvertent environmental effects of conflict-related human displacement. The draft principle recognizes the interconnectedness of providing relief for those displaced by armed conflict and reducing the impact of displacement on the environment. The draft principle covers both international and internal displacement.

(2) Population displacement typically follows the outbreak of an armed conflict, giving rise to significant human suffering as well as environmental damage.¹⁰⁵⁷ The United Nations Environment Programme has reported on “the massive movement of refugees and internally displaced people ... across the country” as perhaps “the most immediate consequence of the conflict [in Liberia]”,¹⁰⁵⁸ as well as of “clear and significant” “links between displacement and the environment” in the Sudan.¹⁰⁵⁹ In Rwanda, the population displacement and resettlement related to the 1990–1994 conflict and genocide “had a major impact on the environment, substantially altering land cover and land use in many parts of the country”,¹⁰⁶⁰ as well as causing extensive environmental damage in the neighbouring Democratic Republic of the Congo.¹⁰⁶¹

(3) Reference can also be made to a 2014 study on the protection of the environment during armed conflict, which emphasizes the humanitarian and environmental impacts of displacement in various conflicts.¹⁰⁶² The study notes with reference to the Democratic Republic of the Congo that “massive conflict-induced displacement of civilian populations associated with protracted conflict may have even more destructive effects [on] the environment than actual combat operations”.¹⁰⁶³ Non-international armed conflicts, in particular, have caused important effects in terms of displacement, including the environmental strain in the affected areas.¹⁰⁶⁴ In a similar manner, research based on the post-conflict environmental assessments conducted since the 1990s by the United Nations Environment Programme, the United Nations Development Programme and the World Bank has identified human displacement as one of the six principal pathways for direct environmental damage in conflict.¹⁰⁶⁵

(4) As the Office of the United Nations High Commissioner for Refugees (UNHCR) has pointed out, considerations relating to access to water, the location of refugee camps and settlements, as well as food assistance by relief and development agencies, “all have a direct

¹⁰⁵⁷ See Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Environmental Guidelines* (Geneva, 2005). Available at www.refworld.org/docid/4a54bbd10.html (accessed on 8 July 2019).

¹⁰⁵⁸ United Nations Environment Programme, *Desk Study on the Environment in Liberia* (United Nations Environment Programme, 2004), p. 23. Available at <http://wedocs.unep.org/handle/20.500.11822/8396> (accessed on 8 July 2019).

¹⁰⁵⁹ United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (Nairobi, 2007), p. 115. Available at <http://wedocs.unep.org/handle/20.500.11822/22234> (accessed on 8 July 2019).

¹⁰⁶⁰ United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (Nairobi, 2011), p. 74. Available at https://postconflict.unep.ch/publications/UNEP_Rwanda.pdf (accessed on 8 July 2019).

¹⁰⁶¹ As more than 2 million people moved in and out of the country, up to 800,000 people in camps along the border to the Democratic Republic of the Congo had to rely on firewood from the nearby Virunga national park. *Ibid.*, pp. 65–66.

¹⁰⁶² International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Report 12/2014 (Oslo, 2014).

¹⁰⁶³ *Ibid.*, p. 5.

¹⁰⁶⁴ *Ibid.*, p. 6.

¹⁰⁶⁵ D. Jensen and S. Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues”, in Jensen and Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2012), pp. 411–450, p. 414.

bearing on the environment”.¹⁰⁶⁶ Uninformed decisions concerning the siting of a refugee camp in or near a fragile or internationally protected area may result in irreversible – local and distant – impacts on the environment. Areas of high environmental value suffer particularly serious impacts that may be related to the area’s biological diversity, its function as a haven for endangered species or for the ecosystem services these provide.¹⁰⁶⁷ The United Nations Environment Programme¹⁰⁶⁸ and the United Nations Environmental Assembly have similarly drawn attention to the environmental impact of displacement.¹⁰⁶⁹

(5) The African Union Convention for the Protection of Internally Displaced Persons in Africa, also known as the Kampala Convention, stipulates that State Parties shall “[t]ake necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control”.¹⁰⁷⁰ The Kampala Convention applies to internal displacement “in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters”.¹⁰⁷¹

(6) Other recent developments related to displacement and the environment include the Task Force on Displacement, which was set up at the Conference of the Parties to the United Nations Framework Convention on Climate Change, and mandated to produce recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.¹⁰⁷² In 2015, States adopted the Sendai Framework for Disaster Risk Reduction, which calls, *inter alia*, for the promotion of transboundary cooperation to build resilience and reduce the risk of disasters and the risk of displacement.¹⁰⁷³ The more recent Global Compact for Safe, Orderly and Regular Migration likewise includes a section on the relationship between migration and environmental degradation.¹⁰⁷⁴ Although these developments focus on the environmental reasons for – rather than the environmental effects of – displacement, they are indicative of a recognition among States of the nexus between environment and displacement, and the need to foster cooperation and regulation in that field.

(7) Draft principle 8 addresses States, international organizations and other relevant actors. International organizations involved in the protection of displaced people, and the environment, in conflict-affected areas include UNHCR, the United Nations Environment Programme and other United Nations agencies, as well as the European Union, the African Union, and NATO. “Other relevant actors” referred to in the draft principle may include, *inter alia*, international donors, ICRC, and international non-governmental organizations. All these actors are to take appropriate measures to prevent and mitigate environmental

¹⁰⁶⁶ UNHCR *Environmental Guidelines* (footnote 1057 above), p. 5. See also G. Lahn and O. Grafham, “Heat, light and power for refugees: saving lives, reducing costs” (Chatham House, 2015).

¹⁰⁶⁷ *Ibid.*, p. 7.

¹⁰⁶⁸ See United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 1060 above). See also United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (footnote 1059 above).

¹⁰⁶⁹ See United Nations Environmental Assembly resolution 2/15 of 27 May 2016 on “Protection of the environment in areas affected by armed conflict” (UNEP/EA.2/Res.15), para. 1.

¹⁰⁷⁰ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), art. 9, para. 2 (*j*). Available at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>. The Convention entered into force on 6 December 2012.

¹⁰⁷¹ *Ibid.*, art. 1 (*k*).

¹⁰⁷² Conference of the Parties of the United Nations Framework Convention on Climate Change, Decision 1/CP.21 “Adoption of the Paris Agreement”, para. 49, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum (FCCC/CP/2015/10/Add.1). See also the Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (2015). Available at <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (accessed on 8 July 2019).

¹⁰⁷³ Sendai Framework for Disaster Risk Reduction 2015–2030, para. 28 (adopted at the Third United Nations World Conference on Disaster Risk Reduction and endorsed by the General Assembly in resolution 69/283 of 3 June 2015). Available at www.unisdr.org/we/inform/publications/43291 (accessed on 8 July 2019).

¹⁰⁷⁴ General Assembly resolution 73/195 of 19 December 2018, annex.

degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities. The terms “relief and assistance” refer generally to the kind of assistance involved where human displacement occurs. These terms are not intended to convey any different meaning from how these terms are understood in humanitarian work.

(8) Draft principle 8 includes a reference to relief for displaced persons and local communities. The UNHCR Environmental Guidelines note in this regard that the “state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity, whether refugees, returnees or local communities”.¹⁰⁷⁵ Providing livelihoods for displaced people is intimately connected to preserving and protecting the environment in which local and host communities are located. Better environmental governance increases resilience for host communities, displaced persons, and the environment as such.

(9) Similarly, the International Organization for Migration has highlighted the importance of “reducing the vulnerability of displaced persons as well as their impacts on the receiving society and ecosystem” as an emerging issue that requires addressing,¹⁰⁷⁶ and has developed an Atlas of Environmental Migration.¹⁰⁷⁷ The World Bank, furthermore, has drawn attention to the issue in its 2009 report “Forced displacement – The development challenge”.¹⁰⁷⁸ The report highlights the development impacts that displacement can have on environmental sustainability and development, including through environmental degradation.¹⁰⁷⁹ Reference can also be made to the Draft International Covenant on Environment and Development of the International Union for Conservation of Nature, which includes a paragraph on displacement reading as follows: “Parties shall take all necessary measures to provide relief for those displaced by armed conflict, including internally displaced persons, with due regard to environmental obligations”.¹⁰⁸⁰

(10) The reference to “providing relief” to persons displaced by conflict and to local communities in draft principle 8 should also be read in the light of the Commission’s previous work on the topic “Protection of persons in the event of disasters”.¹⁰⁸¹ As explained in the relevant commentary, the draft articles would apply in situations of displacement that, because of their magnitude, can be viewed as “complex emergencies”, including where a disaster occurs in an area where there is an armed conflict.¹⁰⁸²

(11) Draft principle 8 is located in Part Two given that conflict-related human displacement is a phenomenon that may have to be addressed both during and after an armed conflict.

Principle 9

State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State,

¹⁰⁷⁵ UNHCR *Environmental Guidelines* (footnote 1057 above), p. 5.

¹⁰⁷⁶ International Organization for Migration, *Compendium of Activities in Disaster Risk Reduction and Resilience* (Geneva, 2013), as referenced in *IOM Outlook on Migration, Environment and Climate Change* (Geneva, 2014), p. 82.

¹⁰⁷⁷ D. Ionesco, D. Mokhnacheva, F. Gemenne, *The Atlas of Environmental Migration*, (Abingdon, Routledge 2019).

¹⁰⁷⁸ A. Christensen and N. Harild, “Forced displacement – The development challenge” (Social Development Department, The World Bank Group, Washington, D.C., 2009).

¹⁰⁷⁹ *Ibid.*, pp. 4 and 11.

¹⁰⁸⁰ International Union for Conservation of Nature, Draft International Covenant on Environment and Development (2015), art. 40, on military and hostile activities (formerly art. 38). Available from www.iucn.org.

¹⁰⁸¹ Draft articles on the protection of persons in the event of disasters, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10 (A/71/10)*, paras. 48–49.

¹⁰⁸² Para. (9) of the commentary to draft art. 18, para. 2, *ibid.*, at p. 73. See also draft art. 3 (a): “disaster” was defined, for the purposes of the draft articles, as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”. *Ibid.*, at p. 14.

which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.

2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

Commentary

(1) Draft principle 9 concerns the international responsibility of States for damage caused to the environment in relation to armed conflicts. Paragraph 1 restates the general rule that every internationally wrongful act of a State entails its international responsibility and gives rise to an obligation to make full reparation for the damage that may be caused by the act. The paragraph furthermore reaffirms the applicability of this principle to internationally wrongful acts in relation to armed conflict as well as to environmental damage, including damage caused to the environment in and of itself.

(2) Paragraph 1 has been modelled on articles 1 and 31, paragraph 1, of the articles on responsibility of States for internationally wrongful acts. Although no reference is made to other articles, the draft principle shall be applied in accordance with the rules on the responsibility of States for internationally wrongful acts, including those specifying the conditions for internationally wrongful acts. This means, *inter alia*, that conduct amounting to an internationally wrongful act may consist of action or omission. Furthermore, for the international responsibility of a State to arise in relation to armed conflict, the act or omission must be attributable to that State and amount to a violation of its international obligation.¹⁰⁸³

(3) An act or omission attributable to a State that causes harm to the environment in relation to an armed conflict is wrongful if two conditions are met. First, the act or omission in question violates one or more of the substantive rules of the law of armed conflict providing protection to the environment,¹⁰⁸⁴ or other rules of international law applicable in the situation, including but not limited to the law of the use of force (*jus ad bellum*) and international human rights law.¹⁰⁸⁵ Second, such a rule, or rules, are binding on the State. The scope of the responsibility of the State as well as the threshold for compensable environmental harm depend on the applicable primary rules.

(4) The rules of the law of armed conflict concerning the responsibility of States are clear and well-established. As *lex specialis* in armed conflict, the law of armed conflict extends the responsibility of a State party to an armed conflict to “all acts committed by persons forming part of its armed forces”, including their private acts.¹⁰⁸⁶ As far as the law of the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage caused by that violation, whether or not resulting

¹⁰⁸³ Art. 1 of the articles on responsibility of States for internationally wrongful acts (hereinafter, “articles on State responsibility”): “Every internationally wrongful act of a State entails the international responsibility of that State”, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 32–34.

¹⁰⁸⁴ This includes articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts, the principles of distinction, proportionality, military necessity and precautions in attack, as well as other rules concerning the conduct of hostilities, and the law of occupation, also reflected in the present draft principles.

¹⁰⁸⁵ Furthermore, to the extent that international criminal law provides protection to the environment in armed conflict, the relevant international crimes may trigger State responsibility. See art. 1 of the articles on State responsibility”, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, and para. (3) of the commentary to art. 58, *ibid.*, at p. 142. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at p. 116, para. 173.

¹⁰⁸⁶ Convention (IV) respecting the laws and customs of war on land (Hague Convention IV) (The Hague, 18 October 1907), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100, art. 3: “[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” See also Additional Protocol I, art. 91. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 150, p. 537: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused”. This special rule also applies to private acts of members of armed forces.

from a violation of the law of armed conflict.¹⁰⁸⁷ A further basis for responsibility for conflict-related environmental harm – in particular but not exclusively – in situations of occupation may be found in international human rights obligations. Degradation of environmental conditions may violate a number of specific human rights, including the right to life, the right to health and the right to food, as has been established in the jurisprudence of regional human rights courts and human rights treaty bodies.¹⁰⁸⁸

(5) Environmental damage caused in armed conflict was first recognized as compensable under international law by the United Nations Compensation Commission (UNCC), which was established by the Security Council in 1991 to deal with claims concerning the Iraqi invasion and occupation of Kuwait.¹⁰⁸⁹ The UNCC jurisdiction was based on Security Council resolution 687 (1991), which reaffirmed the responsibility of Iraq under international law “for any direct loss or damage – including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”.¹⁰⁹⁰

(6) The experience of UNCC in dealing with environmental claims has been groundbreaking in the area of reparations for wartime environmental harm, and an important point of reference beyond armed conflicts.¹⁰⁹¹ One example is related to how environmental damage can be quantified. UNCC did not attempt to define the concepts of “direct environmental damage” and “depletion of natural resources” in Security Council resolution 687 (1991) but put forward a non-exhaustive list of compensable losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming from the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

¹⁰⁸⁷ See Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding Jus ad Bellum Liability, 26 UNRIAA (2009), p. 631, para. 13; ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3650. See also M. Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, vol. 84 (2002), pp. 401–434; C. Greenwood, “State responsibility and civil liability for environmental damage caused by military operations”, in R.J. Grunawalt, J.E. King and R.S. McClain (eds.), “Protection of the environment during armed conflict”, *International Law Studies*, vol. 69 (1996), pp. 397–415, at pp. 405–406.

¹⁰⁸⁸ See *Yanomami v. Brazil*, Case No. 12/85, Inter-American Commission on Human Rights, resolution No. 12/85, Case-No. 7615, 5 March 1985; *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII; *Powell and Rayner v. the United Kingdom*, Application No. 9310/81, Judgment, European Court of Human Rights, 21 February 1990; *López Ostra v. Spain*, Application No. 16798/90, Judgment, European Court of Human Rights, 9 December 1994; *Guerra and Others v. Italy*, Application No. 116/1996/735/532, Judgment, European Court of Human Rights, 19 February 1998; *Fadeyeva v. Russia*, Application No. 55723/00, Judgment, European Court of Human Rights, 9 June 2005. See also R. Pavoni, “Environmental jurisprudence of the European and Inter-American Courts of Human Rights: comparative insights”, in B. Boer, *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press, 2015), pp. 69–106. See also “Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, individual report of the General Assembly and the Human Rights Council, including the universal periodic review process, Report No. 6, December 2013, part III C.

¹⁰⁸⁹ Security Council resolution 692 (1991) of 20 May 1991.

¹⁰⁹⁰ Security Council resolution 687 (1991) of 3 April 1991, para. 16.

¹⁰⁹¹ D.D. Caron, “The profound significance of the UNCC for the environment”, in C.R. Payne and P.H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission Environmental Liability* (Oxford, Oxford University Press, 2011), pp. 265–275; P. Gautier, “Environmental damage and the United Nations Claims Commission: new directions for future international environmental cases?”, in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law, and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Leiden, Martinus Nijhoff, 2007), pp. 177–214; P.H. Sand, “Compensation for environmental damage from the 1991 Gulf War”, *Environmental Policy and Law*, vol. 35 (2005), pp. 244–249.

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.¹⁰⁹²

(7) Paragraph 1 of draft principle 9 reaffirms the compensability under international law of damage to the environment *per se*. This statement is in line with the Commission's earlier work on State responsibility¹⁰⁹³ as well as on the allocation of loss in the case of transboundary harm arising out of hazardous activities.¹⁰⁹⁴ Reference can also be made to the statement of UNCC that "there is no justification for the contention that general international law precludes compensation for pure environmental damage".¹⁰⁹⁵ Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".¹⁰⁹⁶

(8) The notion of "the environment in and of itself" has been explained to refer to "pure environmental damage".¹⁰⁹⁷ The latter term was used by UNCC in the above citation. Both concepts, as well as the notion of "harm to the environment *per se*" that the Commission used in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities have the same meaning. They refer to harm to the environment that does not, or not only, cause material damage but leads to the impairment or loss of the ability of the environment to provide ecosystem services such as sequestration of carbon from the atmosphere, air quality services and biodiversity.¹⁰⁹⁸

(9) Paragraph 2 of draft principle 9 clarifies that the draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

¹⁰⁹² Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992 (S/AC.26/1991/7/Rev.1), para. 35.

¹⁰⁹³ Para. (15) of the commentary to art. 36 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 101: "environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc. – sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify".

¹⁰⁹⁴ Para. (6) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 73: "it is important to emphasize that damage to environment *per se* could constitute damage subject to prompt and adequate compensation".

¹⁰⁹⁵ United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (S/AC.26/2005/10), para. 58.

¹⁰⁹⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, International Court of Justice, 2 February 2018, General List No. 150, para. 41.

¹⁰⁹⁷ *Ibid.*, Separate Opinion of Judge Donoghue, para. 3: "Damage to the environment can include not only damage to physical goods, such as plants and minerals, but also to the 'services' that they provide to other natural resources (for example, habitat) and to society. Reparation is due for such damage, if established, even though the damaged goods and services were not being traded in a market or otherwise placed in economic use. Costa Rica is therefore entitled to seek compensation for 'pure' environmental damage, which the Court calls 'damage caused to the environment, in and of itself'."

¹⁰⁹⁸ See J.B. Ruhl and J. Salzman, "The law and policy beginnings of ecosystem services", *Journal of Land Use and Environmental Law*, vol. 22 (2007), pp. 157–172. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed (footnote 1096 above), para. 75.

(10) Draft principle 9 is located in Part Two containing draft principles related to the phase before armed conflict, and draft principles that are applicable to more than one phase, including provisions of general applicability. Draft principle 9 belongs to the latter category.

Principle 10
Corporate due diligence

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Commentary

(1) Draft principle 10 recommends that States take appropriate legislative and other measures to ensure that corporations operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, in areas of armed conflict or in post-conflict situations. The second sentence of draft principle 10 specifies that such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner. The draft principle does not reflect a generally binding legal obligation and has been phrased accordingly as a recommendation.

(2) The concept of “corporate due diligence” refers to a wide network of normative frameworks that seek to promote responsible business practices, including respect for human rights and international environmental standards. Such frameworks include non-binding guidelines as well as binding regulation at the national or regional level, and extend to codes of conduct created by the businesses themselves. Draft principle 10 builds on and seeks to complement the existing regulatory frameworks which do not always display a clear environmental focus, or a focus on areas of armed conflict and post-armed conflict situations.

(3) The United Nations Guiding Principles on Business and Human Rights¹⁰⁹⁹ are based on the obligations of States to respect, protect and fulfil human rights and fundamental freedoms, and their implementation largely relies on State action.¹¹⁰⁰ The Guiding Principles propose a number of measures that States can take to ensure that business enterprises operating in conflict-affected areas are not involved with gross human rights abuses.¹¹⁰¹ This includes “[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”.¹¹⁰²

(4) The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises¹¹⁰³ expressly address environmental concerns, recommending that enterprises “take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”.¹¹⁰⁴ The OECD Due Diligence Guidance for Responsible Supply

¹⁰⁹⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

¹¹⁰⁰ So far, 21 States have published national action plans on the implementation of the Guiding Principles, 23 are in the process of preparing such a plan or have committed to preparing one. In nine other States, either the national human rights institute or civil society has taken steps towards preparing a national action plan. Information available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed on 8 July 2019).

¹¹⁰¹ Guiding Principles on Business and Human Rights, principle 7.

¹¹⁰² *Ibid.*, principle 7, para. (d).

¹¹⁰³ OECD, *OECD Guidelines for Multinational Enterprises*. The updated guidelines and the related decision were adopted by the 42 Governments adhering thereto on 25 May 2011. Available at www.oecd.org/corporate/mne (accessed on 8 July 2019).

¹¹⁰⁴ *Ibid.*, chap. VI “Environment”, p. 42.

Chains of Minerals from Conflict-Affected and High-Risk Areas of 2016,¹¹⁰⁵ *inter alia*, encourage companies operating in or sourcing minerals from conflict-affected and high-risk areas to assess and avoid the risk of being involved in serious human rights violations.¹¹⁰⁶ Regulatory frameworks more specifically related to natural resources and areas of armed conflict also include the Certification Mechanism of the International Conference of the Great Lakes Region¹¹⁰⁷ and the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains.¹¹⁰⁸ Due diligence frameworks have also been created for specific businesses, including extractive industries, in cooperation between States, businesses and civil society.¹¹⁰⁹

(5) In some cases, such initiatives have provided the impetus for States to incorporate similar standards into their national legislation, making them binding on corporations subject to their jurisdiction that operate in or deal with conflict-affected areas. Legally binding instruments have also been developed at the regional level. Examples of such legally binding frameworks, either at the regional or national level, include the US Dodd-Frank Act of 2010,¹¹¹⁰ The Lusaka Protocol of the International Conference on the Great Lakes Region,¹¹¹¹ the regulation of the European Union on conflict minerals¹¹¹² and the European Union timber regulation.¹¹¹³

(6) The language of draft principle 10 builds on the existing frameworks of corporate due diligence, *inter alia* regarding how natural resources are purchased and obtained. At the same time, in accordance with the scope of the topic, it specifically focuses on the protection of the environment in areas of armed conflict as well as in post-armed conflict situations. Reference can in this regard be made to the concept of “conflict-affected and high-risk areas”

¹¹⁰⁵ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016). Available at www.oecd.org/daf/inv/mne/mining.htm (accessed on 8 July 2019).

¹¹⁰⁶ *Ibid.*, p. 16.

¹¹⁰⁷ See www.icglr-rinr.org/index.php/en/certification (accessed on 8 July 2019).

¹¹⁰⁸ China, Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. The guidelines apply to all Chinese companies extracting and/or using mineral resources and their related products and come into play at any point in the supply chain of minerals. Available at <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (accessed on 8 July 2019).

¹¹⁰⁹ For Extractive Industries Transparency Initiative, which aims at increasing transparency in the management of oil, gas, and mining revenues, see <http://eiti.org>; for Voluntary Principles on Security and Human Rights for extractive industry companies, see at www.voluntaryprinciples.org; for the Equator Principles of the financial industry for determining, assessing and managing social and environmental risk in project financing, see www.equator-principles.com.

¹¹¹⁰ An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes (Dodd–Frank Act), 11 July, 2010, Pub.L.111–203, 124 Stat. 1376–2223. Section 1502 of the Dodd-Frank Act on conflict minerals originating from the Democratic Republic of the Congo requires that companies registered in the United States exercise due diligence on certain minerals originating from the Democratic Republic of the Congo.

¹¹¹¹ Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region (Nairobi, 30 November 2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcecess.pdf (accessed on 8 July 2019). Art. 17, para. 1, requires States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources.

¹¹¹² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *Official Journal of the European Union*, L130, p. 1 (European Union conflict minerals regulation). The regulation will enter into force on 1 January 2021. The regulation lays down supply chain due diligence obligations for European Union importers of certain minerals originating from conflict-affected and high-risk areas.

¹¹¹³ Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down obligations of operators who place timber and timber products on the market (12 November 2010), *Official Journal of the European Union*, L 295, p. 23. The timber regulation requires that operators exercise due diligence so as to minimize the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the European Union market.

used in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals, as well as in the conflict minerals regulation of the European Union. The OECD Due Diligence Guidance defines this concept in terms of “the presence of armed conflict, widespread violence or other risks of harm to people”.¹¹¹⁴ The European Union conflict minerals regulation gives the following definition: “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”.¹¹¹⁵ The relevance of the notion of “conflict-affected and high-risk areas” for draft principle 10 was acknowledged. The Commission nevertheless chose to refer to “area of armed conflict” and “post-armed conflict situation” as these terms are more closely aligned to the terminology used in the draft principles. They should be understood in the sense of the concepts of “armed conflict”¹¹¹⁶ and “post-armed conflict”¹¹¹⁷ as used in the draft principles.

(7) The first sentence of draft principle 10 refers to “legislative and other measures”. It is usual that international instruments relying on implementation at the national level refer explicitly to legislative measures,¹¹¹⁸ and seeking to ensure corporate due diligence would usually require legislative action. “[O]ther measures” may be wide ranging and include, *inter alia*, judicial and administrative measures. A further qualification, “appropriate”, indicates that the measures taken at the national level may differ from one country to another. Such measures should in any event be aimed at ensuring that corporations and other business enterprises operating in or from the country in question exercise due diligence with respect to the protection of the environment when acting in an area of armed conflict or in a post-armed conflict situation.

(8) There is no uniform practice on how to refer to the business entities for which the due diligence guidance is addressed. The different regulatory frameworks use terms ranging from “transnational corporations”¹¹¹⁹ to “multinational enterprises”,¹¹²⁰ “business enterprises”¹¹²¹ or “companies”.¹¹²² The reference to “corporations and other business enterprises” was

¹¹¹⁴ *OECD Due Diligence Guidance ...* (footnote 1105 above), p. 13. The Guidance explains that “Armed conflict may take a variety of forms such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.”

¹¹¹⁵ European Union conflict minerals regulation (footnote 1112 above), art. 2, para. (f).

¹¹¹⁶ See para. (7) of the commentary to draft principle 13 below.

¹¹¹⁷ More frequently referred to as “after an armed conflict”. This phrase has not been defined. It is nevertheless clear that it cannot, for the purpose of the protection of the environment, be limited to the immediate aftermath of an armed conflict.

¹¹¹⁸ See, e.g. International Covenant on Economic, Social and Cultural Rights (New York, 19 December, 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, art 2, para. 1, which refers explicitly to *legislative measures*, similarly Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210, art. 5, para. 2. See also International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty Series*, vol. 2178, No. 38349, p. 197, art. 18, as well as United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2225, No. 39574, p. 209, art. 7, referring to “comprehensive domestic regulatory and supervisory regime... within [a State’s] competence”. Reference can in this regard also be made to the International Law Association’s work on due diligence, which expresses a clear preference for legislative measures as means to implement the human rights obligation to protect, and points out, with regard to the International Tribunal for the Law of the Sea *Seabed* advisory opinion (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber, International Tribunal of the Law of the Sea, Case No. 17, 1 February 2011), that States’ due diligence obligations are fulfilled and proven if the State has put in place legislative and regulatory framework. ILA Study Group on Due Diligence in International Law, First Report, 7 March 2014, pp. 17 and 26. Available at www.ila-hq.org/index.php/study-groups (accessed on 8 July 2019).

¹¹¹⁹ Human Rights Council resolution 26/9 of 26 June 2014 setting up a Working Group to elaborate a legally binding instrument on transnational corporations and other business entities.

¹¹²⁰ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above).

¹¹²¹ Guiding Principles on Business and Human Rights.

¹¹²² *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (footnote 1108 above).

chosen for the draft principle as a broad notion that would not be unnecessarily limitative. How this notion is interpreted would primarily depend on the national law of each State. There are similarly several ways to describe the connection between a corporation or other business enterprise and a State.¹¹²³ The phrase “operating in or from their territories” is the standard phrase in the OECD Due Diligence Guidance.¹¹²⁴

(9) The notion of “due diligence” as used in the draft principle refers to due diligence expected of corporations and other business entities when acting in areas of armed conflict or in post-armed conflict situations. This notion is not used differently from the due diligence frameworks referred to in paragraphs (2) to (4) above. As for its content, reference can be made to the parameters of “human rights due diligence” as explained in the Guiding Principles on Business and Human Rights:

Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.¹¹²⁵

The European Union conflict minerals regulation defines supply chain due diligence in similar terms as “an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof”.¹¹²⁶ Furthermore, the OECD Guidelines for Multinational Enterprises and the related documentation include detailed guidance on international environmental standards.¹¹²⁷

(10) The phrase “including in relation to human health” underlines the close link between environmental degradation and human health as affirmed by international environmental

¹¹²³ For instance, the Guiding Principles on Business and Human Rights use the notion “business enterprises domiciled in their territory and/or jurisdiction”, see e.g. principle 2.

¹¹²⁴ *OECD Due Diligence Guidance* (footnote 1105 above), p. 9; and Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct (2018), pp. 92–94, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443> (accessed on 8 July 2019). See also OECD, *Implementing the OECD Due Diligence Guidance*, Executive Summary (Paris, 28 May 2018), p. 6, para. 16. Available at https://tuac.org/wp-content/uploads/2018/05/140PS_E_10_duediligence.pdf (accessed on 8 July 2019).

¹¹²⁵ Guiding Principles on Business and Human Rights, principle 17.

¹¹²⁶ See European Union conflict minerals regulation (footnote 1112 above), eleventh preambular para. See also *OECD Due Diligence Guidance ...* (footnote 1105 above), p. 13: “Due diligence is an ongoing, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict”.

¹¹²⁷ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above), part I, chap. VI “Environment”, pp. 42–46. See also OECD, “Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches”. Available at <https://oecd.org/env/34992954.pdf> (accessed on 8 July 2019).

instruments,¹¹²⁸ regional treaties and case law,¹¹²⁹ the work of the Committee on Economic, Social and Cultural Rights,¹¹³⁰ as well as of the Special Rapporteur on human rights and the environment.¹¹³¹ The phrase thus refers to “human health” in the context of the protection of the environment.

(11) According to the second sentence of draft principle 10, the measures to be taken include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner. The requirement of responsible sourcing is included in a number of documents referred to above. The OECD Guidance, for instance, recommends that States promote the observance of the Guidance by companies operating from their territories and sourcing minerals from conflict-affected and high-risk areas “with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development”.¹¹³² The Chinese guidelines require that companies identify and assess the risks of contributing to conflict and serious human rights abuses associated with extracting, trading, processing, and exporting resources

¹¹²⁸ For instance, the following instruments refer to “human health and the environment”: Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, art. 7 (d); Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, preamble and art. 2, para. 2 (a); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989), *ibid.*, vol. 1673, No. 28911, p. 57, preamble, art. 2, paras. 8 and 9, art. 4, paras. 2 (c), (d) and (f) and para. 11, art. 10, para. 2 (b), art. 13, paras. 1 and 3 (d), art. 15, para. 5 (a); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996), *ibid.*, vol. 2942, No. 16908, p. 155, art. 1 (j) and (k); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), *ibid.*, vol. 2244, No. 39973, p. 337, preamble, art. 1 and art. 15, para. 4; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol. 2256, No. 40214, p. 119, preamble, art. 1, art. 3, para. 2 (b) (iii) a, art. 6, para. 1, art. 11, para. 1 (d), art. 13, para. 4; Minamata Convention on Mercury (Kumamoto, 10 October 2013), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.17), preamble, art. 1, art. 3, para. 6 (b) (i), art. 12, paras. 2 and 3 (c), art. 18, para. 1 (b), art. 19, para. 1 (c); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.18), art. 6, para. 12.

¹¹²⁹ For instance, the African Charter on Human and Peoples’ Rights incorporates both the right to health and the explicit right to a healthy environment. See African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 16, para. 1 (the right to health), and art. 24 (“the right to a general satisfactory environment favourable to [each person’s] development”). These rights were resorted to in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria*, Communication No. 155/96, Decision, African Commission on Human and Peoples’ Rights, 27 May 2002, and *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988), Organization of American States, *Treaty Series*, No. 69, includes the right to health. The regional jurisprudence acknowledges that the right to health includes an element of environmental protection, such as a pollution-free environment. See Inter-American Commission on Human Rights, Annual Report 1984–1985, chap. V “Areas in which further steps are needed to give effect to the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights”, OEA/Ser.L/V/II.66; see also Inter-American Commission on Human Rights, Report on the situation of human rights in Cuba, 4 October 1983, OEA/Ser.L/V/II.61, Doc. 29 rev. 1, chap. XIII “The right to health”, para. 41; Inter-American Commission on Human Rights, resolution No. 12/85 in Case No. 7615, 5 March 1985; Inter-American Court of Human Rights, *Indigenous Community Yakye Axa v. Paraguay* (footnote 1015 above), para. 167.

¹¹³⁰ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 30.

¹¹³¹ See the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

¹¹³² *OECD Due Diligence Guidance* (footnote 1105 above), recommendation, pp. 7–9.

from conflict-affected and high-risk areas,¹¹³³ as well as risks associated with serious misconduct in environmental, social and ethical issues.¹¹³⁴ The European Union conflict minerals regulation defines “supply chain due diligence” as meaning “the obligations of Union importers ... in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities”.¹¹³⁵

(12) A view was expressed that the second sentence of draft principle 10 should recommend that natural resources be purchased or obtained “equitably” and in an environmentally sustainable manner. While the established understanding of the concept of sustainability as encompassing environmental, economic and social aspects, or the importance of all these aspects for corporate due diligence was not questioned, the Commission did not include the word “equitably” as it was felt that it could create confusion in the context of draft principle 10.

(13) Draft principle 10 refers to corporate activities in areas of armed conflict or in post-armed conflict situations but addresses what are essentially preventive measures. The draft principle is therefore located in Part One which includes principles relating to the time before conflict, and principles that are applicable in more than one phase including general principles not tied to any particular phase.

Principle 11 **Corporate liability**

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Commentary

(1) Draft principle 11 is closely related to draft principle 10 concerning corporate due diligence. The purpose of draft principle 11 is to address situations in which harm has been caused to the environment, including in relation to human health, in areas of armed conflict or in post-conflict situations. States are invited to take appropriate legislative and other measures aimed at ensuring that corporations or other business enterprises operating in or from the State’s territory can be held liable for having caused such harm. The concepts of “legislative and other measures”, “corporations and other business enterprises”, “the environment, including in relation to human health”, “operating in or from their territories” and “in an area of armed conflict or in a post-armed conflict situation” are to be interpreted in the same way as in draft principle 10.

(2) The notions of “harm” and “caused by them” are to be interpreted in accordance with the applicable law, which may be the law of the home State of the corporation or other business enterprise, or the law of the State in which the harm has been caused. In this regard, reference can be made to the legal regime applicable in the European Union¹¹³⁶ which provides that the law applicable to a claim shall in general be that of the State in which the damage occurred.¹¹³⁷ As for the term “cause”, the Guiding Principles on Business and Human

¹¹³³ *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (see footnote 1108 above), sect. 5.1.

¹¹³⁴ *Ibid.*, sect. 5.2.

¹¹³⁵ European Union conflict minerals regulation (footnote 1112 above), art. 2 (d).

¹¹³⁶ As well as in Iceland, Norway and Switzerland.

¹¹³⁷ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July on the law applicable to non-contractual obligations (Rome II Regulation), *Official Journal of the European*

Rights, in the context of human rights due diligence, refer to adverse impacts that the business enterprise “may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.¹¹³⁸

(3) The second sentence of draft principle 11 follows the wording of draft principle 10 in that it begins with a reference to the preceding sentence and adds a further consideration that is included within its remit. The phrase “as appropriate” which does not appear in draft principle 10 provides nuance as to how the elements of the provision are to be applied at the national level. The second sentence of draft principle 11 recommends measures aimed at ensuring that a corporation or other business enterprise can, under certain circumstances, be held liable if its subsidiary has caused harm to the environment including in relation to human health in armed conflict or a post-armed conflict situation. More specifically, this should be possible when and to the extent that the subsidiary acts under the *de facto* control of the parent company. To illustrate the importance of such control, reference can be made to the statement of the United Kingdom Supreme Court in the *Vedanta v. Lungowe* case regarding the possible liability of the British multinational group Vedanta Resources for the release of toxic substances to a watercourse in Zambia by its subsidiary: “Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”¹¹³⁹

(4) The concept of *de facto* control is to be interpreted in accordance with the requirements of each national jurisdiction. The OECD Guidelines for Multinational Enterprises point out in this regard that the companies or other entities forming a multinational enterprise may coordinate their operations in different ways. “While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.”¹¹⁴⁰

(5) Reference can in this regard also be made to national judicial cases that have shed light on the relevant aspects of the relationship between the parent company and its subsidiary. For instance, in the *Bowoto v. Chevron* case,¹¹⁴¹ the United States District Court for the Northern District of California, paid particular attention to: (a) the degree and content of the communication between the parent and the subsidiary; (b) the degree to which the parent set or participated in setting policy, particularly security policy, for the subsidiary; (c) the officers and directors whom the parent and the subsidiary had in common; (d) the reliance on the subsidiary for revenue production and its importance in the overall success of the parent’s operations; and (e) the extent to which the subsidiary, if acting as the agent of the defendants, was acting within the scope of its authority.¹¹⁴² In a further case,¹¹⁴³ the United States District Court for the Southern District of New York stated that one corporation may be held legally accountable for the actions of the other if the corporate relationship between a parent and its subsidiary is sufficiently close.¹¹⁴⁴ Relevant factors in determining whether this was the case included disregard of corporate formalities, intermingling of funds and overlap of ownership, officers, directors and personnel.¹¹⁴⁵ In the *Chandler v. Cape* case, the England and Wales Court of Appeal concluded that, in appropriate circumstances, the parent

Union, L 199, p. 40, art. 4, para. 1. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 30 October 2007), *Official Journal of the European Union*, L 339, p. 3.

¹¹³⁸ Guiding Principles on Business and Human Rights, principle 17, para. (a).

¹¹³⁹ *Vedanta Resources PLC and another v Lungowe and others*, Judgment, 10 April 2019, Hilary Term [2019] UKSC 20, On appeal from [2017] EWCA Civ 1528, para. 49.

¹¹⁴⁰ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above), chap. I, para. 4, p. 17.

¹¹⁴¹ *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004). The case was related to Chevron-Texaco Corporation’s alleged involvement in human rights abuses in Nigeria.

¹¹⁴² *Ibid.*, p. 1243.

¹¹⁴³ *In re South African Apartheid Litigation*, 617 F. Supp.2d 228 (S.D.N.Y. 2009). In this case, South African plaintiffs sued Daimler AG and Barclays National Bank Ltd. for aiding and abetting the Government of South Africa in its apartheid policy.

¹¹⁴⁴ *Ibid.*, p. 246.

¹¹⁴⁵ *Ibid.*, p. 251.

company may have a duty of care in relation to the health and safety of the employees of its subsidiary. That may be the case, for instance, when the business of the parent and the subsidiary are in a relevant aspect the same and the parent has, or ought to have, superior knowledge of the relevant aspects of health and safety in the particular industry as well as of the shortcomings in the subsidiary's system of work.¹¹⁴⁶

(6) The third sentence of draft principle 11 concerns to both the first and the second sentences of the draft principle. Its purpose is to recall that States should provide adequate and effective procedures and remedies for the victims of environmental and health-related harm caused by corporations or other business enterprises or their subsidiaries in areas of armed conflict or in post-armed conflict situations. The sentence thus refers to situations, in which the host State may not be in the position to effectively enforce its legislation. Reference can in this regard also be made to the general comment of the Committee on Economic, Social and Cultural Rights which interprets the obligation to protect as extending to corporate wrongdoing abroad, “especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective”.¹¹⁴⁷

(7) It may be recalled that the collapse of State and local institutions is a common consequence of armed conflict and one that often casts a long shadow in the aftermath of conflict, undermining law enforcement and the protection of rights as well as the integrity of justice. The important role that home States of corporations and other business enterprises can play in such situations is illustrated by a reference to the *Katanga Mining* case,¹¹⁴⁸ in which the dispute related to events in the Democratic Republic of the Congo. The company Katanga Mining Ltd. was incorporated in Bermuda and resident in Canada for tax purposes¹¹⁴⁹ and had all its actual business operations in the Democratic Republic of the Congo.¹¹⁵⁰ The parties had furthermore agreed in a previous contract that any disputes would be settled in the Court of Great Instance of Kolwezi (Democratic Republic of the Congo). The English Court nevertheless decided, in view of the situation in which “attempted interference with the integrity of justice” was “apparently widespread and endemic”,¹¹⁵¹ that the Democratic Republic of the Congo would not be “a forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice”.¹¹⁵²

(8) The human rights treaty bodies within the United Nations have also addressed the issue in their comments on the situation in individual States. The Human Rights Committee, for instance, has encouraged the relevant State party “to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations” and “to take appropriate measures to strengthen the remedies provided to protect people who have been

¹¹⁴⁶ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525 (Eng.), para. 80. It was furthermore required that the parent company knew or ought to have known that the subsidiary or its employees relied on it for protection. See also R. McCorquodale, “Waving not drowning: *Kiobel* outside the United States”, *American Journal of International Law*, vol. 107 (2013), pp. 846–51. See also *Lubbe and others v. Cape PLC Afrika and others v. Same*, 20 July 2000, 1 Lloyd’s Rep. 139, as well as P. Muchlinski, “Corporations in international litigation: problems of jurisdiction and United Kingdom *Asbestos* cases”, *International and Comparative Law Quarterly*, vol. 50 (2001), pp. 1–25. See also *Akpan v. Royal Dutch Shell PLC*, The Hague District Court, case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854), 30 January 2013.

¹¹⁴⁷ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 30. The general comment links such measures to the obligation to protect Covenant rights.

¹¹⁴⁸ *Alberta Inc. v. Katanga Mining Ltd.* [2008] EWHC 2679 (Comm), 5 November 2008 (Tomlinson J.).

¹¹⁴⁹ *Ibid.*, para. 19.

¹¹⁵⁰ *Ibid.*, para. 20.

¹¹⁵¹ *Ibid.*, para. 34.

¹¹⁵² *Ibid.*, para. 33. Similarly, in the United States case of *In re Xe Services*, the District Court dismissed the private military company’s claim that Iraq would be an appropriate forum and held that it was not shown that an alternative forum existed. See *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009).

victims of activities of such business enterprises operating abroad”.¹¹⁵³ Similarly, the Committee on the Elimination of Racial Discrimination has drawn attention to instances where the rights of indigenous peoples to land, health, environment and an adequate standard of living have been adversely affected by the operations of transnational corporations. In that context, it has encouraged the relevant State party to “ensure that no obstacles are introduced in the law that prevent the holding of ... transnational corporations accountable in the State party’s courts when [violations of the Covenant] are committed outside the State party.”¹¹⁵⁴

(9) Reference can furthermore be made to the Montreux Document which refers to the obligations that home States of private military and security companies have under international human rights law.¹¹⁵⁵ To give effect to such obligations, States “have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of [private military and security companies] and their personnel”.¹¹⁵⁶

(10) The term “victims” refers to persons, whose health or livelihood has been harmed by the environmental damage referred to in draft principle 11. Environmental damage may also affect other human rights such as the right to life and the right to food.¹¹⁵⁷ The phrase “in particular for the victims” indicates, in the first place, that the adequate and effective remedies should be available for the victims of the environmental harm. In the second place, the phrase acknowledges that such remedies may also be available on a broader basis depending on the national legislation. This may be a case of public interest litigation by environmental associations or groups of persons who cannot allege a violation of their individual rights or interests.¹¹⁵⁸ Furthermore, environmental damage can also give rise to civil claims in which the term “victim” would not be normally used.

(11) The words “adequate and effective procedures and remedies” are general in nature and, together with the phrase “as appropriate”, allow States a certain flexibility when applying this provision at the national level.

¹¹⁵³ Human Rights Committee, concluding observations on the report of Germany (CCPR/C/DEU/CO/6), para. 16.

¹¹⁵⁴ Committee on the Elimination of Racial Discrimination, concluding observations on the report of the United Kingdom (CERD/C/GBR/CO/18-20), para. 29.

¹¹⁵⁵ “Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict” (Montreux, ICRC, 2008). Fifty-four States support the Montreux Document, and the European Union endorsed it on 27 July 2012.

¹¹⁵⁶ *Ibid.*, para. 15. See also Federal Department of Foreign Affairs of Switzerland and Geneva Centre for the Democratic Control of Armed Forces (DCAF), “Legislative guidance tool for States to regulate private military and security companies” (Geneva, 2016), which contains also examples of best practices, available at www.dcaf.ch/sites/default/files/publications/documents/Legislative-Guidance-Tool-EN_1.pdf (accessed on 8 July 2019). For national legislation, see also the Office of the United Nations High Commissioner for Human Rights (OHCHR) study, available at www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx (accessed on 8 July 2019). See also *Al-Quraishi et al. v. Nahkla and L-3 Services*, 728 F Supp 2d 702 (D Md 2010) at 35–37, 29 July 2010. A settlement was reached in this case, after years of litigation, in 2012.

¹¹⁵⁷ See footnotes 1304 and 1306 below.

¹¹⁵⁸ See L. Rajamani, “Public interest environmental litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability”, *Journal of Environmental Law*, vol. 19 (2007), pp. 293–321. Available at www.researchgate.net/publication/316876795_Public_Interest_Environmental_Litigation_in_India_Exploring_Issues_of_Access_Participation_Equity_Effectiveness_and_Sustainability (accessed on 8 July 2019). See also India Environmental Portal, Public Interest Litigation, at www.indiaenvironmentportal.org.in/category/1255/thesaurus/public-interest-litigation-pil (accessed on 8 July 2019). See also the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 6, as well as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

- (12) Draft principle 11 is located in Part Two as a provision of general application for the same reasons as draft principle 10.

Part Three

Principles applicable during armed conflict

Principle 12

Martens Clause with respect to the protection of the environment in relation to armed conflict

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Commentary

(1) Draft principle 12 is inspired by the Martens Clause, which originally appeared in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,¹¹⁵⁹ and has been restated in several later treaties.¹¹⁶⁰ The Martens Clause provides, in essence, that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.¹¹⁶¹ The International Court of Justice has stated that the clause forms part of customary international law.¹¹⁶² While originally conceived in the context of belligerent occupation, the clause has today a broader application, covering all areas of the law of armed conflict.¹¹⁶³

(2) The function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule.¹¹⁶⁴ The International Court of Justice referred to the Martens Clause in Its Advisory Opinion on the *Legality of Nuclear Weapons* to strengthen the argument about the applicability of international humanitarian law to the threat or use of nuclear weapons.¹¹⁶⁵ Similarly, the ICRC Commentary to Geneva Convention I mentioned, as a dynamic aspect of the clause, that it confirms “the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are

¹¹⁵⁹ Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 1086 above). The 1899 Martens Clause reads: “Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” For a general overview, see memorandum by the Secretariat on the effect of armed conflicts on treaties: an examination of practice and doctrine (A/CN.4/550), paras. 140–142.

¹¹⁶⁰ See Geneva Convention I, art. 63; Geneva Convention II, art. 62; Geneva Convention III, art. 142; Geneva Convention IV, art. 158. Additional Protocol I, art. 1, para. 2, and Additional Protocol II, preamble, para. 4. See also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, 10 October 1980), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, preamble, para. 5.

¹¹⁶¹ Additional Protocol I, art. 1, para. 2.

¹¹⁶² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 84.

¹¹⁶³ T. Meron, “The Martens Clause, principles of humanity, and dictates of public conscience”, *American Journal of International Law*, vol. 94 (2000), pp. 78–89, at p. 87.

¹¹⁶⁴ Para. (3) of the commentary to art. 29 of the articles on the law of the non-navigational uses of international watercourses with commentaries and resolution on transboundary confined groundwater, *Yearbook ... 1994*, vol. II (Part Two), at p. 131; para. (3) of the commentary to art. 18 of the articles on the law of transboundary aquifers, *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54, at p. 43: “In cases not covered by a specific rule, certain fundamental protections are afforded by the ‘Martens clause’”.

¹¹⁶⁵ “Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), para. 87.

not, or not specifically, addressed in treaty law”.¹¹⁶⁶ The clause thus prevents the argument that any means or methods of warfare that are not explicitly prohibited by the relevant treaties¹¹⁶⁷ are permitted, or, in a more general manner, that acts of war not expressly addressed by treaty law, customary international law, or general principles of law, are *ipso facto* legal.¹¹⁶⁸

(3) Further than that, however, views differ as to the legal consequences of the Martens Clause. It has been seen as a reminder of the role of customary international law in the absence of applicable treaty law, and of the continued validity of customary law beside treaty law.¹¹⁶⁹ The Martens Clause has also been seen to provide additional interpretative guidance “whenever the legal regulation provided by a treaty or customary rule is doubtful, uncertain or lacking in clarity”.¹¹⁷⁰ A further interpretation links the Martens Clause to a method of identifying customary international law in which particular emphasis is given to *opinio juris*.¹¹⁷¹ The inclusion of the present draft principle in the set of draft principles does not mean, or imply, that the Commission is taking a position on the various interpretations regarding the legal consequences of the Martens Clause.

(4) Draft principle 12 is entitled “Martens Clause with respect to the protection of the environment in relation to armed conflict”. The title draws attention to the environmental focus of the draft principle, the purpose of which is to provide subsidiary protection to the environment in relation to armed conflict.

(5) This is not the first time the Martens Clause has been invoked in the context of the protection of the environment in armed conflict.¹¹⁷² The ICRC Guidelines on the Protection of the Environment in Armed Conflict of 1994 include a provision stating the following: “In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.”¹¹⁷³ In 1994, the General Assembly invited all States to disseminate the revised guidelines widely and to “give due

¹¹⁶⁶ ICRC commentary (2016) to the Geneva Convention I, art. 63, para. 3298. See also C. Greenwood, “Historical developments and legal basis”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008), pp. 33–34, at p. 34: “as new weapons and launch systems continue to be developed, incorporating ever more sophisticated robotic and computer technology, the venerable Martens Clause will ensure that the technology will not outpace the law.”

¹¹⁶⁷ ICRC commentary (1987) to Additional Protocol I, art. 1, para. 2, para. 55; ICRC commentary to the Geneva Convention I (2016), para. 3297.

¹¹⁶⁸ According to the German Military Manual, “[i]f an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible”. See Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, para. 129 (ZDv 15/2, 1992).

¹¹⁶⁹ Greenwood, “Historical developments and legal basis” (footnote 1166 above), p. 34. See also the ICRC commentary 2016 to the Geneva Convention I, art. 63, para. 3296, which characterizes this as the minimum content of the clause.

¹¹⁷⁰ A. Cassese, “The Martens Clause: half a loaf or simply pie in the sky?”, *European Journal of International Law*, vol. 11 (2000), pp. 187–216, at pp. 212–213; G. Distefano and E. Henry, “Final provisions, including the Martens Clause”, in A. Clapham, P. Gaeta and M. Sassóli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), pp. 155–188, at pp. 185–186. See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, paras. 525 and 527.

¹¹⁷¹ Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (see previous footnote), p. 214; Meron, “The Martens Clause, principles of humanity, and dictates of public conscience” (see footnote 1163 above), p. 88.

¹¹⁷² See P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), p. 832: “In modern international law, there is no reason why [the dictates of public conscience] should not encompass environmental protection”. Similarly M. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities”, *International Review of the Red Cross*, vol. 92 (2010), pp. 569–592, at pp. 588–589; Droegge and Tougas, “The protection of the natural environment in armed conflict: existing rules and need for further legal protection” (footnote 998 above), pp. 39–40; M. Tignino, “Water during and after armed conflicts: what protection in international law?”, *Brill Research Perspectives in International Water Law*, vol. 1.4 (2016), pp. 1–111, at pp. 26, 28 and 41.

¹¹⁷³ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 973 above), guideline 7.

consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel”.¹¹⁷⁴ The second IUCN World Conservation Congress, furthermore, in 2000 urged Member States of the United Nations to endorse a policy reading as follows:

Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.¹¹⁷⁵

The recommendation was adopted by consensus¹¹⁷⁶ and was meant to apply during peacetime as well as during armed conflicts.¹¹⁷⁷

(6) The present draft principle follows the wording of the Martens Clause in Additional Protocol I to the Geneva Conventions (art. 1, para. 2), which states: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” The Commission agreed that in particular the reference to “the dictates of public conscience”, as a general notion not intrinsically limited to one specific meaning, justified the application of the Martens Clause to the environment. In this regard, reference can be made to the importance, as generally recognized, of environmental protection, as well as to the growth and consolidation of international environmental law. More specifically, the understanding of the environmental impacts of conflict has developed considerably since the adoption of the treaties codifying the law of armed conflict.

(7) Another essential component of the Martens Clause, the reference to “the principles of humanity”, displays a more indirect relationship to the protection of the environment. It has even been asked whether the environment can remain under the protection of “the principles of humanity”, given that the function of such principles is to specifically serve human beings. That reference was retained given that humanitarian and environmental concerns are not mutually exclusive, as pointed out by the International Court of Justice: “The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.¹¹⁷⁸ The intrinsic link between the survival of people and the environment in which they live has also been recognized in other authoritative statements.¹¹⁷⁹ Similarly, modern definitions of the environment as an object of protection do not draw a strict dividing line between the environment and human activities but encourage definitions that include components of both.¹¹⁸⁰ Moreover, the retention of that notion was seen as appropriate to protect the

¹¹⁷⁴ General Assembly resolution 49/50 of 9 December 1994, para. 11.

¹¹⁷⁵ World Conservation Congress, resolution 2.97, entitled “A Martens Clause for environmental protection” (Amman, 4–11 October 2000).

¹¹⁷⁶ The United States and United States agency members did not join the consensus.

¹¹⁷⁷ D. Shelton and A. Kiss, “Martens Clause for environmental protection”, *Environmental Policy and Law*, vol. 30 (2000), pp. 285–286, at p. 286.

¹¹⁷⁸ See *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), p. 241, para. 29.

¹¹⁷⁹ The World Charter for Nature stated that “[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems”. General Assembly resolution 37/7 of 28 October 1982, annex, preamble. The Special Rapporteur on human rights and the environment has furthermore linked human dignity with the environment as a “minimum standard of human dignity”: “Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.” See, OHCHR, “Introduction”, available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx (accessed on 8 July 2019).

¹¹⁸⁰ See Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 14: The concept of the environment, however, encompasses “both the features and the products of the natural world and those of human civilisation.” See also C.R. Payne, “Defining the environment: environmental integrity”, in C. Stahn, J. Iverson and J. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford, Oxford University

integrity of the Martens Clause. Additionally, the phrase “principles of humanity” can be taken to refer more generally to humanitarian standards that are found not only in international humanitarian law but also in international human rights law,¹¹⁸¹ which provides important protections to the environment.¹¹⁸²

(8) As originally proposed by the Special Rapporteur, the draft principle included a reference to “present and future generations”. This reference was ultimately not retained so as to stay as close to the established language of the Martens Clause as possible. The view was also expressed that the term “public conscience” could be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law.

(9) Draft principle 12 is located in Part Three containing draft principles applicable during an armed conflict. It also applies in situations of occupation.

Principle 13

General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
3. No part of the natural environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 13 comprises three paragraphs which broadly provide for the protection of the natural environment during armed conflict. It reflects the obligation to respect and protect the natural environment, the duty of care and the prohibition of attacks against any part of the environment, unless it has become a military objective.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

(3) The words “respected” and “protected” were considered fitting for use in this draft principle as they have been used in several law of armed conflict, international environmental law and international human rights law instruments.¹¹⁸³ The International Court of Justice in

Press, 2017), pp. 40–70, at p. 69, calling for a consideration of “how human activities and environment function as an interactive system”, not focusing exclusively on one element.

¹¹⁸¹ Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (footnote 1170 above), p. 212, refers to “general standards of humanity” as deduced from international human rights standards. Principles of humanity can furthermore be equated with “elementary considerations of humanity” which, according to the International Court of Justice, are “even more exacting in peace than in war”. See *Corfu Channel case, Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 4, at p. 22. See also P.-M. Dupuy, “‘Les considérations élémentaires d’humanité’ dans la jurisprudence de la Cour internationale de Justice”, in L.-A. Sicilianos and R.-J. Dupuy (eds.), *Mélanges en l’honneur de Nicolas Valticos: Droit et justice* (Paris, Pedone, 1998), pp. 117–130.

¹¹⁸² Several courts and tribunals have explicitly recognized the interdependence between human beings and the environment by affirming that environmental harm affects the right to life. *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012; *Öneriyildiz v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII, para. 71. As the most recent such ruling, the advisory opinion of the Inter-American Court of Human Rights *Medio Ambiente y Derechos Humanos* established that there is an inalienable relationship between human rights and environmental protection. Inter-American Court of Human Rights, Advisory Opinion No. OC 23-17, *Medio Ambiente y Derechos Humanos* [The environment and human rights], 15 November 2017, Series A, No. 23. See also the resolution of the Inter-American Commission of Human Rights in *Yanomami v. Brazil*, resolution No. 12/85, Case No. 7615, 5 March 1985.

¹¹⁸³ A considerable number of instruments on the law of armed conflict, environmental law and human rights law which contain the terms “respect” and “protect”. Of most relevance is the World Charter of

its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity” and that States have a duty “to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives”.¹¹⁸⁴

(4) As far as the use of the term “law of armed conflict” is concerned, it should be emphasized that traditionally there was a distinction between the terms “law of armed conflict” and “international humanitarian law”.¹¹⁸⁵ International humanitarian law could be viewed narrowly as only referring to the part of the law of armed conflict which aims at protecting victims of armed conflict; whereas the law of armed conflict can be seen as more of an umbrella term covering the protection of victims of armed conflict as well as regulating the means and methods of war.¹¹⁸⁶ The terms are often seen as synonyms in international law.¹¹⁸⁷ However, the term “law of armed conflict” was preferred due to its broader meaning and to ensure consistency with the Commission’s previous work on the draft articles on effects of armed conflict on treaties, in which context it was pointed out that the law of armed conflict also includes the law of occupation and the law of neutrality.¹¹⁸⁸ The relationship between the present topic and the topic on the effects of armed conflict on treaties should be emphasized.

(5) As far as the term “applicable international law” is concerned, it must be noted that the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, remain relevant.¹¹⁸⁹ Paragraph 1 of draft principle 13 is therefore relevant during all three phases (before, during and after armed conflict) to the extent that the law of armed conflict applies. This paragraph highlights the fact that the draft principles are intended to build on existing references to the protection of the environment in the law of armed conflict together with other rules of international law in order to enhance the protection of the environment in relation to armed conflict overall.

(6) Paragraph 2 is inspired by article 55 of Additional Protocol I, which provides the rule that care shall be taken to protect the environment against widespread, long term and severe damage in international armed conflicts.¹¹⁹⁰ The term “care shall be taken” should be

Nature, General Assembly resolution 37/7 of 28 October 1982, in particular the preamble and principle 1, and Additional Protocol I, art. 48, para. 1, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171, art. 2; Additional Protocol I, art. 55, and the Rio Declaration on Environment and Development (Rio Declaration), *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 10.

¹¹⁸⁴ *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), para. 30. See also *ibid.*, p. 253, para. 63.

¹¹⁸⁵ For a description of the semantics, see Y. Dinstein (ed.), *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, Cambridge University Press, 2010), at paras. 35–37 and 41–43.

¹¹⁸⁶ See e.g., R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford, Hart, 2008), pp. 16–17.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ *Official Records of the General Assembly, Sixty-Sixth Session, Supplement No. 10 (A/66/10)*, Commentary on art. 2, p. 182.

¹¹⁸⁹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), pp. 240–242, paras. 25 and 27–30.

¹¹⁹⁰ Article 55 – Protection of the natural environment reads:

“1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”

2. Attacks against the natural environment by way of reprisals are prohibited.”

interpreted as indicating that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the natural environment.¹¹⁹¹

(7) Similar to article 55, draft principle 13 also uses the word “and” which indicates a triple cumulative standard. However, draft principle 13 differs from article 55 as regards applicability and generality. First, draft principle 13 does not make a distinction between international and non-international armed conflicts, with the understanding that the draft principles are aimed at applying to all armed conflicts.¹¹⁹² This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, as well as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination; as well as non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State.¹¹⁹³

(8) The terms “widespread”, “long-term” and “severe” are not defined in Additional Protocol I. The same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.¹¹⁹⁴ However, the Convention does not contain the triple cumulative requirement as required by Additional Protocol I, as it uses the word “or” instead of “and”, and also that the context of the Convention is far narrower than Additional Protocol I.

(9) Second, draft principle 13 differs from article 55 of Additional Protocol I in that it is of a more general nature. Unlike article 55, draft principle 13 does not explicitly prohibit the use of methods or means of warfare which are intended or may be expected to cause damage to the natural environment and thereby prejudice the health or survival of the population. Concerns that this exclusion may weaken the text of the draft principles should be considered in light of the general nature of the draft principles. Paragraph 2 should be read together with draft principle 14, which deals with the application of principles and rules of the law of armed conflict to the natural environment with the aim of providing environmental protection.

(10) Paragraph 3 of draft principle 13 is based on the fundamental rule that a distinction must be made between military objectives and civilian objects. .¹¹⁹⁵ It underlines the inherently civilian nature of the natural environment. Paragraph 3 of draft principle 13 can be linked to article 52, paragraph 2, of Additional Protocol I, which defines the term “military objective” as:

... [T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹¹⁹⁶

¹¹⁹¹ Pilloud and Pictet, “Article 55: Protection of the natural environment” (see footnote 999 above), p. 663, para. 2133. See also K. Hulme, “Taking care to protect the environment against damage: a meaningless obligation?” in *International Review of the Red Cross*, vol. 92 (2010), pp. 675–691.

¹¹⁹² See [A/CN.4/674](#), paras. 69–78.

¹¹⁹³ Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV, common articles 2 and 3; Additional Protocol I, art. 1; and Additional Protocol II, art. 1.

¹¹⁹⁴ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151, art. 2. In the understanding relating to article I thereof, the terms “widespread”, “long-term” and “severe” are understood as follows: “‘widespread’: encompassing an area on the scale of several hundred square kilometers”; “‘long-lasting’: lasting for a period of months, or approximately a season”; “‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets” (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, vol. I, pp. 91–92).

¹¹⁹⁵ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7 and rule 43, pp. 25–29 and 143.

¹¹⁹⁶ Additional Protocol I, art. 52, para. 2. A similar definition is provided in the following protocols to the Convention on Certain Conventional Weapons: Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Certain Conventional

The term “civilian object” is defined as “all objects which are not military objectives”.¹¹⁹⁷ In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.¹¹⁹⁸ There are several binding and non-binding instruments which indicate that this rule is applicable to parts of the natural environment.¹¹⁹⁹

(11) Paragraph 3 is, however, temporally qualified with the words “has become”, which emphasizes that this rule is not absolute: the environment may become a military objective in certain instances, and could thus be lawfully targeted.¹²⁰⁰

(12) Paragraph 3 is based on the first paragraph of rule 43 of the ICRC study on customary international humanitarian law. However, the other parts of rule 43 were not included in its current formulation, which raised some concerns. In this regard, it is useful to reiterate that the draft principles are general in nature. Accordingly, both paragraph 2 and paragraph 3 must be read together with draft principle 14, which specifically references the application of the law of armed conflict rules and principles of distinction, proportionality, military necessity and precautions in attack.

(13) Draft principle 13 strikes a balance: creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict.

Principle 14

Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Weapons (Geneva, 10 October 1980) (Protocol II to the Convention on Certain Conventional Weapons), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, at p. 168; amended Protocol II to the Convention on Certain Conventional Weapons and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol III to the Convention on Certain Conventional Weapons), *ibid.*, vol. 1342, No. 22495, p. 171 as well as the 1999 Second Protocol.

¹¹⁹⁷ See art. 52, para. 1, of Additional Protocol I, as well as art. 2, para. 5 of the Protocol II to the Convention on Certain Conventional Weapons; art. 2, para. 7, of the amended Protocol II to the Convention on Certain Conventional Weapons; and art. 1, para. 4, of the Protocol III to the Convention on Certain Conventional Weapons.

¹¹⁹⁸ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7, pp. 25–29. The principle of distinction is codified, *inter alia*, in article 48 and 52, paragraph 2, of Additional Protocol I, as well as the Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

¹¹⁹⁹ The following instruments have been cited, *inter alia*: art. 2, para. 4, of Protocol III to the Convention on Certain Conventional Weapons, the Guidelines on the Protection of the Environment in Times of Armed Conflict, the Final Declaration adopted by the International Conference for the Protection of War Victims, General Assembly resolutions 49/50 and 51/157, annex, the military manuals of Australia and the United States, as well as national laws of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 43, pp. 143–144.

¹²⁰⁰ See e.g. M. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities” (footnote 1172 above), at p. 576; R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” in *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, R. Rayfuse (ed.) (Leiden, Brill Nijhoff, 2015) p. 6; see also C. Droegge and M.-L. Tougas, “The protection of the natural environment in armed conflict ...” (footnote 998 above), pp. 17–19; D. Fleck, “The protection of the environment in armed conflict: legal obligations in the absence of specific rules”, *ibid.*, pp. 47–52; E. Koppe, “The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict”, *ibid.*, pp. 76–82; and M. Bothe, “The ethics, principles and objectives of protection of the environment in times of armed conflict”, *ibid.*, p. 99.

Commentary

(1) Draft principle 14 is entitled “Application of the law of armed conflict to the natural environment” and deals with the application of principles and rules of the law of armed conflict to the natural environment with a view to its protection. Draft principle 14 is placed in Part Two of the draft principles indicating that it is intended to apply during armed conflict. The overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict.

(2) The words “law of armed conflict” were chosen instead of “international humanitarian law” for the same reasons explained in the commentary on draft principle 13. The use of this term also highlights the fact that draft principle 14 deals exclusively with the law of armed conflict as *lex specialis*, and not other branches of international law.

(3) Draft principle 14 lists some specific principles and rules of the law of armed conflict, namely the principles and rules of distinction, proportionality, military necessity and precautions in attack.¹²⁰¹ The draft principle itself is of a general character and does not elaborate on how these well-established principles and rules under the law of armed conflict should be interpreted. They are explicitly included in draft principle 14 because they have been identified as being the most relevant principles and rules relating to the protection of the environment in relation to armed conflict.¹²⁰² However, this reference should not be interpreted as indicating a closed list, as all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.¹²⁰³

(4) One of the cornerstones of the law of armed conflict¹²⁰⁴ is the principle of distinction which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times, and that attacks may only be directed against military objectives.¹²⁰⁵ This is considered a rule under customary international law, applicable in both international and non-international armed conflict.¹²⁰⁶ As explained in the commentary on draft principle 13, the natural environment is not intrinsically military in nature and should be treated as a civilian object. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

¹²⁰¹ The reference to the rule of military necessity rather than to the principle of necessity reflects the view of some States that military necessity is not a general exemption, but needs to have its basis in an international treaty provision.

¹²⁰² See R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 1200 above), p. 6; United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi, United Nations Environment Programme, 2009), pp. 12–13.

¹²⁰³ These include, *inter alia*, arts. 35 and 55 of Additional Protocol I. Other provisions of Additional Protocol I and Additional Protocol II, as well as other instruments of the law of armed conflict which may indirectly contribute to protecting the environment such as those prohibiting attacks against works and installations containing dangerous forces (Additional Protocol I, art. 56; Additional Protocol II, art. 15), those prohibiting attacking objects indispensable to the civilian population (Additional Protocol I, art. 54; Additional Protocol II, art. 14); the prohibition against pillage (Regulations respecting the laws and customs of war on land (The Hague, 18 October 1907) (the Hague Regulations), art. 28); Additional Protocol II, art. 4, para. 2 (g) and the prohibition on the forced movement of civilians (Additional Protocol II, art. 17). See also United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia: A Guide for Decision Makers and Practitioners* (2006).

¹²⁰⁴ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), para. 78; M.N. Schmitt, “Military necessity and humanity in international humanitarian law: preserving the delicate balance”, *Virginia Journal of International Law*, vol. 50 (2010), pp. 795–839, at p. 803.

¹²⁰⁵ The principle of distinction is now codified in arts. 48, 51, para. 2, and 52, para. 2, of Additional Protocol I; art. 13, para. 2, of Additional Protocol II; amended Protocol II to the Convention on Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

¹²⁰⁶ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7, p. 25.

(5) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.¹²⁰⁷

(6) The principle of proportionality is an important rule under the law of armed conflict also because of its relation to the rule of military necessity.¹²⁰⁸ It is codified in several instruments of the law of armed conflict, and the International Court of Justice has also recognized its applicability in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.¹²⁰⁹ It is considered a rule under customary international law, applicable in both international and non-international armed conflict.¹²¹⁰

(7) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the natural environment in armed conflict.¹²¹¹ The particular importance of the principle of proportionality in relation to the protection of the natural environment in armed conflict has been emphasized by the ICRC customary law study, which found that the potential effect of an attack on the environment needs to be assessed.¹²¹²

(8) If the rules relating to proportionality are applied in relation to the protection of the natural environment, it means that attacks against legitimate military objectives must be refrained from if such an attack would have incidental environmental effects that exceed the value of the military objective in question.¹²¹³ On the other hand, the application of the principle of proportionality also means that “if the target is sufficiently important, a greater degree of risk to the environment may be justified”.¹²¹⁴ It therefore accepts that “collateral damage” to the natural environment may be lawful in certain instances.

(9) Under the law of armed conflict, military necessity allows “measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited”.¹²¹⁵ It means that an attack against a legitimate military objective which may have negative environmental effects will only be allowed if such an attack is actually necessary to

¹²⁰⁷ Art. 51, para. 5 (b), of Additional Protocol I. See also Y. Dinstein, “Protection of the environment in international armed conflict” *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), pp. 523–549, at pp. 524–525. See also L. Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, *International Review of the Red Cross*, vol. 37 (1997), pp. 35–55, at p. 52.

¹²⁰⁸ Schmitt, “Military necessity and humanity ...” (footnote 1204 above), p. 804.

¹²⁰⁹ Additional Protocol I, arts. 51 and 57, Additional Protocol II, and amended Protocol II to the Convention on Certain Conventional Weapons as well as the Statute of the International Criminal Court, art. 8, para. 2 (b) (iv). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), at p. 242, para. 30.

¹²¹⁰ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 14, p. 46.

¹²¹¹ *Ibid.*, rule 44, p. 150; Droegge and Tougas, “The protection of the natural environment in armed conflict ...” (footnote 998 above), p. 19; see also United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 1058 above) and United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia ...* (footnote 1203 above).

¹²¹² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 44, p. 150.

¹²¹³ See also Dinstein, “Protection of the environment ...” (footnote 1207 above), pp. 524–525; Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice ...” (footnote 1207 above); United Nations Environment Programme, *Protecting the Environment During Armed Conflict ...* (footnote 1202 above), p. 13; Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 1200 above), p. 6; Droegge and Tougas, “The protection of the natural environment ...” (footnote 998 above), pp. 19–23.

¹²¹⁴ International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 19. Available from www.icty.org/x/file/Press/nato061300.pdf (accessed on 8 July 2019). See also Dinstein, “Protection of the environment ...” (footnote 1207 above), pp. 524–525.

¹²¹⁵ M. Sassoli, A. Bouvier and A. Quintin, “How does law protect in war: online glossary”. Available from <https://casebook.icrc.org/glossary/military-necessity> (accessed on 8 July 2019).

accomplish a specific military purpose and is not covered by the prohibition against the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,¹²¹⁶ or other relevant prohibitions, and meets the criteria contained in the principle of proportionality.¹²¹⁷

(10) The rule concerning precautions in attack lays out that care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations; and also that all feasible precautions must be taken to avoid and minimize incidental loss of civilian life, injury to civilians as well as damage to civilian objects which may occur. The rule is codified in several instruments of the law of armed conflict¹²¹⁸ and is also considered to be a customary international law rule in both international and non-international armed conflict.¹²¹⁹

(11) The fundamental rule concerning precautions in attack obliges parties to an armed conflict to take all feasible precautions in planning and deciding an attack. Therefore in relation to the protection of the environment, it means that parties to an armed conflict are obliged to take all feasible precautions to avoid and minimize collateral environmental damage.¹²²⁰

(12) Lastly, the words “shall be applied to the natural environment, with a view to its protection” introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment.

Principle 15 Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Commentary

(1) Draft principle 15 is entitled “Environmental considerations” and provides that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

(2) The text is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which held that: “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality”.¹²²¹

(3) Draft principle 15 is closely linked with draft principle 14. The added value of this draft principle in relation to draft principle 14 is that it provides specificity with regard to the application of the principle of proportionality and the rules of military necessity. It is therefore of operational importance. However, a view was expressed that it should be deleted altogether.

(4) Draft principle 15 aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such. This is already regulated under the law of armed conflict, and is often reflected in military manuals and domestic law of

¹²¹⁶ Additional Protocol I, art. 35, para. 3.

¹²¹⁷ *Ibid.*, art. 51, para. 5 (b).

¹²¹⁸ The principle of precautions in attack is codified in art. 2, para. 3, of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907), J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 1086 above); art. 57, para. 1, of Additional Protocol I, as well as amended Protocol II to the Convention on Certain Conventional Weapons, and the 1999 Second Protocol.

¹²¹⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 15, p. 51.

¹²²⁰ *Ibid.*, rule 44, p. 147.

¹²²¹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 242, para. 30.

States.¹²²² The words “*when applying* the principle” were specifically chosen to make this point clear. Also for purposes of clarity and in order to emphasize the link between draft principles 14 and 15, it was decided to refer explicitly to the principle of proportionality and the rules on military necessity. These principles have been discussed in the commentary to draft principle 14 above.

(5) Draft principle 15 becomes relevant once the legitimate military objective has been identified. Since knowledge of the environment and its eco-systems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops.

Principle 16
Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 16 is entitled “Prohibition of reprisals” and is identical to paragraph 2 of article 55 of Additional Protocol I.

(2) Although the draft principle on the prohibition of reprisals against the natural environment was welcomed and supported by some members, other members raised several issues concerning its formulation and were of the view that it should not have been included in the draft principles at all. The divergent views centred around three main points: (a) the link between draft principle 16 and article 51 of Additional Protocol I; (b) whether or not the prohibition of reprisals against the environment reflected customary law; and (c) if so, whether both international and non-international armed conflicts were covered by such a customary law rule.

(3) Those who expressed support for the inclusion of the draft principle stressed the link between draft principle 16 and article 51 of Additional Protocol I. In their view, article 51 (which is placed under the section “General protection against effects of hostilities”) is one of the most fundamental articles of Additional Protocol I. It codifies the customary rule that civilians must be protected against danger arising from hostilities, and, in particular, also provides that “attacks against the civilian population or civilians by way of reprisals are prohibited”.¹²²³ This made the inclusion of draft principle 16 essential. In their view, if the environment, or part thereof, became an object of reprisals, it would be tantamount to an attack against the civilian population, civilians or civilian objects, and would thus violate the laws of armed conflict.

(4) In this context, some members took the view that the prohibition of reprisals forms part of customary international law. However, other members questioned the existence of this rule, and were of the view that the rule exists only as a treaty obligation under Additional Protocol I.¹²²⁴

¹²²² See Additional Protocol I, arts. 48, 50, 51 (in particular para. 4), 52 (in particular para. 2) and 57, para. 2, and Additional Protocol II, art. 13, para. 2. See Y. Dinstein, “Legitimate military objectives under the current *jus in bello*”, *International Law Studies*, vol. 78 (2002), p. 139, and L.R. Blank, “Extending positive identification from persons to places: terrorism, armed conflict, and the identification of military objectives”, *Utah Law Review*, No. 5 (2013), pp. 1227–1261. See, e.g., United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), para. 5.4; Canada, National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001) B-GJ-005-104/FP-021, pp. 405–427; United States, Department of Defense, *Law of War Manual* (Office of General Counsel, Washington D.C., 2015).

¹²²³ Additional Protocol I, art. 51, in particular para. 6. See C. Pilloud and J. Pictet, “Article 51: Protection of the civilian population” in *ICRC Commentary on the Additional Protocols ...*, Sandoz and others (footnote 976 above), p. 615, para. 1923.

¹²²⁴ For a discussion on the customary law status of reprisals, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rules 147–149, pp. 523–530; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), pp. 285–

(5) Concerns were raised that including draft principle 16 as a copy of article 55, paragraph 2, of Additional Protocol I risked the draft principles going against their main aim, which is to apply generally. Although Additional Protocol I is widely ratified and thus the prohibition of reprisals against the environment is recognized by many States, Additional Protocol I is not universally ratified.¹²²⁵ Some members were concerned that reproducing article 55, paragraph 2, verbatim in draft principle 16 could therefore be misinterpreted as trying to create a binding rule on non-State parties. It was also pointed out in this regard that paragraph 2 of article 55 has been subject to reservations and declarations by some States parties.¹²²⁶

(6) It is therefore worth summarizing the position of article 55, paragraph 2 (as a treaty provision), as follows: the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 State parties to Additional Protocol I. The extent to which States have made declarations or reservations that are relevant to its application must

289; M. A. Newton, “Reconsidering reprisals” *Duke Journal of Comparative and International Law*, vol. 20 (2010), pp. 361–388; S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden, Brill, 2007) pp. 154–156.

¹²²⁵ There are currently 174 State parties to Additional Protocol I. See the ICRC website (www.icrc.org/ihl/INTRO/470 (accessed on 8 July 2019)).

¹²²⁶ For a description of declarations, statements and reservations made by States in connection with regard to, *inter alia*, article 55, see [A/CN.4/685](#), paras. 129 and 130. It should also be noted that the United Kingdom declared that: “The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.” The text of the reservation is available on the ICRC website www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (accessed on 8 July 2019), at para. (m). The conditions under which belligerent reprisals against the natural environment may be taken are partly described in United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), paras. 16.18–16.19.1. For declarations that relate to the understanding of whether Additional Protocol I is applicable only to conventional weapons and not to nuclear weapons, see [A/C.N.4/685](#), para. 130. See declarations and reservations of Ireland: “Article 55: In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population.” The declaration is available on the ICRC website at www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?documentId=27BBCD34A4918BFBC1256402003FB43A&action=OpenDocument (accessed on 8 July 2019). It should also be noted that in the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 246, para. 46, the Court stated that: “Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.”

be evaluated on a case by case basis, since only a few States have made an explicit reference to paragraph 2 of article 55.¹²²⁷

(7) Another contentious issue raised which merits discussion is the fact that there is no corresponding rule to article 55, paragraph 2, in common article 3 to the four Geneva Conventions or in Additional Protocol II which explicitly prohibits reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects). The drafting history of Additional Protocol II reveals that at the time of drafting, some States were of the view that reprisals of any kind are prohibited under all circumstances in non-international armed conflicts.¹²²⁸ There are, however, also valid arguments that reprisals may be permitted in non-international armed conflicts in certain situations.¹²²⁹

(8) In the light of this uncertainty, some members expressed concern that by not differentiating between the position in international armed conflicts and non-international armed conflicts, draft principle 16 would attempt to create a new international law rule. It was therefore suggested that the principle be redrafted with appropriate caveats, or excluded from the draft principles altogether.

(9) Concerning reprisals against the natural environment in particular, it is worth mentioning that the International Criminal Tribunal for the Former Yugoslavia considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule “in armed conflicts of any kind”.¹²³⁰ As the environment should be considered as a civilian object unless parts of it becomes a military objective, some members expressed the view that reprisals against the environment in non-international armed conflicts are prohibited.

(10) Given the controversy surrounding the formulation of this draft principle, various suggestions were made regarding ways in which the principle could be rephrased to address the issues in contention. However, it was ultimately considered that any formulation other than the one adopted could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given the fundamental importance of the existing rules of the law of armed conflict. Despite the concerns raised during drafting, including a draft principle on the prohibition of reprisals against the natural environment was viewed as being particularly relevant and necessary, given that the overall aim of the draft principles is to enhance environmental protection in relation to armed conflict. In the light of the comments made above, the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission.

Principle 17 **Protected zones**

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

¹²²⁷ France, Ireland and the United Kingdom.

¹²²⁸ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977) vol. IX, available from www.loc.gov/rf/frd/Military_Law/RC-dipl-conference-records.html (accessed on 8 July 2019), most notably the statements made by Canada (p. 428), Greece (p. 429), the Islamic Republic of Iran (p. 429), Iraq (p. 314), Mexico (p. 318). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 148, p. 528.

¹²²⁹ See V. Bílková, “Belligerent reprisals in non-international armed conflicts”, *International and Comparative Law Quarterly*, vol. 63 (2014), p. 31; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, Oxford University Press, 2012), pp. 449–457.

¹²³⁰ *Prosecutor v. Duško Tadić*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112. See also in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), pp. 526–529.

Commentary

(1) This draft principle corresponds with draft principle 4. It provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. Unlike the earlier draft principle, it only covers areas that are designated by agreement. There has to be an express agreement on the designation. Such an agreement may have been concluded in peacetime or during armed conflict. The reference to the term “agreement” should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors. Such zones are protected from attack during armed conflict. The reference to the word “contain” in the phrase “as long as it does not contain a military objective” is intended to denote that it may be the entire zone, or only parts thereof. Moreover, the protection afforded to a zone ceases if one of the parties commits a material breach of the agreement establishing the zone.

(2) As mentioned above, a designated area established in accordance with draft principle 4 may lose its protection if a party to an armed conflict has military objectives within the area, or uses the area to carry out any military activities during an armed conflict. The term “military objective” in the present draft principle frames the description of military objectives as “so long as it does not contain a military objective”, which is different from draft principle 13, paragraph 3, which stipulates “unless it has become a military objective”. The relationship between these two principles is that principle 17 seeks to enhance the protection established in draft principle 13, paragraph 3.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian, and environmental concerns. This balance mirrors the mechanism for demilitarized zones as established in article 60 of Additional Protocol I to the Geneva Conventions. Article 60 states that if a party to an armed conflict uses a protected area for specified military purposes, the protected status shall be revoked.

(4) Under the 1954 Hague Convention referred to above, State parties are similarly under the obligation to not destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the proposed protected area. For example, the *pacta tertiis* rule will limit the application of a formal treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to alert parties to an armed conflict that they should take this into account when applying the principle of proportionality or the principle of precautions in attack. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.

Principle 18 **Prohibition of pillage**

Pillage of natural resources is prohibited.

Commentary

(1) The purpose of draft principle 18 is to restate the prohibition of pillage as well as its applicability to natural resources. Illegal exploitation of natural resources has been a driving force for many, in particular non-international, armed conflicts in recent decades,¹²³¹ and has

¹²³¹ According to the United Nations Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990, at least 18 armed conflicts have been fuelled directly by natural resources. See *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (New York, United Nations Interagency Framework Team for Preventive Action, 2012), p. 14. Available at www.un.org/en/land-natural-resources-conflict/renewable-resources.shtml (accessed on 8 July 2019).

caused severe environmental strain in the affected areas.¹²³² In this context, the prohibition of pillage was identified as one of the provisions of the law of armed conflict that provide protection to the environment in armed conflict.

(2) Pillage is an established violation of the law of armed conflict and a war crime. Geneva Convention IV contains an absolute prohibition of pillage, both in the territory of a party to an armed conflict, and in an occupied territory.¹²³³ Additional Protocol II to the Geneva Conventions confirms the applicability of this general prohibition in non-international armed conflicts meeting the criteria set out in the Protocol and, in that context, “at any time and in any place whatsoever”.¹²³⁴ The prohibition has been widely incorporated into national legislation as well as in military manuals.¹²³⁵ There is considerable case law from both post-Second World War and modern international criminal tribunals confirming the criminal nature of pillage.¹²³⁶ The war crime of pillaging is also prosecutable under the Rome Statute, in both international and non-international conflicts.¹²³⁷ The prohibition of pillage has been found to constitute a customary rule of international law.¹²³⁸

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- ¹²³² Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (S/2002/565), para. 52. See also United Nations Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment. Synthesis Report for Policy Makers* (Nairobi, United Nations Environment Programme, 2011), pp. 26–28, available at <http://wedocs.unep.org/handle/20.500.11822/22069> (accessed on 8 July 2019); Report of the Panel of Experts pursuant to paragraph 25 of Security Council resolution 1478 (2003) concerning Liberia (S/2003/779), para. 14; United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 1058 above), pp. 16–18 and 42–51; C. Nellemann *et al.* (eds.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (United Nations Environment Programme–INTERPOL, 2016), p. 69.
- ¹²³³ Geneva Convention IV, art. 33, para. 2. See also Geneva Convention I, art. 15, first para., according to which “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage”.
- ¹²³⁴ Additional Protocol II, art. 4, para. 2 (g). See also African Charter on Human and Peoples’ Rights, art. 21, para. 2: “In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation”. Furthermore, the Lusaka Protocol of the International Conference on the Great Lakes Region reproduces the same provision, see Protocol Against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region art. 3, para. 2.
- ¹²³⁵ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 52, “Pillage is prohibited”, pp. 182–185.
- ¹²³⁶ See, e.g., *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, Vol. IX, p. 1337–1372; *U.S.A. v. von Weizsäcker et al. (Ministries case)*, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. XIV, p. 741; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 14 December 1999; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a “Pavo”, Hazim Delić and Esad Landžo a/k/a “Zenga”*, Case No. IT-96-21-T, Judgment, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, and Sentencing Judgment, International Criminal Tribunal for the Former Yugoslavia, 9 October 2001; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment (with Declaration of Judge Shahabuddeen), Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, *Judicial Reports 2000*; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 26 February 2001; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-1234, Judgment, Trial Chamber, Special Court for Sierra Leone, 2 March 2009; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (*Taylor Trial Judgment*); *Prosecutor against Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, Appeals Chamber, Special Court for Sierra Leone, 26 September 2013.
- ¹²³⁷ Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (b) (xvi) and (e) (v).
- ¹²³⁸ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above) rule 52, pp. 182–185.

(3) According to the ICRC commentary, the prohibition applies to all categories of property, whether public or private.¹²³⁹ The scope of the present draft principle is limited to the pillage of natural resources, which is a common phenomenon in armed conflicts, and one that leads to severe environmental impacts. While such pillage only applies to natural resources that can be subject to ownership and constitute “property”, this requirement is easily met for high-value natural resources. The prohibition covers pillage of natural resources, whether owned by the State, communities or private persons.¹²⁴⁰ The applicability of the prohibition of pillage to natural resources has been confirmed by the International Court of Justice, which found in the *Armed Activities* judgment, that Uganda was internationally responsible “for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]’s natural resources” committed by members of the Ugandan Armed Forces in the territory of the Democratic Republic of the Congo.¹²⁴¹

(4) Pillage is a broad term that applies to any appropriation of property in armed conflict that violates the law of armed conflict. At the same time, the law of armed conflict provides a number of exceptions under which appropriation or destruction of property is lawful.¹²⁴² According to the ICRC commentaries, the prohibition of pillage covers both organized pillage and individual acts,¹²⁴³ whether committed by civilians or military personnel.¹²⁴⁴ Acts of pillage do not necessarily involve the use of force or violence.¹²⁴⁵

(5) The terminology used for illegal appropriation of property, including natural resources, in armed conflict has not been consistent. The International Court of Justice, in the *Armed Activities* judgment, referred to “looting, plundering and exploitation”,¹²⁴⁶ the Statute of the International Criminal Tribunal for the Former Yugoslavia referred to “plunder”,¹²⁴⁷ while the African Charter uses the term “spoliation”.¹²⁴⁸ Research shows, however, that the terms “pillage”, “plunder”, “spoliation” and “looting” have a common legal meaning and been used interchangeably by international courts and tribunals.¹²⁴⁹ The Nürnberg Judgment thus used “pillage” and “plunder” as synonyms.¹²⁵⁰ While the post-Second World War jurisprudence preferred the term “spoliation”, it confirmed that the term was synonymous with “plunder”, which was the term appearing in Control Council Law No. 10.¹²⁵¹ The

¹²³⁹ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to Geneva Convention IV, art. 33, para. 2.

¹²⁴⁰ Property rules have also been widely used at the national level “for settling disputes concerning access, use and control of resources” and constitute therefore “a critical mechanism for environmental protection”. T. Hardman Reis, *Compensation for Environmental Damage under International Law. The Role of the International Judge* (Alphen aan den Rijn, Wolters Kluwer, 2011), p. 13.

¹²⁴¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, at p. 253, para. 250.

¹²⁴² For capture of an adversary’s movable public property that can be used for military purposes, see Geneva Convention I, art. 50. Adversary’s property can also be lawfully destroyed or appropriated if required by imperative military necessity; see the Hague Regulations (1907), art. 23 (g). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 50, pp. 175–177. For the lawful use by an Occupying Power of the resources of the occupied territory for the maintenance and needs of the army of occupation, see commentary to draft principle 21 below.

¹²⁴³ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) on Geneva Convention IV, art. 33, para. 2.

¹²⁴⁴ ICRC commentary (2016) on Geneva Convention I, art. 15, para. 1495.

¹²⁴⁵ *Ibid.*, para. 1494.

¹²⁴⁶ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), para. 248.

¹²⁴⁷ Art. 3 (e). Originally adopted by Security Council resolution 827 (1993) on 25 May 1993. The updated Statute is available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed on 8 July 2019).

¹²⁴⁸ African Charter on Human and Peoples’ Rights, art. 21, para. 2.

¹²⁴⁹ J.G. Stewart, *Corporate War Crimes. Prosecuting the Pillage of Natural Resources* (Open Society Foundations, 2011), pp. 15–17.

¹²⁵⁰ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Washington D.C., Nürnberg Military Tribunals, 1945), p. 228

¹²⁵¹ See *United States v. Krauch et al.* in *Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII–VIII (Washington D.C., Nürnberg Military Tribunals, 1952), p. 1081, at p. 1133.

jurisprudence of the modern international criminal courts and tribunals has further confirmed that “pillaging”, “plunder” and “looting” all signify unlawful appropriation of public or private property in armed conflict.¹²⁵²

(6) The term “pillaging” has been used in the Hague Regulations¹²⁵³ and Geneva Convention IV,¹²⁵⁴ Additional Protocol II¹²⁵⁵ and the Rome Statute.¹²⁵⁶ The Nürnberg Charter¹²⁵⁷ used the term “plunder”. The concept of pillage has been defined in the ICRC Commentaries to the Geneva Conventions and Additional Protocol II, as well as in the jurisprudence of the international criminal tribunals. It has therefore been deemed appropriate to use the term “pillaging” in the draft principle.

(7) Pillage of natural resources is part of the broader context of illegal exploitation of natural resources that thrives in areas of armed conflict and in post-armed conflict situations. The Security Council and the General Assembly have drawn attention in this regard to the connections between transnational criminal networks, terrorist groups and armed conflicts, including in relation to illicit trade in natural resources.¹²⁵⁸ Frequently characterized by poor governance, widespread corruption and weak protection of resource rights, post-armed conflict situations are vulnerable to exploitation through transnational environmental crime.¹²⁵⁹ “Illegal exploitation of natural resources”, as used in the relevant Security Council resolutions¹²⁶⁰ is a general notion that may cover the activities of States, non-State armed groups, or other non-State actors, including private individuals. Accordingly, the notion may refer to illegality under international or national law. While the notion of “illegal exploitation of natural resources” is partly overlapping with the concept of pillage, it has not been defined¹²⁶¹ and may also refer to environmental crime, whether in times of armed conflict or in times of peace. This broader context underscores the application of the prohibition of pillage to natural resources.

¹²⁵² *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (see footnote 1236 above), para. 591: “the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed ‘pillage’, ‘plunder’ and ‘spoliation’. ... The Trial Chamber reaches this conclusion on the basis of its view that [plunder], as incorporated in the Statute of the International Criminal Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillaging’”. See also *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Judgment, Special Court for Sierra Leone, 20 June 2007, para. 751; and *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 17 October 2003, para. 98.

¹²⁵³ Arts. 28 and 47 of the 1907 Hague Regulations.

¹²⁵⁴ Art. 33, para. 2, of Geneva Convention IV.

¹²⁵⁵ Art. 4, para. 2(g), of Additional Protocol II.

¹²⁵⁶ Rome Statute, art. 8, para. 2 (b) (xvi), and art. 8, para. 2 (e) (v), referring to “pillaging”.

¹²⁵⁷ Nürnberg Charter, art. 6 (b).

¹²⁵⁸ Security Council resolution 2195 (2014) of 19 December 2014, para. 3; General Assembly resolution 69/314 of 30 July 2015, paras. 2–5. See also Security Council resolutions 2134 (2014) of 28 January 2014 and 2136 (2014) of 30 January 2014 on the Security Council’s sanctions against persons and entities involved in wildlife poaching and trade. See also United Nations Environmental Assembly resolution 2/15 of 27 May 2016 on “Protection of the environment in areas affected by armed conflict” (UNEP/EA.2/Res.15), para. 4, and resolution 3/1 of 6 December 2017 on “Pollution mitigation and control in areas affected by armed conflict or terrorism”, paras. 2–3.

¹²⁵⁹ Corruption has been identified as the most important enabling factor behind illegal trade in wildlife and timber. See Nellemann *et al.*, *The Rise of Environmental Crime ...* (footnote 1232 above), p. 25: transnational environmental crime thrives in permissive environments. See also C. Cheng and D. Zaum, “Corruption and the role of natural resources in post-conflict transitions”, in C. Bruch, C. Muffett, and S.S. Nichols (eds.), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2016), pp. 461–480.

¹²⁶⁰ See, e.g., Security Council resolution 1457 (2003) of 24 January 2003, para. 2, in which the Council “[s]trongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo”.

¹²⁶¹ The term “illegal exploitation of natural resources” appears in Lusaka Protocol of the International Conference on the Great Lakes Region, art. 17, para. 1, but has not been defined.

- (8) Draft principle 18 is located in Part Three containing draft principles applicable during an armed conflict. It also applies in situations of occupation.

Principle 19
Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Commentary

(1) Draft principle 19 has been modelled on article 1, paragraph 1, of the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques.¹²⁶² The Convention prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects.¹²⁶³ Environmental modification techniques are defined in the convention as “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”.¹²⁶⁴ The present draft principle uses the concept of environmental modification technique in the same sense.

(2) The mention of international obligations in the draft principle refers to the treaty obligations of States parties to the Convention and, to the extent that the prohibition overlaps with a customary obligation that, according to the ICRC study on customary international humanitarian law, prohibits the use of the environment as a weapon, the obligations under customary international law. To quote the ICRC study, “there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon”, and this irrespective of whether the provisions of the Convention are themselves customary.¹²⁶⁵ The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict also contain a guideline based on articles I and II of the Convention.¹²⁶⁶

(3) The Convention does not spell out clearly whether the prohibition of the use of environmental modification techniques could be applicable in a non-international armed conflict. The formulation of paragraph 1 of article I only prohibits environmental modification that causes damage to another State Party to the Convention. It has been argued that this condition could nevertheless also be fulfilled in a non-international armed conflict provided that a hostile use of an environmental modification technique by a State in the context of such a conflict causes environmental or other damage in the territory of another State party.¹²⁶⁷ The environmental modification techniques addressed in the Convention – capable of causing “earthquakes, tsunamis, an upset in the ecological balance of a region,

¹²⁶² Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

¹²⁶³ *Ibid.*, art. I, para. 1.

¹²⁶⁴ *Ibid.*, art. II.

¹²⁶⁵ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 969 above), p. 156.

¹²⁶⁶ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 973 above), guideline 12.

¹²⁶⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 969 above) rule 44, commentary, p. 148: “it can be argued that the obligation to pay due regard to the environment also applies in non-international armed conflicts if there are effects in another State.” See also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, Cambridge University Press, 2010), p. 243, referring to cross-border damage caused by environmental modification techniques. See also T. Meron, “Comment: protection of the environment during non-international armed conflicts”, in J.R. Grunawalt, J.E. King and R.S. McClain (eds.), *International Law Studies*, vol. 69, *Protection of the Environment during Armed Conflicts* (Newport, Rhode Island, Naval War College, 1996), pp. 353–358, stating, at p. 354, that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques “is applicable in all circumstances”.

changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer, and changes in the state of the ionosphere¹²⁶⁸ – could well be expected to produce transboundary effects.

(4) The Convention only addresses the hostile or military use of environmental modification techniques by States, excluding hostile use of such techniques by non-State actors. The ICRC study on customary international humanitarian law concludes that the prohibition of the destruction of the natural environment as a weapon is a norm of customary international law “applicable in international armed conflicts and arguably also in non-international armed conflicts”.¹²⁶⁹

(5) Draft principle 19 has been located in Part Three, which contains draft principles applicable during armed conflict. This location reflects the most likely situations in which the Convention would be applied, even though the prohibition of the convention is broader, and also covers other hostile uses of environmental modification techniques.

(6) The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques deserves particular attention in the context of the present draft principles as the first and, so far, the only international treaty to specifically address means and methods of environmental warfare. The inclusion of draft principle 19 in the set of draft principles is without prejudice to the existing conventional or customary rules of international law regarding specific weapons that have serious impacts on the environment.

Part Four

Principles applicable in situations of occupation

Introduction

Commentary

(1) The three draft principles related to situations of occupation are placed in a separate Part Four. The new category of draft principles is not intended as a deviation from the temporal approach chosen for the topic but as a practical solution reflecting the great variety of circumstances that may qualify as a situation of occupation. While military occupation under the law of armed conflict is a specific form of international armed conflict,¹²⁷⁰ situations of occupation differ from armed conflicts in many respects. Most notably, occupations are typically not characterized by active hostilities and can even take place in situations in which the invading armed forces meet no armed resistance.¹²⁷¹ A stable occupation shares many characteristics with a post-conflict situation and may with time even come to “approximating peacetime” conditions.¹²⁷² Occupations can nevertheless also be volatile and conflict-prone. The Occupying Power may confront armed resistance during the occupation and even temporarily lose control of part of the occupied territory without this

¹²⁶⁸ Understanding relating to article II, *Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, p. 92.

¹²⁶⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), explanation of rule 45, p. 151. See also Part 2 of the ICRC Customary International Humanitarian Law Study (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45) and related practice.

¹²⁷⁰ It is worth recalling in this context that the end of an international armed conflict is determined by the general close of military operations or, in the case of occupation, the termination of the occupation. See Geneva Convention IV, art. 6, and Additional Protocol I, art. 3 (b). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 277, para. 11.8, and R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Brussels, Bruylant, 2009), p. 166.

¹²⁷¹ Geneva Convention IV, art. 2.

¹²⁷² A. Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, *American Journal of International Law*, vol. 84 (1990), pp. 44–103, p. 47. The article mentions several cases of occupations lasting more than five years in the period since the Second World War.

affecting the characterization of the situation as one of occupation.¹²⁷³ Furthermore, the beginning of an occupation does not necessarily coincide with the beginning of an armed conflict, nor is there any necessary concurrence between the cessation of active hostilities and the termination of an occupation. Parallels can therefore be drawn between occupations and armed conflicts, on the one hand, and occupations and post-conflict circumstances, on the other, depending on the nature of the occupation.

(2) In spite of this variety, all occupations display certain common characteristics, namely that the authority over a certain territory is transferred from a territorial State, without its consent, to the Occupying Power. The established understanding of the concept of occupation is based on article 42 of the Hague Regulations,¹²⁷⁴ which stipulates that a territory is considered occupied “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” According to the judgment in *Armed Activities on the Territory of the Congo* case, it was necessary “that the Ugandan armed forces in the [Democratic Republic of the Congo] were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government”.¹²⁷⁵ Authority in this context is a fact-based concept: occupation “does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty”.¹²⁷⁶

(3) Once established in the territory of an occupied State, at least when the whole territory is occupied, the temporary authority of an Occupying Power extends to the adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights. Similarly, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea. Such authority underscores the obligation of the Occupying Power to take appropriate steps to prevent transboundary environmental harm.¹²⁷⁷

(4) The status of a territory as occupied is often disputed, including in situations in which the Occupying Power relies on a local surrogate, transitional government or rebel group for the purposes of exercising control over the occupied territory.¹²⁷⁸ It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory.¹²⁷⁹ The possibility of

¹²⁷³ ICRC commentary (2016) to Geneva Convention I, art. 2, para. 302. See, similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 277, para. 11.7.1.

¹²⁷⁴ Hague Regulations, art. 42. The definition contained in art. 42 has been confirmed by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, which have referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict. See, respectively, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 167, para. 78, and *Prosecutor v. Mladen Naletilić, aka “TUTA” and Vinko Martinović, aka “ŠTELA”, Case No. IT-98-34-T, Judgment of 31 March 2003, Trial Chamber, para. 215*. See also ICRC commentary (2016) to Geneva Convention I, art. 2, para. 298.

¹²⁷⁵ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), para 173; see also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 275, para. 11.3.

¹²⁷⁶ United States, Department of Defence, *Law of War Manual* (see footnote 1222 above), sect. 11.4, pp. 772–774. See also H.-P. Gasser and K. Dörmann, “Protection of the civilian population”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (footnote 1165 above), pp. 231–320, at p. 274, para. 529.

¹²⁷⁷ *Manual of the Laws of Naval War* (Oxford, 9 August 1913), sect. VI, art. 88. Available from <https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument> (accessed on 8 July 2019). See also Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), p. 47; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford University Press, 2012), p. 55, referring to the practice of several occupants, and M. Sassòli, “The concept and the beginning of occupation”, in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), pp. 1389–1419, at p. 1396.

¹²⁷⁸ Roberts, “Prolonged military occupation ...” (see footnote 1272 above), p. 95; Gasser and Dörmann, “Protection of the civilian population” (see footnote 1276 above), p. 272.

¹²⁷⁹ Benvenisti, *The International Law of Occupation* (see footnote 1277 above), pp. 61–62. Similarly, ICRC, “Occupation and other forms of administration of foreign territory”, Report of an expert meeting (2012), pp. 10 and 23 (the theory of “indirect effective control” was met with approval). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote

such an “indirect occupation” has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia,¹²⁸⁰ the International Court of Justice,¹²⁸¹ and the European Court of Human Rights.¹²⁸²

(5) The law of occupation is applicable to situations that fulfil the factual requirements of effective control of a foreign territory irrespective of whether the Occupying Power invokes the legal regime of occupation.¹²⁸³ It also extends to territories with unclear status that are placed under foreign rule.¹²⁸⁴ Similarly, and in accordance with the fundamental distinction between *jus ad bellum* and *jus in bello*, the law of occupation applies equally to all occupations, whether or not they result from a use of force that is lawful in the sense of *jus ad bellum*.¹²⁸⁵ The law of occupation may also be applicable to territorial administration by an international organization, provided that the situation meets the criteria of article 42 of the Hague Regulations.¹²⁸⁶ Even where this is not the case, as in operations relying on the consent of the territorial State, the law of occupation may provide guidance and inspiration for international territorial administration entailing the exercise of functions and powers over a territory that are comparable to those of an Occupying Power under the law of armed conflict.¹²⁸⁷ The term “Occupying Power” as used in the present draft principles is sufficiently broad to cover such cases.

1222 above), p. 276, para. 11.3.1 (“likely to be applicable”). See also Kolb and Vité, *Le droit de l'occupation militaire ...* (footnote 1270 above), p. 181, as well as ICRC commentary (2016) to Geneva Convention I, art. 2, paras. 328–332.

¹²⁸⁰ See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, *Judicial Reports 1997*, para. 584, which refers to circumstances, in which “the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local de facto organs or agents”. See also *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgment, 3 March, 2000, *Judicial Reports 2000*, paras. 149–150.

¹²⁸¹ The Court seems to have accepted in the *Armed Activities* case that Uganda would have been an occupying power in the areas controlled and administered by Congolese rebel movements, had these non-State armed groups been “under the control” of Uganda. See *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 231, para. 177. See also the separate opinion of Judge Kooijmans, *ibid.*, p. 317, para. 41.

¹²⁸² The European Court of Human Rights has confirmed that the obligation of a State party to the European Convention on Human Rights to secure the rights and freedoms set out in the Convention in an area outside its national territory, over which it exercises effective control, “derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”, see *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions 1996-VI*, para. 52.

¹²⁸³ *The Hostages Trial: Trial of Wilhelm List and Others*, Case No. 47, United States Military Tribunal at Nuremberg, *Law Reports of Trial of War Criminals*, vol. VIII (London, United Nations War Crimes Commission, 1949, London), p. 55: “[w]hether an invasion has developed into an occupation is a question of fact”. See also *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 230, para. 173; *Naletilić and Martinović* (footnote 1274 above), para. 211; and ICRC commentary (2016) to Geneva Convention I, art. 2, para. 300.

¹²⁸⁴ *Legal Consequences of the Construction of a Wall* (see footnote 1274 above), pp. 174–175, para. 95.

¹²⁸⁵ See ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), Foreword by K. Dörmann, p. 4. Similarly, the war crime trials after the Second World War relied on and interpreted the Hague Regulations and customary law.

¹²⁸⁶ M. Sassòli, “Legislation and maintenance of public order and civil life by Occupying Powers”, *European Journal of International Law*, vol. 16 (2005), pp. 661–694, at p. 688; T. Ferraro, “The applicability of the law of occupation to peace forces”, ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations*, G.L. Beruto (ed.), 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, *Proceedings*, pp. 133–156; D. Shraga, “The applicability of international humanitarian law to peace operations, from rejection to acceptance”, *ibid.* pp. 90–99; S. Wills, “Occupation law and multi-national operations: problems and perspectives”, *British Yearbook of International Law*, vol. 77 (2006), pp. 256–332, Benvenisti, *The International Law of Occupation* (see footnote 1277 above), p. 66; See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), pp. 33–34. See, however, also Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 37 for a more reserved view.

¹²⁸⁷ Gasser and Dörmann, “Protection of the civilian population” (see footnote 1276 above), p. 267; Arai-Takahashi, *The Law of Occupation ...* (see footnote 1224 above), p. 605; M. Zwanenburg, “Substantial relevance of the law of occupation for peace operations”, ICRC and International Institute of

(6) While the type and duration of occupation do not affect the applicability of the law of occupation as *lex specialis*, the obligations of the Occupying Power under the law of occupation are, to a certain extent, context specific. As has been pointed in the ICRC commentary to common article 2 of the Geneva Conventions, negative obligations – mostly prohibitions – under the law of occupation apply immediately, whereas the implementation of positive obligations depends on “the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces”.¹²⁸⁸ Certain flexibility is thus recognized in the implementation of the law of occupation, and the exact scope of the respective obligations depends on the nature and duration of the occupation. In other words, the responsibilities falling on the Occupying Power are “commensurate with the duration of the occupation”.¹²⁸⁹ Furthermore, while protracted occupations remain governed by the law of occupation, other bodies of law, such as human rights law and international environmental law, gain more importance as time goes by.

(7) Given the variety of different situations of occupation, the draft principles in Parts Two, Three and Five apply *mutatis mutandis* to situations of occupation. For instance, the draft principles in Part Two, which cover measures to be taken with a view to enhancing the protection of the environment in the event of an armed conflict, remain relevant whether or not an armed conflict takes place and whether or not it includes an occupation. To the extent that periods of intense hostilities during an occupation are governed by the rules concerning the conduct of hostilities, the draft principles in Part Three concerning the protection of the environment in the “during” phase are directly relevant. Additionally, the environment of an occupied territory continues to enjoy the protection accorded to the environment during an armed conflict in accordance with applicable international law and as reflected in draft principle 13. The draft principles in Part Five addressing post-armed conflict situations would primarily have relevance for situations of prolonged occupation. For each part, the draft principles may require some adjustment, hence the phrase *mutatis mutandis*.

Principle 20 **General obligations of an Occupying Power**

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.
3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Commentary

(1) Paragraph 1 of draft principle 20 sets forth the general obligation of an Occupying Power to respect and protect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory. The provision is based on the Occupying Power’s obligation to take care of the welfare of the occupied population, derived from article 43 of the Hague Regulations which requires that the Occupying Power restores and maintains public order and security in the occupied territory.¹²⁹⁰ The obligation to ensure that the occupied population lives as normal a life as

Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations* (see previous footnote), pp. 157–167.

¹²⁸⁸ ICRC commentary (2016) to Geneva Convention I, art. 2, para. 322.

¹²⁸⁹ *Ibid.*

¹²⁹⁰ Hague Regulations, art. 43: “The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The authentic French text of article 43 uses the expression “*l’ordre et la vie publics*”, and the provision has been accordingly interpreted to refer not only to physical safety but also to the “social functions and ordinary transactions which constitute daily life”, in other words, to the entire

possible in the prevailing circumstances¹²⁹¹ entails environmental protection as a widely recognized public function of the modern State. Moreover, environmental concerns relate to an essential interest of the territorial sovereign,¹²⁹² which the occupying State as a temporary authority must respect.

(2) The law of occupation is a subset of the law of armed conflict, and draft principle 20 shall be read in the context of draft principle 13, which provides that the “natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict”. Both draft principles refer to the obligation to “respect and protect” the environment in accordance with applicable international law, although draft principle 20 does so in the more specific context of occupation.¹²⁹³

(3) The term “applicable international law” refers, in particular, to the law of armed conflict, but also to the law of the environment and international human rights law. Concurrent application of human rights law is of particular relevance in situations of occupation. The International Court of Justice has notably interpreted respect for the applicable rules of international human rights law to be part of the obligations of the Occupying Power under article 43 of the Hague Regulations.¹²⁹⁴ As for the application of

social and economic life of the occupied region”, see M. S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University, 1961), p. 746. See also Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 89, and Sassòli, “Legislation and maintenance of public order...” (footnote 1286 above). This interpretation is also supported by the *travaux préparatoires*: in the Brussels Conference of 1874, the term “vie publique” was interpreted as referring to “des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours”. See Belgium, Ministry of Foreign Affairs, *Actes de la Conférence de Bruxelles de 1874 sur le projet d’une convention internationale concernant la guerre*, p. 23. Available from <https://babel.hathitrust.org/>.

¹²⁹¹ T. Ferraro, “The law of occupation and human rights law: some selected issues”, in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Edward Elgar, 2013), pp. 273–293, p. 279.

¹²⁹² *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, para. 53.

¹²⁹³ Reference can furthermore be made to the Rio Declaration, which states that “[t]he environment and natural resources of people under oppression, domination and occupation shall be protected”. See the Rio Declaration, principle 23.

¹²⁹⁴ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), p. 231, para. 178. See also p. 243, para. 216, in which the Court confirms that international human rights arguments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, “particularly in occupied territories”. See also *Legal Consequences of the Construction of a Wall* (footnote 1274 above), pp. 177–181, paras. 102–113. The International Criminal Tribunal for the Former Yugoslavia, likewise, has stated that the distinction between a phase of hostilities and a situation of occupation “imposes more onerous duties on an occupying power than on a party to an international armed conflict”, see *Naletilić, and Martinović* (footnote 1274 above), para. 214. See also the European Court of Human Rights: *Loizidou v. Turkey* (Preliminary Objections), Judgment, 23 March 1995, Series A, No. 310, para. 62, and Judgment (Merits), 18 December 1996 (footnote 1282 above), para. 52; and *Al-Skeini and others v. United Kingdom* [Grand Chamber], Application No. 55721/07, *Reports of Judgments and Decisions 2011*, para. 94, in which reference was made to the Inter-American Court of Human Rights case *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, Series C, No. 134, in support of the duty to investigate alleged violations of the right to life in situations of armed conflict and occupation. The applicability of human rights during occupation has been further recognized by the Human Rights Committee, see, general comment No. 26 (1997) on continuity of obligations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40*, vol. I (A/53/40 (Vol. I)), annex VII, para. 4; general comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 3; general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 10. See also Committee on Economic, Social and Cultural Rights, concluding observations: Israel, E/C.12/1/Add.69, 31 August 2001; and concluding observation: Israel, E/C.12/ISR/CO/3, 16 December 2011, as well as the report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, E/CN.4/1992/26, 16 June 1992. Such applicability has also been widely endorsed in scholarly writings: see, for example, Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), pp. 69–71; Kolb and Vité, *Le*

environmental law, reference can be made to the 1996 Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons* which provides important support to the claim that customary international environmental law and treaties on the protection of the environment continue to apply in situations of armed conflict.¹²⁹⁵ Similarly, the Commission's 2011 articles on the effects of armed conflicts on treaties indicate that treaties relating to the international protection of the environment, treaties relating to international watercourses or aquifers, and multilateral law-making treaties may continue in operation during armed conflict.¹²⁹⁶ Furthermore, to the extent that multilateral environmental agreements address environmental problems that have a transboundary nature, or a global scope, and the treaties have been widely ratified, it may be difficult to conceive of suspension only between the parties to a conflict.¹²⁹⁷ Obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation.¹²⁹⁸

(4) Paragraph 1 is also related to draft principle 15 entitled “Environmental considerations”. The reference to environmental considerations in both provisions is drawn from and inspired by the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. While the statement referred to in the commentary to draft principle 15 is related to the principle of proportionality and rules of military necessity, the Court also held more generally that “the existing international law relating to the protection and safeguarding of the environment ... indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.¹²⁹⁹ The Arbitral Tribunal, furthermore, has stated that “where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply”.¹³⁰⁰ The

droit de l'occupation militaire ... (footnote 1270 above), pp. 299–332; A. Roberts, “Transformative military occupation: applying the laws of war and human rights”, *American Journal of International Law*, vol. 100 (2006), pp. 580–622; J. Cerone, “Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations”, *Vanderbilt Journal of Transnational Law*, vol. 39 (2006), pp. 1447–1510; Benvenisti, *The International Law of Occupation* (see footnote 1277 above), pp. 12–16; Arai-Takahashi, *The Law of Occupation ...* (footnote 1224 above); N. Lubell, “Human rights obligations in military occupation”, *International Review of the Red Cross*, vol. 94 (2012), pp. 317–337; Ferraro, “The law of occupation and human rights law ...” (footnote 1291 above), pp. 273–293; and M. Bothe, “The administration of occupied territory”, in Clapham, Gaeta and Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (see footnote 1277 above), pp. 1455–1484. See, differently, M.J. Dennis, “Application of human rights treaties extraterritorially in times of armed conflict and military occupation”, *American Journal of International Law*, vol. 99 (2005), pp. 119–141.

¹²⁹⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at pp. 241–243, paras. 27–33.

¹²⁹⁶ Draft articles on the effects of armed conflicts on treaties, *Yearbook ... 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101. See also ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 973 above), guideline 5, which states that “[i]nternational environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict. Obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict”.

¹²⁹⁷ K. Bannelier-Christakis, “International Law Commission and protection of the environment in times of armed conflict: a possibility for adjudication?”, *Journal of International Cooperation Studies*, vol. 20 (2013), pp. 129–145, at pp. 140–141; D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge, Cambridge University Press, 2015), pp. 110–111.

¹²⁹⁸ In the sense of art. 48, para 1 (a), of the articles on responsibility of States for internationally wrongful acts, the relevant commentary, para. (7), mentions environmental treaties in this context. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 26–143, at p. 126.

¹²⁹⁹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 243, para. 33.

¹³⁰⁰ Award in the Arbitration regarding the *Iron Rhine (“Ijzeren Rijn”) Railway* between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, *Reports of International Arbitral Awards* (UNRIAA), vol. XXVII, pp. 35–131 (*Iron Rhine*), at paras. 222–223. See also Final Award

term “environmental considerations” as used in paragraph 1 is comparable to the phrases “environmental factors” or “considerations of environmental protection” in that it does not have a specific content. It is a generic notion that is widely used but rarely defined.¹³⁰¹ Furthermore, environmental considerations are context dependent¹³⁰² and evolving: they cannot remain static over time but have to reflect the development of the human understanding of the environment and its ecosystems.¹³⁰³

(5) Paragraph 2 provides that an Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory. This provision should be read in the context of the general obligation in paragraph 1. The purpose of paragraph 2 is to indicate that significant harm to the environment of an occupied territory may have adverse consequences for the population of the occupied territory, in particular with respect to the

regarding the *Indus Waters Kishenganga* Arbitration between Pakistan and India, 20 December 2013, UNRIAA, vol. XXXI, pp. 1–358, e.g. at paras. 101, 104 and 105. Available at <https://pca-cpa.org/en/cases/20/> (accessed on 8 July 2019).

¹³⁰¹ See, however, United States, Department of Defense, *Dictionary of Military and Associated Terms* (2005), p. 186: “Environmental considerations: The spectrum of environmental media, resources, or programs that may impact on, or are affected by, the planning and execution of military operations. Factors may include, but are not limited to, environmental compliance, pollution prevention, conservation, protection of historical and cultural sites, and protection of flora and fauna”. Available from www.jcs.mil/Doctrine/Joint-Doctrine-Pubs/Reference-Series/ (accessed on 8 July 2019).

¹³⁰² For practical examples of environmental considerations in the context of an armed conflicts, see D.E. Mosher *et al.*, *Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict* (RAND Corporation, 2008), pp. 71–72: “given the importance placed on military expedience during combat, a unit’s environmental responsibilities are fairly limited. Experience in recent contingency operations has shown that environmental considerations are significantly more important in other areas, including base camps, stability and reconstruction, and the movement of forces and materiel”; p. 75: “The movement of forces and materiel ... can involve significant environmental considerations”; p. 121: “Balancing environmental considerations with other factors that contribute to mission success is a constant undertaking and requires better awareness, training, information, doctrine, and guidelines”; p. 126: “For example, experience in Iraq ... points to the need for high-quality information about environmental conditions and infrastructure before an operation is initiated”. See also *UNHCR Environmental Guidelines* (footnote 1057 above), p. 5: “Environmental considerations need to be taken into account in almost all aspects of UNHCR’s work with refugees and returnees.” See furthermore European Commission, “Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process”, document COM(2004) 394 final.

¹³⁰³ See para. (5) of the commentary to draft principle 15 above.

enjoyment of certain human rights, such as the right to life,¹³⁰⁴ right to health,¹³⁰⁵ or right to food.¹³⁰⁶ There is in general a close link between key human rights, on the one hand, and the protection of the quality of the soil and water, as well as biodiversity to ensure viable and healthy ecosystems, on the other.¹³⁰⁷

¹³⁰⁴ See International Covenant on Civil and Political Rights, art. 6, para. 1. See also Human Rights Committee, general comment No. 36 (2018), para. 26 [this general comment has not yet been published so citations and paragraph numbers may be subject to change in the final version], in which the Committee lists “degradation of the environment” among general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. See also Human Rights Committee, concluding observations: Israel (CCPR/C/ISR/CO/3), para. 18. See also Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series* vol. 1577, No. 27531, p. 3, art. 6, para. 1, which provides that “States Parties recognize that every child has the inherent right to life”. In general comment No. 16, the Committee on the Rights of the Child has related the child’s right to life with environmental degradation and contamination resulting from business activities, see general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights (CRC/C/GC/16), para. 19. See further African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 4 which stipulates i.e. that human beings are entitled to respect for their life. In *SERAP v. Nigeria* case, the Community Court of Justice of the Economic Community of West African States affirmed that that “[t]he quality of human life depends on the quality of the environment”. See *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012, para. 100. See also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 2 May 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), art. 1; American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, art. 4, para. 1, as well as *Yanomami v. Brazil*, Case No. 7615, Inter-American Commission on Human Rights, resolution No. 12/85, 5 March 1985, which acknowledged that a healthy environment and the right to life are interlinked. See also Inter-American Court of Human Rights, *Medio Ambiente y Derechos Humanos* (footnote 1182 above), paras. 55 and 59.

¹³⁰⁵ See Universal Declaration of Human Rights, art. 25, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 12. See also Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 4. See also Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15), paras. 49–50. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) includes the right to health, and the regional jurisprudence acknowledges the connection between the right to health and environmental protection in the context of the universal periodic reviews. See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights and Office of the United Nations High Commissioner for Human Rights, “Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: individual report on the General Assembly and the Human Rights Council, including the universal periodic review process”, Report No. 6, December 2013, part III C. See also the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

¹³⁰⁶ See International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/C.12/2000/22-E/C.12/1999/11)*, annex V, para. 7, which determines that the concept of adequacy is interlinked with the notion of sustainability, meaning that food must also be available for the future generations. See also paras. 8 and 10, which require that available food must be free from adverse substances. Moreover, the right to food has been related to the depletion of natural resources traditionally possessed by indigenous communities. *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, para. 337; *ibid.*, 2010, *Supplement No. 2 (E/2010/22-E/C.12/2009/3)*, para. 372; *ibid.*, 2012, *Supplement No. 2 (E/2012/22-E/C.12/2011/3)*, para. 268; *ibid.*, 2008, *Supplement No. 2 (E/2008/22-E/C.12/2007/3)*, para. 436.

¹³⁰⁷ See, for example, World Health Organization, “Our planet, our health, our future: human health and the Rio Conventions: Biological Diversity, Climate Change and Desertification”, discussion paper, 2012, p. 2, acknowledging the role of biodiversity as the “foundation for human health”. Available at www.who.int/globalchange/publications/reports/health_rioonventions.pdf (accessed on 8 July 2019).

(6) The formulation of paragraph 2 is based on article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions¹³⁰⁸ and international human rights law. Unlike article 55, paragraph 1, which refers to “the health or survival” of the population, the present paragraph uses the formulation “health and well-being”. Reference can in this regard be made to the common objectives between economic, social and cultural rights, such as the right to health, on the one hand, and the law of occupation, on the other, such as the well-being of the population. The notion of “health and well-being” is furthermore consistently used by the World Health Organization, which recalls that health and well-being affect both the society at present and future generations and are dependent on a healthy environment.¹³⁰⁹ Reference can also be made to the Stockholm Declaration, which reaffirms “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.¹³¹⁰

(7) As for the standard of “significant harm” in paragraph 2, reference can be made to the Commission’s earlier work on the prevention of transboundary harm from hazardous activities¹³¹¹ and the allocation of loss in the case of such harm.¹³¹² “Significant harm” is thus “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’”.¹³¹³ Such harm must lead to real detrimental effects on the environment. At the same time, “the determination of ‘significant damage’ involves both factual considerations and objective criteria, and a value determination”, which is dependent on the circumstances of the particular case.¹³¹⁴ In the context of paragraph 2, harm that is likely to prejudice the health and well-being of the population of the occupied territory would amount to “significant harm”. The two phrases in paragraph 2 should thus not be read as two cumulative thresholds.

(8) Paragraph 2 refers to “the population of the occupied territory” in general terms. This wording has been aligned with article 55, paragraph 1, of Additional Protocol I, which refers to “population” without the qualifying adjective “civilian”. This omission, according to the ICRC commentary, “serves to emphasize the fact that damage caused to the environment

¹³⁰⁸ See Additional Protocol I, art. 55, para. 1: “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”

¹³⁰⁹ According to the Constitution of the World Health Organization, “[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and has been amended in 1977, 1984, 1994 and 2005, the consolidated text is available at www.who.int/governance/eb/who_constitution_en.pdf (accessed on 8 July 2019).

¹³¹⁰ Stockholm Declaration, principle 1. See also *UNCHR Environmental Guidelines* (footnote 1057 above), p. 5: “The state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity”.

¹³¹¹ Paras. (1)–(7) of the commentary to draft art. 2 of draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at pp. 152–153.

¹³¹² Paras. (1)–(3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at pp. 64–65.

¹³¹³ Para. (4) of the commentary to draft art. 2 of the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 152 (emphasis removed).

¹³¹⁴ Para. (3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 65. In the context of the Convention on the Law of the Non-navigational Uses of International Watercourses ((New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)*, vol. III, resolution 51/229, annex), “significant harm” has been similarly defined as “the real impairment of a use, established by objective evidence. For harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis”. See “No significant harm rule”, User’s Guide Fact Sheet, No. 5. Available at www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf (accessed on 8 July 2019).

may continue for a long time and affect the whole population without any distinction”.¹³¹⁵ Similarly, health and well-being affect society at present as well as future generations.¹³¹⁶

(9) Paragraph 3 of draft principle 20 provides that an Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.¹³¹⁷ The term “law and institutions” is intended to also cover the international obligations of the occupied State.¹³¹⁸ The paragraph is based on the last phrase of article 43 of the Hague Regulations, “while respecting, unless absolutely prevented, the laws in force in the country”, as well as on article 64 of Geneva Convention IV.¹³¹⁹ These provisions embody the so-called conservationist principle, which underlines the temporary nature of occupation and the need for maintaining the *status quo ante*.

(10) In spite of their strict wording, the two provisions have been interpreted to allow the Occupying Power the competence to legislate when necessary for the maintenance of public order and civil life and to change legislation that is contrary to established human rights standards.¹³²⁰ The ICRC commentary to article 47 of Geneva Convention IV points out that some changes to the institutions “might conceivably be necessary and even an improvement” and explains that the object of the text in question was “to safeguard human beings and not to protect the political institutions and government machinery of the State as such”.¹³²¹ It is furthermore evident that “civil life” and “orderly government” are evolving concepts, comparable to the notions of “well-being and development”, or “sacred trust” which the International Court of Justice described in the *Namibia* Advisory Opinion as “by definition

¹³¹⁵ ICRC commentary (1987) to Additional Protocol I, art. 55, para. 1, p. 663, para. 2134. See also Payne, “Defining the environment: environmental integrity” (footnote 1180 above), p. 58: “the word ‘population’ was used without its usual qualifier of ‘civilian’ because the future survival or health of the population in general, whether or not combatants, might be at stake” and “[t]he population might be that of today or that of tomorrow, in the sense that both short-term and long-term survival was contemplated”.

¹³¹⁶ See Health 2020, *Health and well-being – a common purpose, a shared responsibility* (World Health Organization Regional Office for Europe, 2012), p. 1.

¹³¹⁷ Environmental rights have been recognized at national level in the constitutions of more than a hundred States. There are nevertheless considerable variations in how the respective rights and duties are conceived. See P. Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 816. A list of relevant constitutions is available in Earthjustice, *Environmental Rights Report 2008*, at <http://earthjustice.org/sites/default/files/library/reports/2008-environmental-rights-report.pdf>, Appendix (accessed on 8 July 2019).

¹³¹⁸ Major multilateral environmental agreements have attracted a high number of ratifications. See <https://research.un.org/en/docs/environment/treaties>.

¹³¹⁹ Art. 64 of Geneva Convention IV reads as follows:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.” The ICRC commentary points out that, in spite of the reference to penal law, occupation authorities are bound to respect the whole of the law in the occupied territory, see ICRC commentary (1958) to Geneva Convention IV, art. 64, p. 335; see also Sassòli, *Legislation and maintenance of public order ...* (footnote 1286 above), p. 669; similarly, Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 111; Benvenisti, *The International Law of Occupation* (footnote 1277 above), p. 101; Kolb and Vité, *Le droit de l'occupation militaire ...* (footnote 1270 above), pp. 192–194.

¹³²⁰ Sassòli, “Legislation and maintenance of public order...” (see footnote 1286 above), p. 663. See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 284, para. 11.25, acknowledging that new legislation may be necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 1290 above), p. 757.

¹³²¹ ICRC commentary (1958) to Geneva Convention IV, art. 47, p. 274.

evolutionary”.¹³²² The longer the occupation lasts, the more evident is the need for proactive action and to allow the Occupying Power to fulfil its duties under the law of occupation, including for the benefit of the population of the occupied territory.¹³²³ At the same time, the Occupying Power is not supposed to take over the role of a sovereign legislator.

(11) Paragraph 3 takes into account that armed conflict may have caused significant stress on the environment of the occupied State and resulted in institutional collapse, which is a common feature of many armed conflicts,¹³²⁴ and recognizes that an Occupying Power may have to take proactive measures to address immediate environmental problems. The more protracted the occupation, the more diversified measures are likely to be required for the protection of the environment. Furthermore, as the objectives of such proactive action are limited, it would be appropriate in a prolonged occupation to engage the population of the occupied territory in decision-making.¹³²⁵

(12) While some active interference in the law and institutions concerning the environment of the occupied territory may thus be required, the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied

¹³²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53. Similarly *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77, in which the Court stated that the meaning of certain generic terms was “intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time”. See also World Trade Organization, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R* (Appellate Body Report), 6 November 1998, *Dispute Settlement Reports*, vol. VII (1998), p. 2755, at para. 129, according to which the expression “exhaustible natural resources” had to be interpreted in the light of contemporary concerns about the protection and conservation of the environment. Available at <https://docs.wto.org>; Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 1300 above), at paras. 79–81. See also the Commission’s work on subsequent agreements and subsequent practice, commentary to draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time), *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10 (A/68/10)*, para. 39, at pp. 24–30.

¹³²³ E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, D.C., Carnegie Endowment for International Peace, 1942), p. 49, who pointed to the need to modify tax legislation in an occupation that lasts through several years, noting that “[a] complete disregard of these realities may well interfere with the welfare of the country and ultimately with ‘public order and safety’ as understood in Article 43”. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 1290 above), p. 746. See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), p. 58, stressing the ability of the occupant to legislate to fulfil its obligations under Geneva Convention IV or to enhance civil life in the occupied territory. Sassòli, “Legislation and maintenance of public order...” (see footnote 1286 above), p. 676, nevertheless holds that the occupant should “introduce only as many changes as is absolutely necessary under its human rights obligations”.

¹³²⁴ See Jensen and Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues” (footnote 1065 above), p. 415. See also K. Conca and J. Wallace, “Environment and peacebuilding in war-torn societies: lessons from the UN Environment Programme’s experience with post-conflict assessment” in *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (footnote 1065 above), pp. 63–84.

¹³²⁵ See the *Rio Declaration*, principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” See also Framework principles on human rights and the environment (A/HRC/37/59, annex), principle 9: “States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.” See further Aarhus Convention.

territory.¹³²⁶ The phrase “within the limits provided by the law of armed conflict” in paragraph 3 also refers to article 64 of Geneva Convention IV. According to this provision, local laws may be changed when it is essential: (a) to enable the Occupying Power to fulfil its obligations under the Convention; (b) to maintain the orderly government of the territory; or (c) to ensure the security of occupying forces or administration.¹³²⁷

Principle 21

Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Commentary

(1) The purpose of draft principle 21 is to set forth the obligations of an Occupying Power with respect to the sustainable use of natural resources. As indicated in the first part of the sentence, the draft principle applies “to the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory”. The phrase refers to the various limitations set forth by the law of armed conflict and other international law to the exploitation of the wealth and natural resources of the occupied territory.

(2) The provision is based on article 55 of the Hague Regulations, which regards the Occupying Power “only as administrator and usufructuary” of immovable public property in the occupied territory.¹³²⁸ This description has traditionally been interpreted to forbid “wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation”.¹³²⁹ A similar limitation deriving from the nature of occupation as temporary administration of the territory prevents the Occupying Power from using the resources of the occupied country or territory for its own domestic purposes.¹³³⁰ Furthermore, any exploitation of property is permitted only to the extent required to cover the expenses of the occupation, and “these should not be greater than the economy of the country can reasonably be expected to bear”.¹³³¹

¹³²⁶ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (footnote 1323 above), p. 89. See also Ferraro, “The law of occupation and human rights law ...” (footnote 1291 above), pp. 273–293; see similarly the Supreme Court of Israel: H.C. 351/80, *The Jerusalem District Electricity Company Ltd. v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region* 35(23), Piskei Din 673, partly reprinted in *Israel Yearbook on Human Rights* (1981), pp. 354–358.

¹³²⁷ Geneva Convention IV, art. 64.

¹³²⁸ See Hague Regulations, art. 55: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

¹³²⁹ J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (London, Stevens and Sons Limited, 1954), p. 714. See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, University of Minnesota Press, 1957), p. 177, who emphasizes that the Occupying Power “is not permitted to exploit immovable property beyond normal use, and may not cut more timber than was done in pre-occupation days” and L. Oppenheim, *International Law: A Treatise*, vol. II, *War and Neutrality*, 2nd ed. (London, Longmans, Green and Co., 1912), p. 175, pointing out that the Occupying Power “is ... prohibited from exercising his right in a wasteful or negligent way that would decrease the value of the stock and plant” and “must not cut down a whole forest unless the necessities of war compel him”.

¹³³⁰ Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, Reports: 1956 Singapore Law Reports, p. 65; reprint in *International Law Reports*, vol. 23 (1960), pp. 810–849, p. 822 (*Singapore Oil Stocks* case); *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. IX, p. 1340.

¹³³¹ *The United States of America and Others v. Goering and Others*, Judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nuremberg, 1947), p. 239.

(3) The second sentence of the draft principle mentions explicitly that the Occupying Power's administration and use of natural resources in the occupied territory may only be "for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict".¹³³² The reference to "the population of the occupied territory" is to be understood in this context in the sense of article 4 of Geneva Convention IV, which defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals".¹³³³

(4) A further limitation that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in the general prohibition of destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure is rendered absolutely necessary by military operations (or, with respect to seizure of movable public property, is necessary for military operations).¹³³⁴ The prohibition of pillage of natural resources is furthermore applicable in situations of occupation.¹³³⁵ An "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is also defined as a grave breach in article 147 of Geneva Convention IV (see also article 53) and as a war crime of "pillage" in the Rome Statute of the International Criminal Court.¹³³⁶

(5) The principle of permanent sovereignty over natural resources also has a bearing on the interpretation of article 55 of the Hague Regulations. According to this principle, as enshrined in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.¹³³⁷ The International Court of Justice has confirmed the customary nature of the principle.¹³³⁸ Similarly, the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State.¹³³⁹

¹³³² As summarized by the Institute of International Law, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". See Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq.*; available from www.idi-iil.org, Declarations, at p. 288.

¹³³³ Geneva Convention IV, art. 4. See also ICRC commentary (1958) to Geneva Convention IV, art. 4, p. 45, according to which there are two main classes of civilians whose "protection against arbitrary action on the part of the enemy was essential in time of war – on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the inhabitants of occupied territories."

¹³³⁴ Art. 23 (g) and art. 53 of the Hague Regulations, and art. 53 of Geneva Convention IV.

¹³³⁵ See draft principle 18 and the commentary thereto above.

¹³³⁶ Rome Statute, art. 8, para. 2 (a) (iv) and (b) (xiii).

¹³³⁷ International Covenant on Civil and Political Rights, art. 1, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 1, para. 2. See also General Assembly resolutions 1803 (XVII) of 14 December 1962; 3201 (S-VI) of 1 May 1974 (Declaration on the Establishment of a New International Economic Order); 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States).

¹³³⁸ *Armed Activities on the Territory of the Congo* (footnote 1241 above), at p. 251, para. 244.

¹³³⁹ In the *Wall* Advisory Opinion, the International Court of Justice stated that the construction of the wall, as well as other measures by the occupying State, "severely impedes the exercise by the Palestinian people of its right to self-determination": *Legal Consequences of the Construction of a Wall* (see footnote 1274 above), at p. 184, para. 122. The right to self-determination was also referred to in the *Namibia, Advisory Opinion* (see footnote 1322 above), p. 31, paras. 52–53, in *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, at pp. 32–33, paras. 56–59, as well as in the *East Timor* case, in which the Court affirmed the *erga omnes* nature of the principle, see *East Timor (Portugal v. Australia), Judgment*, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

(6) While the right of usufruct has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones,¹³⁴⁰ the various limitations outlined above serve to curtail the Occupying Power's rights to exploit the natural resources of the occupied territory. These limitations are also reflected in the use of "permitted".

(7) The last sentence of draft principle 21 addresses situations in which an Occupying Power is permitted to administer and use the natural resources in an occupied territory. It sets forth an obligation to do so in a way that ensures the sustainable use of such resources and minimizes environmental harm. This requirement is based on the Occupying Power's duty under article 55 of the Hague Regulations to safeguard the capital of public immovable property, which has for long been interpreted to entail certain obligations with regard to the protection of the natural resources in the occupied territory. In the light of the development of the international legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital. Reference can in this respect be made to the *Gabčíkovo-Nagymaros* judgment, in which the International Court of Justice, in interpreting a treaty that predated certain recent norms of environmental law, accepted that "the Treaty is not static, and is open to adapt to emerging norms of international law".¹³⁴¹ An arbitral tribunal has furthermore stated that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.¹³⁴²

(8) The notion of sustainable use of natural resources can in this regard be seen as the modern equivalent of the concept of "usufruct", which is in essence a standard of good housekeeping, according to which the Occupying Power "must not exceed what is necessary or usual"¹³⁴³ when exploiting the relevant resource. This entails that the Occupying Power should exercise caution in the exploitation of non-renewable resources, not exceeding pre-occupation levels of production, and exploit renewable resources in a way that ensures their long-term use, and capacity for regeneration.

(9) The notion of minimization of environmental harm follows from the purpose of the draft principles. Draft principle 2 notably states that the draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures. While the obligation to ensure the sustainable use of natural

¹³⁴⁰ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (see footnote 1323 above), p. 55. See also Oppenheim, *International Law ...* (footnote 1329 above), p. 175, and Von Glahn, *The Occupation of Enemy Territory ...* (footnote 1329 above), p. 177. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 303, para. 11.86.

¹³⁴¹ *Gabčíkovo-Nagymaros* (see footnote 1292 above), pp. 67–68, para 112. See also p. 78, para. 140, in which the Court rules that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and ... new standards given proper weight." Further, see Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 1300 above), in which the Court applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century.

¹³⁴² *Indus Waters Kishenganga* (see footnote 1300 above), para. 452, in which the Court held that: "It is established that principles of international environmental law must be taken into account even when ... interpreting treaties concluded before the development of that body of law ... It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today". Furthermore, the International Law Association has suggested that treaties and rules of customary international law should be interpreted in the light of the principles of sustainable development unless doing so would conflict with a clear treaty provision or be otherwise inappropriate: "[I]nterpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine ... fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of *jus cogens*." See International Law Association, Committee on International Law on Sustainable Development, Resolution No. 7 (2012), annex (Sofia Guiding Statement), para. 2.

¹³⁴³ *The Law of War on Land Being Part III of the Manual of Military Law* (Great Britain, War Office, 1958), sect. 610. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 303, para. 11.86.

resources is most relevant in a long-term perspective, the use of natural resources, and the need to minimize environmental harm, is relevant both in short-term and more protracted occupations.

Principle 22
Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.

Commentary

(1) Draft principle 22 contains the established principle that each State has an obligation not to cause significant harm to the environment of other States or to areas beyond national jurisdiction. The International Court of Justice referred to this principle in the *Legality of the Threat or Use of Nuclear Weapons* case and confirmed its customary nature, stating that the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national control constitutes “part of the corpus of international law relating to the environment”.¹³⁴⁴

(2) The obligation not to cause significant harm to the environment of other States has an established status in a transboundary context and has been particularly relevant with regard to shared natural resources, such as sea areas, international watercourses and transboundary aquifers. This obligation is explicitly contained in the Convention on the Law of the Non-navigational Uses of International Watercourses and in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes as well as in the United Nations Convention on the Law of the Sea.¹³⁴⁵ Numerous regional treaties establish corresponding obligations of prevention, cooperation, notification or compensation with regard to damage caused to rivers or lakes.¹³⁴⁶ The principle has also been confirmed and clarified in international and regional jurisprudence.¹³⁴⁷

¹³⁴⁴ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), pp. 241–242, para. 29. The principle is also contained in contained in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration: see Stockholm Declaration, principle 21: “States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” See furthermore Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 206, as well as U. Beyerlin, “Different types of norms in international environmental law: policies, principles and rules”, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2008), pp. 425–448, p. 439.

¹³⁴⁵ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary-General, chap. XXVII), art.7; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 2; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, p. 397, art. 194, para. 2.

¹³⁴⁶ See, e.g., Convention on the Protection of the Rhine (1999), Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (1987); Agreement on Co-operation for the Sustainable Development of the Mekong River Basin (1995), all available at www.ecolex.org; Revised Great Lakes Water Quality Agreement (United States, Canada, 2012), available at <https://ijc.org>.

¹³⁴⁷ Several of the cases in which the International Court of Justice has clarified environmental obligations have been related to the use and protection of water resources such as wetlands or river; e.g., the *Construction of a Road (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665) and *Pulp Mills (Pulp Mills on the River Uruguay (Argentina v. Uruguay))*, Judgment, I.C.J. Reports 2010, p. 14) cases, as well as the case of *Gabčíkovo-Nagymaros* (see footnote 1292 above). See also *Indus Waters Kishenganga* (see footnote 1300 above), paras. 449–450. Regional jurisprudence is widely available at www.ecolex.org.

(3) Furthermore, the Commission has included this principle in its draft articles on prevention of transboundary harm from hazardous activities.¹³⁴⁸ According to the commentary thereto, the obligation of due diligence can be deduced from a number of international conventions as the standard basis for the protection of the environment from harm.¹³⁴⁹

(4) As regards the applicability of this principle in the specific context of occupation, reference can be made to the International Court of Justice's Advisory Opinion in the *Namibia* case, in which the Court underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".¹³⁵⁰ Furthermore, the Court has referred to the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control in its judgment concerning the *Pulp Mills on the River Uruguay* case,¹³⁵¹ as well as in the joint cases of *Certain Activities and Construction of a Road*.¹³⁵²

(5) The Commission's draft articles on prevention of transboundary harm from hazardous activities state that this obligation applies to activities carried out within the territory or otherwise under the jurisdiction or control of a State.¹³⁵³ It should be recalled that the Commission has consistently used this formulation to refer not only to the territory of a State but also to activities carried out in other territories under the State's control. As explained in the commentary to draft article 1, "it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation".¹³⁵⁴

(6) The "no harm" or due diligence principle in customary international environmental law only applies to harm above a certain threshold, most often indicated as "significant harm",¹³⁵⁵ and it is an obligation of conduct that requires in situations of occupation that the Occupying Power takes all measures it can reasonably be expected to take.¹³⁵⁶ The notion of significant harm is the same as referred to above in the commentary to draft principle 20.¹³⁵⁷

(7) The wording of draft principle 22 is different from the established precedents in that it refers to "the environment of areas beyond the occupied territory". The consideration behind this formulation was related to situations in which the occupied territory extends to only a part of the territory of a State and not its entirety. The concern was expressed that the term "to the environment of another State or to areas beyond national jurisdiction" could be interpreted as excluding the territory of other parts of the occupied State. It was therefore decided to indicate that the territorial scope of the provision should cover "areas beyond the occupied territory". Furthermore, the reference to the conduct required of the Occupying Power to ensure that activities in the occupied territory do not cause significant transboundary

¹³⁴⁸ Art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 146: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".

¹³⁴⁹ Para. (8) of the commentary to art. 3, *ibid.*, at p. 154.

¹³⁵⁰ *Namibia, Advisory Opinion* (see footnote 1322 above), p. 54, para. 118.

¹³⁵¹ *Pulp Mills* (see footnote 1347 above), pp. 55–56, para. 101.

¹³⁵² See footnote 1347 above.

¹³⁵³ Para. (10) of the commentary to art. 2 (use of terms) of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 153.

¹³⁵⁴ Para. (12) of the commentary to art. 1, *ibid.*, at p. 151.

¹³⁵⁵ See, for instance, K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden, Martinus Nijhoff, 2004), p. 68, pointing out that in case of environmental harm, it is common to use the standard of "significant" damage. See similarly T. Koivurova, "Due diligence", *Max Planck Encyclopedia of Public International Law*, p. 241, para. 23. Available from www.mpepil.com.

¹³⁵⁶ Second report of the International Law Association, Study Group on Due Diligence in International Law, July 2016, p. 8.

¹³⁵⁷ See para. (5) of the commentary to para. 2 of draft principle 20 above.

harm was replaced by the term “due diligence”. A view was nevertheless expressed that language commonly used in international instruments would be preferable.

Part Five
Principles applicable after armed conflict

Principle 23
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Commentary

(1) Draft principle 23 aims to reflect that environmental considerations are, to a greater extent than before, being taken into consideration in the context of peace processes, including through the regulation of environmental matters in peace agreements. Reference can also be made to the heavy environmental impact of non-international armed conflicts that has led a growing number of States to include measures to protect and restore the environment in transitional justice processes.¹³⁵⁸

(2) Including the term “peace process” in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.¹³⁵⁹ Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of an armed conflict, a ceasefire agreement, an armistice or a situation of *de facto* peace with no agreement could be reached. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a

¹³⁵⁸ “[T]ransitional justice ... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”, Report of the Secretary-General on “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616), para. 8; numerous countries affected by post-conflict crises have adopted transitional justice mechanisms to enhance their environmental protection and restoration, some under assistance of the United Nations Environment Programme: see, for instance, United Nations Environment Programme, “Reporting on the state of the environment in Afghanistan: workshop report” (2019); United Nations Environment Programme, *South Sudan: First State of the Environment and Outlook Report 2018* (Nairobi, 2018); A. Salazar *et al.*, “The ecology of peace: preparing Colombia for new political and planetary climates”, *Frontiers in Ecology and the Environment* (September 2018), available at http://www.researchgate.net/publication/327605932_The_ecology_of_peace_preparing_Colombia_for_new_political_and_planetary_climates/download (accessed on 8 July 2019); United Nations Environment Programme, “Addressing the role of natural resources in conflict and peacebuilding” (Nairobi, 2015); United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 1060 above); United Nations Environment Programme, “Sierra Leone: environment, conflict and peacebuilding assessment” (Geneva, 2010); Cambodia, Ministry of Environment, “Cambodia environment outlook” (2009); Sierra Leone, *An Agenda for Change* (2008); United Nations Environment Programme, *Environmental assessment of the Gaza Strip following the escalation of hostilities in December 2008–January 2009* (Nairobi, 2009).

¹³⁵⁹ The United Nations peace agreements database, a “reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material”, contains a huge variety of documents, such as “formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences ... The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations”. Selected resolutions of the Security Council are also included. The database is available at <http://peacemaker.un.org/document-search>.

peace agreement thus represents only one aspect, which, if at all, may take place several years after the cessation of hostilities. For this purpose, and to also avoid any temporal *lacuna*, the words “as part of the peace process” have been employed. The outcome of a peace process often involves different steps and the adoption of a variety of instruments.

(3) The phrase “[p]arties to an armed conflict” is used in paragraph 1 to indicate that the provision covers both international and non-international armed conflicts. This is in line with the general understanding that the draft principles apply to international, as well as non-international armed conflicts.

(4) The word “should” is used to reflect the normative ambition of the provision, while also recognizing that it does not correspond to any existing legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist after an armed conflict. The condition of the environment after an armed conflict can vary greatly depending on a number of factors.¹³⁶⁰ In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency; whereas, in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.¹³⁶¹ Some environmental damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed group(s). Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.¹³⁶²

(7) Some modern peace agreements contain environmental provisions.¹³⁶³ The types of environmental matters that have been addressed in the instruments concluded during the

¹³⁶⁰ For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

¹³⁶¹ Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces’ use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which range in severity, have also been documented in other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See United Nations Environment Programme Colombia, “UN Environment will support environmental recovery and peacebuilding for post-conflict development in Colombia”, available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 8 July 2019); United Nations Environment Programme, “Post-conflict environmental assessment of the Democratic Republic of the Congo”, available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 8 July 2019); United Nations Environment Programme, “Post-conflict environmental assessment, clean-up and reconstruction in Iraq”, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 8 July 2019); “Lebanon Environmental Assessment of the Syrian Conflict” (supported by UNDP and EU), available at www.undp.org/content/dam/lebanon/docs/Energy%20and%20Environment/Publications/EASC-WEB.pdf (accessed on 8 July 2019). See also International Law and Policy Institute, “Protection of the natural environment in armed conflict: an empirical study” (Oslo, 2014), pp. 34–40.

¹³⁶² See C. Bell, “Women and peace processes, negotiations, and agreements: operational opportunities and challenges”, Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at <http://noref.no> under “Publications”, p. 1.

¹³⁶³ Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the National Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP), (Bogotá, 24 November 2016), available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y->

peace process or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.¹³⁶⁴ The present draft principle aims to encourage parties to consider including such provisions in the agreements.

(8) Paragraph 2 aims to encourage relevant international organizations to take environmental considerations into account when they act as facilitators in peace processes. The wording of the paragraph is intended to be broad enough to cover situations where Chapter VII resolutions of the United Nations Security Council have been passed, as well as situations where relevant international organizations play a facilitating role at the consent of the relevant State or parties to an armed conflict in question.

(9) Paragraph 2 refers to “relevant international organizations” to signal that not all organizations are suited to address this particular issue. The organizations that are envisioned as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs in particular, as well as the African Union, the European Union and the Organization of American States.¹³⁶⁵ The draft principle also

conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf (in Spanish) and at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> (in English) (accessed on 5 August, 2019); Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord’s Resistance Army/Movement (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf (accessed on 5 August 2019), para. 14.6; Darfur Peace Agreement (Abuja, 5 May 2006), available from <http://peacemaker.un.org/node/535> (accessed on 5 August 2019), chap. 2, at p. 21, art. 17, para. 107 (g) and (h), and at p. 30, art. 20; Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from <http://peacemaker.un.org/drc-suncity-agreement2003> (accessed on 5 August 2019), resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (Machakos, 20 July 2002), available from <http://peacemaker.un.org/node/1369> (accessed on 5 August 2019), chap. V, p. 71 and chap. III, p. 45, which set out as guiding principles that “the best known practices in the sustainable utilization and control of natural resources shall be followed” (para. 1.10) — further regulations on oil resources are found in paras. 3.1.1 and 4; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from <http://peacemaker.un.org/node/1207> (accessed on 5 August 2019), Additional Protocol III, at p. 62, art. 12, para. 3 (e), and Additional Protocol IV, at p. 81, art. 8 (h); Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), available from <https://peacemaker.un.org/sierraleone-lome-agreement99> (accessed on 5 August 2019), S/1999/777, annex, art. VII; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (Paris, 18 March 1999), S/1999/648, annex; Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864, annex, chap. II.

¹³⁶⁴ Chapultepec Agreement, chap. II. Further regulations are found in art. 13 contained in annex II to the Peace Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to “be responsible for preventing and combating crimes and misdemeanours against the environment”. The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, at p. 62, art. 12, para. 3 (e), and at p. 81, art. 8 (h), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is “[t]o detect as early as possible any threat to the country’s ecological environment”. Furthermore, it states that “[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country’s water system through protection of forests”.

¹³⁶⁵ The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia* the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also played a facilitating role in the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, Comoros, Côte d’Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, “The African Union’s role in promoting peace, security and stability: from reaction to

includes the words “where appropriate” to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties.

Principle 24
Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.
2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

- (1) Draft principle 24 refers generally to “States”, as this term is broader than “parties to an armed conflict”. States not parties to an armed conflict may be affected as third States, and may have relevant information useful for the taking of remedial measures that could usefully be provided to other States or international organizations. This obligation applies to States, even though non-State actors are addressed in other draft principles, and the set of draft principles covers both international and non-international armed conflicts.
- (2) While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier “relevant”. The specific term “national defence” applies only to States. For some international organizations, confidentiality requirements may also affect the extent of information that they can share or grant access to in good faith.¹³⁶⁶
- (3) Draft principle 24 consists of two paragraphs. Paragraph 1 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict. Paragraph 2 refers to security considerations to which such access may be subject.
- (4) The expression “in accordance with their obligations under international law” reflects that treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict,¹³⁶⁷ such as, for instance, keeping a record of the placement of landmines. Obligations to grant access to and/or share information which provide protection for the environment in relation to armed conflicts have been listed above. Also relevant is paragraph 2 of article 9 on “Recording and use of information on minefields, mined areas, mines, booby-traps and other devices” of Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on “Recording, retaining and transmission of information” of Protocol V to the Convention on Certain Conventional Weapons.

prevention?”, meeting summary, available from www.chathamhouse.org, p. 3. The Organization of American States was involved in the peace process in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P.J. Meyer, “Organization of American States: background and issues for Congress” (Congressional Research Service, 2014), available at www.fas.org, p. 8. See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, “Mediation and facilitation in today’s peace processes: centrality of commitment, coordination and context”, presentation by Thomas Greminger, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under “Publications”.

¹³⁶⁶ Cf. e.g. UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015), available at www.refworld.org/pdfid/55643c1d4.pdf (accessed on 8 July 2019).

¹³⁶⁷ Additional Protocol I, art. 33; Geneva Convention I, art. 16; Geneva Convention II, arts. 19 and 42; Geneva Convention III, art. 23; Geneva Convention IV, art. 137.

(5) Furthermore, this expression reflects that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to “national defence and public security” or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.¹³⁶⁸

(6) While the term “share” refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term “granting access” refers primarily to allowing access to individuals for example to such information, and thus signifies a more unilateral relationship.

(7) The obligation to share and grant access to information pertaining to the environment can be found in numerous sources of international law, both at global and regional level.

(8) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,¹³⁶⁹ as well as in article 19 of the International Covenant on Civil and Political Rights.¹³⁷⁰ General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.¹³⁷¹

(9) A right to environmental information has also developed within the context of the European Convention on Human Rights as exemplified in the case of *Guerra and Others v. Italy*,¹³⁷² in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.¹³⁷³ In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).¹³⁷⁴

(10) Principle 10 of the 1992 Rio Declaration also provides that individuals shall have appropriate access to information, including on hazardous materials. The recently adopted Sustainable Development Goal 16 on peaceful and inclusive societies calls upon States to ensure public access to information concerning the environment and protect fundamental freedoms, in accordance with national legislation and international agreements.¹³⁷⁵

(11) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines “environmental information” as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements.¹³⁷⁶ Article 4 of the Aarhus Convention stipulates that State parties must “make such

¹³⁶⁸ See Aarhus Convention, art. 4, para. 4 (b); Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, art. 9, para. 3 (g). See also the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), article 5, paragraph 6 (b).

¹³⁶⁹ General Assembly resolution 217 (III) A of 10 December 1948.

¹³⁷⁰ New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

¹³⁷¹ Human Rights Committee, general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I), annex V, para. 18.

¹³⁷² *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

¹³⁷³ Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

¹³⁷⁴ *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

¹³⁷⁵ General Assembly resolution 70/1 of 25 September 2015.

¹³⁷⁶ Aarhus Convention, art. 2.

[environmental] information available to the public, within the framework of national legislation”. Such a right necessarily entails a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted on 4 March 2018, comprises similar provisions.

(12) The United Nations Framework Convention on Climate Change addresses access to information in its article 6, noting that the Parties shall “[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: ... public access to information on climate change and its effects”.¹³⁷⁷ In addition, the Cartagena Protocol on Biosafety to the Convention stipulates that Parties shall promote and facilitate access to information on living modified organisms.¹³⁷⁸ Both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,¹³⁷⁹ and the Stockholm Convention on Persistent Organic Pollutants¹³⁸⁰ contain provisions on access to information. Similarly, article 18 of the 2013 Minamata Convention on Mercury¹³⁸¹ stipulates that Parties shall “promote and facilitate” access to such information. The recently concluded Paris Agreement similarly addresses access to information in numerous paragraphs and articles, e.g. as part of the responsibility for States to provide intended nationally determined contributions in article 4, paragraph 8, of the Agreement, and more generally regarding climate change education and public access to information in article 12.¹³⁸²

(13) In accordance with the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Parties thereto shall make information on desertification “fully, openly and promptly available”.¹³⁸³ Similarly, the 2010 Bali Guidelines provide that “affordable, effective and timely access to environmental information held by public authorities upon request” should be ensured.¹³⁸⁴

(14) Within the particular regime of humanitarian demining and remnants of war, a number of instruments contain requirements on providing environmental information. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.¹³⁸⁵ Similarly, in connection to the destruction of cluster munitions, the “location of all destruction sites and the applicable safety and environmental standards” must be outlined.¹³⁸⁶ Similar obligations are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.¹³⁸⁷ Reference can also be made to the

¹³⁷⁷ United Nations Framework Convention on Climate Change (New York, 9 May 1992), *ibid.*, vol. 1771, No. 30882, p. 107.

¹³⁷⁸ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23.

¹³⁷⁹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15.

¹³⁸⁰ Stockholm Convention on Persistent Organic Pollutants, art. 10.

¹³⁸¹ Text available from <https://treaties.un.org> (*Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXVII.17).

¹³⁸² Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex.

¹³⁸³ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

¹³⁸⁴ United Nations Environment Programme, Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A, of 26 February 2010. Available from www.unep.org, under “Resources”.

¹³⁸⁵ Art. 4, para. 6 (*h*).

¹³⁸⁶ Art. 7 (transparency measures), para. 1 (*e*).

¹³⁸⁷ Art. 5.

International Mine Action Standard 10.70, which states, *inter alia*, that national mine action authorities should “promulgate information about significant environmental incidents to other demining organizations within the programme”.¹³⁸⁸

(15) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to “[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental issues”.¹³⁸⁹ The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(16) Moreover, the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations,¹³⁹⁰ which could include environmental organizations gathering environmental data as a means of “contributing to prevent or repair damage to the environment”.¹³⁹¹

(17) In connection with post-armed conflict environmental assessments, it is worth recalling that the United Nations Environment Programme guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as “natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner” in post-conflict contexts.¹³⁹²

(18) The obligation to *share information* and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.¹³⁹³ Moreover, the Convention on Biological Diversity contains a provision on exchange of information in its article 14, requiring that each Contracting Party shall, as far as possible and as appropriate, promote “notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate”.¹³⁹⁴ In addition, article 17 of the Convention calls upon the Parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(19) Previous work of the Commission of relevance to this aspect of the draft principle includes the articles on nationality of natural persons in relation to the succession of States (1999),¹³⁹⁵ the articles on prevention of transboundary harm from hazardous activities (2001),¹³⁹⁶ the principles on the allocation of loss in the case of transboundary harm arising

¹³⁸⁸ IMAS 10.70, 1 October 2007, “Safety and occupational health, protection of the environment”, para. 12.1 (a). Available from www.mineactionstandards.org.

¹³⁸⁹ United Nations, Department of Peacekeeping Operations and Department of Field Support, “Environmental Policy for UN Field Missions”, 2009, para. 23.5.

¹³⁹⁰ See ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 973 above), guideline 19, referring to Geneva Convention IV, art. 63, para. 2, and Additional Protocol I, arts. 61–67.

¹³⁹¹ It should be noted that guideline 19 refers to pursuant to special agreements between the parties concerned or permission granted by one of them.

¹³⁹² United Nations Environment Programme, Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments* (Geneva, 2009), available from http://postconflict.unep.ch/publications/environment_toolkit.pdf (accessed on 8 July 2019) (as referenced in para. 144 and footnote 237 of A/CN.4/700).

¹³⁹³ Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

¹³⁹⁴ Art. 14, para. 1 (c).

¹³⁹⁵ General Assembly resolution 55/153 of 12 December 2000, annex, art. 18. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

¹³⁹⁶ Arts. 8, 12–14 and 17.

out of hazardous activities (2006)¹³⁹⁷ and the articles on the law of transboundary aquifers (2008).¹³⁹⁸

(20) Paragraph 2 serves a similar purpose in the context of draft principle 24. The exception to the obligation set out under paragraph 1 concerns information vital to the national defence of a State or the security of a State or an international organization. This exception is not absolute. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the circumstances, through cooperation in good faith. Paragraph 2 is based on provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 31 of the Convention provides that a watercourse State is not obliged to provide data and information vital to its national defence or security, while noting that obligation to cooperate in good faith is still applicable. The articles on prevention of transboundary harm from hazardous activities¹³⁹⁹ and the articles on the law of transboundary aquifers¹⁴⁰⁰ contain a similar exception.

(21) Draft principle 24 is closely linked to the duty to cooperate, as well as draft principle 25 on post-armed conflict environmental assessments and remedial measures.

Principle 25

Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Commentary

(1) The purpose of draft principle 25 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations. The draft principle is closely linked to draft principle 8.

(2) The reference to “relevant actors” includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations and non-State actors, have a role to play in relation to environmental assessments and remedial measures. The phrase “are encouraged” is hortatory in nature and is to be seen as an acknowledgment of the scarcity of practice in this field.

(3) The term “environmental assessment” is distinct from an “environmental impact assessment”, which is typically undertaken *ex ante* as a preventive measure.¹⁴⁰¹ Such impact assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental, including health, effects, in a plan or programme.¹⁴⁰²

(4) It is in this context that a post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans in the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.¹⁴⁰³ A post-conflict environmental assessment is intended to meet

¹³⁹⁷ General Assembly resolution 61/36 of 4 December 2006, annex, principle 5. The draft principles and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67.

¹³⁹⁸ General Assembly resolution 63/124 of 11 December 2008, annex, arts. 8, 13, 15, 17 and 19. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

¹³⁹⁹ Art. 14.

¹⁴⁰⁰ Art. 19.

¹⁴⁰¹ See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

¹⁴⁰² Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf (accessed on 8 July 2019).

¹⁴⁰³ Post-crisis environmental assessment, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/preparedness-and-response/post-crisis-environmental (accessed on 8 July 2019).

various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.¹⁴⁰⁴ Such post-conflict environmental assessment, undertaken at the request of a State, may take the form of: (a) a needs assessment;¹⁴⁰⁵ (b) a quantitative risk assessment;¹⁴⁰⁶ (c) a strategic assessment;¹⁴⁰⁷ or (d) a comprehensive assessment.¹⁴⁰⁸ The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk study, field work, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that “conflicts often have environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services”.¹⁴⁰⁹

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to “further population displacement and socio-economic instability”, thereby “undermining recovery and reconstruction in post-conflict zones” and “triggering a vicious cycle”.¹⁴¹⁰

(6) In order to align the text with other draft principles, in particular draft principle 2, the term “remedial” is used in the present principle even though “recovery” has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the concerned State’s development plans.¹⁴¹¹ The term “remedial measures” has a more limited remit than “recovery”.

Principle 26 **Relief and assistance**

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

¹⁴⁰⁴ D. Jensen, “Evaluating the impact of UNEP’s post conflict environmental assessments”, *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, Jensen and S. Lonergan (eds.). Available at https://environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_061.pdf (accessed on 8 July 2019), p. 18.

¹⁴⁰⁵ A needs assessment and desk study can be done during or after a conflict, based on a collection pre-existing secondary information on environmental trends and natural resource management, challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs. *Ibid.*, pp. 18–19.

¹⁴⁰⁶ A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure. *Ibid.*, pp. 19–20.

¹⁴⁰⁷ A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration. *Ibid.*, p. 20.

¹⁴⁰⁸ A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium, and long term. *Ibid.*, p. 20.

¹⁴⁰⁹ DAC Network on Environment and Development Cooperation (ENVIRONET), “Strategic environment assessment and post-conflict development SEA toolkit” (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf (accessed on 8 July 2019).

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ United Nations Environment Programme, “Disasters and Conflicts Programme”, p. 3. Available at www.un.org/en/events/environmentconflictday/pdf/UNEP_conflict_and_disaster_brochure.pdf (accessed on 8 July 2019).

Commentary

(1) The purpose of draft principle 26 is to encourage States to take appropriate measures aimed at repairing and compensating environmental damage caused during armed conflict. More specifically, it addresses relief and assistance in situations where the source of environmental damage is unidentified or reparation is not available. Such a situation may arise because of different reasons. The particular features of environmental damage may complicate the establishment of responsibility: the damage may result from a chain of events rather than from a single act, and extend over the course of many years, which makes it difficult to establish a causal link to specific acts.¹⁴¹² The presence of multiple State and non-State actors in contemporary conflicts may further complicate the allocation of responsibility.¹⁴¹³ Environmental damage in armed conflict may moreover result from lawful activities,¹⁴¹⁴ and there may be no means of establishing the responsibility and claiming reparation.¹⁴¹⁵

(2) It is furthermore not uncommon that States and international organizations use *ex gratia* payments to make amends for wartime injury and damage without acknowledging

¹⁴¹² “First, the distance separating the source from the place of damage may be dozens or even hundreds of miles, creating doubts about the causal link even where polluting activities can be identified.”; “Second, the noxious effects of a pollutant may not be felt until years or decades after the act.”; “Third, some types of damage occur only if the pollution continues over time”; and “Fourth, the same pollutant does not always produce the same detrimental effects due to important variations in physical circumstances.” A.C. Kiss and D. Shelton, *Guide to International Environmental Law* (Leiden, Martinus Nijhoff, 2007), pp. 20–21. See also P.-M. Dupuy, “L’État et la réparation des dommages catastrophiques”, in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Boston, Graham and Trotman, 1991), pp. 125–147, p. 141, who describes the inherent characteristics of ecological damage as follows: “au-delà de ses incidences immédiates et souvent spectaculaires, il pourra aussi être diffus, parfois différé, cumulatif, indirect” [beyond its immediate and often spectacular consequences, it could also be pervasive, sometimes deferred, cumulative, indirect]. See also C.R. Payne, “Developments in the law of environmental reparations. A case study of the UN Compensation Commission”, in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace* (footnote 1180 above), pp. 329–366, p. 353. For the definition of environmental harm, see Sands, *Principles of International Environmental Law* (footnote 1172 above), pp. 741–748.

¹⁴¹³ See ICRC, “International humanitarian law and the challenges of contemporary armed conflicts”, document prepared for the 32nd International Conference of the Red Cross and Red Crescent (2015), *International Review of the Red Cross*, vol. 97 (2015), pp. 1427–1502, at pp. 1431–1432.

¹⁴¹⁴ This would arguably be the case with most environmental harm in conflict, given that the specific prohibitions in the law of armed conflict “do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance”, as pointed out by C.R. Payne, “The norm of environmental integrity in post-conflict legal regimes”, in C. Stahn, J.S. Easterday and J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford, Oxford University Press, 2014), pp. 502–518, at p. 511. See draft principle 14 and para. (8) of the commentary thereto above.

¹⁴¹⁵ For the history of wartime reparations, see P. d’Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des États à l’épreuve de la guerre* (Brussels, Bruylant, 2002). See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3651: “On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit.” The United Nations Compensation Commission’s experience was groundbreaking in the area of reparations for wartime environmental harm (see footnote 1091 above). The other relevant international instances of either addressing wartime environmental damage or having the potential to do so include: the Eritrea-Ethiopia Claims Commission that was established in 2000 (see Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers, 18 June 2000), United Nations, *Treaty Series*, vol. 2138, No. 37273, p. 85, and Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (Algiers, 12 December 2000), *ibid.*, No. 37274, p. 93); and the 2004 Advisory Opinion of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territories, see *Legal Consequences of the Construction of a Wall* (footnote 1274 above), p. 189, para. 131, and p. 192, para. 136. See also *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 257, para. 259.

responsibility, and possibly also excluding further liability. Such payments serve different purposes and may be available for damage and injury caused by lawful action.¹⁴¹⁶ In most cases, amends are paid for civilian injury or death, or damage to civilian property, but they may also entail remediation of harm to the environment. Victims assistance is a broader and more recent concept used in relation to armed conflicts – but also in other contexts – to respond to harm caused to individuals or communities, *inter alia* by military activities.¹⁴¹⁷

(3) An example of environmental remediation in a situation in which the establishment or implementation of State responsibility is not possible is provided by the assistance to Lebanon following the bombing of the Jiyeh power plant in 2006. After the strike on the power plant on the Lebanese coast by Israeli Armed Forces, an estimated 15,000 tons of oil were released into the Mediterranean Sea.¹⁴¹⁸ Following requests for assistance from the Government of Lebanon, the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea provided remote and on-site technical assistance in the cleanup. Assistance was provided pursuant to the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, one of protocols to the Barcelona Convention.¹⁴¹⁹ The amends related to the use of Agent Orange (a herbicide containing the toxic substance dioxin), by the United States in the Viet Nam War provide an example of *ex gratia* response to environmental and health effects of armed conflict.¹⁴²⁰

(4) The term “reparation” is used in the draft principle as a general notion that covers different forms of reparation for an internationally wrongful act.¹⁴²¹ The context, however, is one in which reparation is unavailable, including where there has been no wrongful act. The term “unrepaired” similarly refers to the lack of any reparative measures, while “uncompensated” refers specifically to the lack of monetary compensation. These terms define the specific circumstances in which States are encouraged to take appropriate measures of relief and assistance. Such measures may include establishment of a compensation fund.¹⁴²² The terms “relief” and “assistance” should also be read as including

¹⁴¹⁶ University of Amsterdam and Center for Civilians in Conflict, “Monetary payments for civilian harm in international and national practice” (2015). See also United States, Government Accountability Office, “Military operations. The Department of Defense’s use of solatia and condolence payments in Iraq and Afghanistan”, Report, May 2007; and W.M. Reisman, “Compensating collateral damage in elective international conflict”, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.

¹⁴¹⁷ See, e.g., Handicap International, “Victim Assistance in the context of mines and explosive remnants of war”, Handicap International (July 2014). Available at https://handicap-international.ch/files/documents/files/assistance-victimes-mines-reg_anglais.pdf (accessed on 8 July 2019). See also International Human Rights Clinic, Harvard Law School, “Environmental remediation under the treaty on the prohibition of nuclear weapons” (April 2018). Available at <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf> (accessed on 8 July 2019). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex. Principle 9 states that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted”.

¹⁴¹⁸ United Nations Environment Programme, *Lebanon Post-Conflict Environmental Assessment* (2007), pp. 42–45. Available at https://postconflict.unep.ch/publications/UNEP_Lebanon.pdf (accessed on 8 July 2019). See also Office for the Coordination of Humanitarian Affairs, “Environmental emergency response to the Lebanon crisis”. Available at www.unocha.org/sites/dms/Documents/Report_on_response_to_the_Lebanon_Crisis.pdf (accessed on 8 July 2019).

¹⁴¹⁹ Protocol concerning Cooperation in Preventing Pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valetta, 25 January 2002), United Nations, *Treaty Series*, vol. 2942, annex A, No. 16908, p. 87.

¹⁴²⁰ See United States, Congressional Research Service, “U.S. Agent Orange/Dioxin Assistance to Vietnam” (updated on 21 February 2019). Available at <https://fas.org/sgp/crs/row/R44268.pdf> (accessed on 8 July 2019).

¹⁴²¹ Art. 34 and commentary thereto of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 95–96.

¹⁴²² Draft principle 26 has been modelled after article 12 on “Collective reparation” of the Institute of International Law resolution on responsibility and liability under international law for environmental

remedial measures in the sense in which the term has been used in the present draft principles, encompassing any measure of remediation that may be taken to restore the environment.¹⁴²³

(5) Draft principle 26 is closely linked to draft principle 25 on “Post-armed conflict environmental assessments and remedial measures” as well as to draft principle 24 on “Sharing and granting access to information”. All three draft principles address situations in which damage has been caused to the environment in relation to an armed conflict, and they all refer generally to “States” rather than the parties to a conflict. Unlike draft principles 24 and 25, however, the present draft principle, which has a specific focus on relief and assistance provided by States, makes no express reference to international organizations. It is nevertheless understood that States may channel such relief and assistance through international organizations.

(6) Draft principle 26 has been located in Part Five containing draft principles applicable after an armed conflict. While it was recognized that it could be preferable to take measures to address environmental damage already during an armed conflict, given that environmental damage accumulates and restoration becomes more challenging with time, the draft principle was seen as primarily relevant in post-armed conflict situations.

Principle 27 **Remnants of war**

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Commentary

(1) Draft principle 27 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic and hazardous remnants of war that are causing or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic and hazardous remnants of war on land, as

damage from 1997 reading as follows: “Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary”. International Law Institute, resolution on “Responsibility and liability under international law for environmental damage”, *Yearbook*, vol. 67, Part II, Session of Strasbourg (1997), p. 486, at p. 499.

¹⁴²³ See para. (3) of the commentary to draft principle 2 above. See also para. (6) of the commentary to draft principle 25 above. See further S. Hanamoto, “Mitigation and remediation of environmental damage”, in Y. Aguila and J. Vinuales (eds.), *A Global Pact for the Environment – Legal Foundations* (Cambridge, Cambridge University Press, 2019), p. 79: “Mitigation and remediation of environmental damage aim at ‘avoid[ing], reduc[ing] and, if possible, remedy[ing] significant adverse effects’ (Article 5(3)(b), Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment to the environment). More precisely, ‘[m]itigation is the use of practice, procedure or technology to minimise or to prevent impacts associated with proposed activities’ and ‘[r]emediation consists of the steps taken after impacts have occurred to promote, as much as possible, the return of the environment to its original condition’ (Antarctic Treaty Consultative Meeting, Revised Guidelines for Environmental Impact Assessment in Antarctica, 3.5, 2016).”

well as those which have been placed or dumped at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.¹⁴²⁴ In other words, removing the remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words “or render harmless”, to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to “seek to” is one of conduct and relates to “toxic and hazardous remnants of war” that “are causing or risk causing damage to the environment”. The terms “toxic” and “hazardous” are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms here.¹⁴²⁵ The term “hazardous” is somewhat wider than the term “toxic”, in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term “toxic remnants of war” does not have a definition under international law, but has been used to describe “any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems”.¹⁴²⁶

(4) The reference to “jurisdiction or control” is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term “jurisdiction” is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.¹⁴²⁷ The term “control” is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.¹⁴²⁸ It therefore “refers to the factual capacity of effective control over activities outside the jurisdiction of a State”.¹⁴²⁹

¹⁴²⁴ For example, this is often the case with chemical weapons that have been dumped at sea. See T.A. Mensah, “Environmental damages under the Law of the Sea Convention”, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch (eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea (accessed on 8 July 2019). See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at www.helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions (accessed on 8 July 2019).

¹⁴²⁵ See, for more information, ICRC, “Strengthening legal protection for victims of armed conflicts”, report prepared for the Thirty-first International Conference of the Red Cross and Red Crescent in 2011, No. 31IC/11/5.1.1.3, p. 18.

¹⁴²⁶ See M. Ghalaieny, “Toxic harm: humanitarian and environmental concerns from military-origin contamination”, discussion paper (Toxic Remnants of War project, 2013), p. 2. See also www.toxicremnantsofwar.info/new-trw-publication-toxic-harm-humanitarian-and-environmental-concerns-from-military-origin-contamination/ (accessed on 8 July 2019). For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org under “Glossary”, which cites ICRC, “Strengthening legal protection for victims of armed conflicts”, p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly as its sixty-eighth session, which are available from the paper-smart portal at <http://papersmart.unmeetings.org>.

¹⁴²⁷ See para. (9) of the commentary to art. 1 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 151. See also General Assembly resolution 62/68 of 6 December 2007, annex.

¹⁴²⁸ Para. (12) of the commentary to art. 1, *ibid.*

¹⁴²⁹ *A/CN.4/692*, para. 33. Concerning the concept of “control”, see *Namibia, Advisory Opinion* (footnote 1322 above), at p. 54, para. 118, where it states that: “The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this

(5) The present draft principle is intended to apply to international as well as non-international armed conflicts. For this reason, paragraph 1 addresses “parties to a conflict”. The phrase “party to a conflict” has been used in various provisions of law of armed conflict treaties in the context of remnants of war.¹⁴³⁰ It was considered appropriate to use the term in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

(6) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. It should be noted that paragraph 2 does not aim to place any new international law obligations on parties to cooperate. However, it is foreseeable that there may be situations where an armed conflict has taken place and a party is not in a position to ensure that toxic and hazardous remnants of war are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(7) Paragraph 3 contains a without prejudice clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations prevail. There are various laws of armed conflict treaties that regulate remnants of war, and different States thus have varying obligations relating to remnants of war.¹⁴³¹

(8) The words “clear, remove, destroy or maintain”, as well as the specific remnants of war listed, namely “minefields, mined areas, mines, booby-traps, explosive ordnance and other devices”, were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.¹⁴³²

(9) It should be noted that the draft principle does not directly deal with the issue of responsibility or reparation for victims on purpose. This is because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict, at least in the sense that certain treaties identify who should take action.¹⁴³³ The draft principle is without prejudice to the allocation of responsibility and questions of compensation.

Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”

¹⁴³⁰ See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (hereinafter, “Protocol V to the Convention on Certain Conventional Weapons”) (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100.

¹⁴³¹ See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211; Convention on Cluster Munitions (Dublin, 30 May 2008), *ibid.*, vol. 2688, No. 47713, p. 39; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

¹⁴³² See the wording of the amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions.

¹⁴³³ See, e.g., art. 3, para. 2, of the amended Protocol II Convention on Certain Conventional Weapons: “Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.” Art. 10, para. 2, in turn provides that: “High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.” In addition, art. 3, para. 2, of Protocol V to the Convention on Certain Conventional Weapons provides that: “After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of

Principle 28
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Commentary

(1) Unlike the broader draft principle 27, which deals with remnants of war more generally, draft principle 28 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 28 has added value as draft principle 27 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not wide enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.¹⁴³⁴

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.¹⁴³⁵ It is therefore not surprising that remnants of war at sea pose significant legal challenges.¹⁴³⁶ For example, the parties to the armed conflict may have ceased to exist; the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment; or the coastal State may not have been a party to the conflict, but the cooperation of that State may still be needed in efforts to get rid of remnants. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened but these remnants now pose environmental risk.

(3) Accordingly, draft principle 28 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,¹⁴³⁷ to cooperate to ensure that remnants of war at sea do not constitute a danger to the environment. The reference to “international organizations” is qualified with the word “relevant”, in the light of the fact that the issues involved tend to be specialized.

war in affected territories under its control”; Convention on Cluster Munitions, art. 4, para. 1: “Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control”; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 5, para. 1: “Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control”.

¹⁴³⁴ The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical weapons dumped at sea and invites the Secretary-General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

¹⁴³⁵ See 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. The remnants of war could be located in the territorial waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

¹⁴³⁶ See A. Lott, “Pollution of the marine environment by dumping: legal framework applicable to dumped chemical weapons and nuclear waste in the Arctic Ocean”, *Nordic Environmental Law Journal*, vol. 1 (2015), pp. 57–69, and W. Searle and D. Moody, “Explosive Remnants of War at Sea: Technical Aspects of Disposal”, in *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

¹⁴³⁷ For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 1424 above).

(4) The words “should cooperate” rather than the more prescriptive “shall cooperate” were considered appropriate, given that this is an area where practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.¹⁴³⁸ Dangers posed to the environment by remnants of war at sea could have significant collateral damage to human health and safety, especially of seafarers and fishermen.¹⁴³⁹ The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage the cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger.¹⁴⁴⁰

(7) Draft principle 28 intentionally does not deal with any issues concerning the allocation of responsibility or compensation for damages regarding remnants of war at sea. Determining which party has the primary obligation to ensure that remnants of war at sea do not pose environmental risks is a very complex and delicate issue to define, especially considering the varied legal nature of the law of the sea, ranging from internal waters to the high seas.

¹⁴³⁸ See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and [A/68/258](#). See also Mensah, “Environmental damages under the Law of the Sea Convention”, p. 233.

¹⁴³⁹ The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview, see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/ (accessed on 8 July 2019).

¹⁴⁴⁰ There is a clear link between danger to the environment and public health and safety. See, for example, article 55, paragraph 1, of Additional Protocol I provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that adverse effects on the environment include: “effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.

Chapter VII

Succession of States in respect of State responsibility

A. Introduction

72. 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.¹⁴⁴¹ The General Assembly subsequently, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

73. At the same session, the Commission considered the first report of the Special Rapporteur (A/CN.4/708), which set out the Special Rapporteur’s approach to the scope and outcome of the topic, and provided an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the first report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft articles 1 and 2, provisionally adopted by the Committee, which was presented to the Commission for information only.¹⁴⁴²

74. At its seventieth session (2018), the Commission considered the second report of the Special Rapporteur (A/CN.4/719), which addressed the legality of succession, the general rules on succession of States in respect of State responsibility, and certain special categories of State succession to the obligations arising from responsibility. Following the debate in plenary, the Commission decided to refer draft articles 5 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft article 1, paragraph 2, and draft articles 5 and 6, provisionally adopted by the Committee, which was presented to the Commission for information only.¹⁴⁴³

B. Consideration of the topic at the present session

75. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/731). The Commission also had before it a memorandum by the Secretariat providing information on treaties which may be of relevance to its future work on the topic (A/CN.4/730).

76. In his third report, which is composed of four parts, the Special Rapporteur first addressed introductory issues, including certain general considerations (Part One). Thereafter, the Special Rapporteur discussed questions of reparation for injury resulting from internationally wrongful acts committed against the predecessor State, considering, in particular, claims for reparation in different categories of State succession, as well as various approaches to reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State (Part Two). Further, the Special Rapporteur made technical proposals in relation to the scheme of the draft articles (Part Three). The future programme of work on the topic was then addressed (Part Four). The Special Rapporteur proposed several new draft articles (draft articles 2, paragraph (f), X, Y, 12, 13,

¹⁴⁴¹ At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*).

¹⁴⁴² The interim report of the Chair of the Drafting Committee is available in the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/3_5.shtml.

¹⁴⁴³ *Ibid.*

14 and 15) and suggested that the draft articles be organized into three parts (Parts One, Two and Three) with proposed titles for Parts Two and Three.¹⁴⁴⁴

¹⁴⁴⁴ The text of draft articles 2, paragraph (f), X, Y, 12, 13, 14 and 15, and the titles of Part II and Part III, as proposed by the Special Rapporteur in his third report, reads as follows:

Draft article 2

Use of terms

For the purposes of the present draft articles: ...

(f) “States concerned” means, in respect of a case of succession of States, a State which before the date of succession of States committed an internationally wrongful act, a State injured by such act and a successor State or States of any of these States; ...

Title for Part II – Reparation for injury resulting from internationally acts committed by the predecessor State

Draft article X

Scope of Part II

The provisions of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States.

Title for Part III – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

Draft article Y

Scope of the present Part

The articles in the present Part apply to reparation for injury resulting from internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation before the date of succession of States.

Draft article 12

Cases of succession of States when the predecessor State continues to exist

1. In the cases of succession of States:

(a) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or

(b) when a part or parts of the territory of a State separate to form one or more States, while the predecessor State continues to exist; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

the predecessor State injured by an internationally wrongful act of another State may request from this State reparation even after the date of succession of States.

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and successor State.

Draft article 13

Uniting of States

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.

2. Paragraph 1 applies unless the States concerned otherwise agree.

Draft article 14

Dissolution of States

1. When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor States may request reparation from the responsible State.

2. Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.

77. The Commission considered the third report of the Special Rapporteur at its 3475th to 3480th meetings, from 8 to 15 July 2019. At its 3480th meeting, on 15 July 2019, the Commission decided to refer draft articles 2, paragraph (f), X, Y, 12, 13, 14 and 15, and the titles of Part Two and Part Three, as contained in the third report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the plenary debate.

78. At its 3489th meeting, on 24 July 2019, the Commission considered a first report of the Drafting Committee on the topic¹⁴⁴⁵ and provisionally adopted draft articles 1, 2 and 5, which had been provisionally adopted by the Drafting Committee at the sixty-ninth and seventieth sessions (see section C.1 below).

79. At its 3495th meeting, on 31 July 2019, the Chair of the Drafting Committee presented an interim report on draft articles 7, 8 and 9, provisionally adopted by the Committee at the present session. The report was presented for information only and is available on the website of the Commission.¹⁴⁴⁶ The Commission took note of the draft articles as presented by the Drafting Committee.

80. At its 3507th meeting, on 9 August 2019, the Commission adopted the commentaries to draft articles 1, 2 and 5 provisionally adopted at the present session (see section C.2 below).

1. Introduction by the Special Rapporteur of the third report

81. The Special Rapporteur indicated that Part One of his third report recalled the work of the Commission on the topic so far and the summary of the debate in the Sixth Committee of the General Assembly. Reiterating that he was attentive to comments made in the Commission and in the Sixth Committee, the Special Rapporteur stressed that he was open to suggestions regarding his proposals. The report aimed to follow the programme of work, as previously outlined, without undue haste. Apart from one new definition and two provisions on the scheme of the draft articles, only four new substantive draft articles were proposed. Further, the report clarified the Special Rapporteur's approach to the topic, which excluded both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States. As to the fact that complex situations may occur when a claim for reparation is invoked by the predecessor State and one or more successor States, the Special Rapporteur indicated that this issue will be addressed in his fourth report. He also considered it useful to state expressly that the draft articles only covered situations when injury was not made good by reparation before the date of succession of States and he proposed draft articles X and Y to that effect.

82. Part Two of the report, dealing with reparation for injury resulting from internationally wrongful acts committed against the predecessor State, addressed the so-called "passive" aspect of State responsibility where succession of States occurs in relation to the injured State. Unlike the resolution of the Institute of International Law on succession of States in matters of international responsibility, the Special Rapporteur proposed analysing the possible transfer of rights separately from that of obligations, taking into account that an

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

Draft article 15 Diplomatic protection

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.

3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

¹⁴⁴⁵ The report and the corresponding statement of the Chair of the Drafting Committee are available in the analytical guide to the work of the International Law Commission (see footnote 1442 above).

¹⁴⁴⁶ *Ibid.*

important difference between the question of succession to the right to reparation, on one hand, and the question of succession to obligations arising from State responsibility, on the other hand, was that the right to reparation was a consequence of the internationally wrongful act of the responsible State which remained unaffected by the territorial changes giving rise to the succession of States.

83. In addition, the Special Rapporteur distinguished between situations when the predecessor State continued to exist after the date of succession and when 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. Such claim was based on the rules governing the responsibility of States for internationally wrongful acts. However, that did not answer all questions that could arise when the injury primarily or exclusively affected part of the territory which became part of the successor State. In situations such as decolonization, separation or transfer of territory, when the injury affected persons who subsequently became nationals of the successor State, the Special Rapporteur considered it unlikely that the predecessor State could still claim reparation after the date of succession. In contrast, according to the prevailing opinion in doctrine, when the predecessor State ceased to exist, the right to reparation did not devolve from the predecessor State to the successor State. The Special Rapporteur cautioned, however, against the discriminatory treatment of States when continuity was disputed, considering that the distinction made between cases of dissolution and separation of a State was often based on broader political considerations rather than objective criteria. Moreover, the idea of a “personal” right to claim reparation belonging only to the predecessor State seemed to reflect a traditional positivist doctrine, which viewed State responsibility as closely linked to legal personality, and not as a body of secondary rights and obligations.

84. Further, the report provided an analysis of claims for reparation in different categories of succession of States based on State practice, mainly agreements and decisions of international courts and tribunals, which was narrow in scope due to the limited number of cases of succession of States. Draft articles 12 to 14 were informed by the above considerations, and based on the distinction between situations when the predecessor State continued to exist and when the predecessor State ceased to exist. The Special Rapporteur underlined that the expression “may request” used in those draft articles would rebut any allegation of automatic succession and simply reflected the idea that a successor State is able to present a claim or request for reparation. Such an approach was in accordance with the priority generally given to agreements followed by the Commission in this topic. Further, draft article 14, paragraph 2, recalled that any claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors, which could include the principle of unjust enrichment.

85. The report also addressed the possible succession to the right to reparation in cases where an internationally wrongful act was committed against nationals of the predecessor State, on the basis of an analysis of more extensive State practice, including agreements and the practice of international courts and tribunals and of the United Nations Compensation Commission. It revealed that a claim for reparation by the successor State was not purely theoretical or rare, nor did it concern only inter-State relations. Instead, there were important practical consequences for the effective exercise of diplomatic protection by States in cases of injury suffered before the date of succession by individuals who subsequently became their nationals. The Special Rapporteur further observed that, in modern practice and doctrine, a change of nationality resulting from succession of States was largely accepted as an exception to the traditional rule of continuous nationality. Draft article 15 was therefore proposed to that effect. The Special Rapporteur noted that this proposal was consistent with the articles on diplomatic protection in particular.¹⁴⁴⁷ Draft article 15, paragraph 1, recognized that the successor State may exercise diplomatic protection under special circumstances, while paragraph 2 provided that, under the same conditions, a claim in exercise of diplomatic

¹⁴⁴⁷ General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.

protection initiated by the predecessor State may be continued after the date of succession by the successor State. Draft article 15, paragraph 3, clarified that paragraphs 1 and 2 were without prejudice to the application of the rules of State responsibility relating to the nationality of claims and the rules of diplomatic protection.

86. Part Three of the report focused on the scheme of the draft articles presented so far. The Special Rapporteur considered it useful to organize them into three parts and to include two draft articles to address the respective scopes of Parts Two and Three, namely draft articles X and Y. In relation to draft article 2 on “Use of terms”, a new paragraph (*f*) was proposed to define the term “States concerned”, which was often referred to in the draft articles and had a special meaning in the context of succession of States.

87. Regarding the future programme of work, the Special Rapporteur indicated that his fourth report would focus on forms and invocation of responsibility in the context of succession of States and also address procedural and miscellaneous issues, including problems arising in situations where there are several successor States and the issue of shared responsibility. It was hoped that the topic could be completed on first reading in 2020 or 2021.

2. Summary of the debate

(a) General comments

88. Members of the Commission generally welcomed the third report of the Special Rapporteur and expressed appreciation for the memorandum prepared by the Secretariat.

89. Regarding the methodology of the report, several members commended the Special Rapporteur’s survey of relevant State practice, jurisprudence and doctrine, while others called for a closer analysis of such sources. Caution was expressed against over-reliance on academic literature and the work of the Institute of International Law. Members agreed with the Special Rapporteur’s assessment that State practice was diverse, context-specific, and sensitive. Some members also recalled that the scarcity of State practice had been highlighted during the debate in the Sixth Committee, and emphasized the need to take into account more geographically diverse sources of State practice. A number of members also observed that special agreements or *ex gratia* payments by States were often a result of political or other non-legal considerations. Most of these cases did not evidence an *opinio juris* regarding a general rule in connection with State succession, but constituted context-specific arrangements.

90. Members agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned. It was suggested that the important role of agreements should be addressed in greater detail. Further, according to some members, the relationship between a lump sum agreement concluded before the date of succession of States and the principle of full reparation should be discussed. In this regard, the view was expressed that the existence of a lump sum agreement did not necessarily indicate full reparation, since there were examples of decisions by national courts allowing claims for reparation despite the existence of a previous lump sum agreement.

91. Several members emphasized the general rule of non-succession with some exceptions. While some members supported the flexible approach of the Special Rapporteur, others underlined the need to clarify whether such an approach would deviate from the general rule of non-succession. It was suggested that the Commission could acknowledge the limited State practice in this area at the outset of its commentary or approach the project as an effort to develop a new convention, which would be subject to support from States. It was proposed that the Commission expressly indicate that it was engaging in progressive development of international law when proposing draft articles, taking best practices into account, including considering that *lex ferenda* should be based on solid grounds and not on policy preferences. Moreover, the view was expressed that the work of the Commission was not adjudicatory in nature and should not seek to resolve pending disputes between States, and thus the proposed rules should be of general application.

92. The importance of maintaining consistency, in terminology and substance, with the previous work of the Commission was reiterated. It was recalled that different views had

been expressed in the Sixth Committee regarding the extent to which provisions in the 1978 Vienna Convention on Succession of States in Respect of Treaties¹⁴⁴⁸ and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,¹⁴⁴⁹ such as those concerning newly independent States, should be replicated. It was also stressed that the proposed draft articles should be compatible with the articles on responsibility of States for internationally wrongful acts¹⁴⁵⁰ and the articles on diplomatic protection.

93. Several members suggested changing the title of the topic to “State responsibility problems/aspects in cases of succession of States”, as suggested in the Sixth Committee, or to “Succession of States in matters of international responsibility”, as used by the Institute of International Law. An alternative title proposed was “Reparation for injury arising from internationally wrongful acts in State succession”. Several other members indicated their preference for retaining the current title of the topic.

(b) Scheme of the draft articles

94. Support was voiced for the Special Rapporteur’s proposal to organize the draft articles in parts, as well as to include draft articles X and Y indicating the scope of each part. Another proposal was made to organize the draft articles according to specific categories of succession of States and to address the possible transfer of rights and obligations together in the same draft articles. In this regard, members debated whether issues concerning rights and claims arising from an internationally wrongful act could be treated separately from issues concerning obligations arising from such act. While several members reiterated concerns that it might lead to unnecessary duplication of work, the view was expressed that the right to reparation was an “acquired right” transferable from a predecessor State to a successor State, while the concept of “acquired obligations” was not recognized in legal doctrine.

95. Some members also agreed with the Special Rapporteur on the broad distinction between situations where the predecessor State continued to exist and where it ceased to exist, although it was questioned whether this distinction should be more nuanced. Concerning the specific categories of succession of States, some members supported the formulation of draft article 12 in which three categories of succession of States were merged, whereas others expressed doubts in this regard. A proposal was made to define such categories of succession in draft article 2 on “Use of terms”.

(c) Draft article 2 (f)

96. Some members questioned whether it was necessary to define the term “States concerned”, which might lead to confusion, and suggested that it would be sufficient to explain it in the commentary instead.

(d) Draft articles 12 to 14

97. While the overall approach to reparation in draft articles 12 to 14 was supported by some members, a number of other members considered that the expression “may request” was ambiguous. In this regard, various drafting proposals were made to distinguish the legal right to reparation from the procedural possibility of claiming reparation. Nonetheless, some members questioned the usefulness of recognizing procedural possibilities without identifying substantive rights and obligations. Different views were expressed as to whether the terms “reparation” or “compensation” should be used in those draft articles and whether the reference to “injury” was appropriate, in the light of the articles on responsibility of States for internationally wrongful acts.

¹⁴⁴⁸ Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, Treaty Series, vol. 1946, No. 33356, p. 3.

¹⁴⁴⁹ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983), United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.

¹⁴⁵⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

98. Several members considered that the principle of unjust enrichment could form the foundation for progressive development of international law in draft articles 12 to 14, although others questioned whether that would be appropriate or sufficient in the context of this topic. It was also noted that the concept of unjust enrichment fell outside the rules of State responsibility.

99. In relation to draft article 12, some members highlighted the need to clarify the meaning of “special circumstances” in paragraph 2. In this regard, the work of the Institute of International Law referred to “special circumstances” only in the specific context of a potential sharing of responsibility by both the predecessor and successor States as an exceptional solution. It was also suggested that reference be made to agreements between States in paragraph 2. Further, consistency was required with the phrase “particular circumstances” as previously proposed in draft articles 7 to 9. The wording of draft article 12, paragraph 2, seemed to be broader than the requirement of a “direct link” between the internationally wrongful act or its consequences and the territory or nationals of the successor State in draft articles 7 to 9. In contrast, draft article 14, paragraph 2, required a “nexus” between the consequences of an internationally wrongful act and the territory or nationals of the successor State. Moreover, it was noted that the term “nationals” might be too restrictive and could be replaced with “persons under the jurisdiction of the successor State”. At the same time, the question was raised whether a State newly independent as a result of the exercise of the right to self-determination could be considered as a successor injured State with direct rights. It was suggested that the commentary distinguish between the right of a successor State to claim reparation and the potential right of individuals to claim reparation without intervention by the State.

100. Some drafting proposals were also made regarding draft article 13. In this connection, reference was made to article 13 of the resolution adopted the Institute of International Law. It was suggested that cases of merger of States and cases of incorporation of a State into another existing State should be treated in separate draft articles. While draft article 13, paragraph 2, received support for reflecting the priority of any agreement between the States concerned, the view was expressed that it could be deleted.

101. As to draft article 14, it was proposed that paragraph 1 be redrafted to focus on the dissolution of a State without referring to separation of part of the State. The reference to agreements in draft article 14, paragraph 2, needed to be explained. It was opined that agreements between successor States should be considered as a priority over the other factors in paragraph 2. It was suggested that the term “nexus” in paragraph 2 should be clarified, and that the phrase “other relevant factors” raised similar questions in relation to equitable considerations such as unjust enrichment. A number of drafting suggestions regarding paragraph 3 were also made.

(e) Draft article 15

102. Several members concurred with the Special Rapporteur’s approach of allowing an exception to the principle of continuous nationality in cases of succession of States to avoid situations in which an individual lacked protection. In this regard, reference was made to the preamble of the articles on nationality of natural persons in relation to the succession of States,¹⁴⁵¹ stating that due account should be taken both of the legitimate interests of States and those of individuals. Some other members cautioned that the doctrine and practice in this area were not uniform. Some doubts were expressed as to whether issues of diplomatic protection should be addressed in this topic. The need to consider the comments of States in the Sixth Committee concerning the articles on diplomatic protection was stressed.

103. Some members observed that draft article 15 was consistent with article 5, paragraph 2, of the articles on diplomatic protection, as well as article 10, paragraph 1, of the resolution of the Institute of International Law. Nonetheless, it was underlined that the draft articles proposed by the Special Rapporteur should not conflict with the articles on diplomatic protection. Further analysis of their interaction was called for. It was proposed that draft

¹⁴⁵¹ General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

article 15, or its commentary, should include the safeguards stated in article 5, paragraphs 3 and 4, of the articles on diplomatic protection, which were intended to avoid abuses and prevent “nationality shopping” if the rule of continuous nationality was lifted.

104. Clarification was sought regarding the reference to “the corporation” in draft article 15, paragraph 1. In this connection, reference was made to article 10, paragraph 1, of the articles on diplomatic protection. It was also noted that draft article 15, paragraph 2, did not follow the approach of distinguishing between whether the predecessor State continued to exist or not. The view was expressed that draft article 15, paragraphs 1 and 2, should reflect the conditions for the exercise of diplomatic protection by predecessor and successor States. In addition, it was suggested that draft article 15, paragraph 3, or the commentary thereto, should explain that diplomatic protection was not the only recourse for the vindication of rights by individuals, who could not be deprived of the right to reparation due to territorial changes in all circumstances. Moreover, it was proposed that draft article 15 address the case of diplomatic protection on behalf of a person with dual nationality, one of the predecessor State and one of the successor State, in the light of the articles on diplomatic protection, which covered cases of multiple nationality. A proposal was made to expressly state that a successor State shall not use force for diplomatic protection, or at least to restate, in draft article 2 (use of terms), the definition of diplomatic protection as contained in article 1 of the articles on diplomatic protection.

(f) Final form

105. A number of members questioned whether draft articles were the most appropriate outcome for the topic, taking into account the comments by some States that preferred draft guidelines, principles, conclusions, model clauses, or an analytical report as alternatives. It was suggested that the Special Rapporteur consider making a recommendation on this issue in his next report.

(g) Future programme of work

106. Members generally agreed with the future programme of work proposed by the Special Rapporteur, while some cautioned that the Commission should not be hasty in its consideration of the topic. The Special Rapporteur was asked to clarify whether he would discuss specific forms of reparation in his fourth report. Suggestions were also made that the Special Rapporteur consider addressing the relationship between succession of States and State responsibility in relation to damage caused by crimes under international law, and the possible relevance of the topic of general principles of law, including principles of fairness.

3. Concluding remarks of the Special Rapporteur

107. The Special Rapporteur welcomed the prevailing sense of the debate, which focused on how to approach the topic in order to achieve a balanced and generally acceptable outcome.

108. Concerning the need to ensure consistency with the previous work of the Commission, the Special Rapporteur affirmed his readiness to resolve issues of terminology and substance in the Drafting Committee. The articles on responsibility of States for internationally wrongful acts continued to be the basis for the work on the topic, which aimed to clarify the legal consequences of an internationally wrongful act for a predecessor State or a successor State after the date of succession of States. In particular, the use of the terms “injury” and “injured State” in the proposed draft articles were intended to be consistent with Parts Two and Three of the articles on responsibility of States for internationally wrongful acts.

109. The Special Rapporteur agreed with members who expressed the view that the topic could and should include elements of progressive development of international law. This could be stated at the outset of the general commentary to the draft articles and, where necessary, in relation to specific provisions. Further, the work on the topic could proceed based on a cautious analysis of State practice, which would be explained in the commentary. While the Special Rapporteur had tried to include relevant State practice from more diverse sources, he would welcome further examples from members of the Commission and from States. He also agreed with some members that the topic could draw on general principles of

law, including those concerning acquired rights, unjust enrichment, fairness and reasonableness. However, cautious consideration of the role of general principles of law was required. For example, some principles existing in international investment law might not apply to other areas of international law. Nevertheless, general principles of law could still be relevant, along with State practice, case law and agreements, and could evolve into custom over time or inform the negotiation of agreements between States.

110. While the Special Rapporteur acknowledged that it was difficult to affirm the existence of a general rule, he did not agree with the view that the inconclusiveness of State practice would point towards a “clean slate” rule. In particular, the “clean slate” rule in the 1978 Vienna Convention on Succession of States in Respect of Treaties concerned newly independent States and did not apply to other categories of succession of States, whereas the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts contained only specific rules for different categories of succession of States in relation to the different areas of State property, archives and debts. Since the previous work of the Commission confirmed several specific rules rather than a general rule, the “clean slate” rule should not be elevated as a general rule in this topic, particularly in situations where the predecessor State continued to exist. Moreover, even if obligations arising from an internationally wrongful act did not transfer to a newly independent successor State, the position was different with respect to invocation of rights, especially in circumstances where the consequences of such act affected the territory or population of the newly independent State. This also justified the separate treatment of obligations and rights in the draft articles. In addition, although the Special Rapporteur’s approach to the topic was based on the rules relating to succession of States and the responsibility of States for internationally wrongful acts, the doctrine of acquired rights could support such an approach.

111. Regarding the structure of the draft articles, the Special Rapporteur concurred with the proposal that different categories of succession of States where the predecessor State continued to exist could be merged into a single draft article to avoid unnecessary repetitions, whereas those categories of succession of States where the predecessor State ceased to exist could be addressed in separate draft articles. The Special Rapporteur indicated that it would be useful to continue addressing the category of newly independent States in the draft articles, as illustrated by the pronouncements of the International Court of Justice in its Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.¹⁴⁵²

112. The Special Rapporteur welcomed most drafting proposals concerning draft articles 12, 13, 14 and 15. Concerning the expression “may request reparation” in draft articles 12, 13 and 14, he indicated that it was intended to be flexible enough to reflect both *lex lata* and *lex ferenda* without a sharp distinction, since some *lex ferenda* rules might evolve into *lex lata* rules over time. This approach was also in accordance with the subsidiary nature of the draft articles. Based on the Special Rapporteur’s analysis of agreements between States, such a flexible formulation presented advantages from the perspective of enabling States to reach agreement, such as on the restitution of objects or compensation, without any reference to responsibility for an internationally wrongful act. Further, the Special Rapporteur agreed to clarify the reference to “special” or “particular” circumstances in the draft articles, and to consider replacing the term “nationals” with “population” in draft article 12, paragraph 2. He also acknowledged the need to replace the term “compensation” in draft article 12, paragraph 3, and draft article 14, paragraph 3, since those provisions did not address reparation from the responsible State to the injured State but rather some kind of settlement, set-off, arrangement or repayment as between the predecessor and successor States or between two successor States.

113. While the Special Rapporteur was sympathetic to the view that the draft articles should address the potential right of individuals to claim reparation independent of intervention by a State, he noted that it might have broader ramifications for this topic, the scope of which was set out in draft article 1. In that connection, the main focus of draft article 15 was on diplomatic protection. He indicated that draft article 15 was intended to be

¹⁴⁵² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, General List No. 169.

consistent with the articles on diplomatic protection and the work of the Institute of International Law. Regarding the safeguards provided in draft article 5, paragraphs 3 and 4, of the articles on diplomatic protection, he considered it sufficient to include a without prejudice clause referring to other rules of diplomatic protection and to explain the need for safeguards in the commentary. In this regard, he observed that the risk of nationality shopping might be less significant in cases of succession of States that involve involuntary change of nationality.

114. The Special Rapporteur indicated his preference for retaining the current title of the topic for consistency with the previous work of the Commission. In particular, he did not find words such as “aspects”, “problems” and “issues” to be suitable for the title of a Commission’s topic. While other proposals merited consideration, he suggested to return to the question of the title at a later stage after the provisional adoption of all the draft articles.

115. Regarding the outcome of the topic, the Special Rapporteur agreed with those members who stated that the Commission should decide on the most suitable option at a later stage. He reiterated that the preparation of draft articles was a standard method of work by the Commission, which did not prejudice the final outcome. While he did not wish to change the form of the draft articles to draft conclusions, guidelines, principles, or to an analytical report, he was open to the proposal of drafting model clauses or compiling an annex of clauses based on existing agreements, which would be compatible with a set of draft articles.

116. In relation to the future programme of work, the Special Rapporteur agreed with comments that the Commission should have sufficient time and could still aim to complete its work on first reading by the end of the quinquennium. He indicated that his next report would focus on the forms of responsibility (in particular, restitution, compensation and guarantees of non-repetition) and could also address procedural and miscellaneous issues, including those arising in situations of several successor States.

C. Text of the draft articles on succession of States in respect of State responsibility adopted so far by the Commission

1. Text of the draft articles

117. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Succession of States in respect of State responsibility

Article 1

Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.
2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Article 2

Use of terms

For the purposes of the present draft articles:

- (a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

...

Article 5

Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-first session

118. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-first session is reproduced below.

Succession of States in respect of State responsibility

Article 1

Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Commentary

(1) This draft article sets forth the scope of the present draft articles in two respects, which are dealt with successively in paragraphs 1 and 2.

(2) Paragraph 1 identifies the material scope of the present draft articles as limited to matters of succession of States in respect of responsibility of States. The interaction between these two sets of rules is captured by the phrase “the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts”. This is consistent with the Commission’s approach to the study of impacts of the *factual situation* of succession of States in respect of treaties and in respect of State property, archives and debts as reflected in the 1978 and 1983 Vienna Conventions.¹⁴⁵³

(3) The draft articles deal with rules that belong to two areas of international law, i.e. the law of State responsibility and the law of succession of States. It aims at clarifying their mutual relations, in particular if and to what extent cases of succession of States have effects on the responsibility of States for internationally wrongful acts. The draft articles refer to those concepts in their usual meaning.

(4) The term “succession of States” is defined in subparagraph (a) of draft article 2. Draft article 5 further specifies those cases of succession of States to which the present draft articles are limited.

(5) The notion of “responsibility of States” is used in the sense of the Commission’s 2001 articles on responsibility of States for internationally wrongful acts.¹⁴⁵⁴ According to the commentary to article 1 of the those articles, the term “international responsibility” in article 1 “covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured

¹⁴⁵³ Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978) United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983, not yet in force), [A/CONF.117/14](#).

¹⁴⁵⁴ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77 (hereinafter, “articles on State responsibility”).

State or whether they extend also to other States or indeed to other subjects of international law”.¹⁴⁵⁵

(6) Paragraph 1 makes it clear that the present draft articles only apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts. Consequently, the scope of the present topic does not extend to any issues of international liability for injurious consequences arising out of acts not prohibited by international law.

(7) Paragraph 2 clarifies the subsidiary character of the present draft articles. The Commission adopted paragraph 2 of draft article 1, providing that “[t]he present draft articles apply in the absence of any different solution agreed upon by the States concerned”. In the same vein, the general commentary to the articles on State responsibility underlines that:

Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.¹⁴⁵⁶

(8) The draft articles would only apply in cases where the States concerned have not arrived at a different solution among themselves. The words “any different solution” are intended to capture the vast array of possible solutions that the parties may adopt in a situation of succession of States. Such solutions may be expressed in a variety of forms, which could include, for example, international agreements, unilateral declarations, or a combination thereof. In this regard, the words “agreed upon” are to be understood in a broad sense and do not refer only to the consent to be bound by a treaty. The term “States concerned” may refer to the predecessor State or States, the successor State or States, as well as any State injured by an internationally wrongful act occurred before the date of succession.

Article 2

Use of terms

For the purposes of the present draft articles:

(a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;

(b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;

(c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;

(d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

...

Commentary

(1) The definitions in subparagraphs (a), (b), (c) and (d) are identical to the respective definitions contained in article 2 of the 1978 and 1983 Vienna Conventions. The Commission decided to leave the definitions unchanged so as to ensure consistency in the use of terminology across its work on questions relating to the succession of States.

(2) The term “succession of States” is used “as referring exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event”.¹⁴⁵⁷ Unlike the previous work of the Commission relating to

¹⁴⁵⁵ Para. (5) of the commentary to art. 1 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at p. 33.

¹⁴⁵⁶ Para. (5) of the general commentary to the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at p. 32.

¹⁴⁵⁷ Para. (3) of the commentary to draft article 2 of the draft articles on succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), document [A/9610/Rev.1](#), at p. 175.

succession of States, the present draft articles deal with the effects of such succession on the rules of State responsibility. Consequently, the term does not imply an automatic transfer of rights or obligations. Such transfer is only possible under certain circumstances and according to the rules set forth in the draft articles.

(3) The meaning of the terms “predecessor State”, “successor State” and “date of succession” merely follow from the meaning given to “succession of States”. It should be noted that, in some cases of succession of a part of a territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

Article 5

Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) The inclusion of draft article 5 in the present draft articles is in line with a long-established practice of the Commission on matters of succession of States. In fact, this provision *mutatis mutandis* reproduces the text of article 6 of the 1978 Vienna Convention, article 3 of the 1983 Vienna Convention and article 3 of the articles on nationality of natural persons in relation to the succession of States.¹⁴⁵⁸

(2) The provision of draft article 5 is in conformity with the principle of *ex injuria jus non oritur* and with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.¹⁴⁵⁹ Draft article 5 is also in line with an abundant practice of United Nations bodies.¹⁴⁶⁰ Unlawful territorial situations are not instances of succession of States precisely due to their underlying illegality.¹⁴⁶¹

(3) Draft article 5 does not provide any advantage to a State violating international law. To the contrary, it does not give any legal effect to unlawful territorial situations. General rules of international law on State responsibility, including the obligation of non-recognition, continue to apply to such situations.

¹⁴⁵⁸ General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48. See also Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), “State succession in matters of international responsibility”, Fourteenth Commission, Rapporteur: Marcelo Kohen, p. 509, resolution, p. 711.

¹⁴⁵⁹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹⁴⁶⁰ See, for example, Security Council resolution 662 (1990) of 9 August 1990 concerning annexation of Kuwait by Iraq; Security Council resolutions 216 (1965) of 12 November 1965 and 217 (1965) of 20 November 1965 concerning Southern Rhodesia; Security Council resolutions 541 (1983) of 18 November 1983 and 550 (1984) of 11 May 1984 concerning Cyprus.

¹⁴⁶¹ Institute of International Law, *Yearbook*, vol. 76 (see footnote 1458 above), final report, para. 24 (footnote omitted).

Chapter VIII

Immunity of State officials from foreign criminal jurisdiction

A. Introduction

119. 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.¹⁴⁶² At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).¹⁴⁶³

120. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).¹⁴⁶⁴ The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.¹⁴⁶⁵

121. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.¹⁴⁶⁶ The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report, which was considered during the sixty-eighth (2016) and sixty-ninth sessions (2017), and her sixth report, which was considered during the seventieth (2018) and the current seventy-first (2019) sessions.¹⁴⁶⁷ On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has thus far provisionally adopted seven draft articles (see sect. C, below) and commentaries thereto. Draft article 2 on definitions is still being developed.¹⁴⁶⁸

¹⁴⁶² At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 257).

¹⁴⁶³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 386. For the memorandum prepared by the Secretariat, see *A/CN.4/596* and *Corr.1*.

¹⁴⁶⁴ *A/CN.4/601*, *A/CN.4/631* and *A/CN.4/646*, respectively.

¹⁴⁶⁵ See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 343.

¹⁴⁶⁶ *Ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 266.

¹⁴⁶⁷ *A/CN.4/654*, *A/CN.4/661*, *A/CN.4/673*, *A/CN.4/686*, *A/CN.4/701*, and *A/CN.4/722*, respectively.

¹⁴⁶⁸ See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid.*, *Seventy-first Session, Supplement No. 10 (A/71/10)*, paras. 194–195 and 250).

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-first Session, Supplement No. 10 (A/72/10)*, paras. 74, 76 and 140–141).

B. Consideration of the topic at the present session

122. The Commission had before it the sixth report (A/CN.4/722), on which debate had not been completed at the seventieth session, and the seventh report of the Special Rapporteur (A/CN.4/729). The sixth report had summarized the debates in the Commission and the Sixth Committee on draft article 7, dealing with crimes under international law in respect of which immunity *ratione materiae* should not apply. It then started to address the procedural aspects of immunity from foreign criminal jurisdiction, focusing in particular on: (a) timing; (b) the kinds of acts affected by immunity; and (c) the determination of immunity. The report did not include any proposals for new draft articles. The seventh report summarized the debates in the Commission at the seventieth session and in the Sixth Committee at the seventy-third session of the General Assembly and completed the examination of the procedural aspects of immunity regarding the relationship between jurisdiction and the procedural aspects of immunity. To that end, two draft articles concerning the consideration of immunity by the forum State and determination of immunity were proposed (draft articles 8 and 9). In addition, the seventh report addressed the remaining procedural aspects identified in the sixth report, including questions concerning the invocation of immunity and the waiver of immunity and two draft articles were proposed (draft articles 10 and 11). It also examined aspects concerning procedural safeguards related to the State of the forum and the State of the official, communication between the forum State and the State of the official, including the duty to notify to the official's State the intent to exercise jurisdiction by the forum State; exchange of information between the State of the official and the forum State; and cooperation and international legal assistance between the State of the official and the forum State, in particular the transfer of criminal proceedings from the forum State to the State of the official. In this regard, four draft articles were proposed (draft articles 12, 13, 14 and 15). Further, the report considered the procedural rights of the official, focusing on fair treatment and one draft article was proposed (draft article 16). The report also addressed the future work plan, anticipating work on first reading to be completed in 2020, at which also an eighth report would be submitted. It would consider remaining issues of a general nature, including: the possible implication on procedural rules of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal jurisdiction; the possibility of establishing some mechanism for the settlement of disputes; and the possible inclusion of recommended good practices.

123. The Commission considered the sixth and seventh reports at its 3481st to 3488th meetings, from 15 to 19, 22 and 23 July 2019.

124. Following its debate on the reports, the Commission, at its 3488th meeting, on 23 July 2019, decided to refer draft articles 8 to 16, as contained in the Special Rapporteur's seventh report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

125. At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session (A/CN.4/L.940), which can be found on the website of the Commission.¹⁴⁶⁹ The Commission took note of the interim report of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only.

¹⁴⁶⁹ The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission: <http://legal.un.org/ilc/guide/gfra/shtml>. The draft article 8 *ante*, provisionally adopted by the Drafting Committee, reads as follows:

"Draft article 8 *ante*

Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles."

1. Introduction by the Special Rapporteur of the sixth and seventh reports

126. The Special Rapporteur recalled that the Commission had not concluded its debate on the sixth report at the seventieth session last year, and it remained open for comments at the present session. Such comments could be made together with those concerning the seventh report, as both reports formed part of a comprehensive treatment of procedural aspects of immunity. In addition, the Special Rapporteur recalled that definitions with regard to the concepts of “criminal jurisdiction” and “immunity” are still pending for consideration in the Drafting Committee.¹⁴⁷⁰

127. The Special Rapporteur recalled further that the sixth report¹⁴⁷¹ had identified a number of issues to be addressed relating to procedural aspects, of which only the procedural implications for immunity arising from the concept of jurisdiction, in particular the “when”, the “what” and the “who”, were addressed in that report, by examining: (a) the timing of the consideration of immunity; (b) the acts of the authorities of the forum State that may be affected by immunity; and (c) the identification of the organ competent to decide whether immunity applies, without any draft articles being proposed. Accordingly, the seventh report completed the consideration of these aspects.

128. The Special Rapporteur explained that the seventh report was divided into an introduction and five chapters. The purpose of the introduction was to describe the current state of affairs of the topic and, above all, to present a summary of the debates on the Sixth Report held in 2018 (both in the Commission and the Sixth Committee of the General Assembly). Chapter I revisited the issue of the concept of jurisdiction and its impact on the procedural aspects of immunity that was included in the sixth report. It contains two draft articles (8 and 9) that are based on the review conducted in seventh report. Chapter II is devoted entirely to considering the invocation and the waiver of immunity and it too includes two draft articles devoted to the said legal concepts (10 and 11). Chapter III addresses a set of issues that, in essence, are procedural safeguards operating between the forum State and the State of the official, namely: the notification to the State of the official of the forum State’s intention to exercise jurisdiction over a foreign official; the exchange of information between both States; the possibility for the forum State to transfer the proceedings to the State of the official; and – lastly – the conduct of consultations between both States. The analysis of these issues provides the basis of draft articles 12, 13, 14 and 15. Chapter IV is devoted to the

¹⁴⁷⁰ The proposals by the Special Rapporteur currently in the Drafting Committee read as follow:

“Draft article 3

Definitions

For the purposes of the present draft articles:

(a) The term ‘criminal jurisdiction’ means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term ‘criminal jurisdiction’, the basis of the State’s competence to exercise jurisdiction is irrelevant;”

(A/CN.4/661, para. 42). In the draft articles provisionally adopted by the Commission, the definitions article is draft article 2.

“(b) ‘Immunity from foreign criminal jurisdiction’ means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;”

(A/CN.4/661, para. 46).

“(c) ‘Immunity *ratione personae*’ means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;”

“(d) ‘Immunity *ratione materiae*’ means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as ‘official acts’”

(A/CN.4/661, para. 53).

¹⁴⁷¹ See A/CN.4/722.

analysis of the procedural rights and safeguards of the official, and is the basis of draft article 16.

129. The Special Rapporteur underlined that an examination of the procedural aspects was justified considering particularly that the foreign criminal court in which immunity would be invoked would apply procedural rules, principles and processes that could hardly be ignored. Such proceedings necessarily involved a foreign national, whose status as a State official, and whether his acts were “performed in an official capacity” for immunity *ratione materiae* would be matters of determination. Moreover, such consideration had implications on the principle of sovereign equality in the relations between the forum State and the State of the official, which implied the need to strike a proper balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to see the immunity of its officials respected. Also in balance was the respect for the immunity of State officials and the necessity of ensuring accountability for the commission of serious crimes under international law. Additionally, it was useful to ensure that, under all circumstances, State officials who may be affected by the action of a foreign jurisdiction were guaranteed procedural rights recognized under international human rights law.

130. Ultimately, the consideration of procedural aspects would not only provide certainty to both the forum State and the State of the official and help to reduce political considerations and potential abuse of process for political purposes or motives but also foster neutrality, thereby building trust between the forum State and the State of the official. This would mitigate any potential instability in international relations among States. Thus, the consideration of the procedural aspects would assist to ensure a proper balance in safeguarding legal principles and values of the international community.

131. In introducing the various draft articles, the Special Rapporteur stressed that the draft articles contained in her seventh report were designed to apply to the draft articles as a whole, including draft article 7, thereby responding to the concern of some members of the Commission that there is a need to ensure a simultaneous treatment of exceptions to immunity and the formulation of procedural guarantees.

132. The Special Rapporteur noted that draft articles 8 and 9 addressed the procedural aspects of immunity associated with the concept of criminal jurisdiction. Draft article 8¹⁴⁷² referred to the consideration of immunity by the forum State, in particular, the timing at which it must be taken into account by the authorities of that State. This meant that immunity would be considered at the earliest possible time as soon as the State authorities became aware that a foreign official may be affected by the exercise of jurisdiction by the forum State. In any event, such consideration had to be before the indictment of the official and the commencement of the trial phase. The draft article was based on the assumption that immunity may also be assessed at earlier phases if coercive measures or other measures of constraining authority were taken that directly affected the official or had an impact on the performance of his functions.

133. Draft article 9¹⁴⁷³ was based on the recognition that the determination of immunity was for the courts of the State of the forum. This was without prejudice to the possible

¹⁴⁷² The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 8

Consideration of immunity by the forum State

1. The competent authorities of the forum State shall consider immunity as soon as they are aware that a foreign official may be affected by a criminal proceeding.
2. Immunity shall be considered at an early stage of the proceeding, before the indictment of the official and the commencement of the prosecution phase.
3. The immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official that may affect the performance of his or her functions.”

¹⁴⁷³ The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 9

Determination of immunity

participation of other institutions or authorities of the forum State as determined under its legal system. Domestic law continued to be particularly relevant for the purposes of defining the procedure for determining immunity, which should be done in the light of the rules set out in the draft articles, taking into account also whether the State of the official had invoked or had waived immunity, as well as any information that the authorities of the forum State and the State of the official may have provided to the competent courts to rule on the immunity.

134. Draft articles 10 and 11 addressed matters of invocation and waiver of immunity. The Special Rapporteur stressed that the invocation and waiver of immunity ought not be confused with exceptions or limitations to immunity. Invocation involved the assertion of the right to immunity, while waiver denoted a renunciation. Draft article 10,¹⁴⁷⁴ according to the Special Rapporteur, recognized the right of any State to invoke the immunity of its officials against a State seeking to exercise jurisdiction. It was observed that invocation of immunity must be made as soon as the State of the official becomes aware that the forum State intended to exercise jurisdiction. Thus, the draft article contained a set of procedural rules for invoking immunity in order to guarantee legal certainty.

135. Concerning the form and procedure, the Special Rapporteur stated that invocation must be made in writing, and identify the official who would benefit from the immunity, as well as specify the type of immunity (whether *ratione personae* or *ratione materiae*). It was also stressed that, taking into account the diversity of legal systems, the draft article did not identify the invocation of immunity as being necessarily a judicial act alone. It offered sufficient flexibility to facilitate that the invocation of immunity through judicial authorities or the diplomatic channel. Further, it was noted that draft article 10 drew upon the distinction between immunity *ratione personae* and immunity *ratione materiae*. While the invocation was unnecessary for the former as it had to be considered *proprio motu*, it was considered a procedural requirement for the latter.

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1. It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them.
 2. The immunity of the foreign State shall be determined in accordance with the provisions of the present draft articles and through the procedures established by national law.
 3. The competent court shall consider whether the State of the official has invoked or waived immunity, as well as the information provided to it by other authorities of the forum State and by the authorities of the State of the official whenever possible.”

¹⁴⁷⁴ The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 10

Invocation of immunity

1. A State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction.
2. Immunity shall be invoked soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official.
3. Immunity shall be invoked in writing and clearly, indicating the identity of the official in respect of whom the immunity is being invoked and the type of immunity being invoked.
4. Immunity shall be invoked preferably through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. Immunity may also be invoked through the diplomatic channel.
5. Where immunity is not invoked directly before the courts of the forum State, the authorities that have received the communication relating to the invocation of immunity shall use all means available to them to transmit it to the organs that are competent to determine the application of immunity, which shall decide thereon as soon as they are aware of the invocation of immunity.
6. In any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not.”

136. Draft article 11¹⁴⁷⁵ considered waiver of immunity as a right of the State of the official. It must be express, clear and unequivocal, with the mention of the official concerned and, where applicable, the acts to which the waiver referred. The draft article did not provide for implicit waiver. Even in the case of a waiver deriving from a treaty, such a waiver was express if it could be deduced clearly and unequivocally from the terms of the treaty to which both the forum State and the State of the official are parties.

137. Regarding the form and procedure of waiver, the Special Rapporteur noted that they were the same as those set out in draft article 10.

138. With respect to the effects of waiver, the Special Rapporteur observed that, to ensure legal certainty, waiver of immunity was irrevocable. To this end, (a) once immunity was waived, the waiver applied to any act and any stage of the proceedings (including appeals and other legal recourse, as well as any arrest warrants or imprisonment) that might occur as a result of the exercise of criminal jurisdiction by the forum State; and (b) the waiver was solely and exclusively in relation to the official and the acts to which the waiver related.

139. Draft articles 12, 13, 14 and 15 deal with procedural safeguards applicable between the forum State and the State of the official, and were proposals *de lege ferenda* constituting progressive development of international law. The Special Rapporteur recalled the need for procedural safeguards was justified to prevent the political or abusive use of criminal jurisdiction against a foreign official, a matter stressed in both the Commission and in debates of the Sixth Committee. Such safeguards were aimed at protecting the interests of both the forum State and the State of the official. Moreover, they ought to be understood in a broad sense so as to, *inter alia*, (a) allow for the State of the official to invoke and waive immunity, which require knowledge of the intention to exercise jurisdiction by the forum State; (b) enable exchange of information between the authorities of the forum State and of the State of the official; (c) facilitate the exercise of criminal jurisdiction over the official by his own State; and (d) permit consultations between the forum State and the State of the official. The Special Rapporteur highlighted that it was extremely difficult to find uniformity in State practice and that treaty practice was varied and had its own peculiarities.

140. The Special Rapporteur stressed that the draft articles sought to assist to build mutual trust between the forum State and the State of the official; offer legal certainty to both; and help to eliminate the risk of politicization of the prosecution and of creating instability in inter-State relations.

141. On draft article 12,¹⁴⁷⁶ the Special Rapporteur underscored that it constituted an essential guarantee for the respect of the immunity of foreign officials by establishing the

¹⁴⁷⁵ The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 11

Waiver of immunity

1. A State may waive the immunity of its officials from foreign criminal jurisdiction.
2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.
3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.
4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.
5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.
6. Waiver of immunity is irrevocable.”

¹⁴⁷⁶ The draft article proposed by the Special Rapporteur reads as follows:

“Draft article 12

Notification of the State of the official

duty to notify any attempt to exercise jurisdiction over them to the State of the official. The duty to notify was seen as the first guarantee for a State to safeguard its interests by invoking or waiving the immunity. It was noted that notification should be made as soon as the competent authorities of the forum State have sufficient information to conclude the presence of a foreign official who could be subject to its criminal jurisdiction and such notification should contain all the elements allowing the State of the official to assess its interests.

142. As to the form and procedure for notification, the Special Rapporteur observed that a model similar to the invocation and waiver of immunity had been used. Recourse to the diplomatic channel was subsidiary.

143. The Special Rapporteur noted that draft article 13¹⁴⁷⁷ was premised on the recognition that the forum State would need information from the State of the official in order to decide on immunity, in particular with respect to immunity *ratione materiae*. Nevertheless, the Special Rapporteur underlined that the mechanism under the draft article provided a procedural guarantee that favoured both the forum State and of the State of the official. Paragraphs 4 and 6 contained provisions regarding refusal by the State of the official. The form and procedure for the request of information were modelled on the provisions on invocation, waiver and notification.

144. Draft article 14¹⁴⁷⁸ addressed the transfer of the criminal proceedings from the forum State to the State of the official. This mechanism is conceived in the draft article as a right of

1. Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such notification.

2. The notification shall include the identity of the official, the acts of the official that may be subject to the exercise of criminal jurisdiction and the authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction.

3. The notification shall be provided through any means of communication accepted by both States or through means provided for in international cooperation and mutual legal assistance treaties to which both States are parties. Where no such means exist or are accepted, the notification shall be provided through the diplomatic channel.”

¹⁴⁷⁷ The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 13
Exchange of information**

1. The forum State may request from the State of the official information that it considers relevant in order to decide on the application of immunity.

2. That information may be requested through the procedures set out in international cooperation and mutual legal assistance treaties to which both States are parties, or through any other procedure that they accept by common agreement. Where no applicable procedure exists, the information may be requested through the diplomatic channel.

3. Where the information is not transmitted directly to the competent judicial organs so that they can rule on immunity, the authorities of the forum State that receive it shall, in accordance with domestic law, transmit it directly to the competent courts. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such communication.

4. The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (*ordre public*), security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions.

5. The information received shall, where applicable, be subject to conditions of confidentiality stipulated by the State of the official, which shall be fulfilled in accordance with the mutual assistance treaties that provide the basis for the request for and provision of the information or, failing that, to conditions set by the State of the official when it provides the information.

6. Refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply.”

¹⁴⁷⁸ The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 14
Transfer of proceedings to the State of the official**

the forum state and not as an obligation. Therefore, the transfer of proceedings will be subjected to the national laws of the forum State and, where appropriate, to the conventions of international judicial assistance which bind both States. The effect of the referral is materialized in the “suspension” of the exercise of the jurisdiction of the forum State, which is now subject to the pronouncement of the State of the official on the exercise of its own jurisdiction. It was worth highlighting that – despite creating a right and not an obligation for the forum State – it is a useful instrument under certain circumstances to avoid the issue of immunity, or to solve the problems that may come up between affected states in relation to the determination of the applicability of immunity. And, in any case, it can operate as a useful instrument to avoid the problem of politicization or abuse of the exercise of jurisdiction by the forum State through the channel of allowing the State of the official to exercise its own jurisdiction.

145. Draft article 15,¹⁴⁷⁹ couched in general terms, regulated a flexible mechanism for consultations to facilitate the search for solutions when problems of any kind arose in the process of determining the applicability of immunity in a particular case or, if that was not possible, to agree on some avenue of dispute settlement existing under international law. It was stressed that it was a two-way mechanism (consultations) of bilateral nature (forum State – State of the official).

146. The Special Rapporteur noted that draft article 16¹⁴⁸⁰ addressed procedural rights and safeguards applicable to the foreign official. Although immunity was for the benefit of the State of the official, the exercise of jurisdiction by the forum State had a direct bearing on the State official. The draft article recognized the right of the State official to benefit from all fair treatment guarantees, including procedural rights and safeguards related to a fair and impartial trial. The draft article was modelled on the provision adopted by the Commission in the draft articles on prevention and punishment of crimes against humanity.

147. Regarding the future programme of work on the topic, the Special Rapporteur recalled that her sixth report referred to the need of tackling, in a future report, the obligation to cooperate with an international criminal court and its possible impact on the immunity of

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1. The authorities of the forum State may consider declining to exercise its jurisdiction in favour of the State of the official, transferring to that State criminal proceedings that have been initiated or that are intended to be initiated against the official.
 2. Once a transfer has been requested, the forum State shall suspend the criminal proceedings until the State of the official has made a decision concerning that request.
 3. The proceedings shall be transferred to the State of the official in accordance with the national laws of the forum State and the international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties.”

¹⁴⁷⁹ The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 15
Consultations**

The forum State and the State of the official may consult, at the request of either, on matters concerning the determination of the immunity of the foreign official in accordance with the present draft articles.”

¹⁴⁸⁰ The draft article proposed by the Special Rapporteur reads as follows:

**“Draft article 16
Fair and impartial treatment of the official**

1. A State official whose immunity from foreign criminal jurisdiction is being examined by the authorities of the forum State shall benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial.
2. These safeguards shall be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction does not apply.
3. The fair and impartial treatment safeguards shall in all cases include the obligation to inform the nearest representative of the State of the official, without delay, of such person’s detention or any other measure that might affect his or her personal liberty, so that the official can receive the assistance to which he or she is entitled under international law.
4. The official shall be treated in a fair and impartial manner consistent with applicable international rules and the laws and regulations of the forum State.”

foreign criminal jurisdiction of state officials. Besides, in her seventh report she mentioned that this issue had arisen before the International Criminal Court in relation to the Appeal request introduced by Jordan relating to the arrest warrant and surrender of the then President Al-Bashir. Regarding the decision of the International Criminal Court Appeals Chamber issued on 6 May 2019,¹⁴⁸¹ she believed it was not necessary or useful for the current work of the Commission to start a discussion on this judgment. Moreover, it was worth noting that the decision of the General Assembly on the request of an advisory opinion from the International Court of Justice in relation to the immunity of Heads of State and its relationship with the duty to cooperate with the International Criminal Court was still pending. Therefore, she did not believe it was necessary to submit any specific proposal to the Commission at this point during the current session. Nonetheless, she keeps the option of coming back to this question in the next session from a broader perspective, which must not necessarily be referred exclusively to exceptions of immunity or procedural aspects (including procedural guarantees) of this topic. On the other hand, the Special Rapporteur also solicited views of members on (a) the possibility of dealing with the settlement of disputes; and (b) the desirability and the usefulness of addressing “good practices,” which could examine such issues as the referral of power to decide on the application of immunity to the highest courts; the definition of the functions of the Prosecutor; and the preparation of manuals for the authorities and organs of the State dealing with issues of immunity.

2. Summary of the debate

148. The present summary relates to the debate on the sixth and seventh reports of the Special Rapporteur at the present session. It should be read together with the summary of the debate on the sixth report at the seventieth session.¹⁴⁸²

(a) General comments

149. Members commended the Special Rapporteur for her extensive work on the seventh report which, together with the sixth report, provided a rich and detailed review and analysis of State practice, case law and academic literature relevant to procedural aspects. Some members pointed to the relevance of the work of the previous Special Rapporteur, as well as the memorandum by the Secretariat (A/CN.4/596 and Corr.1). While several members observed that the draft articles proposed in the seventh report should be more closely based on practice, members also appreciated the deductive methodology employed by the Special Rapporteur to provide *de lege ferenda* proposals in the progressive development of international law. The acknowledgment by the Special Rapporteur regarding the status of the proposals as constituting progressive development of international law was welcomed. The importance of taking into account State practice from more diverse regions was nevertheless underlined by some members. In that connection, a number of members offered relevant examples including domestic legislation, case law and bilateral agreements. The convenience to maintain consistency with the work of the Commission on other related topics such as crimes against humanity and peremptory norms of general international law (*jus cogens*), as well as the topic of universal criminal jurisdiction on the long-term programme of work, was also highlighted.

150. Concerning the approach to the procedural aspects of the topic, members underlined the importance of balancing essential legal interests, including respect for the sovereign equality of States, the need to combat impunity for international crimes, as well as the protection of State officials from the politically motivated or abusive exercise of criminal jurisdiction. In this regard, concerns expressed in the debates of the Commission and the Sixth Committee regarding the overpoliticization or abuse of the exercise of criminal jurisdiction over State officials were reiterated. In order to achieve a careful balance between

¹⁴⁸¹ Situation in Darfur, Sudan, In the case of the *Prosecutor v. Omar Hassan Ahmed Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir)*.

¹⁴⁸² *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chap. VII.

those important interests, several members indicated that the procedural safeguards proposed in the draft articles should be strengthened.

151. Members also highlighted the crucial link between the procedural aspects of the topic and the exceptions to immunity in respect of serious crimes under international law set out in draft article 7, which had been provisionally adopted by the Commission. In this connection, several members concurred with the Special Rapporteur, as she had explained in her introduction of the seventh report, that the procedural guarantees and safeguards proposed in draft articles 8 to 16 were applicable to the draft articles as a whole. Other members expressed concerns that draft articles 8 to 16, as presently drafted, did not sufficiently establish a link between the proposed procedural guarantees and safeguards and the application of draft article 7 nor address fully the procedures and guarantees necessary to avoid politically motivated prosecutions. The divergent views expressed by members in respect of the adoption of draft article 7 were reiterated. While the need to avoid reopening the debate on draft article 7 was stressed by a number of members, it was recalled by several members that States were evenly divided in their positions on draft article 7, taking into account the distinction between *lex lata* and *lex ferenda*. Therefore, some members emphasized the paramount importance of designing specific procedural safeguards to address concerns regarding the application of draft article 7. At the same time, it was cautioned by several members that the content of draft article 7 should not be undermined. It was noted in any event that further meaningful discussion of the topic was bound to entail an elaboration of a draft similar to draft article 7. Some other members doubted that the use of procedural safeguards could sufficiently cure the substantive flaws inherent in draft article 7, noting further that the draft article remained an obstacle to agreement within the Commission on the topic. Nonetheless, it was recognised by several members that certain proposals made by members in previous debates on the topic merited detailed consideration and provided a good basis for further discussion.

152. In this connection, some support was expressed for a proposal to clarify that the general procedural provisions and safeguards under draft articles 8 to 16 were applicable to the situations covered in draft article 7, and to formulate specific safeguards in relation to draft article 7. Three conditions for the exercise of jurisdiction by the forum State over a foreign State official pursuant to draft article 7 were proposed, namely: (a) the decision to institute criminal proceedings must be taken at the highest level of government or prosecutorial authority; (b) the evidence that the official committed the alleged offence must be fully conclusive; and (c) the forum State must have notified the State of the official of the intention to exercise jurisdiction and must have offered to transfer the proceedings to the courts of the State of the official or to an international criminal court or tribunal. Further, a view was expressed that the presence of the concerned State official in the territory of the forum State was also crucial. It was also considered by some members that there should be a presumption of immunity until determination of its absence was made. Moreover, some members viewed as imperative judicial review of any decision on immunity. Additional proposals were made in relation to the transfer of proceedings to the State of the official (see paragraphs 173–175 below). On the other hand, some alternative suggestions were made regarding the notion of “fully conclusive” as an evidentiary standard, including “reliable and sufficient” or “*prima facie*”, given that this was a matter that had to be considered as a preliminary matter before actual trial.

153. Further, some members stressed the need to achieve a balance between the interests of the forum State and those of the State of the official, in line with the principle of reciprocity. According to some members, draft articles 8 to 16 seemed to place more weight on the right to exercise jurisdiction of the forum State over the right to immunity of the State of the official. In this regard, it was suggested that more discretion should be granted to the State of the official in asserting immunity, although the possibility of abuse by the State of the official in blocking the exercise of jurisdiction by the forum State also raised concerns. Several members considered that draft articles 8 to 15 reflect a correct balance between the safeguards offered to the forum State and to the State of the official, and that they are a good basis for the Commission’s work on procedural provisions and safeguards.

154. Another issue that required clarification was the extent to which the distinction between immunity *ratione personae* and immunity *ratione materiae* was reflected in draft

articles 8 to 16. Some members considered that all the procedural safeguards in draft articles 8 to 16 would apply to both types of immunity, while other members preferred to have separate draft articles addressing the different procedural aspects of immunity reflecting the difference between immunity *ratione personae* and immunity *ratione materiae*.

155. Members generally agreed that draft articles 8 to 16 could be streamlined and simplified. It was also considered important to cover all key points with sufficient clarity and detail to ensure that they are effective and operational. Some members viewed it appropriate for the draft articles to address only those procedural aspects that were directly related to the immunity of foreign State officials and to leave aside other issues to be regulated by existing treaties. The view was expressed regarding an apparent over-reliance in the draft articles on the judiciary in criminal procedure in civil law systems at the expense of other systems where executive and prosecutorial authorities played a more prominent role. Various proposals were also made to reorder the draft articles so that the proposed procedures would be better linked, adopting a new ordering that might start with draft articles 8, 12, 10, 11 and then draft article 9.

(b) Specific comments

Draft articles 8 and 9 (Consideration and determination of immunity)

156. Since national legal systems were varied and it was the prerogative of States to adopt internal procedures relating to immunity, it was noted by some members that the draft articles should aim to provide States with a common procedural framework to adopt in their domestic law without being overly prescriptive. In this regard, it was suggested that a simpler provision based on article 32, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations would suffice. References to phrases like “consider immunity”, “affected by criminal proceedings” were considered vague and unclear. While it was observed that the consideration of immunity as proposed in draft article 8 could be framed in general terms taking into account the circumstances of each State, a proposal was made to provide that States should make efforts to enact or amend national laws governing procedures concerning determination of immunity in draft article 9. The relevance of applicable rules of international law in the determination of immunity under draft article 9 was also raised. Another view was that reference to national and international law could result in confusion.

157. Several members remarked that draft articles 8 and 9 should provide for a more flexible approach concerning the relevant organs of the forum State in the consideration and determination of immunity. Some members considered it sufficient to refer to the competent authorities of the forum State, while others preferred to simply refer to the forum State. At the same time, some members welcomed the acknowledgment that the courts of the forum State usually had the primary authority to determine immunity, as reflected in draft article 9. The concern was expressed that the courts of the forum State should be independent from, not subordinated to, the executive branch. In this regard, clarification was sought regarding the obligation by the courts of the forum State to consider information provided by other authorities.

158. Further, the need to address the role of the prosecutor in the process of consideration and determination of immunity, as well as the issue of control of prosecutorial discretion, was underlined. It was suggested that draft article 8 (consideration of immunity) be redrafted to include the consideration of immunity at the different stages of investigation, particularly with respect to different forms of detention in respect of immunity *ratione materiae*, and trial. Some members expressed the view that some limitations should be apply to draft article 8 in order to avoid a negative impact on the investigation.

159. A proposal was made to specify in draft article 9 that whatever State organ is involved, the determination of immunity should be made at a relatively high level. Given the importance of determining whether any exception to immunity was applicable under draft article 7, it was suggested that such determination be made by the courts of the forum State, including the possibility of appeal to the highest courts. It was also noted that the determination of immunity by the forum State could be subject to a decision by an international criminal court or a treaty binding upon the forum State.

160. A number of members supported the requirement in draft article 8 for consideration of immunity at an early stage of the proceedings, even though there was need for precision as to the moment when such determination had to be made, such as “without delay”. Similarly, it would be useful for draft article 9 (Determination of immunity) to indicate at which stage of the proceedings determination of immunity should take place. Nonetheless, several members concurred with the principle that questions of immunity are of a preliminary nature which must be expeditiously decided *in limine litis*. It was also mentioned that the consequences of consideration of immunity by the forum State could include the immediate requirements of determination of immunity and notification of the State of the official by linking draft article 8 to draft articles 9 and 12.

161. In addition, several members agreed with the condition in draft article 8, paragraph 3, that immunity shall be considered before the forum State intends to take any coercive measures against the foreign State official. In this regard, it was suggested that examples be provided to illustrate acts of the forum State, including coercive measures, that would be affected by immunity, noting that special attention ought to be given to immunity *ratione materiae*. Some members pointed out that consideration of immunity in such cases should not be limited to situations when the foreign State official was on official duty. Moreover, if the foreign State official was presumed to be immune from coercive measures prior to the determination of immunity, that should be clarified in draft article 9.

162. A broader question was raised as to whether draft articles 8 and 9 should be reformulated to reflect the distinction between immunity *ratione personae* and immunity *ratione materiae*. Depending on the type of immunity involved, the timing of consideration of immunity by the forum State may vary (see paragraph 172 below).

Draft articles 10 and 11 (Invocation and waiver of immunity)

163. A number of members agreed in substance with draft article 10 (Invocation of immunity), whereas there were differing opinions regarding a differentiated approach between immunity *ratione personae* and immunity *ratione materiae*. In particular, it appeared from draft article 10, paragraph 6, that the forum State shall decide *proprio motu* in a case concerning immunity *ratione personae*, whereas the State of the official was expected to invoke immunity *ratione materiae* before consideration by the forum State. Not all members supported such a distinction.

164. A proposal was made to indicate that, in a case where immunity *ratione materiae* was not invoked, the forum State should likewise consider or decide *proprio motu* as soon as it was aware of the status of the foreign State official or of the acts involved. Another proposal was that, for the purposes of immunity *ratione materiae*, the acts of the foreign State official should be considered separable, with the effect that invocation or waiver of immunity may be applicable to some acts but not others.

165. It was acknowledged that the right to invoke or waive immunity belonged to the State of the official, not to the official. However, some members noted that, as a practical matter, it was often the official who would be first to claim the immunity in practice. In this regard, it was suggested that States might be advised to stipulate the competent organ to invoke immunity in their domestic law. The obligations of the forum State should also be clarified in the event that immunity was claimed by the official but denied by the State, such as when for example a crime was committed by the official on the orders of the State.

166. Some members considered that the invocation of immunity was not a prerequisite for its application, as immunity existed as a matter of international law and others pointed out that there was no obligation to immediately invoke immunity. The view was expressed that there should be a presumption of immunity unless the State of the official clarified the lack of immunity or waived immunity. Another view was that the lack of invocation of immunity could serve an evidentiary purpose to that effect, but it should not preclude the State of the official from invoking immunity at a later stage. It was stressed that non-invocation of immunity should not be interpreted as a waiver. Nonetheless, it was mentioned that there might be an exceptional possibility where the State of the official is presumed to have waived the immunity of its official if it fails to invoke immunity within a reasonable time after having been notified or made aware of the proceedings against the official. In the view of some

members, it was hoped that the consequences of failing to invoke immunity would be clarified.

167. In relation to draft article 11 (waiver of immunity), several members agreed that waiver of immunity must be express as a general rule. Some considered that waiver must be express in all cases. Reference was also made to the view of the former Special Rapporteur, Mr. Kolodkin, who concluded that waiver of immunity should be express for the troika, but waiver could be either express or implied for other officials enjoying immunity *ratione personae* or immunity *ratione materiae*. Moreover, the issue of the appearance of a State before the courts of another State was raised for further consideration, although the view was also expressed that such appearance should not be interpreted as an express waiver of immunity. In respect of draft article 11, paragraph 4, it was doubted by several members that a treaty provision applicable between the forum State and the State of the official could be interpreted as an implied or express waiver. In this regard, drafting a without prejudice clause to this effect was mentioned as an alternative. It was also suggested this matter be treated in a separate provision as this was in effect a treaty exception.

168. As to the form of communication between the forum State and the State of the official, it was mentioned by some members that the requirement of invocation of immunity in writing did not necessarily reflect the international practice. Moreover, several members highlighted the central role of the diplomatic channel in communications between the forum State and the State of the official. The conduct of diplomacy through third-parties, such as intermediaries, was also mentioned. Support was generally expressed for a drafting proposal to emphasize the use of the diplomatic channel in a broader sense, in the context of invocation and waiver of immunity under draft articles 10 and 11, as well as the processes of notification, exchange of information and consultations under draft articles 12, 13 and 15 respectively. It was further noted that the States concerned should be free to decide on the most appropriate channel for communication.

169. It was proposed that invocation of immunity would trigger consultations between the two States concerned, with the effect of suspending the proceedings for a reasonable period during such consultations. In addition, it was suggested to clarify that the participation of the State of the official in the processes of exchange of information and consultations with the forum State could not be construed as an implied waiver of immunity.

170. Various positions were expressed on the irrevocability of waiver of immunity. Members generally supported the wording of draft article 11, paragraph 6, expressing the view that waiver should be presumed to be irrevocable, unless otherwise indicated by the State of the official. The need for consideration of such a provision was also highlighted, since revocation might be justified on other grounds such as concerning vital national interests.

Draft articles 12 to 15 (Procedural safeguards between the forum State and the State of the official)

171. Several members placed emphasis on the relevance of domestic law and the use of the diplomatic channel in the application of draft articles 12 to 15. Regarding draft article 12, members generally recognised the crucial relevance of notification into the general framework of procedural safeguards. Some members questioned whether a legal obligation upon the forum State to notify the State of the official, particularly in relation to immunity *ratione materiae*, could be established. It was observed that certain treaty provisions cited in the seventh report concerned notification of various States for the purpose of exercise of criminal jurisdiction by those States, not for the purpose of invocation of immunity, its determination or its waiver. Questions were also raised as to the practical implementation of the obligation of notification, such as whether the courts of a State would provide information to its executive branch, and whether the central authority of a State for mutual legal assistance would be the relevant authority for communicating notification with respect to immunity. Other members expressed support for imposing a limited obligation of notification. In particular, it was suggested by some members that notification of information be excluded in circumstances which could create a risk that victims and potential witnesses might be harmed, evidence might be damaged or tampered with, or the official might abscond. Further,

notification could be subject to conditions of confidentiality, as recognised in draft article 13, paragraph 5.

172. In respect of draft article 13 (Exchange of information), it was suggested that the scope of information that may be requested from the State of the official should be limited to the information necessary for the forum State to decide upon the application of immunity. Further, some members observed in respect of draft article 13, paragraph 4, that the grounds for refusal of a request for information were not necessarily limited to situations affecting sovereignty, public order, security or essential public interests, but might include other reasons, such as cases involving the political crime exception, violations of human rights, harassment or discrimination. Alternatively, it was proposed that the State of the official should have the right to refuse a request for information for any reasons without providing an explanation.

173. Concerning draft article 14 (Transfer of criminal proceedings), a number of members agreed with the Special Rapporteur that the transfer of proceedings to the State of the official was a useful tool in ensuring individual criminal responsibility of State officials while achieving a balance between respecting the sovereign equality of the State of the official and the right of the forum State to exercise criminal jurisdiction. The principles of complementarity and subsidiarity of the jurisdiction of the forum State, in relation to the primacy of the jurisdiction of the State of the official, were reiterated. In this regard, reference was made to State practice illustrating the transfer of proceedings from the forum State to the State of the official, conditioned upon the effective exercise of jurisdiction by the latter. In addition, how the principle of subsidiarity would operate in the context of the exercise of jurisdiction based particularly on the passive nationality principle was raised, and highlighted.

174. Several members suggested that draft article 14 should expressly provide that the State of the official may request a transfer of proceedings relating to its official from the forum State. In relation to draft article 14, paragraph 2, it was proposed that a request for the transfer of proceedings, either by the State of the official or the forum State, should have the effect of suspending the proceedings until the State concerned decides on such a request.

175. A number of proposals were also made with the aim of preventing the potential abuse of the transfer of proceedings. It was suggested that restrictions could be placed where the State of the official was unwilling or unable genuinely to investigate or prosecute its official, based on article 17 of the Rome Statute of the International Criminal Court. Likewise, the State of the official could be required to provide assurances in this regard as a condition for the transfer of proceedings. Further, in the case of a transfer of proceedings, the State of the official should be obliged to conduct such proceedings in good faith and in accordance with the highest recognized international judicial standards. Another proposal, inspired by article 20 of the Rome Statute, was to permit the official to be retried before the courts of the forum State if the proceedings transferred to the State of the official were for the purpose of shielding the official from criminal responsibility or conducted in a manner which was inconsistent with an intent to bring the official concerned to justice. In this connection, it was important to bear in mind the overall situation in the State of the official. The importance of the principle of *non-refoulement* was also mentioned. The inclusion of a provision to ensure that a forum State could not arbitrarily deny a request for the transfer of proceedings was suggested as well.

176. Emphasis was placed on the central role of consultations between the States concerned, as reflected in draft article 15. Drafting proposals were made to link or merge draft articles 13 and 15. Draft article 15 was generally supported, even though a suggestion was made to consider the timing of the consultations further.

Draft article 16 (Procedural rights and safeguards pertaining to the official)

177. While some members questioned whether the inclusion of draft article 16 was necessary, others found it useful for its emphasis on the procedural rights and safeguards pertaining to the foreign State official, particularly in the context of protecting the official from politically motivated proceedings. Several members agreed with the Special Rapporteur that procedural rights and safeguards relating to fair treatment before an impartial tribunal

were well-recognized in international law, including international human rights law, international criminal law and international humanitarian law. At the same time, it was suggested that it would be helpful to clarify the content of the procedural rights and safeguards proposed. The need to link such rights and safeguards to the application of draft article 7 was also mentioned. It was further suggested that draft article 16 might be extended to provide procedural safeguards for foreign State officials regardless of whether immunity is being examined in a particular case.

178. Concerning draft article 16, paragraph 3, it was observed that the Vienna Convention on Consular Relations, which codified customary international law, only required consular notification upon the request of the detained individual. While it was noted by one member that a general right to consular assistance was not established under customary international law, the view was expressed by several members that more emphasis should be placed on consular assistance, particularly if the forum State intended to exercise criminal jurisdiction against an individual who has ceased to be a State official and the situation would be brought to the attention of the State of the official through consular assistance.

179. A number of drafting proposals were made. For the purpose of consistency, it was suggested by several members that similar language to draft article 11 of the draft articles on crimes against humanity be used.

(c) Future programme of work

180. Members generally supported the plan to complete the first reading of the draft articles in 2020, although sufficient time was needed for substantial consideration of the draft articles by the Commission. While some members welcomed the consideration of certain definitions, including “criminal jurisdiction,” proposed for draft article 2 (definitions), others preferred to do so at a later stage. Moreover, it was suggested that the Commission should address in its future work the issues of the *ultra vires* acts of State officials, the questions concerning inviolability in relation to immunity, considerations concerning recognition, as well as to revisit the question of the tort exception clause and its implications on criminal jurisdiction.

181. Taking into account the position of the Special Rapporteur in her introduction of the seventh report, most members agreed that the Commission did not need to enter into a debate on the judgment dated 6 May 2019 of the Appeals Chamber of the International Criminal Court in the case involving Jordan, although some members saw a need to address the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation of States to cooperate with international criminal courts or tribunals. It was noted that the Appeals Chamber judgment was, in any event, not the final word on the matter since African States were considering proposing that the General Assembly request an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials. Some members voiced concerns about the possibility that the Special Rapporteur might consider this issue from a broad perspective, while other members were in favour of or did not oppose such an approach. Some members opined that this issue fell outside the scope of the topic, as reflected in draft article 1. Some other members reserved their position in this regard.

182. Members held differing views in relation to the question of whether the Special Rapporteur should propose a mechanism for the settlement of disputes between the forum State and the State of the official in the draft articles. A number of members were open to such a proposal, whereas some other members did not support it. It was recalled that consideration of this issue had been requested by African States within the context of discussions on universal jurisdiction. Some members suggested that a dispute settlement mechanism could be developed based on similar provisions prepared by the Commission in other topics, namely, draft article 15 of the draft articles on crimes against humanity, and draft conclusion 21 of the draft conclusions on peremptory norms of international law (*jus cogens*). Concerns were also raised in relation to the feasibility and suitability of a dispute settlement mechanism that would operate other than as a treaty provision, and the need to avoid potentially undermining the draft articles as a whole.

183. As to the possible inclusion of recommended best practices on the topic, several members noted that it could be useful to States, particularly in reducing the risk of any abusive or politically motivated exercise of jurisdiction over State officials. At the same time, a number of members pointed out that this would need to be decided by the Commission depending on the final form envisaged by the Special Rapporteur.

184. A view was expressed that the Commission should adopt a clear position on the final outcome of work on the topic, noting in particular that a recommendation to elaborate a treaty would assist in overcoming some of the differences that relate to procedures and that some of the proposals made sense in relation to a treaty as an outcome.

3. Concluding remarks of the Special Rapporteur

185. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and substantive discussion of the sixth and seventh reports in 2018 (16 statements) and in 2019 (28 statements). The debate was rich and constructive both in 2018 and at the present session. She noted that the debate confirmed the importance of consideration of provisions on procedural guarantees and safeguards in the context of the topic, whose inclusion in the draft articles is an innovative proposal that could significantly help States. She noted the broad support offered by the members of the Commission with respect to draft articles 8 to 16. She also acknowledged the comments, suggestions, and criticisms made, and additional proposals on the substance, some of which could be addressed in the Drafting Committee. Regarding the suggestion made by the members of the Commission related with the reordering of the draft articles, she proposed to follow this sequence: draft articles 8, 12, 10, 11, 13, 9, 14, 15 and 16.

186. The Special Rapporteur reiterated that the draft articles on procedural provisions and safeguards should be considered as a whole in relation to the application of immunity. Their purpose was not to provide safeguards solely in respect of a specific case in which the question of immunity arose (especially in relation to draft article 7), but in respect of all situations where the application of immunity might arise. Their aim was to provide for mechanisms that ensured a balance among the various norms, principles and interests at play and to provide safeguards that ensured a balance between the forum State and the State of the official. Accordingly, she reaffirmed that the proposed draft articles applied to the draft articles taken as a whole, including draft article 7.

187. In that regard, she stated that she did not share the opinions expressed by some members of the Commission to the effect that draft articles 8 to 16 were not applicable to situations addressed in draft article 7. She said that the provisions concerning consideration of immunity, notification, invocation and waiver of immunity, exchange of information, determination of immunity, transfer of proceedings, consultations and the right of the foreign official to fair treatment applied to situations addressed in draft article 7. Nonetheless, the Special Rapporteur referred to the concern that some members of the Commission had expressed about the need to adopt special safeguards for draft article 7 and the proposals that some members had made in that regard. In that sense, she expressed her willingness for those specific proposals to be considered by the Drafting Committee when it examined the draft articles contained in her seventh report.

188. With regard to the terminology employed in draft articles 8 (Consideration of immunity) and draft article 9 (Determination of immunity), the Special Rapporteur said that the use of separate terms was deliberate, as each draft article referred to a different issue. The expression “consideration of immunity” was used to refer to the obligation of the forum authorities to initiate examination of the question of immunity as soon as they established that a foreign official was involved. The expression “determination of immunity” was used to refer to the act of deciding whether or not immunity applied in a specific case. Thus, while draft article 8 was principally temporal in scope, draft article 9 focused on which authority was competent to take a decision on whether immunity applied, the normative elements that the authority concerned must take into account in reaching that decision, and whether certain circumstances pertained, such as whether immunity had been invoked, which could be essential to deciding whether immunity applied or not. Accordingly, she said that she did not consider it appropriate to use the same term in both articles, although she was open to considering different terminology in each case, such as for example “examination of the issue

of immunity” (draft article 8) or “ruling on the applicability of immunity” (draft article 9). In any case, she was opposed to merging draft articles 8 and 9 into a single draft article.

189. In relation to draft article 8, she said that the majority of members of the Commission had supported the flexible approach it reflected, under which immunity should always be examined before the indictment of the official and/or the commencement of oral proceedings (i.e. in the judicial phase), or even earlier if the authorities of the forum State intended to take any coercive measure against the foreign official that might affect the performance of his or her functions. However, she took note of the comments of some members that the issue of considering immunity in relation to purely executive activities and in relation to any investigative activity should be examined in more detail, along with the need to consider the issue of the inviolability of the foreign official. With regard to those comments, she said that many of the issues raised could be dealt with in the context of defining the concept of “criminal jurisdiction”, to which end she had already made a proposal in 2013 that was with the Drafting Committee pending consideration. And she expressed satisfaction because the preparation of that definition had received wide support from members of the Commission. Similarly, she expressed her willingness to consider using the expression “without delay” instead of “at an early stage”. Lastly, the Special Rapporteur said that she was also open to considering using the alternative expressions “competent authorities”, “authorities of the forum State” or simply “forum State”.

190. With regard to draft article 9, the Special Rapporteur reiterated, first and foremost, her conviction that it was for the courts of the forum State to determine immunity, although she took note of the comments of a certain number of members of the Commission on variations in national legal regimes and the fact that in some States such determinations were made by authorities other than the courts, even in some cases the executive authorities. She was therefore open to the Drafting Committee considering broader wording that would cover all the possible situations that might arise in national law. However, she emphasized that the internal judicial effects of a decision on the applicability of immunity would not permit such a decision to be classed as a mere “political act” or “act of government” that could be excluded from judicial review. With regard to what law applied in determining whether immunity was applicable, she reiterated that the decision should necessarily take into account the law of the forum State, the rules incorporated into the Commission’s draft articles defining the normative elements of immunity *ratione personae* and immunity *ratione materiae*, and other norms of international law that applied to the case in question.

191. The Special Rapporteur said that draft article 9 was the appropriate framework within which to consider the proposal on strengthening procedural guarantees in respect of draft article 7 that had been made by a member of the Commission in his statement to plenary, as the aim of that proposal was to establish certain additional safeguards for determining whether immunity applied or not in the event that any of the crimes under international law listed in that draft article were alleged. In respect of those safeguards, the Special Rapporteur expressed agreement with the requirement that immunity should be decided by the competent authorities of the forum State at the highest level. She said that it would also be desirable for the determination of immunity to be undertaken only if there was sufficient evidence that the foreign official could have committed the crimes imputed to him or her, but said that the use of the phrase “the alleged offence is fully conclusive” was not suitable, particularly because it implied that proceedings would be too far advanced to be compatible with the requirement that immunity must be considered at an early stage. Lastly, the Special Rapporteur said that she could also consider the question of the transfer of proceedings to the State of the official, which could be examined either in relation to draft article 9 or in the context of draft article 14, which already provided for a transfer mechanism. In any event, the Special Rapporteur said that, in her view, the supplementary safeguards should apply to all cases in which it was necessary to determine whether immunity *ratione materiae* of a State official applied (including if the applicability of draft article 7 was at issue), without there being any grounds at all to restrict it to cases involving the possible commission of a crime under international law. Lastly, the Special Rapporteur said that she did not consider it appropriate to include the requirement that the State official must be on the territory of the forum State, as it did not take account of the wide variation in State legal systems in that regard.

192. With regard to draft article 11, the Special Rapporteur reiterated her position with regard to the separate procedures that should apply to invocation in the cases of immunity *ratione personae* and immunity *ratione materiae*, recalling that the same position had also been adopted by the previous Special Rapporteur, Mr. Kolodkin. However, she said that she was open to considering wording that would enable the distinction to be made more flexible for cases in which the authorities of the forum State were directly aware that the individual over whom they intended to exercise jurisdiction was a foreign official, for which purpose wording from the Vienna Convention on Consular Relations could be used. With regard to the time at which immunity should be invoked, she accepted the suggestion made by various members of the Commission to amend the wording of paragraph 2 of the draft article so as to take into consideration the different situations in which a State might find itself at the point of deciding whether to invoke the immunity of one of its officials. In any case, she reiterated that not invoking immunity could not automatically be understood as a waiver of immunity.

193. With respect of draft article 11, she reiterated that waiver of immunity was a right of the State of the official, which could not produce retroactive effects and which must be express and clear, while indicating her willingness for the Drafting Committee to explore the most appropriate way to refer to the manner in which a treaty could give rise to a waiver of immunity. She also stated that it would be useful for the Drafting Committee to examine the proposal put forward by a member of the Commission to the effect that the State of the official should waive immunity or offer to itself prosecute if it was alleged that the official concerned had committed serious crimes under international law.

194. Concerning the procedural elements common to both invocation and waiver of immunity, the Special Rapporteur drew attention to the broad consensus within the Commission with respect to the form of both acts and the organ competent to perform them. In that regard, she reiterated that both invocation and waiver should be formulated in writing and be precise as to content, and that the organ competent to invoke or waive immunity should be part of the judicial system of each State. With respect to the channel to be used to communicate to the forum State both invocation and waiver of immunity, she pointed out that the reference to mutual legal assistance mechanisms was justified on grounds of efficiency, without that entailing any prejudice to communication through the diplomatic channel. In that regard, she said that she was open to considering new wording that emphasized that invocation and waiver were habitually communicated through the diplomatic channel. The Special Rapporteur also referred in similar terms to communication via the diplomatic channel in connection with draft articles 12 and 13.

195. With regard to draft articles 12 to 15, the Special Rapporteur noted that in general they had received broad support. Regarding draft article 12 (notification), she reiterated its essential role in the proper functioning of the system of procedural guarantees, although she stated that the definition of the limits of the obligation of notification should be examined by the Drafting Committee.

196. With respect to draft article 13, the Special Rapporteur recalled that the exchange of information constituted an essential element for considering and determining immunity, in particular immunity *ratione materiae*. Regarding the refusal of the State of the Official to transmit the requested information, she reiterated that it would be useful to enumerate the grounds for such a refusal, or at least establish that the State of the Official “must consider the request in good faith”. In any event, she insisted that refusing to transmit the requested information cannot be the reason to declare that immunity does not apply. Moreover, she affirmed that draft article 13 could be supplemented by an explicit reference stating that the provision of information may in no case be interpreted as waiver of immunity or of recognition of the criminal jurisdiction of the forum State. The Special Rapporteur reiterated her opinion that the exchange of information provided for in draft article 13 can function in a bidirectional manner.

197. Regarding draft article 14, the Special Rapporteur emphasized the broad support it had received, with members of the Commission considering that the transfer of criminal proceedings to the State of the official was a useful instrument and an important element in the system of procedural safeguards. With regard to that mechanism, the Special Rapporteur clarified that the transfer of proceedings could take place both in situations where immunity did not apply and in those where it did. She also clarified that draft article 14 allowed for the

transfer request to be made by either the forum State or the State of the official, although it would always be for the competent authorities of the forum State to decide on whether or not to transfer the proceedings to the State of the official. The Special Rapporteur stated that transfer of proceedings was based on the principles of subsidiarity and complementarity, since if the State of the official exercised its own jurisdiction to prosecute the official, it seemed logical that such jurisdiction should have priority over the jurisdiction of the forum State. However, she expressed the view – put forward by a good number of Commission members – that transfer of proceedings must not become an instrument for exempting the official from prosecution, which would constitute fraudulent use of the institution of “transfer of proceedings”, invalidate its useful effect and might have the undesired effect of facilitating impunity for the most serious international crimes. She therefore supported the proposal put forward by various Commission members to the effect that transfer of proceedings should be subject to the condition that the State of the official was genuinely able and willing to exercise jurisdiction and actually did so. The Special Rapporteur did not consider it necessary at the current stage to take a position on the transfer of criminal proceedings to an international criminal court.

198. With respect to draft article 15, the Special Rapporteur emphasized the broad support that the institution of consultations had received from Commission members, who had considered it a wide-ranging instrument that could even be useful in the context of the settlement of disputes. Accordingly, she said that consultations should receive separate treatment in the draft articles and that she was opposed to merging draft article 15 with any other procedural provision.

199. Regarding draft article 16, the Special Rapporteur affirmed its importance and its essential character, since it ensured that the foreign official would receive fair and impartial treatment from the forum authorities, both in the process of considering and determining immunity and also subsequently, if the authorities of the forum State considered that immunity did not apply. With regard to the content of the draft article and its relationship with other similar provisions recently adopted by the Commission within the framework of other topics, the Special Rapporteur indicated that those aspects could be dealt with by the Drafting Committee, taking into account the specificities of each topic.

200. Concerning future work, the Special Rapporteur reiterated her wish to provide a brief analysis, in general terms, on the relationship of the present topic with international criminal jurisdiction, bearing in mind the possibility of transfer the proceeding to an international tribunal. She confirmed that she will address the question of dispute settlement mechanisms, as well as best practices focusing on operational rather than normative aspects. She noted that questions concerning *ultra vires* acts and other remaining issues would be addressed in the commentaries.

201. In relation to the final form of the project, the Special Rapporteur noted that it was premature for the Commission to decide on whether or not a treaty was being elaborated; the current form of draft articles sufficed.

Chapter IX General principles of law

A. Introduction

202. 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.

B. Consideration of the topic at the present session

203. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/732). In his first report, the Special Rapporteur addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also addressed previous work of the Commission related to general principles of law and provided an overview of the development of general principles of law over time, as well as an initial assessment of certain basic aspects of the topic. The Special Rapporteur proposed three draft conclusions. He also made suggestions for the future programme of work on the topic.

204. The Commission considered the report at its 3488th to 3494th meetings, from 23 to 30 July 2019.

205. At its 3494th meeting, on 30 July 2019, the Commission decided to refer draft conclusions 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.¹⁴⁸³

206. At its 3503rd meeting, on 7 August 2019, the Chair of the Drafting Committee presented an interim oral report of the Drafting Committee on draft conclusion 1, provisionally adopted by the Drafting Committee. The report was presented for information only and is available on the website of the Commission.¹⁴⁸⁴

207. At its 3507th meeting, on 9 August 2019, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

1. Introduction by the Special Rapporteur of the first report

208. The Special Rapporteur introduced his report by making some general observations. He noted that general principles of law are an important component of the international legal system and that this source of international law could be usefully clarified by the Commission

¹⁴⁸³ The draft conclusions proposed by the Special Rapporteur in his first report read as follows:

“Draft conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

Draft conclusion 2

Requirement of recognition

For a general principle of law to exist, it must be generally recognized by States.

Draft conclusion 3

Categories of general principles of law

General principles of law comprise those:

- (a) derived from national legal systems;
- (b) formed within the international legal system.”

¹⁴⁸⁴ <http://legal.un.org/ilc/guide/gfra/shtml>.

almost a century after its inclusion in Article 38 of the Statute of the Permanent Court of International Justice.

209. The Special Rapporteur stressed that, by adopting a cautious and rigorous approach, the Commission could provide guidance to States, international organizations, courts and tribunals, and all those called upon to use general principles of law as a source of international law.

210. The Special Rapporteur noted that reactions by Member States in the Sixth Committee to the inclusion of the topic in the programme of work of the Commission were generally very positive, with only one Member State expressing concern that there was insufficient State practice to study it appropriately. He mentioned that many delegations welcomed the Commission's decision to address the topic, which will complement its work in relation to other sources of international law. He added that several delegations also considered that the Commission may provide an authoritative clarification of the nature, scope and functions of general principles of law, as well as the criteria and methods for their identification. The Special Rapporteur also noted the considerable interest for the topic demonstrated by a study group of the International Law Association and through the various academic publications and events organized on the topic.

211. The Special Rapporteur drew the attention of members of the Commission to the French and Spanish versions of his first report. The Spanish version of the report contains the terminology "principios generales *del* derecho" whilst Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, refers to "principios generales *de* derecho". The French version of the report refers to "principes généraux *du* droit", while the Statute of the Court refers to "principes généraux *de* droit". In his view, these differences were not substantive and the terminology used in the report could be maintained, since these expressions ("*del* derecho" and "*du* droit") have been used in international instruments, such as the Rome Statute of the International Criminal Court, in doctrine and by the Commission itself in its recent work, including in the topic "Identification of customary international law".

212. The Special Rapporteur explained that the first report was preliminary and introductory in nature, and that its main purpose was to lay the foundation of the Commission's work on the topic and to obtain the views of members of the Commission and States in this regard.

213. The Special Rapporteur indicated that the report was divided into five parts: Part One deals with general matters; Part Two deals with the Commission's previous work on the topic; Part Three with the development of the topic over time; Part Four provides an initial assessment of certain basic aspects of the topic, namely the elements and origins of general principles of law; and Part Five sets forth a tentative future programme of work. The report also proposed three draft conclusions.

214. Part One of the report sets forth the scope of the topic and raised four interrelated issues to be considered by the Commission: (i) the legal nature of general principles of law as a source of international law and the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; (ii) the origins of general principles of law; (iii) the functions of general principles of law and their relationship with other sources of international law; and (iv) the identification of general principles of law. Certain aspects related to methodology were also highlighted, namely how to select relevant materials for the study of the topic in light of the imprecise terminology employed in the literature and in practice (e.g. "principle", "general principle", "general principle of law", "general principle of international law", "fundamental principle of international law"), and a non-exhaustive list of factors to be considered to determine the relevance of materials. The Special Rapporteur further considered that, as in the case of the topic "Identification of customary international law", the examples of general principles of law that may be referred to in the work of the Commission must be illustrative only and contained in the commentaries to the draft conclusions, and that the Commission should not delve into their substance.

215. Part Two of the report addresses the Commission's previous work related to the topic. The Special Rapporteur noted that general principles of law have appeared in the work of the Commission since its early years; that general principles of law seem to have been codified in the context of some topics, such as the law of treaties and responsibility of States for

internationally wrongful acts; and that certain aspects of the present topic had been previously studied or discussed, albeit in general briefly, by the Commission, such as in the topics on fragmentation of international law, and identification of customary international law. He stressed that the previous work of the Commission must be taken into account in an appropriate manner.

216. Part Three of the report, which deals with the development of general principles of law over time, had two main objectives: (i) to provide context to the topic and (ii) to provide relevant materials for the study of general principles of law by members of the Commission. The Special Rapporteur highlighted that section A focused on references to general principles of law in international instruments while section B addressed general principles of law in the case law of international courts and tribunals. The Special Rapporteur stressed that, while section B focused almost exclusively on examples from judicial settlement of disputes, this did not mean that this is the only context in which general principles of law applied. As a source of international law, they apply to the relations between subjects of international law generally. He added that the materials referred to in this section were not exhaustive and that, taking into account the materials available, there was sufficient State and international judicial practice for the Commission to address this topic adequately. The Special Rapporteur also indicated that the first report briefly mentioned practice related to general principles of law of a regional scope and the practice of international administrative tribunals, and indicated that he would welcome the views of members as to whether these should be studied further.

217. Part Four of the report provides first an initial assessment of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, which refers to “the general principles of law recognized by civilized nations”. The Special Rapporteur identified three interrelated elements, namely “general principles of law”, “recognized” and “civilized nations”. Part Four also addressed the question of the origins of general principles of law. The Special Rapporteur stressed that the position of the Commission on this latter question would be decisive as to how the topic would be addressed in the future.

218. The Special Rapporteur raised the question whether “general principles of law” in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice share any characteristics with the “general principles” that exist in national legal systems. He noted that, while it may be said that they share some common features, such as their function of filling gaps, their characteristics are probably to be distinguished due to the structural differences between the international legal system and national legal systems. Another issue that the Special Rapporteur pointed to for consideration by the Commission is the possible distinction between the terms “principle” and “rule” or “norm”. The Special Rapporteur indicated that the doctrine is not unanimous on this matter. He recalled that both the International Court of Justice and the Commission have expressed that the term “principle” refers to a more “general” and “fundamental” norm than other norms of international law. The report preliminarily concludes that, while general principles of law may have a more “general” and “fundamental” character, it cannot be excluded, having regard to existing practice, that there may exist general principles of law which do not have these characteristics. Another issue addressed in Part Four of the report is the relationship between general principles of law and “general international law”. The Special Rapporteur indicated that it is clear that the term “general international law” includes general principles of law, as has been recently reiterated by the Commission in the commentary of the draft conclusions on the identification of customary international law, which implies that they are universally applicable. However, a reference to “general international law” is not to be necessarily understood as a reference to general principles of law. Each case should thus be examined in its context.

219. Part Four of the report also addressed the meaning of the term “recognized” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Special Rapporteur stated that recognition was the essential condition for the existence of a general principle of law, in accordance with the text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and the *travaux préparatoires* of the Statute of the Permanent Court of International Justice. The Special Rapporteur indicated that the drafters of the Statute considered that the formal validity of general principles of law would be based

on their recognition by “civilized nations”. This recognition would constitute an objective basis that would address the drafters’ concern not to afford to a judge excessive discretion in the determination of the law. This objective could be achieved with the recognition of a principle by States in general, a condition that did not depend on the subjective view of a judge or a particular State. The Special Rapporteur also stressed that the essential condition of recognition of general principles of law differs clearly from the essential conditions for the identification of customary international law, namely a general practice and its acceptance as law (*opinio juris*).

220. As to the term “civilized nations”, the Special Rapporteur considered that it should not cause major difficulties for the work of the Commission. He noted that, while this term may have had a particular meaning in the past, it has become anachronistic and should be avoided. Taking into account existing practice and the principle of sovereign equality, this term must be understood as referring to all States of the international community. The Special Rapporteur indicated that this conclusion did not exhaust all the questions that arise regarding whose recognition is required, and that he would welcome the views of members of the Commission on issues that would need to be addressed in a future report, such as the degree of recognition that a general principle of law must have, whether international organizations could also contribute to the formation of general principles of law, and the particular role that international courts and tribunals may play in this matter.

221. Section II of Part Four of the first report deals with the origins of general principles of law and corresponding categories. The Special Rapporteur reiterated that this fundamental issue would determine the work of the Commission in the future. In view of existing practice and literature, the report addresses two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. The Special Rapporteur indicated that other categories have been proposed in doctrine, but that they were somewhat vague, could allow excessive discretion and did not find sufficient support in practice, at least in a clear manner, and therefore were not addressed in the first report.

222. The category of general principles of law derived from national legal systems finds support in the practice prior to the adoption of the Statute of the Permanent Court of International Justice, in the *travaux préparatoires* of the Statute, as well as broadly in current State and international judicial practice. The Special Rapporteur indicated that the identification of principles falling within this category required a two-step analysis: (i) the identification of a principle common to the generality of national legal systems or principal legal systems of the world; and (ii) the determination of whether such principle is applicable in the international legal system (sometimes referred to as “transposition”).

223. The second category of general principles refers to general principles of law formed within the international legal system. The Special Rapporteur stressed that nothing in the *travaux préparatoires* of the respective Statutes of the Permanent Court of International Justice and the International Court of Justice, nor their text, suggested that general principles of law are limited to those derived from national legal systems. He recalled that, in the Advisory Committee of Jurists, although there was general agreement among its members that the general principles of law could derive from national legal systems, the possibility that they may have other origins was not excluded. The existence of this category could also be explained on the basis that, if the function of general principles of law is to fill gaps, then it would be logical to have recourse to it, since general principles of law derived from national legal systems may not be sufficient to perform such function. State practice and international jurisprudence, as well as the literature, also support the existence of this category.

224. Finally, with respect to the future work of the Commission, the Special Rapporteur proposed that the second report address the functions of general principles of law and their relationship to other sources of international law, and that the third report be dedicated to the identification of general principles of law. The Special Rapporteur indicated his flexibility on the order in which these aspects of the topic should be addressed and would welcome views of members of the Commission thereon.

2. Summary of the debate

(a) General comments

225. Members welcomed the first report of the Special Rapporteur and noted with appreciation that it was well structured and researched. Members noted its “preliminary and introductory” nature. Some members indicated that their comments were also preliminary until the Commission had an opportunity to progress in its work. It was agreed that a number of issues would need to be further addressed and nuanced in the course of future work on the topic, in particular regarding the scope of the topic, as well as the elements and origins of general principles of law, and their identification.

226. With respect to the terminology to be used in French and Spanish, some members expressed the view that it would be important not to depart from the precise terminology contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice in the title of the topic and in the Commission’s documentation.

227. Some members agreed that this topic was relevant not only because general principles of law were essential in the judicial context, but also because they were generally applicable between States. A view was expressed, however, that, while it was important for the Commission to consider the topic, general principles of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice did not play a very important role in practice.

(i) *Scope and outcome of the topic*

228. Several members stressed that the scope of the topic refers to general principles of law as a source of international law. A number of members supported limiting the scope of the topic to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, but not limited to its application by the Court, and in the light of the practice of States and of international courts and tribunals. Some members suggested that the Commission could consider revising the title of the topic to clarify its scope.

229. It was agreed by a number of members that the Commission should not delve into the substance of general principles of law, although it could provide illustrative examples. Some members proposed that an illustrative list of general principles of law be prepared and provided as an annex, while others stressed that this would be an incomplete exercise and could become a distraction from the core issues. Several members considered that illustrative examples of general principles of law could be included in the commentaries together with all relevant materials.

230. Members generally agreed with the issues set forth for consideration by the Commission in the Special Rapporteur’s first report, namely: (i) the legal nature of general principles of law as a source of international law; (ii) the origins of general principles of law; (iii) the functions of general principles of law and their relationship with other sources of international law; and (iv) the identification of general principles of law. Some members, however, expressed doubts as to the proposed order in which these issues would be addressed.

231. With respect to the legal nature of general principles of law as a source of international law, members agreed that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice provided an authoritative statement in this sense, which is moreover corroborated in the practice of States and international courts and tribunals. One member questioned the meaning of the term “source” and whether it included formal sources, material sources, judicial sources, historical sources and literary sources, while other members found the common understanding of this term sufficiently clear for the Commission to advance in its work, which is the form by which a legal rule or principle comes into existence. Several members noted that general principles of law must be afforded autonomy from the other sources. While it was noted that there was no hierarchy among the sources of international law, some members stressed that, in practice, general principles of law played a role of filling gaps. The view was expressed that general principles of law were a secondary source of international law, which played a “subsidiary” role. Some members indicated, however, that

the Commission should avoid describing general principles of law as subsidiary and that the term “supplementary” was a more appropriate description.

232. With respect to the functions of general principles of law and their relationship with other sources of international law, members agreed with the Special Rapporteur that this issue would require careful consideration. Members generally supported the Special Rapporteur’s conclusion that the *travaux préparatoires* of Article 38 of the Statute of the Permanent Court of International Justice suggested that the inclusion of general principles of law as a source of international law was driven by a concern to avoid findings of *non liquet*, and that the purpose of the elements provided in this article was to limit judicial discretion in the determination of international law. Some members indicated that general principles of law could have other possible functions, such as to serve as an interpretative tool, and that they serve as sources of rights and obligations. Some members expressed doubt as to whether the meaning of *non liquet* and its prohibition under international law should be addressed as this fell outside the scope of the topic.

233. Members agreed that the distinction between general principles of law and customary international law would be important for the topic. In particular, some members noted that, if the distinction was not clearly explained, there may be a certain confusion between these two sources of international law. Some suggested that these two sources could be distinguished, for example, by their process of coming into existence and the conditions they must fulfil for doing so. The view was expressed that it may sometimes be difficult to differentiate general principles of law from customary international law. Some members indicated that it would be important for the Commission to examine not only the relationship of general principles of law with treaties and customary international law, but also with equity. Further, it was suggested that general principles of law and principles regulating the various branches of international law should also be examined.

234. Members generally agreed that draft conclusions would be an appropriate form with respect to the outcome of the topic. The view was expressed, however, that draft guidelines or draft articles would be a more appropriate outcome. A view was also expressed that the Commission should remain open and make such determination at a later stage of its work.

(ii) *Methodology*

235. Members generally agreed with the methodology proposed by the Special Rapporteur and reiterated the importance of a cautious approach. Some members indicated that, while the practice of States and the jurisprudence of international courts and tribunals were a good starting point, as proposed by the Special Rapporteur, jurisprudence of national courts, the output of international organizations and the literature would also be relevant. A view was expressed that focus should also be placed on regional entities, such as the Inter-American Juridical Committee and Inter-American Court of Human Rights. The suggestion was made that it would be relevant to examine soft law instruments.

236. According to a view, the Commission should avoid settling theoretical debates and should aim at providing practical solutions. It was also noted that the Commission should be transparent if State practice was insufficient and that it would be challenging to canvas global information relating to this topic to analyse all major legal systems. Members also agreed with the Special Rapporteur regarding the imprecision of the language used in previous work and literature. Some members suggested that a measure of flexibility may be needed by the Commission to accommodate the specificities of the many areas of international law upon which this topic would touch.

(b) **Previous work of the Commission and development of general principles of law over time**

237. Members welcomed the analysis of the historical background provided by the Special Rapporteur. In particular, it was stressed that general principles of law were historically largely derived from national legal systems and Roman law and applicable only when a specific matter was not regulated by other sources of law. Several members noted that the *travaux préparatoires* of the Statute of the Permanent Court of International Justice should be seen in that context, since at the time of its adoption, international law did not regulate the

issues involved in many areas, and general principles of law were intended to provide the judge with an alternative to a finding of *non liquet*. It was noted that the link between general principles of law and the European *ius commune* could have been assessed in the report and that these historical antecedents may assist the Commission in getting a sense of what was meant by general principles of law.

238. Some members noted that caution was required when characterizing the Commission's previous work. In addition, some members questioned the usefulness of reviewing references to general principles of law in specific treaty regimes, while several members supported it. Some members questioned why the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had not been mentioned in the report.

(c) Elements of general principles of law

239. Members generally agreed with the Special Rapporteur's approach of looking separately at the three elements of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Several members highlighted the distinction between "general principles of law" and "general principles of international law" and stressed that their relationship would need to be addressed. Further, a number of members noted that the term "general" and "principles" would need thorough analysis. In this connection, the suggestion of the Special Rapporteur to closely examine the distinction between a "principle" and "norm" or "rule" was supported by several members. Some members supported the Special Rapporteur's explanation regarding the "general" and "fundamental" nature of a principle, although the specific meaning of these terms was questioned. Other members indicated that not all general principles of law necessarily have those characteristics, as mentioned in the report and shown by existing practice.

240. The possibility of addressing "regional" or "bilateral" general principles of law was welcomed by some members, while others expressed doubts as to whether it would be appropriate, and some suggested that it was premature for the Commission to examine this issue at this early stage of its work. In particular, it was stressed that they did not fall within the scope of the topic and it was stated that the term "general" in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice entailed the applicability of general principles of law to "all States", excluding "regional" or "bilateral" general principles of law. Some members suggested that the Commission revert to this issue as its work progresses, in light of further research. Finally, several members were of the view that the term "law" would also merit closer examination, for example to determine whether it encompasses both national and international law.

241. Members generally agreed that the element of "recognition" was essential to the identification of general principles of law and supported the suggestion by the Special Rapporteur to study further this specific requirement in a future report. Members highlighted the delineation between recognition, as a requirement for general principles of law, and acceptance as law, as an element of customary international law. Some members further made clear that they did not view the requirement of "recognition" as similar to the element of "acceptance as law" relevant in the context of customary international law.

242. Further, members generally supported the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems – (i) the identification of a principle common to a sufficiently large number of national legal systems and (ii) the determination of whether such principle is applicable in the international legal system. Several members agreed that this two-step analysis and each of its elements would have to be examined closely. A number of issues were raised with respect to this matter, such as whether the same recognition would apply to the two categories of general principles of law proposed by the Special Rapporteur; the level or degree of recognition needed, and in particular the meaning of a "sufficiently large majority"; whose recognition is required; the role of States in the transposition stage; the role, if any, of international organizations; and whether the term "transposability" was more accurate than "transposition".

243. Members generally agreed that the term “civilized nations” was inappropriate and outdated and should not be used in the context of the present draft conclusions. Some members supported the Special Rapporteur’s proposal to refer instead to “States”, while others cautioned that this term may not encompass all actors involved in the formation of general principles of law, including international organizations. Some members expressed the view that the term “nations” should be further considered. It was also suggested to use the term “community of nations”, contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights: “general principles of law recognized by the community of nations”.

(d) The origins of general principles of law as a source of international law

244. Several members agreed with the two categories proposed by the Special Rapporteur based on their origins, namely general principles of law derived from national legal systems and general principles of law formed within the international legal system, considering that there was sufficient practice supporting both of them. Some members expressed the view that the difference between general principles of law of a procedural nature and those of substantive nature was important when categorizing general principles of law and should be further considered. While it was indicated that other categories should not be excluded, some members cautioned against the proliferation of categories.

245. Several members suggested, however, that the category of general principles formed within the international legal system should not be considered since there was insufficient State practice to support it. A number of members considered that this category was debatable and that a cautious approach should be taken when considering it, and in establishing its limits. It was noted that an additional challenge would be to delineate the limits of this category, which may lead to excessive and subjective judicial discretion, and could undermine the requirements for the formation of customary international law. It was considered that this category should not be rejected or overly restricted; the main concern would be that the precondition for its formation be sufficiently stringent. Finally, some members expressed the view that a hard distinction should not be drawn between national legal systems and the international legal system when determining the origins of general principles of law, as the latter could be derived indistinctly from either system.

(e) Comments on the draft conclusions proposed in the first report

246. A number of drafting proposals were made concerning draft conclusions 1, 2 and 3. Several members suggested that draft conclusions 2 and 3 be held in the Drafting Committee until the Commission has had the opportunity to consider further relevant issues that may have an impact on their formulation.

(f) Future programme of work

247. Members generally supported the proposal by the Special Rapporteur to address the functions of general principles of law and their relationship with other sources of law in his second report and the issue of identification of general principles of law in his third report. Some members suggested that the Special Rapporteur may wish to reverse the proposed order and begin with the issue of identification of general principles of international law, and in particular with the threshold for recognition and the criteria for the transposability or transposition of principles common to national legal systems to the international legal system. Some members suggested that the Special Rapporteur propose a definition for general principles of law. It was also suggested that the Special Rapporteur address first the more generally accepted category of general principles of law, namely those derived from national legal systems, before addressing general principles of law formed within the international legal system, and treat both function and recognition together.

3. Concluding remarks of the Special Rapporteur

248. The Special Rapporteur welcomed the interest that the topic received among the members of the Commission and noted that the debate had shown that, despite the different points of view on certain complex aspects, there were fundamental points on which there was general consensus. For instance, there was consensus on the issues to be considered by the

Commission, namely: (1) the legal nature of general principles of law as a source of international law; (2) the origins and corresponding categories of general principles of law; (3) the functions of general principles of law and their relationship to other sources of international law (in particular customary international law); and (4) the identification of general principles of law.

249. Further, the Special Rapporteur noted the general consensus on the final outcome of the Commission's work, which should take the form of conclusions accompanied by commentaries, since the purpose of the topic was to clarify various aspects of one of the main sources of international law and such outcome was consistent with the previous work of the Commission.

250. The Special Rapporteur also noted that, although the current title of the topic had not been the subject of any observations by States in the Sixth Committee, members of the Commission had made proposals to modify it. He noted that, in his view, such proposals were not needed and would not accurately reflect the scope of the topic.

251. The Special Rapporteur further noted the general consensus on the scope of the topic and stressed that it would not be necessary for the Commission to have a theoretical debate about the meaning of the term "sources". He added that the Commission has been working on the sources of international law since its creation and that the common understanding of its work is on "formal sources", which refers to the legal process and the form by which a rule or principle comes into existence. The text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was clear in that general principles of law constitute a source of international law, distinct from treaties and customary international law, which has been confirmed in the practice of States and of international courts and tribunals. He emphasized that the commentary would clarify that general principles of law were being considered in the context of Article 38, paragraph 1 (c), and that it would therefore not be necessary, at this stage at least, to draft a definition of general principles of law as was suggested by some members.

252. The Special Rapporteur observed that there was general consensus that the starting point for consideration was Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. The Special Rapporteur stated that the concerns raised by some members related to the scarcity of State practice with respect to certain specific aspects of the topic should not impede the progress of this topic. He noted that the written and oral pleadings made by States before international courts and tribunals would be relevant to the extent that a common approach could be identified. Further, the fact that the Commission was considering the topic might encourage States in the Sixth Committee to pronounce themselves on such issues. For the Special Rapporteur, an in-depth analysis of general practice could give indications of how States understand, even implicitly, the more specific aspects of the topic, and that, in any case, the Commission should continue its work with a careful and transparent approach. In this context, the Special Rapporteur highlighted that the inter-American system as well as all relevant practice in other regions should be considered.

253. The Special Rapporteur observed that some members favoured the inclusion of general principles of regional or bilateral scope, while others expressed doubts as to its existence or relevance for the purposes of the present topic. He stressed that such general principles of law should not be discarded at this early stage. The Special Rapporteur also addressed the concerns about the relevance of international instruments, other than the Statute of the International Court of Justice, which seem to refer to general principles of law, such as the Rome Statute of the International Criminal Court. In his view, such instruments should be examined to determine whether or not they are relevant, since there may otherwise be a risk of gaps in the study of the topic. On the practice of international organizations, the Special Rapporteur indicated that its relevance should be further examined.

254. The Special Rapporteur considered that preparing an illustrative list of general principles of law would be impractical, necessarily incomplete and would divert attention away from the central aspects of the topic. The Special Rapporteur noted that specific examples of general principles of law should be made in the commentaries without taking a position on their substance. Further, the Special Rapporteur expressed his willingness to

submit a preliminary bibliography to be annexed in one of his future reports. In addition, the Special Rapporteur noted that the possible role of international courts and tribunals in the formation or identification of general principles of law should be analysed with the understanding that these decisions are a subsidiary means for the determination of rules of law, as provided in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

255. The Special Rapporteur noted that the majority of members supported, at least on a preliminary basis, that general principles of law were supplementary in nature, and that their main function was to fill gaps or lacunae in international law or to avoid *non liquet*. He also referred to the position of other members who consider that, in view of the absence of hierarchy between the sources of international law, priority to treaties and customary international law may be given rather on the basis of the principles of *lex specialis* and *lex posterior*.

256. The Special Rapporteur also noted that there was consensus on the need to consider the relationship between general principles of law and other sources of international law, in particular customary international law. He emphasized the need to carefully and clearly differentiate general principles of law from the other sources, and indicated that future reports would address this issue in a rigorous manner. He stressed that, with regard to the concept of “general international law”, members of the Commission broadly agreed that general principles of law form part of general international law.

257. In addition, the Special Rapporteur observed that for some members there was, or should be, a distinction between “principles” and “norms” or “rules”, and that the majority of members focused on the question of whether the wording “general principles of law” indicates anything about the characteristics, functions, origins or other aspects of this source of international law. He also noted that some members raised questions on whether such principles could be considered as more “general” and “fundamental” than other norms. He also indicated that, for some members, the term “law” may or may not be interpreted as referring to national law and international law. In this context, the Special Rapporteur stressed that, at this stage, it could not be excluded that the term “general principles of law” was simply a term of art used to designate this source of international law, and that, for that reason, there may be no need to provide the specific meaning of each word. He added that this would be clarified, in any event, after studying the identification of general principles of law.

258. The Special Rapporteur stated that the Commission was unanimous in considering that recognition is the essential condition for the existence of general principles of law and that this would be a central aspect of this topic. The degree of recognition required, as well as the specific forms that recognition may take for each of the categories of general principles of law, were issues that needed further consideration. The Special Rapporteur stressed the importance of continuing with a cautious approach and that the criteria for determining the existence of general principles of law must be balanced between flexibility – so their identification would not be an impossible task – and strictness – to avoid the risk of being used as a shortcut to identify rules of international law, which could undermine other sources.

259. The Special Rapporteur observed that there was also consensus that the term “civilized nations” was anachronistic, and should be avoided, considering the principle of sovereign equality of States. The main question remained as to the appropriate alternative term to be used. He agreed with the suggestion made in the debate that possibly the best formulation could be the term “community of nations”, contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

260. The Special Rapporteur stressed that besides the two categories proposed in the first report, which are supported by practice and doctrine, the Commission should avoid an unnecessary proliferation of categories of general principles of law. He also stated that the possible distinction between substantive general principles and procedural general principles did not necessarily fall within the scope of the present topic, and that those two types of general principles of law, as was suggested in the debate, could have their origin both in national legal systems and in the international legal system.

261. The Special Rapporteur highlighted that members of the Commission unanimously accepted the category of general principles of law derived from national legal systems and that members agreed that the identification of this category should follow a two-step analysis. First, the identification of a principle at the national level and, second, its transposability or transposition to the international level. Such analysis, including how recognition is expressed, the degree of recognition required and the method for identifying this category and would be set forth in a future report. The Special Rapporteur observed that there was less consensus among members on the second category of general principles of law, namely those formed within the international legal system. Several members supported this category of general principles of law, considering that it is based in sufficient practice, while its existence was questioned by some other members. The Special Rapporteur indicated that the latter considered that practice was not sufficient to demonstrate the existence of this category of general principles of law and that the forms of recognition of this second category may be too flexible. The Special Rapporteur noted that these members were nonetheless not entirely excluding the possible existence of this second category, suggesting that the issue should be examined further.

262. The Special Rapporteur indicated that he would take into account the suggestions formulated by members of the Commission to further address the requirement of recognition and the identification of general principles of law in his next report. In addition, the Special Rapporteur underlined that a study from the Secretariat on certain aspects of the present topic would contribute to the Commission's work, as would a questionnaire to be circulated to States requesting information about their practice on general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

Chapter X

Sea-level rise in relation to international law

A. Introduction

263. At its seventieth session (2018), the Commission decided to include the topic “Sea-level rise in relation to international law” in its long-term programme of work.¹⁴⁸⁵

264. In its resolution 73/265 of 22 December 2018, the General Assembly subsequently noted the inclusion of the topic in the long-term programme of work of the Commission, and in that regard called upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.

B. Consideration of the topic at the present session

265. At its 3467th meeting, on 21 May 2019, the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

266. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.

267. The Study Group, co-chaired by Ms. Patrícia Galvão Teles and Ms. Nilüfer Oral, held a meeting on 6 June 2019. The Study Group considered an informal paper on the organization of its work containing a road map for 2019 to 2021. The discussion of the Study Group focused on its composition, its proposed calendar and programme of work, and its methods of work.

268. Concerning the composition, consensus was reached on establishing a membership-based Study Group which will be open to all members of the Commission. As members will be asked to join via a participation list each year, the membership of the Study Group could change from year to year.

269. With regard to the programme of work, over the next two years, the Study Group is expected to work on the three subtopics identified in the syllabus prepared in 2018,¹⁴⁸⁶ namely: issues related to the law of the sea, in 2020, under the co-chairpersonship of Mr. Bogdan Aurescu and Ms. Nilüfer Oral; and issues related to statehood, and issues related to the protection of persons affected by sea-level rise, in 2021, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria. Support was expressed by members of the Study Group for this approach. It was also noted that the proposed programme of work of the Study Group might require adjustment in the light of the complexity of the issues to be considered.

270. As to the methods of work, it was anticipated that approximately five meetings of the Study Group will take place each session. It was agreed that, prior to each session, the Co-Chairs will prepare an issues paper. The issues paper will be edited, translated and circulated as an official document to serve as the basis for the discussion and for the annual contribution of the members of the Study Group. It will also serve as the basis for subsequent reports of the Study Group on each subtopic. Members of the Study Group will then be invited to put forward contribution papers that could comment upon, or complement, the issues paper prepared by the Co-Chairs (by addressing, for example, regional practice, case law or any other aspects of the subtopic). Recommendations will be made at a later stage regarding the format of the outcome of the work of the Study Group.

¹⁴⁸⁵ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 369.

¹⁴⁸⁶ *Ibid.*, annex B.

271. At the end of each session of the Commission, the work of the Study Group will be reflected in a substantive report, taking due account of the issues paper prepared by the Co-Chairs and the related contribution papers by the members, while summarizing the discussion of the Study Group. That report will be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, so that a summary can be included in the annual report of the Commission.

272. The Study Group also recommended that the Commission invite the comments of States on specific issues that are identified in chapter III of the report of the Commission. The possibility of requesting a study from the Secretariat of the United Nations was discussed in the Study Group as well. The knowledge of technical experts and scientists will continue to be considered, possibly through side events organized during the next sessions of the Commission.

273. Finally, with the assistance of the Secretariat, the Study Group will update the Commission on new literature on the topic and related meetings or events that might be organized in the next two years.

Chapter XI

Other decisions and conclusions of the Commission

A. Provisional application of treaties

274. At its 3495th meeting of the Commission, on 31 July 2019, the Special Rapporteur on the topic “Provisional application of treaties”, Mr. Juan Manuel Gómez Robledo, presented an oral report on the informal consultations held on 10 and 18 July 2019 to consider the draft model clauses on provisional application of treaties.

275. The Special Rapporteur recalled that at the time of the adoption on first reading of the draft Guide to Provisional Application of Treaties, at the seventieth session, in 2018, the Commission also took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee.¹⁴⁸⁷ Such reference was subsequently included in paragraph (7) of the general commentary,¹⁴⁸⁸ in which it was explained that, in preparing a set of draft model clauses, to be annexed to the Guide, the Commission would seek to reflect the best practice with regard to the provisional application of both bilateral and multilateral treaties. It was also clarified that in no way would they be intended to limit the flexible and voluntary nature of provisional application of treaties. Nor would they attempt to address the whole range of situations that may arise.

276. The Special Rapporteur further recalled that the Commission, in its report on the seventieth session, had indicated its intention to resume the consideration of the draft model clauses at the present session, in order “to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during the seventy-second session”.¹⁴⁸⁹

277. The Special Rapporteur drew the Commission’s attention to the fact that 41 delegations, including the European Union which spoke on behalf of its 28 member States and other States, had expressed views in the debate on the topic in the Sixth Committee, during the seventy-third session of the General Assembly, in 2018. During that debate, many delegations had acknowledged with appreciation the proposal of the Special Rapporteur of including draft model clauses as an annex to the Guide, with several delegations observing that the inclusion of draft model clauses would provide practical assistance and guidance to States when drafting provisions of treaties. At the same time, some delegations had regretted that the Commission had not been able to complete its consideration of the draft model clauses during the first reading and expressed their hope that they could be in a position to consider the draft model clauses before the second reading commenced.

278. It was with the 2018 decision of the Commission and the views of Governments in mind that the Special Rapporteur circulated an informal paper containing a revised set of draft model clauses, which then served as a basis for discussion in the informal consultations held at the present session. He pointed to the following understandings that underpinned his revised proposal for the draft model clauses, namely that:

(a) the draft model clauses should be aimed at addressing the most common issues faced by States and international organizations who are willing to resort to provisional application;

(b) the draft model clauses should not pretend to address the whole range of situations that may arise;

¹⁴⁸⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 85.

¹⁴⁸⁸ *Ibid.*, para. 90.

¹⁴⁸⁹ *Ibid.*, para. 85, footnote 1008.

(c) special care should be taken so as to avoid the draft model clauses overlapping with the guidelines contained in the Guide to Provisional Application of Treaties; and

(d) the draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

279. In addition, in his view, the draft model clauses should at least provide for the following situations:

(a) the provisional application of a treaty or a part of a treaty in the treaty itself or in a separate agreement;

(b) the most common situations of termination of the provisional application of a treaty or a part of a treaty;

(c) the possibility of opting for the provisional application of a treaty or a part of a treaty, or for opting not to have the treaty or a part of a treaty being provisionally applied for that State or international organization, particularly whenever the decision to resort to provisional application is made by:

(i) a resolution adopted by an international organization or at an intergovernmental conference in which the State or international organization concerned is not in agreement with such resolution; or,

(ii) a declaration by a State or international organization that is not a negotiating party to the treaty; and

(d) limitations deriving from internal law of States or rules of international organizations.

280. Furthermore, as had been explained in his fifth report,¹⁴⁹⁰ submitted in 2018, the draft model clauses were intended only to draw attention to some of the most common legal issues that arose in the event of an agreement to apply a treaty provisionally. Accordingly, they contained elements that reflected the most clearly established practice of States and international organizations, while avoiding other elements that were not reflected in practice or were unclear or legally imprecise. While none of the proposed wording was taken verbatim from any existing treaty, the draft model clauses included footnotes giving examples of provisional application clauses found in treaties that referred generally to the same issue covered in the draft model clause in question, although such examples were by no means exhaustive.

281. During the informal consultations, members were generally supportive of the proposal to include a set of draft model clauses, as an annex to the Guide to Provisional Application of Treaties, to be adopted on second reading next year. A number of suggestions were made concerning the approach to be taken to the model clauses, as well as on the drafting of the draft model clauses. For example, it was stated that the Commission should carefully explain their nature as not necessarily being definitive, but rather that they were intended to merely provide a basis for States to negotiate such clauses in their treaties. It was also suggested that a clearer distinction be drawn, in the text of the draft model clauses, between bilateral and multilateral treaties. Support was also expressed for the inclusion of draft model clauses 4 and 5, dealing with the question of opting out of provisional application arising from a resolution of an international organization, and limitations deriving from internal law of States or rules of international organizations, respectively. Indeed, the accompanying commentary would need to provide clear explanations.

282. The concern was also expressed, during the informal consultations, that the inclusion of a set of draft model clauses could be interpreted as the Commission encouraging States to resort to provisional application. In the view of the Special Rapporteur, such concern had existed from the very beginning of the work on the topic. The very fact of clarifying the applicable rules could be understood as facilitating the provisional application of treaties. However, this was not necessarily the only possible interpretation. It was recalled that there already existed a significant body of practice of States resorting to provisional application

¹⁴⁹⁰ A/CN.4/718, paras. 75–77, and Add.1.

from even before the 1969 Vienna Convention on the Law of Treaties,¹⁴⁹¹ and especially so since the adoption of article 25 of that Convention. The Commission had decided to undertake the topic in order to provide a service to the Member States by seeking to clarify the legal framework for provisional application as well some of the legal consequences arising therefrom. At all times, the optional and voluntary nature of provisional application had been emphasized. The draft model clauses would simply be provided to facilitate drafting in those situations where negotiating parties decided to resort to the mechanism of provisional application.

283. The Special Rapporteur proposed that the Commission annex his revised version of the draft model clauses to its annual report to the General Assembly, with the request that the Governments also consider them in preparing their comments and observations on the first reading of the Guide to Provisional Application of Treaties. It would be on the basis of the views of members of the Commission, expressed during the informal consultations, together with the comments received from Governments, that he would include a further revised version of the draft model clauses in his final report to be considered at the seventy-second session of the Commission.

284. At the same 3495th meeting, the Commission took note of the oral report, and decided to annex the proposed draft model clauses to the Commission's report to the General Assembly, with a view to seeking comments from Governments in advance of the commencement of the second reading of the draft Guide to Provisional Application of Treaties at the next session of the Commission. The proposed draft model clauses appear in annex A to the present report.

B. Sea-level rise in relation to international law

285. At its 3467th meeting, on 21 May 2019, the Commission decided to include the topic "Sea-level rise in relation to international law" in its programme of work and decided to establish an open-ended Study Group on the topic co-chaired, on a rotating basis, by: Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

C. Request by the Commission for the Secretariat to prepare studies on topics in the Commission's agenda

286. At its 3507th meeting, on 9 August 2019, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic "General principles of law".

D. Programme, procedures and working methods of the Commission and its documentation

287. At its 3470th meeting, on 24 May 2019, the Commission established a Planning Group for the present session.

288. The Planning Group held two meetings on 24 May and 23 July 2019. It had before it section E, entitled "Other decisions and conclusions of the Commission", of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session (A/CN.4/724); General Assembly resolution 73/265 of 22 December 2018 on the report of the International Law Commission on the work of its seventieth session; and General Assembly resolution 73/207 of 20 December 2018 on the rule of law at the national and international levels.

¹⁴⁹¹ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

1. Working Group on the long-term programme of work

289. At its 1st meeting, on 24 May 2019, the Planning Group decided to reconvene the Working Group on the long-term programme of work, with Mr. Mahmoud D. Hmoud as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 2nd meeting, on 23 July 2019. The Planning Group took note of the oral report.

290. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission:

(a) Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law; and

(b) Prevention and repression of piracy and armed robbery at sea.

291. In the selection of the topics, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission considered that work on the two topics would constitute useful contributions to the progressive development of international law and its codification. The syllabuses of the topics selected appear as annexes B and C to the present report.

2. Working Group on methods of work of the Commission

292. At its 1st meeting, on 24 May 2019, the Planning Group decided to re-establish the Working Group on methods of work of the Commission, with Mr. Hussein A. Hassouna as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 2nd meeting, on 23 July 2019. The Planning Group took note of the oral report.

3. Consideration of General Assembly resolution 73/207 of 20 December 2018 on the rule of law at the national and international levels

293. The General Assembly, in resolution 73/207 of 20 December 2018 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report¹⁴⁹² remain relevant and reiterates the comments made at its previous sessions.¹⁴⁹³

294. 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.

¹⁴⁹² *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10).*

¹⁴⁹³ *Ibid.*, Sixty-fourth Session, Supplement No. 10 (A/64/10), para. 231; *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), paras. 390–393; *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), paras. 392–398; *ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 274–279; *ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 171–179; *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 273–280; *ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), paras. 288–295; *ibid.*, Seventy-first Session, Supplement No. 10 (A/71/10), paras. 314–322; *ibid.*, Seventy-second Session, Supplement No. 10 (A/72/10), paras. 269–278; *ibid.*, Seventy-third Session, Supplement No. 10 (A/73/10), paras. 372–380.

295. 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.

296. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.¹⁴⁹⁴

297. 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)”,¹⁴⁹⁵ without emphasizing one at the expense of the other. In this context, the Commission is cognizant that the 2030 Agenda for Sustainable Development recognizes the need for an effective rule of law and good governance at all levels.¹⁴⁹⁶ In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law.

298. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,¹⁴⁹⁷ the Commission wishes to recall that much of its work consists of collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law. In this spirit, the Commission particularly welcomes the decision of the General Assembly inviting Member States to focus their comments during the upcoming Sixth Committee debate at the seventy-fourth session of the General Assembly regarding the rule of law on the subtopic “Sharing best practices and ideas to promote the respect of States for international law”.¹⁴⁹⁸

299. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,¹⁴⁹⁹ the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.¹⁵⁰⁰

300. In the course of the present session, the Commission has continued to make its contribution to the rule of law, including by working on the topics, “Crimes against humanity” (adopted on second reading at the current session), “Peremptory norms of general international law (*jus cogens*)” (adopted on first reading at the current session), “Protection of the environment in relation to armed conflicts” (adopted on first reading at the current session), “Succession of States in respect of State responsibility”, “Immunity of State officials from foreign criminal jurisdiction”, “General principles of law” and “Provisional application of treaties”. The Commission also decided to include a new topic, “Sea-level rise in relation to international law” in its programme of work.

301. The Commission reiterates its commitment to the rule of law in all of its activities.

4. Honoraria

302. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which

¹⁴⁹⁴ General Assembly resolution 67/1 of 30 November 2012 on the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, para. 41.

¹⁴⁹⁵ Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, [S/2013/341](#), 11 June 2013, para. 70.

¹⁴⁹⁶ General Assembly resolution 70/1 of 21 October 2015, para. 35.

¹⁴⁹⁷ General Assembly resolution 73/207 of 20 December 2018, paras. 2 and 23.

¹⁴⁹⁸ *Ibid.*, para. 23.

¹⁴⁹⁹ *Ibid.*, para. 9.

¹⁵⁰⁰ See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10)*, para. 294.

have been expressed in the previous reports of the Commission.¹⁵⁰¹ The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research work.

5. Documentation and publications

303. The Commission underscored once more the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission stresses that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission. It follows that Special Rapporteurs cannot be asked to reduce the length of their report following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission by the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.¹⁵⁰² The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterated its request that: (a) Special Rapporteurs submit their reports within the time limits specified by the Secretariat; and (b) the Secretariat continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

304. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English and French versions for timely correction and prompt release. The Commission called on the Secretariat to resume the practice of preparing summary records in English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission also welcomed the fact that these working methods had led to the more rational use of resources and called on the

¹⁵⁰¹ See *ibid.*, Fifty-seventh Session, Supplement No. 10 (A/57/10), paras. 525–531; *ibid.*, Fifty-eighth Session, Supplement No. 10 (A/58/10), para. 447; *ibid.*, Fifty-ninth Session, Supplement No. 10 (A/59/10), para. 369; *ibid.*, Sixtieth Session, Supplement No. 10 (A/60/10), para. 501; *ibid.*, Sixty-first Session, Supplement No. 10 (A/61/10), para. 269; *ibid.*, Sixty-second Session, Supplement No. 10 (A/62/10), para. 379; *ibid.*, Sixty-third Session, Supplement No. 10 (A/63/10), para. 358; *ibid.*, Sixty-fourth Session, Supplement No. 10 (A/64/10), para. 240; *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), para. 396; *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), para. 399; *ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), para. 280; *ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), para. 181; *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), para. 281; and *ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), para. 299; *ibid.*, Seventy-first Session, Supplement No. 10 (A/71/10), para. 333; *ibid.*, Seventy-second Session, Supplement No. 10 (A/72/10), para. 282; *ibid.*, Seventy-third Session, Supplement No. 10 (A/73/10), para. 382.

¹⁵⁰² 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.

Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

305. The Commission expressed its gratitude to all Services involved in the processing of documents, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work.

306. The Commission reaffirmed its commitment to multilingualism and recalls the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolution 69/324 of 11 September 2015.

307. The Commission once again expressed its warm appreciation to the United Nations Office at Geneva Library, which continues to assist members of the Commission very efficiently and competently.

6. *Yearbook of the International Law Commission*

308. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 73/265, expressed its appreciation to Governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the trust fund.

309. The Commission recommends that the General Assembly, as in its resolution 73/265, express its satisfaction with the remarkable progress achieved in the past few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the efforts made by the Division of Conference Management, especially the Editing Section of the United Nations Office at Geneva, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

7. Assistance of the Codification Division

310. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of a memorandum on information on treaties which may be of relevance to the future work of the Commission on the topic "Succession of States in respect of State responsibility" (A/CN.4/730).

8. Websites

311. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.¹⁵⁰³ The Commission reiterated that the website and other websites maintained by the Codification Division¹⁵⁰⁴ constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the

¹⁵⁰³ <http://legal.un.org/ilc>.

¹⁵⁰⁴ In general, available from: <http://legal.un.org/cod/>.

Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio recording of the plenary meetings of the Commission.

9. United Nations Audiovisual Library of International Law

312. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law¹⁵⁰⁵ in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission.

E. Date and place of the seventy-second session of the Commission

313. The Commission decided that its seventy-second session would be held in Geneva from 27 April to 5 June and from 6 July to 7 August 2020.

F. Cooperation with other bodies

314. At the 3478th meeting, on 11 July 2019, Judge Abdulqawi Ahmed Yusuf, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.¹⁵⁰⁶ An exchange of views followed.

315. The Committee of Legal Advisers on Public International Law of the Council of Europe was represented at the present session of the Commission by the Chair of the Committee, Mr. Petr Válek, and the Head of the Public International Law and Treaty Office Division of the Directorate of Legal Advice and Public International Law and Secretary of the Committee, Ms. Marta Requena, both of whom addressed the Commission at its 3472nd meeting, on 31 May 2019.¹⁵⁰⁷ They focused on the current activities of the Committee in the field of public international law, as well of the Council of Europe. An exchange of views followed.

316. The Inter-American Juridical Committee was represented at the present session of the Commission by its President, Ms. Ruth Correa Palacio, who addressed the Commission at the 3477th meeting, on 10 July 2019.¹⁵⁰⁸ She gave an overview of the activities of the Committee on various legal issues, focusing in particular on activities in 2018. An exchange of views followed.

317. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Kennedy Gastorn, who addressed the Commission at its 3485th meeting, on 18 July 2019.¹⁵⁰⁹ He briefed the Commission on the organization and provided an overview of its deliberations at its fifty-seventh annual session held in Japan from 8 to 12 October 2018, including on its discussions on topics on the programme of work of the Commission. An exchange of views followed.

318. The African Union Commission on International Law was represented at the present session of the Commission by Ms. Kathleen Quartey Ayensu and Mr. Sindiso H. Sichone, members of the African Union Commission, who addressed the Commission at its 3486th meeting, on 19 July 2019.¹⁵¹⁰ They gave an overview of the activities of the African Union Commission on the various legal issues that it had been engaged in since its establishment, including activities to commemorate its tenth anniversary. An exchange of views followed.

319. On 17 July 2019, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Welcoming remarks were made by Mr. Gilles Carbonnier, Vice President, ICRC, and opening remarks by Ms. Cordula Droege, Chief Legal Officer and Head of the Legal

¹⁵⁰⁵ http://legal.un.org/avl/intro/welcome_avl.html.

¹⁵⁰⁶ The statement is recorded in the summary record of that meeting.

¹⁵⁰⁷ The statements are recorded in the summary record of that meeting.

¹⁵⁰⁸ The statement is recorded in the summary record of that meeting.

¹⁵⁰⁹ The statement is recorded in the summary record of that meeting.

¹⁵¹⁰ The statements are recorded in the summary record of that meeting.

Division, ICRC, and Mr. Pavel Šturma, Chair of the Commission. Presentations were made on the topics, “The role of States in clarifying or developing international law” by Ms. Cordula Droegge and by Mr. Pavel Šturma, as well as on “Peremptory norms of general international law (*jus cogens*) by Mr. Dire Tladi, Special Rapporteur on the topic, “and on “International humanitarian law update on autonomous weapons systems” by Ms. Netta Goussac, Legal Adviser, ICRC. Each set of presentations was followed by discussion moderated by Ms. Helen Durham, Director, International Law and Policy Department, ICRC. Concluding remarks were made by Ms. Durham.

G. Representation at the seventy-fourth session of the General Assembly

320. The Commission decided that it should be represented at the seventy-fourth session of the General Assembly by its Chair, Mr. Pavel Šturma.

H. International Law Seminar

321. Pursuant to General Assembly resolution 73/265 of 22 December 2018, the fifty-fifth session of the International Law Seminar was held at the Palais des Nations from 8 to 26 July 2019, during the present session of the Commission. The Seminar is intended for young jurists specializing in international law, and young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their countries.

322. Twenty-five participants of different nationalities, from all regional groups, took part in the session.¹⁵¹¹ The participants attended plenary meetings of the Commission and specially arranged lectures, and participated in working groups on specific topics.

323. Mr. Pavel Šturma, Chair of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar and served as its Director. Mr. Vittorio Mainetti, international law expert and consultant, acted as Coordinator, assisted by Mr. Pietro Gerundino, legal assistant from the University of Geneva.

324. The following lectures were given by members of the Commission: “The work of the International Law Commission” by Mr. Georg Nolte; “The International Law Commission viewed from outside” by Ms. Patrícia Galvão Teles; “Evidence before international courts and tribunals” by Mr. Aniruddha Rajput; “Protection of the atmosphere” by Mr. Shinya Murase; “Immunity of State officials from foreign criminal jurisdiction” by Ms. Concepción Escobar Hernández; “Peremptory norms of general international law (*jus cogens*)” by Mr. Dire D. Tladi; “Reparations to individuals for gross violations of international human rights law, and serious violations of international humanitarian law” by Mr. Claudio Grossman Guiloff; “Crimes against humanity” by Mr. Sean D. Murphy; “General principles of law” by Mr. Marcelo Vázquez Bermúdez; and “Provisional application of treaties” by Mr. Juan Manuel Gómez Robledo.

325. Participants attended a lecture at the Graduate Institute of International and Development Studies in Geneva on “The expansion of powers of international organizations: theory and practice”, delivered by Mr. Fouad Zarbiev, Associate Professor of international

¹⁵¹¹ The following persons participated in the Seminar: Mr. Mohamed Abdelmeguid Rabie (Egypt), Mr. Hafez Abou Alchamat (Syrian Arab Republic), Mr. Alexander Antialon Conde (Peru), Ms. Giulia Bernabei (Italy), Ms. Ozge Bilge (Turkey), Ms. Elisabetta Bucci (San Marino), Ms. Arianna del Carmen Carral Castelo (Cuba), Mr. Delva Dimanche (Haiti), Ms. Victoria Ernst (United States of America), Ms. Benjaporn Fattier (Thailand), Mr. René Figueredo Corrales (Paraguay), Mr. Javier Fernando Garcia Botero (Colombia), Mr. Gueorgui Gueorguiev (Bulgaria), Ms. Fatima Hajoui (Morocco), Ms. Ha’a Hauirae (Solomon Islands), Mr. Martin Mändveer (Estonia), Mr. Chany Pavel Ngateho Akony (Congo), Ms. Marie Claire Ngo Nyeheg (Cameroon), Ms. Pia Niederdorfer (Austria), Ms. Marieanne Oludhe (Kenya), Ms. Naureen Rahim (Bangladesh), Mr. Shokirjon Rakhmatov (Uzbekistan), Mr. Simon-Peter St. Emmanuel (Nigeria), Ms. Aichatou Tamba (Senegal), Mr. Kiran Mohan Vazhapully (India). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 30 April 2019 and selected 25 candidates from 304 applications.

law, and Mr. Gian Luca Burci, Adjunct Professor of international law, Graduate Institute of International and Development Studies. They also attended a conference organized by the University of Geneva on the topic “Protection of the environment and water installation during and after armed conflicts”, with the participation of Ms. Marja Lehto, member of the Commission and Special Rapporteur on the topic “Protection of the environment in relation to armed conflicts”. The following speakers spoke at the conference: Ms. Laurence Boisson de Chazournes, Professor of International Law, University of Geneva; Mr. Marco Sassòli, Professor of International Law, University of Geneva, and Director of the Geneva Academy of International Humanitarian Law and Human Rights Law; Ms. Mara Tignino, Reader, University of Geneva, and Coordinator of the Platform for International Water Law at the Geneva Water Hub; Ms. Helen Obregón Gieseken, Legal Advisor, Legal Division, ICRC; and Ms. Danae Azaria, Professor of International Law, University College London.

326. Participants visited the International Labour Organization (ILO), and attended two presentations given by Mr. Dražen Petrović, Registrar of the ILO Administrative Tribunal, on “International administrative justice”, and Mr. Georges Politakis, ILO Legal Adviser, on “ILO standard-setting”.

327. Two working groups, on identifying new topics for the Commission and on evidence before international courts and tribunals, were organized and participants were assigned to one of them. Two members of the Commission, Ms. Patrícia Galvão Teles and Mr. Aniruddha Rajput, respectively, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

328. Participants also attended the first Conference of the International Law Seminar Alumni Network. Ms. Verity Robson (alumna 2017), President of the Network and legal counsellor at the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland in Geneva, and Mr. Vittorio Mainetti, Secretary-General of the Network and Coordinator of the International Law Seminar, welcomed participants and alumni. Some 90 persons attended the event. Two panels were organized on the international law and the environment and procedural issues in international dispute settlement. Mr. Christian Tomuschat (alumnus 1966), Professor Emeritus, Humboldt University of Berlin, former member of the Commission, delivered a keynote speech. The following speakers spoke at the conference: Ms. Marja Lehto (alumna 1993), member of the Commission; Ms. Jasmine Moussa (alumna 2009), First Secretary at the Permanent Mission of Egypt in Geneva; Mr. Shinya Murase (alumnus 1975), member of Commission; Mr. Gentian Zyberi (alumnus 2008), Head of Department at the Norwegian Centre for Human Rights, member of Human Rights Committee; Mr. Marcelo Kohen (alumnus 1989), Professor of International Law at Graduate Institute of International and Development Studies in Geneva and Secretary General of the Institute of International Law, spoke in the first panel; Mr. Antonios Abou Kasm (alumnus 2009), Professor of International Law at Lebanese University; Ms. Mónica Feria-Tinta (alumna 2000), Barrister, 20 Essex Street Chambers; Mr. Philippe Gautier (alumnus 1988), Registrar of the International Tribunal for the Law of the Sea; Mr. Raul Pangalangan (alumnus 1988), Judge of the International Criminal Court; Mr. Brian McGarry (alumnus 2013), Lecturer and Senior Researcher at Geneva Centre for International Dispute Settlement, spoke in the second panel. Finally, Ms. Mary-Elisabeth Chong (alumna 2017), Vice-President of the Network and State Counsel at Attorney General’s Chambers of Singapore, made concluding remarks.

329. The Chair of the Commission, the Director of the International Law Seminar and Mr. René Figueredo Corrales, on behalf of participants attending the Seminar, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a diploma.

330. The Commission noted with preoccupation that in 2019 only five Governments had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar: Austria, India, Ireland, Switzerland and the United Kingdom. The financial crisis of recent years seriously affected the finances of the Seminar. Therefore, the Fund was only able to grant a limited number fellowships to deserving candidates from developing

countries. In 2019, 12 fellowships were granted (8 for living expenses only, and 4 for travel and living expenses).

331. Since its inception in 1965, 1,258 participants, representing 177 nationalities, have taken part in the Seminar. Some 760 participants have received a fellowship.

332. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2020 with as broad participation as possible, and an adequate geographical distribution.

Annexes

Annex A

Draft model clauses on provisional application of treaties

(The following draft model clauses have been proposed by the Special Rapporteur for consideration by the Commission at its seventy-second session.)

Commencement and termination

Draft model clause 1

1. This Treaty [article (s)...] shall apply provisionally¹ from the date of signature² [or from X date³], unless⁴ a State [an international organization] notifies the other State [international organization] [Depository] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application.⁵

¹ Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other, to take account of the accession of the Republic of Croatia to the European Union, *Official Journal of the European Union*, No. L 373, p. 3, art. 4 (“This Protocol shall apply provisionally...”); Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services, *Ibid.*, No. L 179, p. 20, art. 9 (“...the Parties agree to provisionally apply this Agreement...”); Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO₂ and the reimbursement of the tax on CO₂ to enterprises under Liechtenstein’s law on the exchanges of rights, United Nations, *Treaty Series*, vol. 2763, p. 274, at 262, art. 12 (“...this Agreement shall apply provisionally...”); Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC), *Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1, art. 2 (“The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force ...”); ECOWAS Protocol A/P.1/12/99 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, art. 57 (“This Protocol shall enter into force provisionally upon signature...”); Supplementary Protocol A/SP.1/01/06 Amending Articles VI-C, VI-I, IX- 8, XI – 2 AND XII of Protocol A/P2/7/87 on the Establishment of the Western African Health Organization (WAHO), art. 2 (“This Protocol shall enter into force provisionally upon signature...”); Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, art. 4 (“The present Supplementary Protocol shall enter into force provisionally upon signature...”); ECOWAS Supplementary Protocol A/SP.2/06/06 amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7, Paragraph 3 of the Protocol on the Community Court of Justice, art. 8 (“This Supplementary Protocol shall come into force provisionally upon its signature...”).

² Treaty between the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Kyrgyz Republic on the deepening of integration in economic and humanitarian fields (Moscow, 29 March 1996), United Nations, *Treaty Series*, vol. 2014, No. 34547, p. 15, art. 26; Statutes of the Community of Portuguese-Speaking Countries (Lisbon, 17 July 1996), *Ibid.*, vol. 2233, No. 39756, p. 207; Agreement concerning permission for the transit of Yugoslav nationals who are obliged to leave the country (Berlin, 21 March 2000), *Ibid.*, vol. 2307, No. 41137, p. 3, art. 7, para. 3; Agreement establishing the “Karanta” Foundation for support of non-formal education policies and including in annex the Statutes of the Foundation (Dakar, 15 December 2000), *ibid.*, vol. 2341, No. 41941, p. 3, art. 8; 1972 International Cocoa Agreement (Geneva, 21 October 1972), *ibid.*, vol. 882, No. 12652, p. 67, art. 66; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu August 13, 2004), *ibid.*, [vol. not yet published], No. 51490, art. 17, para. 2.

³ 1994 International Coffee Agreement, United Nations, *Treaty Series*, vol. 1827, No. 31252, p. 3, art. 40; 1994 International Tropical Timber Agreement, *Ibid.*, vol. 1955, No. 33484, p. 81, art. 41, para. 2; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, L 161, p. 3; 1968 International Coffee Agreement (open for signature at New York from 18 to 31 March 1968), United Nations, *Treaty Series*, vol. 647, No. 9262, p. 3, art. 62, para. 2; 1976 International Coffee Agreement (London, 3 December 1975), *ibid.*, vol. 1024, No. 15034, p. 3, art. 61, para. 2; International Coffee Agreement, 1983 (London, 16 September 1982), *ibid.*, vol. 1333, No. 22376, p. 119, art. 61, para. 2. Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO₂ and the reimbursement of the tax on CO₂ to enterprises under Liechtenstein’s law on the exchanges of rights, United Nations, *Treaty Series*, vol. 2763, p. 274, at 262, No. 48680, art. 12 (“Like the Treaty, this Agreement shall apply provisionally as of...”).

⁴ Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *Official Journal of the European Union*, No. L 29, 4 February 2016, p. 3, art. 281, para. 5 (“unless otherwise specified therein, shall apply provisionally”).

⁵ 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, p. 41, at p. 46, art. 7; Exchange of notes of 17 June 1979 constituting an agreement for the provisional application of the Convention on International Land Transport and the annexes thereto (Mar del Plata

2. The provisional application of this Treaty [or article (s)...] shall terminate upon its entry into force⁶ for a State [an international organization] that is applying it provisionally or if that State [international organization] notifies the other State [international organization] [Depositary] of its intention not to become a party to the Treaty.⁷

on 10 November 1977) (available on the website of the Ministry of Foreign Affairs of Peru, Directorate-General for Treaties: https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=E0F2.); Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002), United Nations, *Treaty Series*, [vol. not yet published], No. 51181 (text available at: <https://treaties.un.org>); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (Nassau, 5 July 2001), *ibid.*, vol. 2259, No. 40269, p. 440; Agreement on the provisional application of certain provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention] pending its entry into force (Agreement of Madrid) (Madrid, 12 May 2009), *Council of Europe Treaty Series*, No. 194; available at: <https://rm.coe.int/1680083718>.

⁶ Agreement of Madrid; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the annex to the agreement, on costs to States parties and institutional arrangements; International Cocoa Agreement, 1986 (Geneva, 25 July 1986) United Nations, *Treaty Series*, vol. 1446, No. 24604, p. 104, art. 69 (“It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.”); Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force. Council of Europe, *Treaty Series*, No. 194, para. e (“the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree.”).

⁷ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331; Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), *ibid.*, vol. 2389, No. 43165, p. 117; Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000), *ibid.*, vol. 2161, No. 37756, p. 45; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004), *ibid.*, vol. [not yet published], No. 51490 (text available at: <https://treaties.un.org>); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *ibid.*, vol. 2167, p. 3, at p. 126.; Energy Charter Treaty (Lisbon, 17 December 1994), *ibid.*, vol. 2080, No. 36116, p. 95; Final Act of the European Energy Charter Conference, Art. 45 (text available at: <https://www.italaw.com/sites/default/files/laws/italaw%206101%2833%29.pdf>) (“Any signatory may terminate its provisional application of this Treaty by written notification to the Depositary of its intention not to become a Contracting Party to the Treaty”); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 7 (“Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement.”); Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, *ibid.*, No. L 143, 31 May 2011, p. 2, art. 2, para. 10 (“Either party may terminate this Agreement upon six month’s written notice to the other Party.”); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3, art. 281, para. 10 (“Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels.”); ECOWS Energy Protocol A/P4/1/03, art. 40 (“Any signatory may terminate its provisional application of this Protocol by written notification to the Depositary of its intention not to become a Contracting Party to the Protocol.”); Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal of the European Union*, No. L 127, 14 May 2011, p. 6, art. 15.10. para. c (“A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification”); Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom

Form of agreement

Draft model clause 2

This Treaty [or article (s)...] can be provisionally applied in accordance with the provisions of a separate agreement to that effect.⁸

Opt in/Opt out⁹

Draft model clause 3

A State [An international organization] that is not a negotiating State [international organization] of this Treaty may declare that it will provisionally apply it [or article (s)...], provided that the negotiating States [international organizations] accept such declaration

of the Netherlands (Berlin, 29 April 2003), United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, art. 16 (“Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party.”); Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea, *Ibid.*, [vol. not yet published], No. 51490, art. 17, para. 3 (“This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification”); ECOWAS Energy Protocol A/P4/1/03, art. 40 (“Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol.”).

⁸ 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, p. 41, at p. 46.; Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force; International Wheat Agreement 1986 (London, 14 March 1986), *ibid.*, vol. 1429, No. 24237, p. 85, art. 28 (Referencing a separate “mutual consent”); Havana Charter for an International Trade Organization (1947) (E/CONF.2/78) (text available at: https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf (“Any Member which before July 1, 1948 has signed the Protocol of Provisional Application...”))

⁹ Draft Guideline 3 (General Rule) chose not to restrict the possibility of resorting to provisional application to the ‘negotiating States’ (and international organizations), thereby leaving open that possibility to ‘States (international organizations) concerned’. In order not to create a presumption that non-negotiating States and international organizations are generally permitted to be bound by the provisional application of a treaty or a part of a treaty, negotiating States should accept it as established in Draft Guideline 4 (Form of agreement), paragraph (b). This is what draft model clause 3 intends to address.

Draft Guideline 4 allows also for a resolution adopted by an international organization or at an intergovernmental conference, as a means to agree on the provisional application of a treaty or a part of a treaty. Some examples are the following: Article 3, Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU) (Official Journal of the European Union, No. L 346, 15 December 2012, p. 1); Article 2, Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC) (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1); Article 4, Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) (*Official Journal of the European Union*, No. L 278, 20 September 2014, p. 1); Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU) (Official Journal of the European Union, No. L 261, 30 August 2014, p. 1); Article 2, Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional

Draft model clause 4

A State [An international organization] may declare that it will not provisionally apply a treaty [or article (s)...] when the decision to its [their] provisional application results from a resolution of [X international organization or X intergovernmental conference] to which that State [international organizations] does not agree.

Limitations deriving from internal law of States or rules of international organizations¹⁰

Draft model clause 5

A State [An international organization] may at the time of expressing its agreement to the provisional application of this Treaty [article (s)...] [or any other time agreed upon] notify the other State [international organization] [Depository] of any limitations deriving from its internal law¹¹ [the rules of the international organization] that would affect compliance by that State [international organization] of such provisional application.

application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU) (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 1). Without prejudice to the rules of decision-making applicable to an international organization or intergovernmental conference in a concrete situation and to the question of whether a resolution has binding character, the voluntary nature of provisional application may call for an opt-out clause in case a State or international organization does not agree with such resolution. Draft model clause 4 addresses that situation.

¹⁰ A number of multilateral treaties refer to the internal law of concerned States. Some examples are the following: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, article 7, paragraph 2; Agreement on collective forces of rapid response of the Collective Security Treaty Organization, art. 17; Trans-Pacific Strategic Economic Partnership Agreement, article 20.5, paragraph 3; Article 26 of the 1995 Grains Trade Convention; Article XXII (c) (signature and ratification) and article XXIII (c) (accession) of the 1999 Food Aid Convention; Article 40 (entry into force), paragraphs 2 and 3, of the 1994 International Coffee Agreement; Article 38 of the 2006 International Tropical Timber Agreement (notification of provisional application); and Article 45 (entry into force), paragraph 2, of the 2001 International Coffee Agreement.

¹¹ Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95, art. 45 (“to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”); Protocol Of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947), *ibid.*, vol. 55, No. 814, p. 308, art. 1 (“Undertake... to apply provisionally...to the fullest extent not inconsistent with existing legislation.”); International Natural Rubber Agreement (Geneva, 6 October 1979), *ibid.*, vol. 120, No. 19184, p. 191, art. 59 (“a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures.”); Sixth International Tin Agreement (Geneva, 26 June 1981), *ibid.*, vol. 1282, No. 21139 pg. 205, art. 53 (“will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally...”); Agreement on Air Transport between Canada and the European Community and its Member States (available at: https://www.icao.int/sustainability/Documents/Compendium_FairCompetition/Practices/EU-canada-OSA_final_text_agreement.pdf) (“in accordance with the provisions of domestic law of the Parties...”); Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part (2010) (“in accordance with their internal procedures and/or domestic legislation as applicable”); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 3 (“in accordance with their respective internal procedures and legislation as applicable.”); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3 (“may apply this Agreement...in accordance with their respective internal procedures and legislation, as applicable”); EuroMediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part, *ibid.*, No. L 386, 29 December 2006, p. 57, art. 30 (“in accordance with the national laws of the Contracting Parties, from the date of signature.”); ECOWAS Energy Protocol A/P4/1/03, art. 40 (“to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *Official Journal of the*

European Union, No. L 260, 30 August 2014, p. 4, art. 464 (“in accordance with their respective internal procedures and legislation, as applicable”). Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46, art. 7, para. 2 (“All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations...”).

Annex B

Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law

Mr. Claudio Grossman Guiloff

I. Introduction

1. The topic of reparation to individuals for damage caused by gross violations of international human rights law¹ (“IHRL”) and serious violations of international humanitarian law² (“IHL”) has featured increasingly in the practice of States, international organizations, and international tribunals during recent decades, reflecting the evolving status of the individual under international law, especially since World War II.³ However, the availability of international and domestic forums to address violations of individual rights has existed in various forms since the early 1900s.⁴

2. It is a principle of international law that the breach of an international obligation involves an obligation to make reparation in an adequate form.⁵ In 1928, in the *Case Concerning the Factory at Chorzow (Chorzow Factory Case)*, the Permanent Court of International Justice (“PCIJ”) clearly articulated the content of this general obligation, stating “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁶

¹ The term “gross” violations of IHRL is used to properly narrow the scope of this text, for its content *see* Academy Briefing No. 6, *What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*, Geneva Academy of International Humanitarian Law and Human Rights, August 2014 at p. 10

² The term serious violations and grave breaches of IHL have been used interchangeably; however, the syllabus employs the term “serious”, among other reasons, to promote consistency with the language of the General Assembly. *See* 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, General Assembly Resolution, UN Doc. A/RES/60/147, Principle 2(c) (Mar. 21, 2006). Additionally, it aligns the text with the view of the International Committee of the Red Cross that has explained that “Serious violations of international humanitarian law are: grave breaches as specified under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) [...], grave breaches as specified under Additional Protocol I of 1977 (Articles 11 and 85) [...], war crimes as specified under Article 8 of the Rome Statute of the International Criminal Court [...], • and other war crimes in international and non-international armed conflicts in customary international humanitarian law [...]. *See* Explanatory Note, *What are “serious violations of international humanitarian law”?*, International Committee of the Red Cross, 2012, available at <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>

³ Other topics relating to the individual have also been discussed in the work of the International Law Commission, such as the topics of “State responsibility of internationally wrongful acts,” “Diplomatic protection,” “Position of the individual in international law,” “Nationality including statelessness,” and “Protection of persons in the event of disasters.”

⁴ For instance, the Central American Court of Justice, created in 1907 and recognizing the procedural capacity of individuals to bring claims against States; the International Prize Court, created in 1907 and allowing individuals to bring claims against foreign States; the Treaty of Versailles of 1919, which allowed nationals of the Allied and Associated Powers to bring claims against Germany; and the PCIJ decision in the *Case Concerning Jurisdiction of the Courts of Danzig*, which declared that individuals may have the right to bring international claims before national courts.

⁵ *The Case Concerning the Factory at Chorzow*, Claim for Indemnity (1927) P.C.I.J. Series A, no. 9, 21.

⁶ *See the Case Concerning the Factory at Chorzow (Germ. V. Pol.)*, J. (1928) P.C.I.J. Series A, no. 17, 125 (elaborating further that “[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by the restitution in

3. The general rule articulated by the *Chorzow Factory Case* has been widely cited and reaffirmed in several judgments of the International Court of Justice (“ICJ”), including the *Case Concerning Armed Activities on the Territory of the Congo*. In that judgment, which dealt with violations of IHL and IHRL, inter alia, the Court recognized that the injury caused to individuals was relevant in assessing the scope of reparation owed by Uganda.⁷ The ICJ has explicitly confirmed that a State that has violated a rule of international law causing damage to persons has “the obligation to make reparation for the damage caused to all the natural or legal persons concerned.”⁸ In the context of Diplomatic Protection, in the case of *Ahmadou Sadio Diallo*, the ICJ also stressed the importance of providing reparation for the injury suffered by Mr. Diallo in breach of international law.⁹

4. The practice of States and international organizations, and the case-law of international tribunals, show that the principle of reparation has been extensively applied in the fields of IHRL and IHL. Practice reflects that the content and form of reparation has adjusted to the nature of these specific areas of law. The most relevant sources of practice include treaty provisions regarding reparation to individuals, the establishment of permanent or ad hoc procedures open to individuals, and the creation of specific programmes concerning reparation

5. Current practice reveals there are three levels enabling individuals to obtain reparation for violations of IHRL and serious violations of IHL. Opportunity to receive reparation at the inter-State, international, and domestic levels is discussed below.

6. At the inter-State level, reparation to individuals is sought through the traditional process of diplomatic protection, a topic that was comprehensively studied by the International Law Commission (“ILC”) in its Draft Articles on Diplomatic Protection.¹⁰ However, resort to this means of reparation is a right of States. The topic covered by this syllabus would complement the work of the Commission on the topic of Diplomatic Protection by focusing on reparation to individuals at the international and domestic levels.

7. Reparation at the international level includes international and regional tribunals as well as treaty bodies, which allow individuals to bring complaints against States for violations of IHRL and in certain cases for IHL. Through these mechanisms, individuals seek an objective finding of wrongdoing and an authoritative statement on the appropriate reparation that should be issued, either in the form of a judgment, recommendations, or friendly settlement.¹¹

8. At the domestic level, individuals may bring claims for the violation of IHRL or IHL before the domestic courts of a State, usually the State allegedly responsible for the violation. To comply with the relevant rules of international law, domestic mechanisms are supposed to provide an effective

kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”).

⁷ See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, J., I.C.J. Rep. 2005 (Dec. 19), p. 257, para. 259.

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Op., I.C.J. Rep. 2004 (July 9), p. 136, 193-94, 198

⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, J. on Compensation, I.C.J. Rep. 2012 (June 19), p. 324, para. 57; see also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, J. on Compensation, I.C.J. Rep. 2012 (June 19) Separate Opinion of J. Cançado Trindade, p. 361, para. 35 (“the reparations are owed by the responsible State concerned to the individuals victimized”).

¹⁰ Draft Articles on Diplomatic Protection, with commentaries, United Nations International Law Commission, Yearbook of the International Law Commission, 2006, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2006.

¹¹ See e.g. the friendly settlement process offered by the Inter-American Commission on Human Rights that allows States and aggrieved individuals the opportunity to find a mutually agreeable solution to a human rights violation without resorting to a contentious proceeding.

remedy for affected individuals, including appropriate reparation if the violation is proven. On the other hand, access to international procedures also needs to comply with certain requirements, such as the exhaustion of local remedies, to avoid the misuse of international mechanisms and respect the principle of subsidiarity. International and domestic mechanisms may complement each other.

9. Important human rights instruments address reparation to individuals for violations of IHRL by focusing on the right to an *effective* remedy, a broader concept that encompasses both access to justice and the issue of reparation. The Universal Declaration of Human Rights dealt with this matter in article 8, which asserts “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

10. Article 2(3) of the International Covenant on Civil and Political Rights also establishes the right to an effective remedy, and many multilateral conventions addressing human rights contain similar provisions. Examples include article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance. The Commission, in its draft articles on Crimes Against Humanity, has also adopted a provision on reparation owed to individuals, draft article 12, paragraph 3.

11. Regional conventions on human rights also establish the right to an effective remedy and have regulated the issue of reparation to individuals. Indeed, the American Convention on Human Rights and the European Convention on Human Rights contain specific provisions regulating these matters. The international tribunals established to enforce these conventions have developed several criteria to determine what constitutes full and appropriate reparation, depending on the circumstances of the case. Other regional instruments and mechanisms may offer similar guidance, such as the African Charter on Human and Peoples’ Rights,¹² the Association of Southeast Asian Nations’ Intergovernmental Commission on Human Rights,¹³ and the Arab Charter on Human Rights.

12. The decisions of several treaty bodies, such as the Human Rights Committee and the Committee Against Torture, also provide useful guidance to assess the parameters and appropriate scope of reparation to be granted, based on the relevant instrument.¹⁴

13. Domestic laws and national judicial decisions are also relevant to this topic to the extent they may also regulate the issue of reparation owed to individuals for violations of international law. In this sense, domestic programmes concerning reparation to victims of IHRL violations are also relevant. These programmes may be built upon the work of “truth commissions”, used especially in Latin America and Africa.

14. Concerning violations of IHL, one of the main challenges for victims is that there is not a specialized forum to bring claims against the responsible State. However, victims of violations of IHL may be able to bring claims for violations of IHRL that occurred in the context of an armed

¹² Article 7, paragraph 1 reads, “the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

¹³ See *ASEAN Intergovernmental Commission on Human Rights*, HUMAN RIGHTS IN ASEAN (last accessed June 2, 2019 at 4:53 PM), available at <https://humanrightsinasean.info/asean-intergovernmental-comission-human-rights/about.html> (explaining that although the ASEAN Intergovernmental Commission on Human Rights’ mandate does not explicitly authorize receipt and investigation of complaints for human rights violations, the intergovernmental body seems to be moving in the direction of investigations, based on the fact that six complaints have been accepted since 2012).

¹⁴ The reasoning of these bodies is important to the formation of general principles regarding the contours of specific human rights, especially in the absence of applicable treaties or domestic law.

conflict or emergency situations before competent IHRL mechanisms. In such instances, these bodies may apply the relevant rules of IHL as the *lex specialis*.

15. Furthermore, in many peace treaties, the injured State receives a lump sum payment from the wrongdoing State for the purpose of distributing it among those of its nationals affected by violations of IHL or other areas of law. Ad hoc bodies have also been created to decide these kinds of cases, typically in the form of mixed-claims commissions. Recent examples include the Eritrea-Ethiopia Claims Commission and the United Nations Compensation Commission, a subsidiary organ of the UN Security Council tasked with deciding claims arising from Iraq's unlawful invasion of Kuwait, including those brought by individual persons.

16. This project will examine also the relevant differences existing within the scope of reparations between IHRL and IHL. This includes *inter alia* state practice, treaties, decisions, recommendations by international organizations, courts and various supervisory organs concerning IHL and IHRL in particular in areas related to emergency situations. This summary of practice related to reparation to individuals shows not only its increasing importance, but also the many different ways States and relevant adjudicating bodies have addressed the issue of reparation to individuals for violations of IHL and IHRL. The Commission's consideration of this topic would therefore have a solid foundation in existing practice in order to provide useful guidance for States and adjudicating bodies, by distilling general principles, aimed at providing further consistency and legitimacy in this area.

II. Scope of the topic

17. Considering the different and varied sources of practice available, it could be useful to provide guidance to States in the field of reparation to individuals for damage caused by violations of IHRL and IHL. The scope of the proposed topic does not aim to address primary rules of international law or address which acts constitute violations of international obligations. Rather, the proposed topic seeks to address secondary rules of international law, namely, the consequences of violations of primary rules and which criteria should be considered to provide appropriate reparation to individuals. The distinction between primary and secondary rules is not alien to the Commission in the area of State responsibility, in particular the Articles on State Responsibility for Internationally Wrongful Acts ("Articles on State Responsibility") which is an essential reference for this topic, see *infra* paragraphs 19 and 20. However, when relevant to the topic, the interconnectedness of primary and secondary rules will be considered

18. The scope of this topic is limited to reparation owed to individuals, or groups of individuals,¹⁵ for injury caused by violations of IHRL and serious violations of IHL, and does not address the topic of reparation to corporations or other legal persons. However, this does not mean that the standards identified by the Commission in the course of its work on the topic of reparation to individuals in these areas could not be useful to other topics in the future.¹⁶

¹⁵ The possibility of collective reparation has been envisaged in the Inter-American System of Human Rights, for example, in the *Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua* (Merits, Reparations, and Costs), Inter-American Court of Human Rights (2001), available at www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; see also Rules of Procedure and Evidence of the International Criminal Court, whose article 97 provides that "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both"; 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, also recognize the possibility of collective reparation in its paragraph 13.

¹⁶ Although the proposed topic is limited to obligations resulting from violations of international human rights law and serious violations of international humanitarian law, the result of the Commission's work on this subject may influence

19. The topic will mainly address the issue of reparation from the perspective of State responsibility, and will not focus on the responsibility that other actors may have at the domestic or international level. An essential basis is found in the Articles on State Responsibility adopted by the Commission in 2001.

20. However, although the Articles on State Responsibility reflect the duty of full reparation in article 34¹⁷, the issue of reparation to individuals was not addressed by the Commission in that topic. It is important to note that article 33 referred to the content of State responsibility in paragraph 2 where it explicitly states that Part Two of the Articles is “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. Thus, while that topic did not examine the reparation which may be owed directly to individuals due to violations of international law, it recognized that Part Two was without prejudice to reparation owed to individuals. Accordingly, this topic would be complementary to the work undertaken by the Commission in the Articles on State Responsibility.¹⁸

21. The inclusion of this topic in the programme of work of the Commission would offer an opportunity for both the codification and the progressive development of international law. In particular, it would allow the Commission to analyze how the issue of reparation to individuals has been addressed by States, international organizations, and international tribunals, as well as the rules and principles they follow to make their determinations. Accordingly, to pursue its work on the topic, the Commission would have to examine relevant treaty provisions and rules of customary international law and how they have been interpreted and implemented in practice. It could also enable the Commission to identify the best and most accepted methods of reparation to individuals in order to provide useful guidance to States in this regard. Needless to say, proposals of progressive development would only have a prospective character, and would not reflect legal obligations. Moreover, this project concerns secondary rules of law, and would only address primary rules if required. Accordingly, this topic will not question the principle of the intertemporal application of the law. It is important to note that the duty of reparation to individuals, and its scope, is contingent upon the existence of a valid legal rule generating such duty and its content.

22. A comprehensive analysis would also provide an overview of existing rules, and help identify the main problems that arise in their implementation, the limitations that States face in this area, and the different methods States have developed in order to provide reparation to individuals. In this sense, the outcome of the topic would provide a good opportunity to codify existing rules, and also make proposals for the progressive development of the law. The work of the Commission on this topic is without prejudice to any more favorable legal regimes on reparations established at the national, regional or international level.

other areas of international law where violations of the rights of individuals invoke State responsibility to make reparation, such as: international investment law, international environmental law, and international trade law.

¹⁷ See *id.* at art. 34 (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”).

¹⁸ At the Commemoration of the 70th Anniversary of the Commission, the President of the ICJ, Mr. Abdulqawi Ahmed Yusuf, noted the need to address more comprehensively the situation of the individual in international law. He recognized that whilst “certain elements of the ILC’s work recognize the ability of individuals to hold rights under international law, such as Article 33(2) of the Articles on State Responsibility, the Commission has only acknowledged as recommended practice, under the Articles on Diplomatic Protection, the important fact that reparation should accrue to an aggrieved individual in cases where their rights are breached”. See Abdulqawi A. Yusuf, Keynote Address at the 70th Anniversary of the International Law Commission, Geneva, Switzerland (July 5, 2018), available at http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/key_note_address_5july2018.pdf&lang=E.

III. Possible issues to be addressed

23. As explained in the foregoing paragraphs, this topic focuses on the secondary rules related to the provision of reparation to individuals for violations of IHL and IHRL. Accordingly, the Commission could address, inter alia, the following specific issues:

- a) The different forms of reparation (e.g. restitution, compensation and satisfaction, guarantees of non-repetition, etc.), their definition, and their main purposes;
- b) The degree of flexibility that States have when choosing between different forms of reparation;
- c) The appropriateness of certain forms of reparation, depending on the circumstances;
- d) The relevant circumstances that should be considered when determining the kind of reparation to be provided;
- e) The role played by the principle of proportionality in determining the type and scope of reparation;
- f) The appropriateness of individual and/or collective reparation;
- g) The principle of subsidiarity of international mechanisms and the procedural obligations of States, for example, the establishment of complaint mechanisms open to individuals at the domestic level, and the provision of effective procedural guarantees;
- i) The establishment of ad hoc systems of reparation and friendly settlements

IV. Outcome

24. Concerning the possible outcomes of this topic, the options of presenting the findings as “draft guidelines” or “draft principles” would be especially appropriate, as this would allow the Commission to identify and apply existing rules and consider progressive development, as well as propose best practices in light of the existing challenges.

25. Draft guidelines are appropriate for a non-binding series of rules or recommended practices. In this context, the Commission has explained that the word “guidelines” is used when the work on the topic does not intend to produce a binding instrument, but instead, a toolbox where States may find answers to practical questions.¹⁹ Therefore, the use of draft guidelines in this topic would be appropriate, since it will be aimed at clarifying secondary rules and also proposing best practices, when appropriate.

26. Draft principles have also been understood by the Commission as encompassing non-binding provisions, which are also general in character. In this sense, if the Commission prefers to choose draft principles as the outcome of this topic, it would be helpful to identify a set of general standards and common norms along with a measure of progressive elements.

¹⁹ United Nations International Law Commission. “Methods of work”, available at <http://legal.un.org/ilc/methods.shtml> (last accessed 30 May 2019).

27. Nevertheless, other forms of final outcomes could also be considered depending on the views of the Commission and also on the suggestions and arguments presented by States within the Sixth Committee of the General Assembly.

V. Conclusion

28. On the selection of new topics in its long-term programme of work, the Commission is guided by the following criteria, which it agreed upon at its fiftieth session (1998), 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 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.²⁰

29. The topic of reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law satisfies the conditions for the selection of a new topic in the long-term programme of work. As outlined above, there is considerable State practice and a set of norms and principles that have emerged through judicial, ad hoc, and treaty bodies. However, there is a need for codification and progressive development of these practices to provide guidance to the international community about the principles, content, and procedures related to reparation owed to individuals for violations of international law. Due to the important amount of State practice and judicial decisions available, the topic of reparation for individuals for violations of international law is ripe and appropriate for progressive development and codification.

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²⁰ Yearbook of the International Law Commission, 1997, vol. II, Part Two, 72, para. 238.

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Annex C

Prevention and repression of piracy and armed robbery at sea

Mr. Yacouba Cissé

I. Introduction

1 Maritime piracy is generally understood to be acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship against another ship, including its persons or property on the high seas. Maritime piracy began in antiquity and since the advent of the Law of Nations, has been regarded as an international crime. Indeed, it can be said that piracy at sea is as old as maritime navigation itself.

2 Unfortunately, today maritime piracy is resurging at a rate without precedent in history as exemplified by maritime piracy committed in Indian Ocean off the coast of Somalia, the Gulf of Guinea, the Singapore and Malacca Straits, the Arabian Peninsula, Caribbean, Celebes, Java, North Yellow, and South China Seas, and the Bay of Bengal. Far from being a replica of the past, piracy has reappeared in new forms that are more violent, as pirates are now better organised, better equipped and more heavily armed. In its Report of October 1997 on Oceans and the Law of the Sea, the Secretary-General of the United Nations alerted the International Community on the gravity of piracy and armed Robbery at sea. Such robbery and criminal violence come with a plethora of other associated illicit acts, such as maritime terrorism, corruption, money laundering, violation of international human rights law, illegal fishing, and the unlawful release of waste and toxic substances in the seas and oceans, human and drugs trafficking, etc.

3 As such, maritime piracy is now a major concern of the international community as a whole, as acts of piracy are committed in all maritime zones and affect to various degrees the interests of all states, whether coastal or landlocked. From a standpoint of the wealth and development of States, it is worth noting that 85% of commerce transits through maritime routes, many of which are threatened by piracy. Consequently, Flag States, Coastal States, Port States and other States are attempting to fight all forms of maritime piracy across the oceans, so as to protect human lives, to protect economic interests, to preserve freedom of navigation, and to preserve the marine environment against unlawful marine pollution and other unlawful acts at sea.

4 Piracy at Sea is typically directed against private vessels and therefore has significant effects upon private actors. Crew members of an attacked vessel are at risk of prolonged detention, bodily harm or death. Ship owners are exposed to large ransoms to obtain the release from pirates of their crew, cargo and ship. Maritime insurance companies must take account of the possibility of maritime piracy, thereby increasing the overall cost of maritime transport and introducing in maritime contracts piracy clauses. Piracy is also a source of concern for coastal communities and international organizations. One solution found appropriate under these circumstances, was to involve private companies to help combating piracy despite the controversy surrounding this approach and its legal basis in international law.

5 The human and economic impacts of piracy are indeed far from negligible. In 2010, 26% of piracy victims were taken hostage—representing 1181 out of a total of 4185 victims—and 59% of hostages faced increased levels of violence. Economic costs for piracy acts in Somalia only are estimated at between US\$1 billion and US\$16 billion; they include the cost of fuel due to rerouting, an increase in insurance cost of US\$20,000 per trip, reduced availability of tankers, and increased charter rates. Additionally, ransoms paid by the owner(s) of a ship to pirates have been between US\$500,000 and US\$5.5 million, resulting in an estimated total of US\$160 million paid in ransom for Gulf of Aden piracy acts only. Approximately, 10 hijackings of ships decrease export between Asia and Europe by 11%, which results in costs of US\$28 billion. While precise statistics on fishers are difficult to find, they suffer a disproportionate amount of attacks (usually to steal valuable catches and equipment) resulting in thousands of US\$ of costs per fisher and millions for each affected regions. Finally, the annual estimated cost for security measures implemented by EU and NATO anti-piracy navies is of US\$1.15 billion, and of US\$4.7 billion for private anti-piracy measures.

6 Modern pirates operate from landward bases, spending much less time at sea than pirates of the past. “Their usual strategy is to undertake quick raids in small boats launched from mother ships that were themselves pirated and then return to onshore sanctuaries where they receive protection from local clans and their militias.” This land-based protection makes the detection of pirates very difficult and the success of pirates often depends on the effectiveness of this protection. Harboring and protecting pirates often brings in lucrative revenues, but risky revenues, and it is hypothesized that coastal communities will make this choice when other forms of revenues are unavailable or minimal. Modern day pirates do not possess complex organisational structures, in a sense that they are usually led by a single leader who demands absolute loyalty from their subordinates, and finance themselves by integrating their activities into local economies.

7 There is considerable international law relating to maritime piracy, beginning with State practice that over time developed extensive customary international law in this area. Based on such custom and most importantly the Harvard Research Draft on piracy, the International Law Commission developed as part of its work on the law of the sea a series of provisions concerning piracy which ultimately became Articles 14 to 21 of the *Geneva Convention on the High Seas*, which in turn later served as the basis for Articles 100 to 107 of the *United Nations Convention on the Law of the Sea (UNCLOS)*. Additional conventional law has been developed on the global level, principally under the auspices of the International Maritime Organisation, such as the 1988 *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)*, and its *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf* (and further 2005 Protocols). Other global treaties not specific to piracy may also be relevant, such as the 1979 *International Convention against the Taking of Hostages* and *Convention of the Safety of Life at Sea (SOLAS Convention 1974)*, the *Convention Against Transnational Organized Crime*, the *International Ship and Port Facility Security Code (ISPS)*, etc.

8 There are also numerous treaties and instruments developed at the regional and sub-regional level. Such as the 2004 *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP)* to which 16 Asian States are party. Many States have developed national laws addressing maritime piracy, which has led to important jurisprudence in national courts and good deal of success in the prevention and repression of piracy in certain regions. Other

subsequent sub-regional cooperation have been created to fight against piracy, notably the Code of Conduct of Djibouti adopted in 2009 under the auspices of the International Maritime Organization (IMO) entitled “Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden” to which 9 States are parties: Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles; Somalia, United Republic of Tanzania and Yemen. A second Code of Conduct has been adopted in 2013 in Cameroon dealing with piracy in Western and Central Africa of the Gulf of Guinea called “Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and illicit Maritime Activity in West and Central Africa” (Gulf of Guinea Code of Conduct covering Economic Community of West African States (ECOWAS) and Economic Community of Central African States (ECCAS)). A study indicated that “in the first half of 2018, over 40% of all reported pirate attacks in the world occurred in the Gulf of Guinea”.

9 Further, the Security Council, faced with the gravity of maritime piracy, and acting under Chapter VII of the *United Nations Charter*, has adopted a series of resolutions addressing maritime piracy committed off the coast of Somalia and in the Gulf of Guinea, as well as in several seas such as the Gulf of Aden, the Straits of Malacca and Singapore, and in the Caribbean Sea.

10 Nevertheless, despite the extensive amount of international, regional and national law, there remain important issues of international law that are uncertain or underdeveloped, which could benefit from study, codification, and progressive development by the International Law Commission.

11 The Commission should begin by noting that the core aspects of the topic of maritime piracy has already been codified, notably by the *Convention on the Law of the Sea of 1982*, by *SUA Convention*, and by other treaties. The Commission’s objective would not be to seek to alter any of the rules set forth in existing treaties, but would include whether and how States might best implement their treaty obligations.

II Current Issues of International Law Relevant to Piracy and Armed Robbery at Sea

A *Prevention of Piracy at Sea: A requirement for cooperation*

12 Ideally, in their implementation of these obligations, the conditions by which piracy flourishes would be addressed by States, so as to minimise the ability of pirates to operate on the seas. The Commission might analyse methods of prevention that have operated successfully in other areas of international law so as to provide guidance to States on how to implement these obligations of prevention.

B *Repression of Piracy at Sea: A requirement for Laws and Regulations in place and Clarification of Universal Criminal Jurisdiction with Respect to Piracy at Sea*

13 Prevention, of course, is not always possible, and acts of piracy will continue to occur, raising issues relating to punishment of persons for committing such acts. Piracy has long been regarded as a crime punishable by any State even if that State has no direct connection to the pirates, to their victims, or to the location of the criminal act. Indeed, pirates have long been considered the enemies of all States and of all humanity (*hostis humani generis*). As such, exercise of national jurisdiction

over pirates by any State has long been recognized as the first form of universal criminal jurisdiction, allowing pirates no refuge in any State regardless of their connection to it.

14 Even so, the exact parameters of such universal criminal jurisdiction with respect to piracy are not well understood. The definition of piracy as set forth in the *1982 Law of the Sea Convention* might be analysed by the Commission to help States understand the meaning of “piracy” when establishing and exercising national criminal jurisdiction. Further, whether States have a duty to establish such jurisdiction under either conventional or customary international law could be assessed, as opposed to whether States are simply permitted under international law to establish such jurisdiction if they chose to do so.

C Adoption and Harmonisation of National Criminal Laws on Piracy at Sea

15 In light of the conclusions reached with respect to Section B above, consideration might be given to the specific measures States should or may take within their national criminal law so as to establish and exercise jurisdiction over persons alleged to have committed maritime piracy. Such measures may assist promoting the adoption of and harmonisation of national laws of States in this area, thereby allowing for a more effective global regime of enforcement and for greater inter-State cooperation in this area.

16 Some States may be able to exercise national criminal jurisdiction based solely on ratification of the 1958 or 1982 Conventions and perhaps even based solely on customary international law. Yet in most jurisdictions, it seems likely that such bases would be insufficient, requiring instead the enactment of national statutes criminalising piracy. This requirement for national statutes may be driven by the principle *nullem crimen, nulla poena, sine lege*, which means no crime and no penalty without a law in place. The resurgence of violent maritime piracy criminal acts in 2008 off the coast of Somalia in the Indian Ocean and in the Gulf of Guinea bordering the Atlantic Ocean demonstrated that many States from all continents did not have any national legislation dealing with piracy. One example is that of France in *Ponant case*. After capturing Somali pirates, France had to release them because, at the time, it did not possess national law creating criminal offences for piracy, and general criminal law was insufficient to render piracy acts justiciable in a criminal court in France. Yet France was not alone in this regard. Currently, a majority of African States also do not have legislation on piracy or have laws that are outdated in relation to contemporary international law on this matter.

17 Thus the existence of general criminal law for some States may not be sufficient to prosecute and repress piracy offences. Rather, specific legislation on piracy offences or at least a general reference to maritime piracy in general criminal provisions may be needed to ensure that criminal procedures are available for prosecuting pirates. Furthermore, national prosecutors and judges often do not possess the requisite technical and legal knowledge to effectively deal with this crime, which is unique and may require special guidance for understanding the elements to be proved for the crime and the types of evidence necessary to meet those elements. Even though the ratification of the *Convention on the Law of the Sea* represents the clearest expression of states’ consent to be bound by international law and is a necessary legal act, it is insufficient for the effective enforcement of states’ obligations. This observation is equally applicable to customary international law related to piracy

and to the *Convention on the High Seas* which is still in force for six states. In other words, a state cannot legally repress piracy acts by simply relying on the fact that it is a state party to one of the two relevant conventions or on customary international law. Even if international law has already defined the legal framework to combat piracy, states' national laws are needed for the criminalisation of piracy.

18 In addition to the lack of national legislation and the obsolescence of certain national laws on piracy, there is the issue of harmonisation of piracy law. Some States' national laws link maritime piracy only to acts committed on the high seas, while others link it only to acts within the States' territorial sea or exclusive economic zone. Ideally, States would have the same or similar laws addressing piracy in all areas outside the territorial seas.

D Clarifying the relationship of Maritime Piracy to Armed Robbery at Sea

19 A further issue, though related to Section C above, concerns analysing and helping to clarify the difference between maritime piracy as a crime and armed robbery at sea as a different crime. As a general matter, maritime piracy is a crime that has emerged in relation to the high seas (including what is now regarded as the exclusive economic zone). By contrast, the crime of armed robbery at sea occurs within a States territorial sea.

20 It appears that many States have both types of crime, but are not clear in their national laws as to the distinction between the two offences and, in particular, with respect to the location of the offences. As such, a problem of "double incrimination" may arise, creating confusion regarding the applicable law. Based on international law and States practice, the Commission might analyse when these respective offences should apply, how they differ, and whether they are linked, as a means of clarifying the law in this area, which may be of value to States when developing national laws and exercising national jurisdiction.

III Scope of the topic

21 State actions at sea, whether unilateral or multilateral, are limited in their ability to deal comprehensively and efficiently with maritime piracy, leaving private vessels vulnerable. That vulnerability has led ship owners to pursue their own maritime security often through contracts with security companies. Such private maritime security may consist of having armed security personnel on the private vessel, who may exercise lethal action when approached by other vessels. This phenomenon, in term of preventive measures, raises the questions of whether international law requires or should require the flag State, the State where the security company is incorporated, or other States to regulate such actions. Private vessels are not authorized under the 1982 Convention to engage in hot pursuit. Thus, a private ship that is the victim of piracy has no recourse to undertake enforcement action under the law of law of the sea. The Commission might consider the law and practice in this area to see if private vessels are prohibited from engaging in such action by international law and, if so, the line between such actions and defensive acts when attacked by maritime pirates.

22 The *1982 Convention on the law of the Sea* allows exclusively pursuit against pirates by public vessels, such as military vessels and other vessels owned by the State and accomplishing a public

service. The Commission might analyse the operation of such rules in the context of piracy and armed robbery at sea based on contemporary State practice, and consider whether the rules set forth in the 1982 Convention in this regard have the status of customary international law, binding upon all States.

23 In fact, pirates committing crimes in the high seas know that by staying in the high seas or the exclusive economic zone, they may be pursued and captured by any state on the basis of universal criminal jurisdiction. To avoid that situation, they typically will quickly move, after an act of piracy, to the nearest territorial sea of a State to escape pursuit by foreign vessels. Moreover, the fact that many States do not have the capacity to control their territorial sea encourages pirates to move their operations in these waters by raiding and attacking ships waiting their turn to enter a port.

24 It was to solve this issue that the Security Council, on an exceptional basis, authorised foreign naval forces to engage in pursuing into the Somalian territorial sea from the adjacent high seas and exclusive economic zone for the purpose of capturing pirate vessels. Moreover, the Council also authorized foreign naval vessels, with the consent of the Government of Somalia, to enter into Somalia's territorial sea for the purpose of capturing pirate vessels. In the same time, the Security Council made it clear that "the provisions of this resolution apply only with respect to the situation in Somalia and do not affect the rights and obligations or responsibilities of Member States under international law", which means that these provisions should be enforced under the legal framework of the fight against piracy as established by the *1982 Convention on the law of the Sea* and rules of customary international law.

25 With respect to the Rights of Alleged Offenders, persons who are alleged to have committed maritime piracy are entitled to fair treatment, including a fair trial, and full protection of his or her rights under national and international law as demonstrated by case law through domestic courts' decisions and international courts' rulings dealing with pirates' prosecution.

26 The operation of such rights in context of seizure of the person on the high seas and hence outside the sovereign jurisdiction of any State might be analysed so as to clarify how such rights operate in this context.

27 The scope of this topic is limited to the prevention and repression of piracy and armed robbery at sea. The topic will address the following issues: the definition of piracy in the context of United Nations Convention on the Law of the Sea provisions and taking into account the current and evolving aspects of piracy, as well as the definition provided by relevant international organizations such as the International Maritime Organization. Other elements to be addressed include: the punishment of piracy, the cooperation in the suppression of piracy, the exercise of jurisdiction over the crime of piracy, including issues on criminalization, pursuit, arrest, detention, extradition, transfer agreement of suspected pirates, mutual legal assistance, prosecution, investigation, evidence, sentences, rights of alleged pirates, rights of victims of piracy and armed robbery at sea, etc.

IV The topic satisfies the requirements for addition to the Long-term Programme of Work of the International Law Commission

28 For a topic to be included on the ILC's long-term programme of work, it must be demonstrated that it satisfies the following criteria: *a)* the topic must 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; *c)* the topic should be concrete and feasible for progressive development and codification; and *d)* 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.

29 The topic of piracy and Armed Robbery at Sea responds to the criteria needed for its inclusion in the long term program of work of the Commission.

30 *First:* this topic responds to the needs of states to progressively develop this area of international law. In fact, the interest in this topic is global since, as shown in the introductory section of this syllabus, it concerns the whole of the international community. The global nature of this concern has justified the adoption of several resolutions by the General Assembly and the Security Council of the United Nations on combating maritime piracy and armed robbery at sea. Coastal states, flag states, port states, states whose nationals have been victims of maritime piracy or armed robbery at sea, landlocked states, private maritime industry actors (ship owner, shipper, maritime insurer, etc.) whether they are loaders, receivers, importers or exporters of merchandises, international organisations, all have an interest that the seas be free of all safety concerns and criminality to ensure the development of states, and the security and socio-economic wellbeing of all people.

31 *Second:* the topic deserves to be considered by the Commission since there is State practice that lends itself to the codification and progressive development of international law in respect of the topic. As indicated above, there are global and regional treaties and other instruments that may be analysed in relation to this topic. Further, according to the data provided by the Secretariat of the Ocean Affairs and Law of the Sea Division of the United Nations, there are more than 70 states that have adopted legislation for the prevention and repression of piracy and armed robbery at sea. This practice is sufficiently advanced at this stage and will develop further as additional proposed bills on piracy progressively become applicable laws. On this point, several African coastal states have tabled bills in their respective Parliaments which should be adopted in the near future. Generally, the available legislation on the topic represents the main region of the worlds and the main legal systems as they originate from Africa, Europe, Asia, the Americas and the Caribbean.

32 *Third:* the topic deserves to be analysed in light of the applicable law while keeping in mind its concrete, practical and feasible nature. The topic will not pose any particular difficulties as the majority of the work will involve existing international law: the *lex lata* codified by the 1982 *Convention on the Law of the Sea* that defines the legal regime and the framework for piracy and armed robbery at sea. In addition to the existing and still developing state practice, we can rely on other universal legal instruments such as the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, and the relevant resolutions of the International Maritime

Organisation on piracy and armed robbery at sea adopted between 2005 and 2012. There is an abundance of scholarly writings (see Selected Bibliography below) and national jurisprudence (American, English, French, Spanish, Tanzanian, Kenyan, Seychellois, European through the European Court of Human Rights, Japanese, Korean, etc) on the topic. These judicial domestic decisions will be analysed in light of applicable national laws and of the relevant international law they implement. The various regional approaches on maritime piracy and armed robbery at sea in the different seas of the world will be analysed taking in account the particular geographical context of each maritime region and regional sea as defined by the Regional Seas Programme of the United Nations Environment Programme (UNEP).

33 *Fourth*: International law relating to piracy and armed robbery at sea falls squarely within the scope of topics traditionally taken up by the Commission, which has long had a history of addressing rules relating to the law of the sea. As such, inclusion of this topic in the long-term program of work should not, in principle, pose any problems due to the fact that this topic is a pressing concern of the international community as a whole.

IV Methodology

34 The point of departure of this study will be *UNCLOS* Provisions relating to piracy at sea. Therefore, the purpose when taking up this subject, as indicated above, is not to alter whatsoever these provisions. Further, aspects of this topic not directly regulated by such treaties would be analysed, using other instruments and State practice in this area, so as to further codify or progressively develop international law in a manner that may be helpful to States. The analysed state practice, whether it is legislation or domestic court decisions, will be that of all States with a potential or real interest in the protection of the oceans against piracy and armed robbery at sea. These include coastal States, flag States, port States, landlocked States, States that are susceptible of exercising their active or passive jurisdiction regarding nationals that are victims of perpetrators of piracy acts, and other relevant actors and international organisations.

V Form of the outcome

35 The objective of this topic could be to develop draft articles on the prevention and repression of piracy and armed robbery at sea. As the topic unfolds, it may become clearer whether the topic is an appropriate one for the development of new convention, in which case draft articles would remain the proper form for the Commission's work. If, however, it becomes apparent that the topic is best developed simply as guidance to States with respect to implementation of existing international obligations, then the outcome might be changed to "conclusion" or "guidelines".

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Kenya: *Act 4 of 2009 – Merchant Shipping, Part XVI – Maritime Security, articles 369-372*

Liberia: *Title 26 of the Liberian Code of Laws Revised and Approved July 22, 2008, Vol.IV, page 816, Article 15.31. Piracy*

Morocco: *Code disciplinaire et penal de la marine marchande, Annexe2 du Code maritime de 1919, Article 23(3) crime de piraterie*

South Africa: *Act No.42, 2002, Defence Act 2002, Chapter 4: Law Enforcement Powers of Defence Force at Sea*

Tanzania: *Penal Code, Chapter 16 of the Laws (Revised)*

Togo: *Ordonnance No.129 du 12 Aout 1971, Code de la Marine Marchande, révisée en 2018 ?*

Union des Comores: *Projet de code maritime, Article 81 (sur la piraterie maritime)*

Americas

North America

Canada: *Criminal Code (2009); C-46, Part II, Sections 74-75*

United States of America: *18 U.S.C. §2280; 18 U.S.C.§ Piracy under law of nations; 18 U.S.C.§ 1652 Citizens as pirates*

Latin America and the Caribbean

Argentina: *Penal Code, Chapter III (piracy), Articles 198 and 199*

Argentina: *Penal Code, Section VII, « Crimes against Public Safety », Chapter III-Piracy, Articles 198 and 199*

Bahamas: *Penal Code, Chapter 84, Article 404 (piracy)*

Brazil: *Criminal Code, as Decree Law No 2828 from 7 December 1940, Chapter II, Article 157: Robbery and Extorsion*

Chile: *Codigo Penal : Titulo I del Decreto No.5839 de 30 de septiembre de 1948, Art.6 (7): la pirateria*

Cuba: *la Ley No. 93 de 20 de Diciembre de 2001, « Ley contra actos de terrorismo », Capitulo IV: Actos contra la Seguridad de la Navegacion Maritima, Articulo 16.1 ; Capitulo VI : Otros Actos que Atentan contra la Seguridad Aerea y Maritima, Articulo 21*

Guatemala: *Decreto Numero 56-96*

Mexico: *Federal Penal Code, Chapter I: Piracy, Article 146 (I, II, III)*

Asia

Indonesia: *Penal Code, Chapter XXIX, Article 438-448*

Iran: *Islamic Punishment Act, Article 683, Article 185*

Japan: *Law on Punishment of and Measures against Acts of Piracy*

Philippines: *Act No.9372, “Human Security Act of 2007”, Section 3: Terrorism, (a) Article 122 (piracy in general and Munity in the High Seas or in the Philippine Waters); (5) Presidential Decree No.532 (Anti-Piracy and Anti-Highway Robbery Law of 1974*

Republic of Korea: *Laws and Ordinances on Punishment of Act of Piracy and Armed Robbery at Sea, Article 340*

Singapore: *Penal Code, Cf.12 and 13 Victoria c.96 (Admiralty Offences (Colonial Act 1849), Article 130B (piracy); Article 130C (piratical acts)*

Sri Lanka: *Act No.9 of 2001 (Piracy) and Act No.42 of 2000 (Suppression of Unlawful Acts Against The Safety of Maritime Navigation)*

Thailand: *Act on Prevention and Suppression of Piracy, B.E.2534 (1991), Anti-Piracy Law*

Turkey: *Turkey Penal Code, Articles 8, 12, 13, 35, 36, 37, 223, 224*

United Arab Emirates: *Commercial Maritime Law No.26 of 1981, Articles 208, 209, 210*

Europe and others

Australia: *Crimes Act 1914, Sections 51, 52, 54, Part IV – Piracy and Criminal Code Act 1899*

Austria: *Criminal Code, Section 65*

Belgium: *Loi relative a la lutte contre la piraterie maritime et modifiant le Code judiciaire (1), 30 décembre 2009*

Bulgaria: *Penal Code, Article 6, para.2*

Czech Republic: *Law No.40/2009 Coll., Criminal Code, January 1, 2010, Section 290 (Gaining Control over the Aircraft, Civil Vessel and Fixed Platform)*

Cyprus: *Criminal Code, Part I: Offences related to Piracy, Section 69, and Part II: Other Cyprus legislative provisions on certain acts of piracy/armed robbery*

Denmark: *Criminal Code, Section 183a (piracy) and b (Armed robbery at Sea)*

Estonia: *Penal Code, Section 110 (piracy)*

Finland: *Criminal Code, Chapter 1, Section 2*

France: *Decret No.2011-1213 du 29 septembre 2011 pour l'application de l'article 4 de la loi No.94-589 du 15 juillet 1994 relative a la lutte contre la piraterie et aux modalites de l'exercice par l'Etat de ses pouvoirs de police en mer*

Greece: *Greek Code on Public Maritime Law, Article 215 (crime of piracy), Article 8 of the Penal Code (piracy as a crime jure gentium)*

Italy: *Decree of December 30, 2008, no209 converted by Law 24th February 2009, n.12 , Article 5 of Italian Navigation Code, Article 1135 (Piracy); Article 1136 (Ship on suspicion of Piracy) Israel: Anti-Piracy Legislation: Penal Law, 1977, Section 169*

Latvia: *Criminal Law of 17th June, 1998, Article 176 (Robbery), Article 268 (Seizure of an Air or Water Transport vehicle)*

Malta: *Criminal Code: CAP.9, Sub-title IV B of Piracy, Article 328N (Definition of piracy, Added by XI.2009.7)*

New Zealand: *The Crimes Act 1961, s92-97*

Norway: *General Civil Penal Code, Section 49*

Poland: *Polish Penal Code, Chapter XVI, Chapter XX and Chapter XXXII*

Russia: *Federal Act No.162-FZ of December 2003, Article 227. Piracy*

Spain: *La legislacion Espagnola en material de Pirateria, 2009, la Ley Organica 6/1985, Articulo 23 apartado 4 (c) : Pirateria y apoderamiento illicito de aeronaves*

Ukraine: Criminal Code of 2001, Article 446

United Kingdom: *Merchant Shipping and Maritime Security Act* of 1997, Article 26; and *Piracy Act 1837 c.88*

4 National Court Decisions

AFRICA

Tanzania

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Manju Salum Msambya v. Attorney General and kifu Gulamu Hussein kifu, Court of Appeal of Tanzania, Civil Application No 2 of 2002;

Makoye Samwal Kashinge and 4 Others v. Republic, Court of Appel of Tanzania, Criminal Appeal No 32 of 2014

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Republic v. Mohamed Nuru Adam and Others; High Court of Tanzania: Case No 123 of 2015, Judgment 18/04/2019

Seychelles

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Republic v. Farad Ahmed and Others, Supreme Court of Seychelles, Criminal Side No. 16 of 2012; (Criminal Side No: 16 of 2012) [2013] SCSC 17

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Republic v. Mohammed Ali Hossein and Others, [2016] SCSC 129, 20 January 2016, Supreme Court of Seychelles; (CO 06/2014) [2016] SCSC 129

Abdirahman Mohamed Roble & 10 others v Republic; SCA CR 19/2013) [2015] SCCA 24

The Sunshine incident

The Al Molai incident

Kenya

Abdallah Ramadhan v. The DPP, [2017] eKLR

Abdiaziz Ali Abdulahi & 23 others v Republic, [2014] EKLR

Abdikadir Isey Ali & 8 others v Republic, [2015] EKLR

Attorney General V Mohamud Mohammed Hashi & 8 Others, [2012] EKLR

Hassan M. Ahmed v. Republic, [2009] EKLR

Omar Shariff Abdalla v. Corporate Insurance Co Ltd, [2005] EKLR

Republic v. Chief Magistrate Court, Mombasa Ex-parte Mohamud Mohamed Hashi & 8 Others, [2010] EKLR

ASIA

Enrica Lexie case 2012 (India/Italy) ;AIR 2012 SC 2134; 2013(4) SCALE 578. (2013) 4 SCC 721

Lia incident 2009 (China)

MV Guanabara case 2011 (Japan)

M/V Guanabara Case, Tokyo High Court, 18 December 2013 (Japan)

MV Jag Arnav case 2008 (India)

MV Stolt Valor (India)

MV Zhenhua 2009 (China)

EUROPE & OTHERS

Alakrana case 2009 (Spain)

Athens Maritime Enterprises Corp v. Hellenic Mutual War Risks Association (Bermuda) Limited or the Andreas Lemos, [1983] 1 All ER 590 (UK); [1982] 2 Lloyd's Rep. 483

Carré d'As Case (France)

The case In Re Piracy Jure Gentium, [1934] AC 586 (UK);In re Piracy jure gentium: PC 1934

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Castle John case (Belgium)

The Cygnus case (Somali Pirates), Rotterdam District Court, 17 June 2010, 145 International Law Report 491, 499 (Netherlands); 145 I.L.R. 491, 491–92 (Rb. Rotterdam 2010)

Feddah case 2012 (Netherlands); 22-004920-12 (ECLI:NL:GHDHA:2014:1006)

Fidelio case, Court of Cassation decision of 1 February 1993 (Italy)

MV Faina case 2009 (Russia)

MV Taipan case 2012 (Germany)

New South Wales v. Commonwealth, (1975) 135 CLR 337 (Australia)

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Re Castioni, [1891] 1QB 149 (UK)

Republic of Bolivia v. Indemnity Mutual Marine Assurance Company Limited, [1909] 1 KB 785 (UK)

Samanyulo case 2009 (Netherlands)

Tanit Case (France)

Winner Case 2008 (France)

AMERICAS

United States of America

The Belfast, Supreme Court of the United States, December 1, 1868, 74 U.S. 624.

Ex parte Gordon, Supreme Court of the United States, December 1, 1861, 66 U.S. 503.

Kiobel v. Royal Dutch Petroleum Co., Supreme Court of the United States, April 17, 2013, 569 U.S. 108.

Manro v. Almeida, Supreme Court of the United States, March 8, 1825, 23 U.S. 473.

New Jersey Steam Nav Co. v. Merchant's Bank of Boston, Supreme Court of the United States, January 1, 1848, 47 U.S. 344.

United States v. Flores, Supreme Court of the United States, April 10, 1933, 289 U.S. 137.

U.S. v. ALI, United States Court of Appeals, District of Columbia Circuit, June 11, 2013, 718 F.3d 929 782 F.3d 159.

U.S. v. ALI, United States District Court, District of Columbia, July 13, 2012, 885 F.Supp.2d 17.

U.S. v. Beyle, United States Court of Appeals, Fourth Circuit, April 3, 2015, 782 F.3d 159.

U.S. v. Dire, United States Court of Appeals, Fourth Circuit, February 28, 2014, 680 F.3d 446

U.S. v. Smith, Supreme Court of the United States, February 25, 1820, 18 U.S. 153.

U.S. v. Wiltberger, Supreme Court of the United States, February 18, 2018, 18 U.S. 76.

5 International case law relating to the use of force at sea

Affaires Yassin Abdullah Kadi et Al Barakaat International Foundation/Conseil et Commission, 3 Septembre 2008, CJUE; Joined cases C-402/05 P and C-415/05 P.

Enrica Lexie case, India v. Italy, 2012; AIR 2012 SC 2134; 2013(4) SCALE 578. (2013) 4 SCC 721

Guyana v. Suriname, (2008) 47 ILM 164; ICGJ 370 (PCA 2007), 47 ILM 166, 2008

Medvedyev v. France, judgment, March 29, 2010, para.85 (Eur.Ct.H.R 2010); (Application no. 3394/03)

M/V Saiga (No.2) (Saint Vincent and the Grenadines v. Guinea), judgment, [1999] 3 ITLOS Rep 10 at 48; [1999] 3 ITLOS Rep 10 at 48

SS I'm Alone (Canada v. United States), (1935) 3 RIAA 1609

The Red Crusader (Denmark v. UK), (1962) 35 ILR 485;

6 International Legal Instruments (regional and multilateral legal instruments)

UNCLOS, Articles 100-107, 110, 111, Article 87

IMO Resolutions, Documents and Guidance

- *Assembly Resolution Res.A.922 (22) (November 29, 2001): Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*,
- *“Piracy : elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982” (Doc LEG 98/8/1 and LEG 98/8/3, submitted by DOALOS*
- *“Establishment of a legislative framework to allow for effective and efficient piracy prosecutions” (Doc LEG 98/8/2, submitted by UNODC*
- *“Uniform and consistent application for the provisions of international conventions relating to piracy” (DOC LEG 98/8), submitted by IMO Secretariat*
- *“Establishment of a legislative framework to allow for effective and efficient piracy prosecutions” (DOC LEG 98/4), submitted by Ukraine*
- *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, IMO, LEG/MISC.8, January 30, 2014; at 46-51 (Chapter on piracy*

IMO Assembly Resolutions

- *A.545(13) (1983), Measures to prevent acts of piracy and armed robbery against ships*

- *A.683(17) (1991), Prevention and suppression of acts of piracy and armed robbery against ships*
- *A.738(18) (1993), Measures to prevent and suppress piracy and armed robbery against ships*
- *A.979(24) (2005), Piracy and armed robbery against ships in waters off the coast of Somalia*
- *A.1002(25) (2007), Piracy and armed robbery against ships in waters off the coast of Somalia*
- *MSC.1/Circ. 1333 (2009), Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships (replaces MSC/Circ.622/Rev.1)*
- *MSC.1/Circ. 1334 (2009), Guidance to Shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships (replaces MSC/Circ.623/Rev.3)*
- *MSC.1/Circ. 1332 (2009), Piracy and armed robbery against ships in waters off the coast of Somalia*
- *MSC/Circ.1073 (2003), Directives for Maritime Rescue Co-ordination Centres (MRCCs) on Acts of Violence against Ships, Conference Report: Overview of legal issues relating to different private interests*
- *Draft 26th IMO Assembly Resolution, Adoption of the Code of Practice for Investigation of crimes of piracy and armed robbery against ships (2009), to replace A.922(22), MSC 86/26/Add.2, Annex 23*
- *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, 2009, IMO doc. C 102/14, Annex*
- *SN.1/Circ.281, Information on Internationally Recommended Transit Corridor (IRTC) for Ships Transiting the Gulf of Aden, 32 August 2009*
- *Seoul Statement on Piracy off the Coast of Somalia, 10 June 2009, IMO doc. C 102/INF.3, Annex*

SOLAS Convention (Convention on Safety of Life at Sea)

UNODC Regulations

ICC; International Chamber of Commerce

IMB (International Maritime Bureau)

FAO Resolutions

INTERPOL:

- *INTERPOL's Global Piracy Database ; and its case: Greece to Prosecute First Maritime Piracy Case with Evidence Gathered by INTERPOL Team, December 12, 2012*
- *The EVEXI (Evidence Exploitation Intelligence)*

IOCA Rules

7 Security Council Resolutions

S/Res/1816(2008), November 6, 2008

S/Res/1838(2008), October 7, 2008

S/Res/1846(2008), December 2, 2008

S/Res/1851(2008), December 16, 2008

S/Res/1897(2009), November 30, 2009

S/Res/1918(2010), April 23, 2010

S/Res/1950(2010), November 23, 2010

S/Res/1976(2011), April 11, 2011

S/Res/2015(2011), October 24, 2011

S/Res/2018(2011), October 31, 2011

S/Res/2020(2011), November 22, 2011

S/Res/2039(2012), February 29, 2012

S/Res/2077(2012), November 21, 2012

S/Res/2125(2013), November 18, 2013

S/Res/2383(2017), 7 November 2017

S/2012/45(2012), January 19, 2012

S/2012/50, January 20, 2012: *Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region*

8 United Nations General Assembly Resolutions and Documents

G.A. Res. 63/111, para.61, U.N. Doc. A/RES/63/111, December 5, 2008.

G.A. Res. 66/231, para.81, U.N. Doc. A/RES/66/231, December 24, 2011

G.A. Res. 67/78, para.88, U.N. Doc. A/RES/67/78, December 11, 2012

UNGA: International Expert Group on Piracy off the Somali Coast: Final Report: Assessment and Recommendations (workshop commissioned by the Special Representative of the Secretary-General of the United Nations to Somalia, 21 November 2008)

Advance version (20 August 2019)

UN Basic Principles on Firearms, UN DocA /CONF.144/28/Rev.1, article 9

UN Doc. S/2011/30, January 25, 2011, Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (Special Advisor Jack Lang)

9 Reports of the UN Secretary-General

S/2010/394, July 26, 2010

S/2010/556, October 27, 2010

S/2011/360, June 15, 2011

S/2011/662, October 25, 2011

S/2012/50, January 20, 2012

S/2012/783, October 22, 2012

S/2013/623, October 21, 2013

10 International Cooperation

States involved: Australia, Canada, Denmark, France, India, the Netherlands, the Russian federation, Spain, the United Kingdom, the United States, Japan, China, South Korea, Germany, etc

EU NAVFOR Atalanta, 2008

NATO Operation Ocean Shield, 2009

American-Led Combined Maritime Forces (Task Force 151 on piracy, 2009)

“Exchange of Letters between the European union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of having Committed Acts of Piracy”, Introductory Note by Eugene Kontorovich, in (2009) 48 *ILM* 747, 747-9

11 Regional Cooperation

Regional Cooperation Agreement in Combating Piracy and Armed Robbery against Ships in Asia, 2006 (*ReCAAP, 2006*)

The Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, (*Djibouti Code of Conduct, 2009*)

Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and illicit Maritime Activity in West and Central Africa (*Gulf of Guinea Code of Conduct, 2013*)

