1. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-NINTH SESSION

I. INTRODUCTION

1. The International Law Commission (hereinafter referred to as “ILC” or the “Commission”) established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. Following the 2006 elections, the 34 newly elected Members of the ILC met for its fifty-ninth Session in Geneva from 7 May to 8 June and 9 July to 10 August 2007.\(^1\)

2. The Commission’s membership for the 2007-2011 quinquennium is as follows: Mr. Ali Mohsen Fetais Al-Marri (Qatar), Mr. Ian Brownlie (United Kingdom), Mr. Lucius Caflisch (Switzerland), Mr. Enrique Candioti (Argentina), Mr. Pedro Comissário Afonso (Mozambique), Mr. Christopher John Robert Dugard (South Africa), Ms. Paula Escarameia (Portugal), Mr. Salifou Fomba (Mali), Mr. Giorgio Gaja (Italy), Mr. Zdzislaw Galicki (Poland), Mr. Hussein A. Hassouna (Egypt), Mr. Mahmoud D. Hmoud (Jordan), Ms. Marie G. Jacobsson (Sweden), Mr. Maurice Kamto (Cameroon), Mr. Fathi Kemicha (Tunisia), Mr. Roman Anatolyevitch Kolodkin (Russian Federation), Mr. Donald M. McRae (Canada), Mr. Teodor Viorel Melescanu (Romania), Mr. Bernd H. Niehaus (Costa Rica), Mr. Georg Nolte (Germany), Mr. Bayo Ojo (Nigeria), Mr. Alain Pellet (France), Mr. A. Rohan Perera (Sri Lanka), Mr. Ernest Petrić (Slovenia), Mr. Gilberto Vergne Saboia (Brazil), Mr. Narinder Singh (India), Mr. Eduardo Valencia-Ospina (Colombia), Mr. Edmund Vargas Carreño (Chile), Mr. Stephen C. Vasciannie (Jamaica), Mr. Marcelo Vázquez-Bermúdez (Ecuador), Mr. Amos S. Wako (Kenya), Mr. Nugroho Wisnumurti (Indonesia), Ms. Hanqin Xue (China), and Mr. Chusei Yamada (Japan).\(^2\)

3. The Commission elected Mr. Ian Brownlie as its Chairman, Mr. Edmundo Vargas Carreno as the First Vice Chair, Mr. Pedro Comissario Afonso as Second Vice-Chair, Mr. Chusei Yamada as the Chairman of the Drafting Committee and Mr. Ernest Petric as Rapporteur. Secretary-General Amb. Dr. Wafik Zaher Kamil represented the AALCO at the Session and addressed the Commission on 27 July 2007.

4. There were as six topics on the agenda of the aforementioned session of the ILC. These were:
   (i) Shared Natural Resources
   (ii) Responsibility of International Organizations
   (iii) Reservation to Treaties

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\(^2\) The names of ILC Members from AALCO Member States are indicated in bold, comprising 12 out of 34 Members.
5. The Commission also inter alia considered “Programme, procedure and working methods of the Commission and its documentation”.

6. On the topic of **Shared Natural Resources**, the Special Rapporteur introduced his fourth report on the topic\(^3\). The Report focused on the relationship between the work on transboundary aquifers and any future work on oil and gas and recommended that the Commission should proceed with the second reading of the draft articles on the law of transboundary aquifers independently of any future consideration of oil and gas. The Commission considered the Report and decided to establish a Working Group on Shared Natural Resources under the Chairmanship of Mr. Enrique J. A. Candioti, which addressed (a) the substance of the draft articles on the law of transboundary aquifers adopted on first reading; (b) the final form that the draft articles should take; and (c) issues involved in the consideration of oil and gas, and in particular prepared a questionnaire on State practice concerning oil and gas for circulation to governments.

7. On the topic, **Responsibility of International Organizations**, the Commission considered the fifth report\(^4\) of the Special Rapporteur. The Report focused on content of the international responsibility of an international organization. The Commission referred 15 articles to the Drafting Committee and it subsequently adopted 15 draft articles, together with commentaries, dealing with the content of the international responsibility of an international organization.

8. On the topic, **Reservation to Treaties**, the Commission considered the eleventh\(^5\) and the twelfth\(^6\) reports of the Special Rapporteur on the formulation and withdrawal of acceptances and objections and on the procedure for acceptances of reservations, respectively and referred to the Drafting Committee 35 draft guidelines on the above issues. The Commission also adopted 9 draft guidelines dealing with the determination of the object and purpose of the treaty as well as the question of incompatibility of a reservation with the object and purpose of the treaty together with commentaries.

9. On the topic, **Effects of Armed Conflicts on Treaties**, the Commission considered the third report\(^7\) of the Special Rapporteur, and decided to establish a Working Group under the Chairmanship of Mr. Lucius Caflisch. The Commission subsequently adopted the report of the Working Group\(^8\) and decided to refer draft articles 1 to 3, 5, 5 bis, 7, 10 and 11 as proposed by the Special Rapporteur and draft article 4 as proposed by

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\(^3\) A/CN.4/580.
\(^4\) A/CN. 4/583.
\(^5\) A/CN. 4/574.
\(^6\) A/CN. 4/584.
\(^8\) A/CN.4/L. 718.
the Working Group to the Drafting Committee, together with the recommendations and suggestions of the Working Group.

10. As regards the topic **The Obligation to Extradite or Prosecute** (*aut dedere aut judicare*), the Commission considered the second report⁹ of the Special Rapporteur containing one draft article on the scope of application, as well as proposed plan for further development. The Commission also had before it comments and information received from Governments.¹⁰

11. On the topic **Expulsion of Aliens**, the Commission considered the second¹¹ and third¹² report of the Special Rapporteur dealing, respectively, with the scope of the topic and definition (2 draft articles), and with certain general provisions limiting the right of a State to expel an alien (5 draft articles). The Commission decided to refer the 7 draft articles to the Drafting Committee and also approved the Special Rapporteur’s recommendation that the Secretariat should contact the relevant international organizations in order to obtain information and their views on particular aspects of the topic.

12. The Commission set up the Planning Group to consider its programme, procedures and working methods. A Working Group on the Long-term Programme of Work was established, under the Chairmanship of Mr. Enrique Candioti, which would submit its final report to the Commission at the end of the current quinquennium topic. The Commission decided to include in its current programme of work two new topics, namely “**Protection of Persons in the Event of Disasters**” and “**Immunity of State Officials from Foreign Criminal Jurisdiction**”. In this regard, it decided to appoint Mr. Eduardo Valencia-Ospina as Special Rapporteur for the former topic and Mr. Roman A. Kolodkin Special Rapporteur for the latter topic.

13. The Commission also established a Working Group on the Most-Favoured Nation clause under the Chairmanship of Mr. Donald McRae to examine the possibility of considering the topic “**Most-Favoured-Nation Clause**”. After considering the report of the Working Group, it decided to refer it to the Planning Group.

14. The Commission decided that the sixtieth session of the Commission be held in Geneva from 5 May to 6 June and 7 July to 8 August 2008.

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⁹ A/CN. 4/585.
¹⁰ A/CN. 4/579 and Add. 1, 2, 3, and 4.
¹² A/CN. 4/581.
II. SHARED NATURAL RESOURCES

A. BACKGROUND

15. At its fifty-fourth session (2002), the Commission decided to include the topic “Shared Natural Resources” in its programme of work and accordingly appointed Mr. Chusie Yamada as Special Rapporteur for the topic. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission’s decision to include the topic in its programme of work.

16. At its fifty-fifth session (2003), the commission considered the first report\(^{13}\) of the Special Rapporteur on the topic. In furtherance of its work on the topic the Commission also had an informal briefing by experts on groundwaters from the Food and Agricultural Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

17. At its fifty-sixth session (2004), the Commission considered the second report\(^{14}\) of the Special Rapporteur, which contained seven draft articles. The Commission established an open-ended Working Group on Transboundary Ground waters chaired by the Special Rapporteur. Further, the Commission held two informal briefings by experts on ground waters.

18. At its fifty-seventh session (2005), the Commission considered the third report\(^{15}\) of the Special Rapporteur on the topic, containing a complete set of 25 draft articles on the law of transboundary aquifers. The Commission decided to establish a Working Group to review the draft articles presented by the Special Rapporteur taking into account the debate in the Commission on the topic. The Working Group reviewed and revised 8 draft articles and recommended that it be reconvened in 2006 to complete its work.

19. At its fifty-eighth session (2006), the Commission established a Working Group on Transboundary Groundwaters to complete the consideration of the draft articles submitted by the Special Rapporteur in his third report; referred 19 draft articles to the Drafting Committee; and subsequently adopted on first reading a set of draft articles on the law of transboundary aquifers, together with commentaries.\(^{16}\) The Commission also decided to transmit the draft articles, 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 January 2008.

\(^{13}\) A/CN.4/533 and Add. 1
\(^{14}\) A/CN.4/539 and Add.1
\(^{15}\) A/CN.4/551 and Corr.1 and Add.1
\(^{16}\) For a report on these articles also see AALCO/NOTES&COMMENTS/UNGA/61/2006, pp. 28-40.
B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

20. Mr. Chusei Yamada the Special Rapporteur on the topic of Shared Natural Resources introduced his Fourth Report for the consideration of the Commission at its fifty-ninth session. The Report addressed one particular aspect concerning the relationship between the work on transboundary aquifers and any future work on oil and gas. He proposed that the Commission should proceed with the second reading of the draft articles on the law of transboundary aquifers in 2008, only after the expected comments and observations from Governments were received, and treat the subject independently of any future work by the Commission on oil and gas. The Special Rapporteur stressed that the looming prospect of a water crisis that would affect hundreds of millions of people, particularly in the developing world, required an urgent formulation of an international legal framework for reasonable and equitable management of water resources, international cooperation, as well as settlement of disputes.

21. The Special Rapporteur highlighted the similarities and dissimilarities between oil and gas on the one hand and aquifers on the other, from scientific and technical perspectives, as well as in the light of the political, economic and environmental aspects, noting that in the main, there existed a close similarity between the physical features of a non-recharging aquifer and the reservoir rock of oil and gas. On the whole, however, the differences pointed to the need for special treatment. The Special Rapporteur highlighted the fact that freshwater was a life supporting resource vital for the human being for which there existed no alternative resource. Freshwater was also (a) vital resource for hygienic living of the human being; (b) indispensable for food production; and (c) an essential ingredient of natural ecosystems and organic life of the planet. These considerations necessitated a management policy of groundwaters that was to be different from that of oil and gas.

22. At the fifty-ninth Session, the Commission decided to establish a Working Group on Shared Natural Resources under the Chairmanship of Mr. Enrique Candioti to assist the Special Rapporteur in formulating a future work programme, taking into account the views expressed in the Commission. It decided to deal with three issues, namely (a) the substance of the draft articles on the law of transboundary aquifers adopted on the first reading; (b) the final form that the draft articles should take; and (c) issues involved in the consideration of oil and gas.

23. As regards the substance of draft articles, as the matter had been already submitted to the Governments, the comments made in the Working Group were informal in character, and only intended to facilitate the Special Rapporteur’s work in the preparation of his fifth report and did not prejudice or prejudice any further analysis and discussion to be made during the second reading of the draft articles taking into account the comments and observations of the Governments.

A/CN.4/580.
24. Concerning the issue of the final form that draft articles should take, the Working Group recalled that the Commission makes a recommendation on the final form to the General Assembly at the conclusion of a second reading. Since the final form would have a bearing on the substance of the text, including on issues relating to the relationship between any future binding instrument and existing bilateral agreements or arrangements, as well as concerning dispute settlement, it was noted that an early exchange of views on the matter would assist the Special Rapporteur in the preparation of his fifth report. Although during the course of discussion members expressed views on the different possibilities, including preference for either a non-binding instrument in the form of a declaration of principles or a binding format by way of a framework convention, the Working Group refrained from taking any definitive position on final form.

25. Regarding issues involved in the consideration of transboundary oil and gas resources, the Working Group agreed as a first step to prepare a questionnaire on State practice for circulation to Governments. Such a questionnaire would, inter alia, seek to determine whether there were any agreements, arrangements or practice regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil or gas, including as appropriate, maritime boundary delimitation agreements, as well as utilization and joint development agreements or other arrangements or a description of the practice, as well as any further comments or information, including legislation, judicial decision, which Governments may consider to be relevant or useful to the Commission in the consideration of issues regarding oil and gas.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

26. The Commission intends to study issues concerning oil and gas under the topic “Shared Natural Resources”. It would be useful for the Commission in the consideration of these issues to be provided with relevant State practice, in particular treaties or other arrangements existing on the subject.
III. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

27. At its fifty-second session, in 2000, the Commission decided to include the topic of ‘Responsibility of International Organizations’ in its long-term programme of work. The General Assembly in its resolution 55/152 of 12 December 2000, took note of the Commission’s decision and in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic.

28. At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session a Working Group was established and at the end of the session the Commission adopted the report of the Working Group.

29. From 2003 till 2006 the Commission considered four reports of the Special Rapporteur and adopted 30 draft articles together with commentaries dealing with the internationally wrongful act of an international organisation, attribution of conduct to an international organization, breach of an international obligation, responsibility of an international organization in connection with the act of a State or another international organization, circumstances precluding wrongfulness and responsibility of a State in connection with the act of an international organization.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

30. At the present session, the Commission considered the fifth report of the Special Rapporteur, which focused on content of the international responsibility of an international organization. The Commission also had the written comments received so far from international organizations.

31. During the session it was viewed that the current draft did not take sufficiently into account the great variety of international organizations. The Special Rapporteur indicated that the draft articles had a level of generality which made them appropriate for most, if not all, international organizations; this did not exclude, if the particular features of certain organizations so warranted, the application of special rules.

32. Following the consideration of the Report of the Special Rapporteur the Commission referred 15 draft articles (draft articles 31 to 44) to the Drafting Committee. The Commission considered and adopted the report of the Drafting Committee on draft articles 31 to 44 [45] at its 2945th meeting, on 31 July 2007. At its 2949th to 2954th meetings, the Commission also adopted the commentaries to the aforementioned draft articles.

19 A/CN.4/532 and A/CN.4/541
20 A/CN.4/583.
33. An overview of the draft articles adopted by the Commission is as follows:

PART II
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

34. Part Two of the present draft defines the legal consequences of internationally wrongful acts of international organizations. This Part is organized in three chapters, which follow the general pattern of the articles on responsibility of States for internationally wrongful acts.

   Chapter I (articles 31 to 36) lays down certain general principles and sets out the scope of Part Two.
   Chapter II (articles 37 to 43) specifies the obligation of reparation in its various forms.
   Chapter III (articles 44 [43] and 45 [44]) considers the additional consequences that are attached to internationally wrongful acts consisting of serious breaches of obligations under peremptory norms of general international law.

CHAPTER I: General principles

Article 31
Legal consequences of an internationally wrongf ul act
The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

35. The wording of this article corresponds to article 28 on responsibility of States for internationally wrongful acts, with the only difference that the term “international organization” replaces the term “State”.

Article 32
Continued duty of performance
The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

36. This article states the principle that the breach of an obligation under international law by an international organization does not per se affect the existence of that obligation. The principle that an obligation is not per se affected by a breach does not imply that performance of the obligation will still be possible after the breach occurs. This will depend on the character of the obligation concerned and of the breach. The conditions under which an obligation may be suspended or terminated are governed by the primary rules concerning the obligation. The same applies with regard to the possibility of
performing the obligation after the breach. These rules need not be examined in the context of the law of responsibility of international organizations.\(^{21}\)

**Article 33**  
**Cessation and non-repetition**  
The international organization responsible for the internationally wrongful act is under an obligation:  
(a) To cease that act, if it is continuing;  
(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

37. The present article follows the same wording as article 30 on responsibility of States for internationally wrongful acts, with the replacement of the word “State” with “international organization”. This article is a corollary of above mentioned article 32 that, if the wrongful act is continuing, the obligation has still to be complied with. When the breach of an obligation occurs and the wrongful act continues, the main object pursued by the injured State or international organization will often be cessation of the wrongful conduct. Although a claim would refer to the breach, what would actually be sought is compliance with the obligation under the primary rule.

38. Subparagraph (b) describes the existence of an obligation to offer assurances and guarantees of non-repetition will depend on the circumstances of the case. For this obligation to arise, it is not necessary for the breach to be continuing. The obligation seems justified especially when the conduct of the responsible entity shows a pattern of breaches.

39. The Commentaries notes that assurances and guarantees of non-repetition are considered in the same context as cessation because they all concern compliance with the obligation set out in the primary rule. However, unlike the obligation to cease a continuing wrongful act, the obligation to offer assurances and guarantees of non-repetition may be regarded as a new obligation that arises as a consequence of the wrongful act, which signals the risk of future violations.

**Article 34**  
**Reparation**  
1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.  
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

40. Paragraph 1 of the present article sets out the principle that the responsible international organization is required to make full reparation for the injury caused. The Commentaries notes that the principle of full reparation is often applied in practice in a flexible manner. Further, it may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the

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\(^{21}\) This article uses the same wording as article 29 on responsibility of States for internationally wrongful acts, with the only difference that the term “State” is replaced with the term “international organization”.

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inadequacy of the financial resources that are generally given to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.\(^\text{22}\)

**Article 35**

**Irrelevance of the rules of the organization**

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.
2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

41. Paragraph 1 of the article states the principle that an international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act. This principle finds a parallel in the principle that a State may not rely on its internal law as a justification for failure to comply its obligations under Part Two of the articles on responsibility of States for internationally wrongful acts.\(^\text{23}\)

42. Paragraph 2 applies only insofar as the obligations in Part Two relate to the international responsibility that an international organization may have towards its member States and organizations. It cannot affect in any manner the legal consequences entailed by an internationally wrongful act towards a non-member State or organization. Nor can it affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole.\(^\text{24}\)

**Article 36**

**Scope of international obligations set out in this Part**

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

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\(^{22}\) This article is a reproduction of article 31 on responsibility of States for internationally wrongful acts, with the replacement in both paragraphs of the term “State” with “international organization”.

\(^{23}\) A similar approach was taken by article 27, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, which parallels the corresponding provision of the 1969 Vienna Convention on the Law of Treaties by saying that “[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty”.

\(^{24}\) The text of paragraph 1 replicates article 32 on State responsibility, with two changes: the term “international organization” replaces “State” and the reference to the rules of the organization replaces that to the internal law of the State.
43. Part One of the articles on State responsibility considers any breach of an obligation under international law may be attributed to a State, irrespectively of the nature of the entity or person to whom the obligation is owed. The scope of Part Two of those articles is limited to obligations that arise for a State towards another State. This seems due to the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One.

44. Taking a similar approach with regard to international organizations in the present article would mean limiting the scope of Part Two to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical to include also obligations that organizations have towards States, given the existence of the articles on State responsibility. As a result, Part Two of the draft will encompass obligations that an international organization may have towards one or more other organizations, one or more States, or the international community as a whole.

45. With regard to international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under rules of international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals. While the consequences of these breaches, as stated in paragraph 1, are not covered by the draft, certain issues of international responsibility arising in the context of employment are arguably similar to those that are examined in the draft.

CHAPTER II: Reparation for injury

Article 37

Forms of reparation

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.

46. This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. A note by the Director General of the International Atomic Energy Agency (IAEA) provides an instance in which the three forms of reparation are considered to apply to a responsible international organization. Concerning the “international responsibility of the Agency in relation to safeguards”, he wrote on 24 June 1970:

“Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation.”

25 The provision is identical to article 34 on responsibility of States for internationally wrongful acts.
Article 38
Restitution
An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;
(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

47. The concept of restitution and the related conditions, as defined in article 35 on responsibility of States for internationally wrongful acts, appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 on State responsibility, with the only difference that the term “State” is replaced by “international organization”.

Article 39
Compensation
1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

48. Compensation is the form of reparation most frequently made by international Organizations and there are many well-known instances of this practice.26 A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.

Article 40
Satisfaction
1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

49. The modalities and conditions of satisfaction that concern States are applicable also to international organizations. A form of satisfaction intended to humiliate the responsible international organization may be unlikely, but is not unimaginable. A theoretical example would be that of the request of a formal apology in terms that would be demeaning to the organization or one of its organs. The request could also refer to the

26 The article is similar to the text of article 36 on responsibility of States for internationally wrongful acts, apart from replacing the term “State” with “international organization”.

conduct taken by one or more member States or organizations within the framework of the responsible organization. Although the request for satisfaction might then specifically target one or more members, the responsible organization would have to give it and would necessarily be affected.\textsuperscript{27}

\textbf{Article 41}

\textbf{Interest}

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

50. The rules contained in article 38 on responsibility of States for internationally wrongful acts with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 on State responsibility are here reproduced without change.

\textbf{Article 42}

\textbf{Contribution to the injury}

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

51. This is an extension to international organizations the provision set out in article 39 on responsibility of States for internationally wrongful acts. Such an extension is made in two directions: first, international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations.

52. The reference to “any person or entity in relation to whom reparation is sought” has to be read in conjunction with the definition given in article 36 of the scope of the international obligations set out in Part Two. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole.

\textbf{Article 43}

\textbf{Ensuring the effective performance of the obligation of reparation}

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.

53. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership in a

\textsuperscript{27} This article is similar to article 37 on responsibility of States for internationally wrongful acts, with the replacement of the term “State” with “international organization” in paragraphs 1 and 3.
responsible organization according to the conditions stated in articles 28 and 29. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members. Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly, no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation. This approach appears to conform to practice.

54. Thus, the injured party would have to rely only on the fulfilment by the responsible international organization of its obligations. It is expected that in order to comply with its obligation to make reparation, the responsible organization would use all available means that exist under its rules. In most cases this would involve requesting contributions by the members of the organization concerned.

CHAPTER III: Serious breaches of obligations under peremptory norms of general international law

Article 44 [43]
Application of this chapter
1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

55. The scope of Chapter III corresponds to the scope defined in article 40 on responsibility of States for internationally wrongful acts. The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk that such a breach takes place cannot be entirely ruled out. If a serious breach does occur, it calls for the same consequences that are applicable to States. 28

Article 45 [44]
Particular consequences of a serious breach of an obligation under this chapter
1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].
2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

28 The two paragraphs of the present article are identical to those of article 40 on the responsibility of States for internationally wrongful acts, but for the replacement of the term “State” with “international organization”.

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56. This article recognizes that the legal situation of an international organization is the same as that of a State having committed a serious breach of an obligation under a peremptory norm of general international law. This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 on responsibility of States for internationally wrongful acts. Therefore, the same wording is used here as in that article, with the only additions of the words “and international organizations” in paragraph 1 and “or international organization” in paragraph 2.

57. Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon “all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

58. The Commission would welcome comments and observations from Governments and international organizations on draft articles 31 to 45, in particular on draft article 43, relating to an obligation of members of a responsible international organization to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

59. The Commission also welcome views from Governments and international organizations on the two following questions, due to be examined in the next report:

(a) Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured States or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?

(b) If an injured international organization intends to resort to countermeasures, would it encounter further restrictions than those that are listed in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts?
IV. RESERVATIONS TO TREATIES

A. BACKGROUND

60. It may be recalled that the UN General Assembly in its resolution 48/31 of December 1993 endorsed the decision of the ILC to include in its agenda the topic “The law and practice relating to reservations to treaties.” At its forty-sixth session in 1994, the ILC appointed Mr. Alain Pellet as Special Rapporteur for the topic. The ILC at its forty-seventh session in 1995 and the forty-eighth session in 1996 received and discussed the first\(^{29}\) and second\(^{30}\) reports of the Special Rapporteur, respectively.

61. The ILC continued its work on the understanding that: the title to the topic would read as “Reservations to Treaties”; the form the results of the study would take should be a guide to practice in respect of reservations; and the present work by the ILC should not alter the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on Treaties. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States, and international organizations. These guidelines would, if necessary, be accompanied by model clauses.

62. Since the year 1998, the Commission received the third, fourth, fifth, sixth, seventh and eighth reports of the Special Rapporteur. While the third and fourth reports dealt with the definition of reservations and interpretative declarations, the fifth report focused on the procedure and alternatives to reservations and interpretative declarations, and the sixth report concerned the modalities of formulating and publicity of reservations and interpretative declarations. The seventh report\(^{31}\) and eighth report\(^{32}\) relating to the formulation, modification and withdrawal of reservations and interpretative declarations.

63. At its fifty-sixth session (2004) the Commission had before it the Special Rapporteur’s ninth report relating to the object and definition of objections. This report constituted a complimentary section to the eighth report on the formulation of objection to reservations and interpretative declarations. The Commission further considered and provisionally adopted draft guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12, and 2.5.13 and commentaries thereto.

64. At the forty-seventh session (2005) the Commission had before it the tenth report of the Special Rapporteur on validity of reservations and the concept of the object and purpose of the treaty. The Commission considered part of the tenth report and decided to send draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2. (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4. (Non-specified reservations authorized by the treaty) to the Drafting Committee. The Commission also decided to

\(^{30}\) A/CN.4/477 and Add.7.
\(^{31}\) A/CN.4/526 and Add.1 to 3.
\(^{32}\) A/CN.4/535 and Add.1
send draft guidelines 1.6 and 2.1.8, which had already been provisionally adopted, to the Drafting Committee with a view to their revision in the light of the terms selected. The Commission further considered and provisionally adopted draft guidelines 2.6.1 (Definition of objections to treaties) and 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation), which are described below. Following the deliberations on these reports, the Commission had provisionally adopted 69 draft guidelines by the end of its sixty-eighth session (2006).

65. For purposes of the Guide to Practice, “reservation” means a unilateral statement, however, phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

66. An ‘interpretative declaration’ on the other hand is a unilateral statement … made by a State or by an international organization … purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

67. Till 2006, the Commission received ten reports of the Special Rapporteur on the topic and after the deliberations the Commission has so far adopted 76 draft guidelines with commentaries covering various aspects of reservations to treaties.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

68. At the present session the Commission considered the eleventh and twelfth reports of the Special Rapporteur33 on the formulation and withdrawal of acceptances and objections and on the procedure for acceptances of reservations, respectively, and referred to the Drafting Committee 35 draft guidelines on the above issues. The Commission also adopted 9 draft guidelines dealing with the determination of the object and purpose of the treaty as well as the question of incompatibility of a reservation with the object and purpose of the treaty together with commentaries.

69. During the session, the Commission considered and provisionally adopted draft guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), 3.1.6 (Determination of the object and purpose of the treaty), 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of jus cogens), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties) and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty). The Commission also adopted the commentaries relating to the aforementioned draft guidelines.

70. The Commission also decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15 and 2.7.1 to 2.7.9, 2.8, 2.8.1 to 2.8.12 to the Drafting Committee, and to review the wording of draft guideline 2.1.6 in the light of the discussion.

71. The 9 draft guidelines provisionally adopted by the Commission are reflected below:

**3.1.5 Incompatibility of a reservation with the object and purpose of the treaty**
A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d’être* of the treaty.

72. The compatibility of a reservation with the object and purpose of the treaty constitutes, in the terms of article 19 (c) of the Vienna Convention, the fundamental criterion for the permissibility of a reservation. These are the two fundamental elements crucial for the determination of ‘the object and purpose’: the object and purpose can only be determined by an examination of the treaty as a whole; and, on that basis, reservations to the “essential” clauses, and only to such clauses, are rejected. In other words, it is the “raison d’être” of the treaty, its “fundamental core” that is to be preserved in order to avoid the “effectiveness” of the treaty as a whole to be undermined.

**3.1.6 Determination of the object and purpose of the treaty**
The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

73. The commentaries admit that given the great variety of situations and their susceptibility to change over time, it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable. The International Court of Justice has deduced the object and purpose of a treaty from a number of highly disparate elements, taken individually or in combination: from its title; from its preamble; from an article placed at the beginning of the treaty that “must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied”; from an article of the treaty that demonstrates “the major concern of each contracting party” when it concluded the treaty; from the preparatory works on the treaty; and from its overall framework.

**3.1.7 Vague or general reservations**
A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

74. This guideline highlights the requirement of precision in the wording of reservations in order to assess the compatibility of the reservation with the object and purpose of the treaty. For example, Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women with a reservation “in each and every one of its parts which are not contrary to Islamic sharia”. Denmark noted, “the
general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character”.

3.1.8 Reservations to a provision reflecting a customary norm
1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.
2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

75. This guideline relates to the validity of a reservation to a provision which is restricted to reflecting a customary norm. Paragraph 2 states that the author of a reservation to a provision of this type may not be relieved of his obligations thereunder by formulating a reservation. Paragraph 1, meanwhile, underlines the principle that a reservation to a treaty rule which reflects a customary norm is not ipso jure incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

76. This inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the judgment of the International Court of Justice in the North Sea Continental Shelf cases:
“... 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 law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour”. 34

3.1.9 Reservations contrary to a rule of jus cogens
A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

77. This guideline is a compromise between two opposing lines of argument which merged during the Commission’s debate. Some members held that the peremptory nature of the norm to which the reservation related made the reservation in question invalid, while others maintained that the logic behind draft guideline 3.1.8, on reservations to a provision on reflecting a customary norm, should apply and that it should be accepted.

34 Judgment of 20 February 1969, I.C.J. Reports 1969, pp. 38 and 39, para. 63. The Commentaries however, notes that it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law; it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1-3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court’s own conclusion. See also dissenting opinion of Judge Morelli, when he writes: “Naturally the power to make reservations affects only the contractual obligation flowing from the Convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified.”
that such a reservation was not invalid in itself, provided it concerned only some aspect of a treaty provision setting forth the rule in question and left the norm itself intact. Both groups agreed that a reservation should not have any effect on the content of the binding obligations stemming from the *jus cogens* norm as reflected in the provision to which it referred. This consensus was reflected in draft guideline 3.1.9; without adopting a position as to whether these opposing arguments are founded or unfounded, it establishes that a reservation should not permit a breach of a peremptory norm of general international law.

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

78. To the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former. However, the two are not necessarily identical. The fact that a provision may in principle be the object of a derogation does not mean that all reservations relating to it will be valid. The criterion of compatibility with the object and purpose of the treaty also applies to them. Thus, it is observed that under this guideline reservations remain possible provided they do not call into question the principle set forth in the treaty provision; in that situation, the methodological guidance contained in draft guideline 3.1.6 is fully applicable.

3.1.11 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

79. One of the reasons frequently cited by States in support of their formulation of a reservation relates to their desire to preserve the integrity of specific norms of their internal law (such as constitution, criminal law, family law)

80. In accordance with article 27 of the Vienna Convention on Law of Treaties no party may invoke the provisions of its domestic law as justification for failure to apply a treaty. However, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its domestic law, which it is not in a position to amend, at least initially. However, while article 27 of the Vienna Conventions cannot rightly be said to apply to the case in point, it should nevertheless be borne in mind that national laws are “merely facts” from the standpoint of international law and that the very aim of a treaty can be to lead States to modify them.

3.1.12 Reservations to general human rights treaties
To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

81. This draft guideline attempts to strike a particularly delicate balance between different considerations by combining three elements:

- “The indivisibility, interdependence and interrelatedness of the rights set out in the treaty”: this emphasizes the global nature of the protection afforded by general human rights treaties and is intended to prevent their dismantling.
- “The importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty”: The second element qualifies the previous one by recognizing that certain rights protected by these instruments are no less important than other rights and, in particular, non-derogable ones.
- “The gravity of the impact the reservation has upon it” indicates that even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.

3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its raison d’être; or
(ii) The reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

82. The ICJ in *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Genocide Convention of 1948, which gives the Court jurisdiction to hear all disputes relating to the Convention.35 This was reiterated in the *Armed Activities on the Territory of the Congo* (2002). However, there is also a view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty’s object and purpose: it depended on the particular case.36

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C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

83. The Commission noted that in order for the Special Rapporteur to complete his presentation of problems posed by the invalidity of reservations, welcomed replies from States to the following questions:

(a) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the 1969 and 1986 Vienna Conventions? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the reserving State is flawed and that State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?

(b) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?

(c) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?

(d) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4 (b) (maximum effect), of the Vienna Conventions, either because the objecting State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect ("super-maximum" effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice).
V. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. BACKGROUND

84. It may be recalled that the ILC, at its fifty-second session (2000), identified the topic “Effects of armed conflicts on treaties” for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year’s report of the Commission. The General Assembly, vide its resolution 55/152 of 12 December 2000, took note of the topic’s inclusion.

85. During its fifty-sixth session (2004), the Commission decided to include the topic “Effects of armed conflicts on treaties” in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic. The General Assembly, vide its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

86. At its fifty-seventh (2005) and fifty-eighth (2006) sessions, the Commission had before it the first 37 and second 38 reports of the Special Rapporteur, as well as a memorandum prepared by the Secretariat “The effects of armed conflict on treaties: an examination of practice and doctrine”. 39 At the fifty-seventh Session, the Commission endorsed the Special Rapporteur’s suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to the topic, in particular the more contemporary practice, as well as any other relevant information.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

87. The ILC at its fifty-ninth session, had before it the third report 40 of the Special Rapporteur. The Commission considered the Special Rapporteur’s report and decided to establish a working group, under the chairmanship of Mr. Lucius Caflisch, to provide further guidance regarding several issues which had been identified in the Commission’s consideration of the Special Rapporteur’s third report. Later, the Commission adopted the report of the Working Group.

88. It also decided to refer to the Drafting Committee draft articles 1 to 3, 5, 5 bis, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, together with the guidance containing the recommendations of the Working Group, as well as draft article 4, as proposed by the Working Group.

37 A/CN. 4/552.
40 A/CN. 4/578.
89. The Commission also approved the recommendation of the Working Group that the Secretariat circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them.

i. Introduction by the Special Rapporteur

90. Draft article 1 reads as follows:

Scope
The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

91. The Special Rapporteur was of the view that suggestions to expand the scope of the topic to include treaties entered into by international organizations, failed to consider the difficulties inherent in what was a qualitatively a different subject matter.

92. Draft article 2 reads as follows:

Use of terms
For the purposes of the present draft articles:
(a) “Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;
(b) “Armed conflict” means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

93. In introducing draft article 2, the Special Rapporteur emphasized the fact that the definitions contained therein were, under the express terms of the provision, “for the purposes of the present draft articles”. Subparagraph (a) contained a definition of the term “treaty”, based on that found in the Vienna Convention of 1969. The provision had not given rise to any difficulties. On the contrary, the definition of “armed conflict” in subparagraph (b) had been the subject of much debate. There had been an almost equal division of opinion both in the Commission and in the Sixth Committee on, for example, the inclusion of internal armed conflict. In addition, he noted that part of the difficulty was that the policy considerations pointed in different directions. For example, it was unrealistic to segregate internal armed conflict properly so-called from other types of internal armed conflict which in fact had foreign connections and causes. At the same time, such approach could undermine the integrity of treaty relations by expanding the possible factual bases for alleging that an armed conflict existed for the purposes of the draft articles and with the consequence of the suspension or termination of treaty relations.
Draft Article 3 reads as follows:

Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;
(b) Between one or more parties to the armed conflict and a third State.

The Special Rapporteur pointed out that two alterations to the text had been made in the third report: (1) the title had been changed; and (2) the phrase “ipso facto” had been replaced by “necessarily”. It was recalled that the provision remained central to the entire set of draft articles. Furthermore, it was noted that the majority of the delegations in the Sixth Committee had not found draft article 3 to be problematical.

Draft article 4 reads as follows:

The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.
2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:
   (a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and
   (b) The nature and extent of the armed conflict in question.

The Special Rapporteur recalled that opinion in the Sixth Committee on the inclusion of the criterion of intention had been almost equally divided (as had been the case in the Commission itself). He noted that the opposition to the reliance upon intention was normally based upon the problems of ascertaining the intention of the parties, but this was true of many legal rules, including legislation and constitutional provisions. Furthermore, the difference between the two points of view expressed in the Sixth Committee was probably not, in practical terms, substantial. The existence and interpretation of a treaty was not a matter of intention as an abstraction, but the intention of the parties as expressed in the words used by them and in the light of the surrounding circumstances.

Draft article 5 reads as follows:

Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.
99. Draft article 5 bis reads as follows:

The conclusion of treaties during armed conflict
The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

100. The Special Rapporteur recalled that, on a strict view of drafting, draft article 5 was redundant, but it was generally accepted that such a provision should be included for the sake of clarity. It was noted that draft article 5 bis had previously been included as paragraph 2 of draft article 5, but was now presented as a separate draft article following suggestions that the provision was to be distinguished from that in draft article 5. The term “competence” had been deleted and replaced by “capacity”. The draft article was intended to reflect the experience of belligerents in an armed conflict concluding agreements between themselves during the conflict.

101. Draft article 6 bis reads as follows:

The law applicable in armed conflict
The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable lex specialis, namely, the law applicable in armed conflict.

102. Draft article 6 bis was a new provision. It had been included in response to a number of suggestions made both in the Sixth Committee and the Commission that a provision be included to reflect the principle, stated by the International Court of Justice, in the Legality of the Threat or Use of Nuclear Weapons advisory opinion relating to the relation, in the context of armed conflict, between human rights and the applicable lex specialis, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. The Special Rapporteur noted that while the principle was, strictly speaking, redundant, the draft article provide a useful clarification in an expository manner.

103. Draft article 7 reads as follows:

The operation of treaties on the basis of necessary implication from their object and purpose
1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.
2. Treaties of this character include the following:
   (a) Treaties expressly applicable in case of an armed conflict;
   (b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

41 Draft article was withdrawn by the Special Rapporteur.
(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
(d) Treaties for the protection of human rights;
(e) Treaties relating to the protection of the environment;
(f) Treaties relating to international watercourses and related installations and facilities;
(g) Multilateral law-making treaties;
(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;
(j) Treaties relating to diplomatic relations;
(k) Treaties relating to consular relations.

104. The Special Rapporteur emphasized the importance of draft article 7 to the entire scheme of the draft articles. The key issue had related to the inclusion of an indicative list of categories of treaties the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict. He recalled the different views expressed on the matter in the Sixth Committee and the Commission, and reiterated his own preference to retain such a list in one form or another, including possibly as an annex to the draft articles. He further noted that, given the complexity of the topic, room had to be found in the list for those categories which were based on State practice as well as those which were not, but which enjoyed support in legal practice of a reputable character.

105. Draft article 8 reads as follows:

**Mode of suspension or termination**

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.

106. The Special Rapporteur noted that, as was the case with a number of the provisions in the second half of the draft articles, draft article 8 was, strictly speaking, superfluous because of its expository nature. To his mind, it would not be necessary to attempt to define suspension or termination.

107. Draft article 9 reads as follows:

**The resumption of suspended treaties**

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.
2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:
   (a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties;
   (b) With the nature and extent of the armed conflict in question.
108. The Special Rapporteur recalled that draft article 9 was also not strictly necessary, but constituted a useful further development of the principles in draft articles 3 and 4.

109. Draft article 10 reads as follows:

**Effect of the exercise of the right to individual or collective self-defence on a treaty**

A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

110. The Special Rapporteur pointed out that it was not true that he had not dealt with the question of illegality. In his first report he had proposed a provision which was compatible with draft article 3, and had also set out the relevant parts of the resolution of the Institute of International Law in 1985 which took a different approach. He maintained further that his initial proposal, namely to say that the illegality of a use of force did not affect the question whether an armed conflict had an automatic or necessary outcome of suspension or termination, had been analytically correct for the reason that at the moment of the outbreak of an armed conflict it was not always immediately clear who was the aggressor. However, in response to the opposition to his initial proposal, the Special Rapporteur had included a new draft article 10 as an attempt to meet the criticism that his earlier formulation appeared to ignore the question of the illegality of certain forms of the use or threat of force. The provision was based on article 7 of the resolution of the Institute of International Law adopted in 1985.

111. Draft article 11 reads as follows:

**Decisions of the Security Council**

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

112. Draft article 12 reads as follows:

**Status of third States as neutrals**

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

113. Draft article 13 reads as follows:

**Cases of termination or suspension**

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:
(a) The agreement of the parties; or
(b) A material breach; or
(c) Supervening impossibility of performance; or
(d) A fundamental change of circumstances.

114. Draft article 14 reads as follows:

**The revival of terminated or suspended treaties**
The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

115. The Special Rapporteur observed that draft articles 11 to 14 were primarily expository in character. As regards article 12, the Special Rapporteur explained that he had attempted to make a reference to the issue without embarking on an excursus on neutrality under contemporary international law, which was a complex subject. The point was that the issue of neutrality had not been ignored; it was just that the draft articles were to be without prejudice to it. He noted that it was useful to retain draft article 13 given the amount of confusion there existed between cases of termination or suspension as a consequence of the outbreak of armed conflict as opposed to the situations listed in the draft article.

**ii. Recommendations of the Working Group**

116. The work programme of the Group was organized into three clusters of issues: (a) matters related to the scope of the draft articles; (b) questions concerning draft articles 3, 4 and 7, as proposed by the Special Rapporteur in his third report; and (c) other matters raised during the debate in the plenary. The Working Group completed its consideration of the first two clusters, but was unable to complete its work on the third cluster.

117. The Working Group recommended that:

(1) Draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, be referred to the Drafting Committee, with the following guidance:

(a) As regards draft article 1:

(i) The draft articles should apply to all treaties between States where at least one of which is a party to an armed conflict;

(ii) In principle, the consideration of treaties involving international intergovernmental organizations should be left in abeyance until a later stage of the Commission’s work on the overall topic, at which point issues of the definition of international organizations and which types of treaties (namely whether treaties between States and international organizations or also those between international organizations *inter se*) would be considered;
(iii) The Secretariat should be requested to circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them.

(b) With regard to the definition of “armed conflict” reflected in article 2, paragraph (b), for purposes of the draft articles:
   (i) In principle, the definition of armed conflict should cover internal armed conflicts with the proviso that States should only be able to invoke the existence of internal armed conflicts in order to suspend or terminate treaties when the conflict has reached a certain level of intensity;
   (ii) Occupation in the course of an armed conflict should not be excluded from the definition of “armed conflict”.

(c) Concerning draft article 7:
   (i) The phrase “object and purpose” in paragraph 1 should be replaced by “subject matter” to be in line with the formulation proposed for draft article 4 (see below); and the provision be placed closer to draft article 4;
   (ii) Paragraph 2 should be deleted and the list contained therein be included in an appendix to the draft articles with the indication that:
      - The list is non-exhaustive;
      - The various types of treaties on the list may be subject to termination or suspension either in whole or in part;
      - The list is based on practice and, accordingly, its contents may change over time.

(d) As regards draft articles 10 and 11, the Drafting Committee should proceed along the lines of articles 7, 8 and 9 of the resolution of the Institute of International Law adopted in 1985.

(2) The following revised formulation for draft article 4 should be referred to the Drafting Committee:

   “In order to ascertain whether a treaty is susceptible to termination or suspension in the event of an armed conflict, resort shall be had to:
   (a) Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and
   (b) The nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty.”

(3) Draft article 6 bis should be deleted and its subject matter reflected in the commentaries, possibly to draft article 7.

(4) The Working Group should be re-established at the sixtieth session of the Commission, in 2008, to complete its work on remaining issues relating to draft articles 8, 9, and 12 to 14.
VI. THE OBLIGATION TO EXTRADITE OR PROSECUTE (AUT DEDERE AUT JUDICARE)

A. BACKGROUND

118. The topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” appeared in the list of planned topics already at the first session of the International Law Commission in 1949, but was largely forgotten for more than half a century until it was briefly addressed in articles 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. These articles set out minimum contours of the principle of aut dedere aut judicare and the linked principle of universal jurisdiction.

119. At its fifty-sixth session (2004), the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” for inclusion in its long-term programme of work. The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission’s report concerning its long-term programme of work. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission’s current programme of work and decided to include the topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” on its agenda, and appointed Mr. Zdzislaw Galicki as the Special Rapporteur for this topic.

120. At the fifty-eighth session (2006), the Commission considered the preliminary report of the Special Rapporteur.43 The text report prepared by the Special Rapporteur was a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further considerations and including a very general road map for the future work of the International Law Commission in this field.

121. Further, the report focuses on the sources of the obligation to extradite and prosecute, scope of the obligation to extradite or prosecute, methodological questions and also contains a preliminary plan of action. The report further sees it as premature to decide if the final product of the International Law Commission’s work should take the form of draft articles, guidelines or recommendations. It says that the Special Rapporteur will try, however, to formulate in subsequent reports draft rules concerning the concept, structure and operation of the principle aut dedere aut judicare, without any prejudice as it concerns their final legal form.

122. The formula “extradite or prosecute” (in Latin: “aut dedere aut judicare”) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, which is contained in a number of multilateral treaties and aimed at securing international cooperation in the suppression of certain kinds of criminal conduct. As it is underlined in the doctrine, “the expression ‘aut dedere aut judicare’ is a modern adaptation of a phrase used by Grotius: ‘aut dedere aut punire’ (either extradite or punish)”. It seems, however, that for applying it now, a more permissive formula of the

43 A/CN.4/571
alternative obligation to extradition ("prosecute" (judicare) instead of “punish” (punire)) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured. A modern approach does not seem to go so far as Grotius did, taking also into account that an alleged offender may be found not guilty.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-NINETH SESSION OF ILC

123. At the current session, the Commission had before it the second report of the Special Rapporteur, containing one draft article on the scope of application, as well as a proposed plan for further development. The Commission also had before it comments and information received from Governments.

124. The second report recapitulated the main ideas and concepts presented in the preliminary report, in order to seek the views of the new Commission on the most controversial issues regarding this topic. The preliminary plan of action, contained in the first report would remain the main road map for the further work on the topic.

i. Discussion at the current session

125. The main focus of the debate were on three main issues, namely: (a) the question of the source of the obligation to extradite or prosecute; (b) the problem of the relationship between this obligation and the concept of universal jurisdiction, and how it should be reflected in the draft; and (c) the issue of the scope of the said obligation.

(a) The question of the source of the obligation to extradite or prosecute: the view that treaties constituted a source of the obligation to extradite or prosecute had gathered general consensus, but it had also been suggested that the Commission should explore the possible customary status of the obligation, at least with respect to some categories of crimes (such as crimes under international law). According to some members, the Commission should focus on the identification of the crimes that are subject to the obligation to extradite or prosecute. However, some other members considered that the Commission should not attempt to establish a list of such crimes but should rather identify criteria allowing to determine those categories of crimes in relation to which States are ipso jure bound by that obligation. Some members noted that the future draft should aim at regulating both those cases in which States were bound by the obligation to extradite or prosecute under customary international law, and the problems that arose in the context of one or more treaties imposing such obligation.

b) The problem of the relationship between this obligation and the concept of universal jurisdiction, and how it should be reflected in the draft: Some members suggested that

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46 The report cites the memorandum prepared by the Amnesty International on the relationship between these principles which says that “[t]here are two important related, but conceptually distinct, rules of international law. Universal jurisdiction is the ability of the court of any state to try persons for crimes
the concept of universal jurisdiction be examined by the Commission to determine its relationship with the obligation to extradite or prosecute. It was stressed that, although the obligation to extradite or prosecute and universal jurisdiction shared the same objective (namely, to combat impunity by depriving the persons accused of certain crimes of “safe havens”), they should be distinguished from one another. Universal jurisdiction, which the Commission had decided not to include as a topic in its agenda, should therefore be considered only insofar as it related directly to the present topic.

(c) The issue of the scope of the obligation: It was pointed out by some members that the obligation to extradite or prosecute should not be described as an alternative one. Further, it was noted that the mutual relationship and interdependence between the two elements of this obligation (dedere and judicare) should be carefully considered by the Commission. The establishment, operation and effects of the obligation to extradite or prosecute should be the object of separate analysis.

(d) The question of surrender of an alleged offender to an international criminal tribunal: As regards the so-called “triple alternative”, some members indicated that the surrender to an international criminal tribunal should not be dealt with in the present context, since it was submitted to different conditions, and posed different problems, from those arising from extradition. Some other members, however, observed that the Commission should address certain issues that were connected to the present topic; it was noted, for instance, that the duty for a State to surrender an individual to an international tribunal could paralyse the obligation to extradite or prosecute and that it should therefore be examined in the draft articles.

ii. Draft article 1

126. The report also presented one draft article regarding the scope of application of the future draft articles on the obligation to extradite or prosecute. Draft article 1 reads as follows:

Scope of application
The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.
127. The proposed provision contained three elements. The time element referred to in this draft article would have to take into account the different periods in which the obligation was established, operated and produced its effects. The substantive element, the Commission would have to establish the existence and scope of the obligation to extradite or prosecute. Finally, the personal element refers to alleged offenders under the jurisdiction of the States concerned, which raised the issue of the relationship of the obligation with the concept of universal jurisdiction. Together with the personal element, the Commission would also have to identify the crimes and offences covered by this obligation.

128. Some members found draft article 1 proposed by the Special Rapporteur to be acceptable in principle, other members found it difficult to take a position on the scope of the draft articles without knowing the views of the Special Rapporteur on subsequent issues, including that of the source of the obligation to extradite or prosecute.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

129. The Commission would welcome any information that Governments may wish to provide concerning their legislation and practice with regard to this topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation \textit{aut dedere aut judicare}?

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation \textit{aut dedere aut judicare}?

(c) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation \textit{aut dedere aut judicare}?

(d) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation \textit{aut dedere aut judicare}?

130. The Commission would also appreciate information on the following:

(a) Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?

(b) Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?

(c) Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent?
VII. EXPULSION OF ALIENS

A. BACKGROUND

131. The International Law Commission, at its fiftieth session, in 1998, took note of the report of the Planning Group, which identified, inter alia, the topic of the “Expulsion of Aliens” for inclusion in the long-term work programme of the Commission. At its fifty-second session, in 2000, the Commission included the topic entitled “Expulsion of Aliens” in its long-term programme of work, and a preliminary general scheme or syllabus on the topic was annexed to the report of the Commission. The General Assembly took note of the topic’s inclusion vide its resolution 55/152 of 12 December 2000.

132. The Commission, at its fifty-sixth session, in 2004, decided to include the topic “Expulsion of Aliens” in its current programme of work and appointed Mr. Maurice Kamto as Special Rapporteur for the topic. The General Assembly, vide its resolution 59/41 of 2 December 2004 endorsed that decision. At the fifty-seventh session of the Commission, in 2005, the Special Rapporteur introduced his preliminary report, in which he outlined his understanding of the subject and sought the opinion of the Commission on a few methodological issues to guide his future work. The Report was considered by the Commission at its fifty-seventh session, and it endorsed most of Special Rapporteur’s choices and his draft work plan annexed to the preliminary report.

133. At its fifty-eighth Session, the Commission had before it the second report of the Special Rapporteur and a study prepared by the Secretariat. The Commission decided to consider the second report at its fifty-ninth session in 2007.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

134. At the fifty-ninth Session, the Commission considered the second and third reports of the Special Rapporteur and decided to refer to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur, as well as draft article 3 to 7 to the Drafting Committee.

135. The Commission also approved the Special Rapporteur’s recommendation that the Secretariat should contact the relevant international organizations in order to obtain information and their views on particular aspects of the topic.

136. The second report, which embarked on a study of the general rules on expulsion of aliens, addressed the scope of the topic and the definition of its constituent elements, and proposed two draft articles (draft articles 1 and 2).

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47 A/CN. 4/554.
48 A/CN. 4/573.
50 A/CN. 4/581.
137. Draft article 1 reads as follows:

**Scope**

1. The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).
2. They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum-seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it.

138. According to draft article 1, the topic should include aliens with regular or irregular status, refugees, asylum-seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling States who had lost their nationality or been deprived of it.

139. Draft article 2 reads as follows:

**Definitions**

For the purposes of the draft articles:

1. The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.
2. (a) An alien means a *ressortissant* of a State other than the territorial or expelling State; (b) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory; (c) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed; (d) *Ressortissant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State; (e) Territory means the domain in which the State exercises all the powers deriving from its sovereignty.

140. With regard to the definition of the terms used, which was dealt with in draft article 2, the Special Rapporteur proposed that the concept of “alien” should be defined in opposition to that of “*ressortissant*”, rather than that of “national”. Despite the variable senses in which the term “*ressortissant*” was used, it could be assigned a broader meaning than that of “national” in order also to cover persons subject to the authority of a State as the result of a particular legal connection, such as refugees, asylum-seekers, stateless persons or persons affiliated with territories under a mandate or protectorate. If necessary, draft article 2, paragraph 2 (d), could be reformulated to make nationality the main legal bond in this context.

141. In the preliminary report, the term “expulsion” denoted a unilateral act by which a State compelled an alien to leave its territory. Nevertheless, taking into account the comments made by certain members as well as recent international case law, the Special Rapporteur had come to the conclusion that “expulsion” also covered cases where a State, by its conduct, compelled an individual to leave its territory. Since expulsion involved
leaving the territory of a State by crossing a frontier, draft article 2 also proposed a
definition of the terms “frontier” and “territory”.

142. The third report initiated consideration of the general principles relating to the
expulsion of aliens, proposing five draft articles (draft articles 3 to 7). A State’s right to
expel aliens was presented as a right inherent in State sovereignty, deriving from
territorial competence of each State, rather than a customary right conferred on a State by
an “external” rule. However, this right was subject to limits, among which a distinction
should be drawn between limits inherent in the international legal order (covered by draft
article 3) which exists independently of other constraints relating to special areas of
international law, and limits deriving from international human rights law.

143. Draft article 3 reads as follows:

**Right of expulsion**

1. A State has the right to expel an alien from its territory.
2. However, expulsion must be carried out in compliance with the fundamental principles
   of international law. In particular, the State must act in good faith and in compliance with
   its international obligations.

144. Draft articles 4 to 7 relate to the limits of *rationae personae* of the right of
expulsion.

145. Draft article 4 reads as follows:

**Non-expulsion by a State of its nationals**

1. A State may not expel its own nationals.
2. However, if, for exceptional reasons, it must take such action, it may do so only with
   the consent of a receiving State.
3. A national expelled from his or her own Country shall have the right to return to it at
   any time at the request of the receiving State.

146. The first limit, which is set out in draft article 4, was the prohibition of expulsion
by a State of its own nationals. However, this prohibition, which is well established in
contemporary general international law, was subject to certain exceptions or derogations,
which were confirmed by practice. Yet the expulsion by a State of one of its nationals
was always subject to the requirement of consent by a receiving State; it was nevertheless
without prejudice to the right of the person expelled to return to his or her country at the
request of the receiving State.

147. Draft article 5 reads as follows:

**Non-expulsion of refugees**

1. A State may not expel a refugee lawfully in its territory save on grounds of national
   security or public order [or terrorism], or if the person, having been convicted by a final
   judgement of a particularly serious crime or offence, constitutes a danger to the
   community of that State.

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2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her against such person.

148. Draft article 6 reads as follows:

Non-expulsion of stateless persons
1. A State may not expel a stateless person lawfully in its territory save on grounds of national security or public order or terrorism, or if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State.
2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may, in agreement with the person, expel the person to any State which agrees to host him or her.

149. Draft articles 5 and 6 relate to the situation of refugees and stateless persons respectively. They were designed to complement the rules set out in the relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. In the light of recent developments in efforts to combat terrorism, and also Security Council resolution 1373 (2001), it was possible to explicitly refer to terrorist activities (as well as behaviour intended to facilitate such activities) among the grounds which could justify the expulsion of a refugee or stateless person, even if such activities could be covered by the general ground of expulsion based on “national security”. Where stateless persons were concerned, it was perhaps desirable, in view of their special status, not to make the extent of their protection conditional on whether they were in a regular or irregular situation in the expelling State. Under the heading of progressive development, it was also possible to consider stipulating that the expelling State could be involved in the search for a receiving State in the event that the stateless person had not found one within a reasonable period of time.

150. Draft article 7 reads as follows:

Prohibition of collective expulsion
1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.
2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.
3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.
151. Draft article 7 set out the principle of the prohibition of the collective expulsion of aliens, and for that purpose distinguished between collective expulsions in peacetime and those occurring in wartime. The prohibition of collective expulsions in peacetime was absolute in nature and was confirmed by a variety of legal instruments, as well as the case law of regional human rights institutions. However, the expulsion of a group of persons whose cases had each been examined individually did not fall under this ban. In this regard, the first paragraph of draft article 7, which referred to the criterion of “reasonable and objective examination” of the particular case of each of the aliens concerned, drew on the relevant case law of the European Court of Human Rights.

152. The collective expulsion of the nationals of an enemy State in wartime was not governed either by the international law of armed conflict or by international humanitarian law. Practice in this area was variable, and did not give rise either to a general obligation for States to keep the nationals of an enemy State on their territory, or an obligation to expel them. However, practice and doctrine tended to show that the collective expulsion of the nationals of an enemy State should be confined to aliens who were hostile to the receiving State; in contrast, it would seem that the expulsion of nationals of an enemy State who were behaving peacefully should be prohibited, as the ordinary rules relating to expulsion in peacetime remained applicable to them.

153. During the course of discussion, several members emphasized the need clearly to define the scope of topic (article 1), which was not limited to the *ratione personae* aspect. The debate was concerned with removal measures and with situations and persons to be covered. Some members suggested simplifying draft article 1, paragraph 1, as proposed by the Special Rapporteur, by stating that the draft articles applied to the expulsion of aliens. A proposal was made to delete draft article 1, since draft article 2, which dealt with definitions, might suffice to delineate the parameters of the topic.

154. Following discussion in the Commission, the Special Rapporteur revised and presented the following formulations of draft articles 1 and 2.

155. Draft article 1 as revised reads as follows:

**Scope**

1. The present draft articles shall apply to the expulsion of aliens, as enumerated in paragraph 2 of this article, who are present in the territory of the expelling State.

or

1. The present draft articles shall apply to the expulsion by a State of those aliens enumerated in paragraph 2 of this article who are present in its territory.

2. They shall apply to aliens who are lawfully or unlawfully present in the expelling State, refugees, asylum-seekers, stateless persons, migrant workers, nationals of an enemy State and nationals of the expelling State who have lost their nationality or been deprived of it.

156. Draft article 2 as revised reads as follows:

**Definitions**

For the purposes of the draft articles:
(a) **Expulsion** means a legal act or a conduct by which a State compels an alien to leave its territory;

(b) **Alien** means a person who does not have the nationality of the State in whose territory he or she is present, except where the legislation of that State provides otherwise;

(c) **Conduct** means any act by the authorities of the expelling State against which the alien has no remedy and which leaves him or her no choice but to leave the territory of that State;

(d) **Territory** means the domain in which the State exercises all the powers deriving from its sovereignty;

(e) **Frontier** means the zone at the limits of the territory of an expelling State in which the alien does not enjoy resident status and beyond which the expulsion procedure is completed.

C. **SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION**

157. The Commission would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on the following points:

(a) State practice with regard to the expulsion of nationals. Is it allowed under domestic legislation? Is it permissible under international law?

(b) The manner in which persons having two or more nationalities are dealt with under expulsion legislation. Can such persons be considered aliens in the context of expulsion?

(c) The question of deprivation of nationality as a possible precondition for a person’s expulsion. Is such a measure allowed under domestic legislation? Is it permissible under international law?

(d) The question of the collective expulsion of aliens who are nationals of a State involved in an armed conflict with the host State. In such a situation, should a distinction be drawn between aliens living peacefully in the host State and those involved in activities hostile to it?

(e) The question of whether an alien who has had to leave the territory of a State under an expulsion order that is subsequently found by a competent authority to be unlawful has the right of return.

(f) Criteria that could be used to distinguish between the expulsion of an alien and the question of non-admission; more specifically, determining the point at which the removal of an illegal immigrant is governed by the expulsion procedure and not by the non-admission procedure.

(g) The legal status of illegal immigrants located in the territorial sea or in internal waters, or in the frontier zone excluding port and airport areas. Specifically, apart from port and airport areas, is there an international zone within which an alien would be considered as not having yet entered the territory of the State? If so, how is the extent and breadth of such a zone determined?

(h) State practice in relation to grounds for expulsion, and the question of whether and, where appropriate, the extent to which such grounds are restricted by international law.
VIII. MOST-FAVOURED NATION CLAUSE

158. The Commission also established an open-ended Working Group on the Most-favoured-Nation clause under the chairmanship of Mr. Donald McRae to examine the possibility of including the topic “Most-favoured-Nation clause” in its long-term programme of work. The Working Group considered the working paper prepared by Mr. D.M. McRae and Mr. A. R. Perera. It concluded that the Commission could play a useful role in providing clarification on the meaning and effect of the most-favoured-nation clause in the field of investment agreements and was favourable to the inclusion of the topic. Such work was seen as building on the past work of the Commission on the most-favoured-nation clause. The Commission considered the report of the Working Group\(^{51}\) and decided to refer it to the Planning Group.

159. It may be recalled that the Commission included the topic “The Most-favoured-nation clause” in its programme of work at its twentieth session (1967) and appointed Endre Ustor and Nikolai A. Ushakov as the successive Special Rapporteurs. The Commission completed the second reading of the topic at its thirtieth session (1978). The General Assembly at its thirty-fifth, thirty-sixth, thirty-eighth, fortieth and forty-third sessions (1980, 1981, 1983, 1985 and 1988) invited comments from Governments and intergovernmental organizations, on the draft articles proposed by the Commission. At its forty-sixth session (1991) the General Assembly, in its decision 46/416, took note with appreciation of the work of the Commission as well as views and comments by Governments and intergovernmental organizations and decided to bring the draft articles to the attention of Member States and intergovernmental organizations for their consideration in such cases and to the extent as they deemed appropriate. At its fifty-eighth session (2006), the Commission requested views of Governments on the topic.

\(^{51}\)A/CN. 4/I.719.
IX. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIALM

160. The Planning Group recalled that it was customary at the beginning of each quinquennium to prepare the Commission’s work programme for the remainder of the quinquennium setting out in general terms the anticipated goals in respect of each topic on the basis of indications by the Special Rapporteurs. It is the understanding of the Commission that the work programme has a tentative character since the nature and the complexities of the work preclude certainty in making predictions in advance. \(^5^2\)

A. Reservation to Treaties

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit his thirteenth report on validity of reservations.</td>
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<tr>
<td>2009</td>
<td>The Special Rapporteur will submit his fourteenth report on effects of reservations and of objections to reservations.</td>
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<tr>
<td>2010-2011</td>
<td>The Special Rapporteur will submit his fifteenth report on succession of States and international organizations with regard to reservations, with a view of having achieved the first reading of the draft guidelines in 2011.</td>
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B. Expulsion of Aliens

<table>
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<tr>
<th>Year</th>
<th>Description</th>
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<tr>
<td>2008</td>
<td>The Special Rapporteur will submit an addendum to his third report on expulsion of aliens, dealing with the question of expulsion in case of dual or multiple nationals, and the question of expulsions following deprivation of nationality. He will also submit his fourth report on expulsion of aliens, dealing with the limits to the right of expulsion which relate to the fundamental rights of the human person.</td>
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<tr>
<td>2009</td>
<td>The Special Rapporteur will submit his fifth report on expulsion of aliens, dealing with the limits relating to the procedure to be followed in case of expulsion.</td>
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<td>2010</td>
<td>The Special Rapporteur will submit his sixth report on expulsion of aliens, dealing with the grounds for expulsion.</td>
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<tr>
<td>2011</td>
<td>The Special Rapporteur will submit his seventh report on expulsion of aliens, dealing with the duration of stay as well as the property rights of the expelled person.</td>
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</tbody>
</table>

C. Effects of Armed Conflicts on Treaties

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Consideration by the Drafting Committee of the draft articles submitted by the Special Rapporteur, followed by the adoption of the draft articles</td>
</tr>
<tr>
<td>2009</td>
<td>Work on the topic to be deferred so as to allow time for Governments to submit comments on draft articles on first reading.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>Further reports will be submitted by the Special Rapporteur containing proposals for the second reading of the draft articles, taking into account the comments and observations of Governments.</td>
</tr>
</tbody>
</table>

D. **Shared Natural Resources**

<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit his fifth report containing the whole set of revised draft articles on transboundary aquifers. It is hoped that the Commission would complete the second reading of the draft articles in 2008.</td>
</tr>
<tr>
<td>2009</td>
<td>The Special Rapporteur does not plan to submit any report on transboundary aquifers. If the Commission could not complete the second reading of the second reading of the draft articles in 2008, it is hoped that will complete such a reading in the first part of the Session in 2009.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>The Special Rapporteur would prepare studies in the light of any decision by the Commission on how to proceed with natural resources other than transboundary aquifers.</td>
</tr>
</tbody>
</table>

E. **Responsibility of International Organizations**

<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit his sixth report on the implementation of the responsibility of an international organization.</td>
</tr>
<tr>
<td>2009</td>
<td>The Commission would complete the first reading of the draft articles on responsibility of international organizations.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>The Commission would proceed to the second reading of the draft articles following receipt of comments by Governments and international organizations.</td>
</tr>
</tbody>
</table>

F. **The obligation to extradite or prosecute (aut dedere aut judicare)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit his third report on the obligation to extradite or prosecute (aut dedere aut judicare).</td>
</tr>
<tr>
<td>2009</td>
<td>The Special Rapporteur will submit his fourth report on the obligation to extradite or prosecute (aut dedere aut judicare).</td>
</tr>
<tr>
<td>2010-2011</td>
<td>The Special Rapporteur will submit his fifth report, if necessary, and the Commission would complete his first reading of the draft articles on the obligation to extradite or prosecute (aut dedere aut judicare).</td>
</tr>
</tbody>
</table>

G. **Immunity of State officials from foreign criminal jurisdiction**

<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit his preliminary report.</td>
</tr>
<tr>
<td>2009</td>
<td>The Special Rapporteur would submit his second report.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>The Special Rapporteur would submit his subsequent reports in the light of developments in the Commission.</td>
</tr>
</tbody>
</table>

H. **Protection of persons in the event of disasters**

<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>The Special Rapporteur will submit a preliminary report.</td>
</tr>
<tr>
<td>2009</td>
<td>The Special Rapporteur would submit the second report.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>The Special Rapporteur would submit his subsequent reports in the light of developments in the Commission.</td>
</tr>
</tbody>
</table>